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<sup>2</sup>Succeeded Constantine B. Kilgore, October 1, 1897.

<sup>3</sup>Appointed to succeed Yancey Lewis.

<sup>4</sup>Term expired June 1, 1897.

<sup>5</sup>Appointed July 1, 1897.

<sup>6</sup>To take effect on and after February 2, 1898.

<sup>7</sup>Resigned February 1, 1898.

<sup>8</sup>Appointed February 1, 1898.

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Commissioned October 1, 1897.

<sup>3</sup> Commissioned October 1, 1897.

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[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in 24, 31, 32, 37, 39, and 41 S. W. This list does not include cases where an opinion has been filed on the denial of the rehearing.]

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	Southwestern Inv. Co. v. Crawford (Tex. Civ. App.) 41 S. W. 720.
	Stone v. Wilson (Ky.) 39 S. W. 49.

## WRITS OF ERROR WERE DENIED BY THE SUPREME COURT OF TEXAS

IN THE FOLLOWING CASES IN THE  
COURT OF CIVIL APPEALS  
PRIOR TO JANUARY 20, 1898.

[This list includes only the writs of error denied in which no opinions were filed. All others are published in full in the Southwestern Reporter.]

### FIRST DISTRICT.

East Texas Land & Improvement Co. v. Shelby, 41 S. W. 542.  
M. T. Jones Lumber Co. v. Rhoades, 41 S. W. 102.  
Patrick v. Badger, 41 S. W. 538.  
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### THIRD DISTRICT.

Canadian & American Mortgage & Trust Co. v. Edinburgh-American Land-Mortgage Co., 41 S. W. 140.  
Crawford County Bank of Van Buren, Ark., v. Henry, 41 S. W. 201.

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Wheeler v. First Nat. Bank of Bellville, 41 S. W. 376.

### FOURTH DISTRICT.

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### FIFTH DISTRICT.

Board of Trustees of Public Schools v. City of Sherman, 42 S. W. 546.  
Western Union Tel. Co. v. Russell, 33 S. W. 708.



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COX et al. v. FINKS et al.

(Supreme Court of Texas. Dec. 9, 1897.)

JURISDICTION ON APPEAL—DETERMINATION OF  
BOUNDARIES.

1. Rev. St. 1895, art. 996, § 2, which provides that the judgment of the courts of civil appeals shall be conclusive in all cases of boundary, applies only to cases where the right of the whole case depends on the question of boundary, so that if there had been no such question, there would have been no case.

2. Under Rev. St. 1895, art. 996, § 2, which provides that the judgment of the courts of civil appeals shall be conclusive in all cases of boundary, the supreme court has no jurisdiction to entertain a writ of error in a case where one party claims land by virtue of an appropriation under a Confederate veteran's certificate and a purchase under the scrap act, and the other party claims that said land is within the limits of a previous grant to him, and that the location of the certificate was not made in the manner provided by law, and that it was not subject to sale under the scrap act for the reason that it consisted of more than 640 acres.

Error to court of civil appeals of Third supreme judicial district.

Action by J. H. Finks and others against T. B. Cox and others. Judgment for plaintiffs, and defendants appealed. Affirmed in court of civil appeals (41 S. W. 95), and defendants bring error. Dismissed.

John W. Davis, F. H. Robertson, and Robt. H. Rogers, for plaintiffs in error. A. P. McCormick and Clark & Bollinger, for defendants in error.

GAINES, C. J. The defendants in error have filed a motion to dismiss the writ of error which has been submitted with the case. We considered the question of our jurisdiction when we passed upon the application in this case, and reached the conclusion that we had jurisdiction, and granted the writ. Having heard argument upon the motion to dismiss, and having reconsidered the point, we are now of opinion that the decision of the court of civil appeals was final, and that we have no jurisdiction of the case. The article of the Revised Statutes of 1895 which defines in part the jurisdiction of this court reads as follows: "Art. 940. The supreme court shall have appellate jurisdiction coextensive with the limits of the state, which shall extend to

questions of law arising in all civil cases of which the courts of civil appeals have appellate but not final jurisdiction." But 996 contains, among others, the following provisions: "Art. 996. \* \* \* The judgment of the courts of civil appeals shall be conclusive in all cases on the facts of the case, and a judgment of such courts shall be conclusive on the law and fact, nor shall a writ of error be allowed thereto from the supreme court in the following cases, to wit: (1) Any civil case appealed from a county court or from a district court when under the constitution a county court would have had original or appellate jurisdiction to try it, except in probate matters and in cases involving the revenue laws of the state or the validity of a statute. (2) All cases of boundary. (3) All cases of slander and divorce. (4) All cases of contested elections of every character other than for state officers, except where the validity of the statute is attacked by the decision." The question is, is this a "case of boundary"? The word "boundary" has no technical signification. It is a term in common use, and of no doubtful meaning. But when we undertake to give a precise definition of the words "all cases of boundary," as used in article 996, a difficulty arises. Broadly stated, every action for the recovery of land, and in which a question of the true location of any line of a survey may become involved, is a boundary case. The words admit of that construction. On the other hand, a narrow limitation of the scope of the terms would restrict their meaning to cases brought by one owner of a tract of land against the owner of a contiguous survey to determine one or more of the boundary lines between them. The question of the true construction of the terms under discussion has been frequently considered by us, but in most instances our views have not been expressed in writing, and in determining our jurisdiction in such cases we have adopted neither the broad nor the restricted construction above indicated. Every action to try title to land may involve a question of boundary, but our view has been that this did not of itself make a boundary case. It was held, in effect, in *Schley v. Blum*, 85 Tex. 551, 22 S. W. 667, that the right of the case must depend upon a question of bound-

ary, and we think we may here add to that holding by saying that the right of the whole case must so depend. So, also, the case cited is very distinct authority for the proposition that it is not necessary, in order to make a boundary suit, that the action should be brought avowedly to settle the true location of the dividing line between two contiguous surveys. It seems to us that the decision of the question whether a suit is or is not one of boundary merely depends upon the answer to the further question, if there had been no question of boundary, would there have been any case? If so, it is not a boundary case. If not, it is a case of boundary pure and simple. In other words, the whole litigation must grow out of a question of boundary. There may be a question of boundary as to two grants, one owned by one party to the suit and the other claimed by both. A suit by one to try the title to the survey in controversy may involve a question as to the boundary between that and the other. This would not, in our opinion, be a boundary case within the meaning of the statute. So, on the other hand, a question as to the location of a boundary line may be the ground of the litigation, and yet questions of title may become involved. This may be true in every action to settle a controversy as to the dividing line between two adjacent surveys. The defendant may, if he sees proper to do so, put the plaintiff upon proof of his title, may assail the validity of that title, and defeat the action, should the plaintiff fail to make it good. Let us apply these views to the present case. The defendants in error, who were plaintiffs in the trial court, acting upon the assumption that there was unappropriated public domain between a certain large survey known as the "Nancy Burwell Survey" and the surveys north of it, undertook to appropriate the whole of such tract by virtue of what is known as a "Confederate Veteran Certificate," and also in part by a purchase under what is known as the "Scrap Act." They brought suit, and the plaintiffs in error, disclaiming as to all except a portion of the land sued for, demanded a severance of the case. The land claimed by them was that portion which was covered both by the location of the certificate and the alleged purchase. They claimed that there was no vacancy, and that the land in controversy was within the limits of the Nancy Burwell survey. They also claimed in defense that, even if a vacancy existed, the defendants in error (the plaintiffs below) acquired no title either by the attempted location or the attempted purchase—First, because the location of the certificate was not made in the manner provided by law, and was therefore void; and, second, for the reason that, if there was any vacant land, it consisted of more than 640 acres, and therefore was not subject to sale under the scrap act. Whether there was a vacancy or not depended upon the true location of the north boundary line of the Burwell survey. But for the question as to that line, the controversy

could not have arisen. There would have been no case. Every issue in the case and in the whole case involves the determination of that question of boundary. We are therefore of opinion that this is "a case of boundary," within the meaning of the statute, and that the decision of the court of civil appeals is final. Accordingly, the motion is sustained, and the writ of error dismissed.

TERRELL et al. v. McCOWN et al. (PIERCE et al., Interveners).

(Supreme Court of Texas. Nov. 22, 1897.)

APPEAL—REVIEW—MATTERS NOT APPARENT OF RECORD—EXCEPTIONS—POWER OF SALE—SURVIVAL—DELEGATION—EXERCISE OF POWER—WHAT CONSTITUTES—SALES BY AGENT—RATIFICATION—TRESPASS TO TRY TITLE—EVIDENCE—BURDEN OF PROOF—TRIAL—INSTRUCTIONS.

1. A refusal to suppress depositions on the ground that the motion to suppress was made too late will not be disturbed on appeal, though the motion was made in time, where the bill of exceptions does not state that the grounds of the motion were good.

2. Under the statute providing that a testator may, by will, direct that no action shall be had in the probate court in the administration of his estate, where a testator so directs, and gives a discretionary power of sale to two executors, the power survives on the death of one of them, in the absence of any language in the will indicating that one shall not act, and that the estate shall be thrown back into the probate court in case of the death of the other; especially where the will provides that, in case one of the executors named refuses to act, the other shall not be required to give bond.

3. The rule of law in such case was not changed by Gen. Laws 1870, p. 141, c. 81, § 160, providing that, when a will directs that no action be had in the probate court except to prove and record it, or to prove and record it, and return an inventory and appraisement, no other provisions of this act, except as declared in section 148, subd. 4, shall apply to such estate, but it shall become, like any other property to be administered under a power, chargeable in the hands of a trustee, and liable to execution, etc.

4. The discretionary power of an executor under a will to sell land cannot be delegated.

5. Where an executor has a discretionary power to sell land, a power of attorney given by him authorizing his attorney in fact to sell and execute conveyances, is valid in so far as it delegates mere power to execute deeds in the name of the executor.

6. Where an executor who has a discretionary power to sell land executes a power of attorney authorizing his attorney in fact to sell and execute conveyances, and the executor performs some of his discretionary acts before the agent executes the deed, and thereafter, with full knowledge of all the facts, performs others, approving the sale, a deed by the agent binds the estate.

7. When the agent in the first instance executes the deed in the name of the executor, and thereafter the executor, when informed thereof, with full knowledge of all the facts, in the exercise of his discretionary powers, approves of and ratifies the sale, the deed binds the estate.

8. An executor with discretionary power to sell land exercised the power where he determined to sell particular land in small tracts, authorized an attorney in fact to negotiate sales and subdivide to suit purchasers, and considered the sales made by such agent to be advantageous to the estate, and assented thereto as they were made, and the facts concerning them were from time to time, as the business progressed, reported to

him, though the deeds were executed by the attorney in fact.

9. The exercise of such power was also shown by the facts that the notes for purchase money, taken in his name, informed him that the sales were made in small parcels; that the deeds executed by him through his agent referred to the notes, and both informed him fully as to the terms of the sale; and that he brought suit on some of the notes.

10. In trespass to try title against persons claiming under deeds given by an executor's attorney in fact, who sold a large tract of land in small parcels, and executed a deed for the same to each purchaser, judgments in suits by the executor against various persons for parts of the purchase money for portions of the land in controversy were admissible as circumstances tending to show the executor's acquiescence in, and consent to, the sales, and the manner in which the purchasers paid for the land.

11. Where the deeds to the purchasers reserved a vendor's lien, a deed executed after the executor's death, by the attorney in fact of certain heirs of the testator, to a purchaser of part of the land in dispute, "in consideration of \$180 in gold, being balance of purchase money of said land," was admissible to show payment of the purchase money, and also ratification by said heirs.

12. It was not error to admit evidence of the attorney in fact that he sold the land in parcels to various persons, taking part cash and the balance in vendor's lien notes payable to the executor; that he remitted the proceeds to him from time to time; that the executor acknowledged the receipt of said money "sometimes by letter and several times by personally saying so"; that his letters to witness uniformly stated that he was well satisfied with the sales and payments; and that, when witness ceased to act as agent and attorney in fact, he turned over his papers, together with itemized statements of the transactions.

13. Nor was it error to admit evidence by one of the purchasers that he was with the executor about three times, and conversed with him about the land, and the substance of the conversations.

14. Evidence that the executor told witness "that he was going up in the northern part of the state to sell lands belonging to the estate, to pay off the judgment," was not objectionable as hearsay.

15. A question to a witness was: "You only remember that F. was satisfied by the transfer of said judgment to one S., or to some one else, do you not? You could not undertake to say when or how the M. [testator's] estate paid the judgment, could you?" *Held*, that an answer that the executor "stated to me that he was going up in the northern part of the state to sell lands belonging to the estate, to pay off the judgment," was responsive.

16. When a will provides that the estate shall be administered outside of the probate court, and gives the executor discretionary power to sell land to pay debts, the burden of proof is on the heirs claiming the land as against bona fide purchasers and grantees of the executors to show that there were no debts when the deeds were made.

17. In trespass to try title, an instruction which authorizes a recovery of all the land is properly refused where there can be no recovery, in any event, of part of it.

18. It is proper to refuse a charge as to the burden of proof where it is included in the general charge of the court.

Error to court of civil appeals of Fourth supreme judicial district.

Trespass to try title by Isabella S. McCown and others against W. T. Terrell and others, in which Annie E. Pierce and others inter-

vened. There was a judgment of the court of civil appeals (40 S. W. 54) reversing a judgment in favor of defendants, and they bring error. Reversed.

Tarlton & Morrow and Crane & Ramsey, for plaintiffs in error. W. L. McDonald, Chas. I. Evans, and Alexander, Clark & Hall, for defendants in error.

DENMAN, J. Prior to 1855, Alexander McCown, subsequent to his marriage with Nancy McCown, acquired the McCracken league and labor of land in Hill county, Tex., the title to which is in controversy herein. On the 28th day of September, 1855, he executed his will, which provided: "(1) That I do hereby appoint my beloved wife, Nancy McCown, and my worthy and trusty friend Peter J. Willis, executors of this, my last will and testament, and I direct that the county court have nothing to do with my estate, or with its settlement, other than to probate and registry of my will and an inventory of my estate; and, should my friend P. J. Willis decline assisting my wife in the execution of this trust, then I direct that my said wife be not required to give any bond for the execution of this will. (2) I direct that all my just debts be paid as soon as possible, for which my executors shall have all the power to raise funds out of my effects that a court would give them, and for this purpose to sell and convey lands or other property." The will then refers to the wife's separate property as being of record, gives her the household furniture, and provides that the balance of the property, being community, should go according to law, except that a certain sister should be excluded. McCown died October 15, 1855, and the will was probated, and Nancy McCown and P. J. Willis were appointed and qualified as executors, on November 26, 1855, by taking the oath and filing a bond. The inventory of the estate filed according to law showed personal and real property variously estimated to have been worth from fifty to one hundred thousand dollars; a large portion of the personal property being slaves, and most of the lands being unproductive. The record does not disclose the doings of the executors except in a most general way. It appears, however, that some of the slaves were hired out, some of them were sold, and the remainder were freed, and that the executors did not make any sale of lands during the lifetime of Nancy McCown, who died intestate in 1870. Chambers was appointed administrator of her estate, and continued to act as such until July, 1876, when J. T. and Annie E. Pierce, husband and wife, were appointed joint administrators to succeed Chambers, and they acted as such until 1888. On March 20, 1871, and after the death of Nancy McCown, P. J. Willis executed the following instrument: "State of Texas, County of Hill. Know all men by these presents, I, P. J. Willis, executor of the last will and testament of Alex. McCown, deceased, of

Montgomery county, Texas (for which reference is here made to said will), reposing especial confidence in the skill and integrity of Wm. B. Tarver, of the county of Hill, and state aforesaid, have made, constituted, and appointed, and do by these presents nominate, make, constitute, and appoint, the said Wm. B. Tarver my true and lawful attorney in fact for me, and in my name as executor of the said Alexander McCown, deceased, to convey and sell, and good and sufficient titles and conveyances make, to all or any part of the league of land in Hill county, Texas, about eight miles N. W. of the town of Hillsboro, and known as the 'Amanda F. McCracken League,' hereby giving to my said attorney, Wm. B. Tarver, full power and authority in the sale and conveyance of said land the same that I could do if personally present, and to receive and receipt for any money or moneys arising from the sale of said land, hereby ratifying and confirming any and all legal acts done by my said attorney by virtue of the premises. Witness my hand and scroll for seal, at Hillsboro, Texas, this March 20, 1871. [Signed] P. J. Willis, Executor of A. McCown." W. B. Tarver, in the name of P. J. Willis, the executor of the estate of Alexander McCown, by said Tarver, agent, during the years 1871-72, and after the execution of said power of attorney, conveyed to various persons small portions of said league, receiving therefor part cash and part notes executed by the different purchasers payable to P. J. Willis as such executor, and at the time of such sales surveyed such tracts, and placed the respective purchasers in possession; the lands being at that time unimproved, such purchasers placed thereon valuable improvements. The lands thus sold by Willis through Tarver constituted the greater portion of said league and labor. In March and May, 1873, Willis, as executor, executed two deeds to small tracts to two of defendants. Alexander McCown and his wife, Nancy McCown, having both died without issue, the heirs of Alexander McCown in 1873 sued the administrator and the heirs of Nancy McCown, claiming a portion of the estate accumulated in Texas by Alexander and Nancy McCown during their marriage. The result of such litigation was that the heirs of Alexander McCown recovered an interest in said property. After Pierce and wife became administrators of the estate of Nancy McCown, they caused to be sold under orders of the probate court a three-quarter interest in various small tracts of land out of the remainder of said league left after the sales made by Tarver and Willis as above stated, and at the same time the heirs of Alexander McCown, through their attorney in fact, conveyed to the purchasers under such probate sales a one-fourth undivided interest in each of said tracts. This is an action of trespass to try title, brought by the heirs of Alexander McCown and the heirs of Nancy McCown to recover from the defendants claiming un-

der the sales above mentioned said league and labor; the said heirs of Alexander McCown suing as original plaintiffs, and the heirs of Nancy McCown suing as interveners. Defendants pleaded not guilty, three, five, and ten years' limitations, and improvements in good faith. There was a verdict and judgment for defendants, from which an appeal was taken to the court of civil appeals of the Fifth district, where the judgment was reversed, and the cause remanded, as shown by the opinion of that court. 29 S. W. 484. Upon a second trial, verdict and judgment were for defendants, from which plaintiffs and interveners appealed to the court of civil appeals for the Fifth district, and, the cause being subsequently transferred by the supreme court to the court of civil appeals for the Fourth district, that court reversed the judgment of the district court, and ordered the cause remanded for another trial. 40 S. W. 54. Thereupon the defendants in the court below applied to this court for a writ of error upon the ground that said two courts of civil appeals in said opinions held differently upon several questions of law involved herein. This court having granted the application for writ of error, and assumed jurisdiction upon the ground stated, it becomes necessary to determine whether any of the assignments of error made in the court of civil appeals upon the last appeal were well taken.

The first assignment of error complains of the action of the trial court in overruling plaintiffs' and interveners' motion to suppress the depositions of J. R. Peel. The bill of exceptions reserved to the action of the court upon that motion is substantially as follows: "Be it remembered that upon the call for trial of this cause counsel for plaintiffs presented to the court the following motion to suppress the depositions of the witness J. R. Peel [here the bill sets out in full the motion, in which various facts and circumstances are detailed as constituting grounds for the suppression of such depositions, said motion being too long to copy here], and it further appeared to the court that the last term of the district court of Hill county, Texas, was begun on the 4th day of March, 1895, and upon inspection of the envelope containing said depositions of J. R. Peel it appeared that said depositions were duly returned to and filed in said district court on the 8th day of March, 1895, and that plaintiffs and interveners obtained a continuance of this cause on the 11th day of March, 1895, and the court being of opinion that said motion to suppress said depositions was not made and determined at the first term of said court after said depositions had been filed, as is required by article 2235 of the Revised Civil Statutes of Texas, as amended, came too late, and overruled said motion; to which ruling of the court the plaintiffs and interveners then and there excepted, and now here tender this, their bill of exceptions to said ruling, and ask that the same be signed, which is accordingly done." It will

be observed that the bill does not state that the facts set out in the motion are true, and, in the absence of such a statement, we cannot assume them to be. The only facts stated in the bill are (1) that, upon a calling of the cause for trial, plaintiffs and interveners presented the motion set out therein to suppress the depositions; (2) that the previous term of the district court of Hill county began March 4, 1895; (3) that the depositions of Peel were returned into said court March 8, 1895; (4) that plaintiffs and interveners obtained a continuance March 11, 1895. It is too clear for argument that these facts would not justify this court in holding that the district court erred in refusing to quash the depositions. If plaintiffs and interveners wished to have this court consider any of the facts set up in their motion in passing upon the ruling of the trial court, they should have had that court determine and state in the bill which of such facts are true. But it appears from the bill that the trial court overruled the motion because, in his opinion, it was made too late, and counsel for plaintiffs and interveners in their brief urge that "the ruling of the court that the motion to suppress came too late was a virtual admission that it was good if it had been presented in time, and this court will only pass upon the question which the court below passed upon, and which is presented here for revision, viz. whether or not the objections to the deposition were presented in time." We cannot accede to this proposition. The trial court overruled the motion to quash the deposition. Upon the trial, defendants obtained a verdict and judgment. Plaintiffs and interveners have a legal right to seek to have that verdict and judgment set aside upon the ground that the trial court erred in its ruling, and not upon the ground that it erred in the reasons given therefor. In order to justify this court in reversing the judgment, it devolves upon appellants to show affirmatively by the record facts demonstrating the error of the ruling of the trial court upon the motion. Being of opinion that the facts stated in the bill do not show that the trial court erred in overruling the motion, we must hold the assignment of error not well taken, without regard to the question whether the motion came too late, upon which point we are not called upon to express an opinion.

Under various assignments it is strenuously urged that the power to sell conferred by the will was a bare power, not coupled with any interest, and did not survive to Willis upon the death of Nancy McCown, and that, therefore, all the deeds made by Willis, either in person or through Tarver, were without authority, and passed no title. It would seem that this question has been settled by adjudications in this state. *Johnson v. Bowden*, 13 Tex. 670; *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626; *Bennett v. Kilber*, 76 Tex. 385, 13 S. W. 220; *Eskridge v. Patterson*, 78 Tex.

417, 14 S. W. 1000. But it is insisted that none of the cases above, except *Roberts v. Connellee*, were governed by chapter 81, p. 141, Gen. Laws 1870, and that in that case section 160 of that act was overlooked, and therefore it is not authority in this case. It is urged that at common law the power would not survive; that, to change the law in that respect, the English statute referred to in *Johnson v. Bowden* was enacted; that to accomplish a similar result a like statute was at an early day enacted in Texas; that under and by reason of such statute *Johnson v. Bowden* was correctly decided; that section 160 of the act of 1870, supra, which is as follows: "When a will contains directions that no action be had in the district court in the administration of the estate, except to prove and record the same or to prove and record it and return an inventory and appraisement, no other provisions of this act, except as declared in subdivision four of section one hundred and fifty-eight, shall apply to such estate; but the same shall become like any other property to be administered under a power, chargeable in the hands of a trustee, and liable to execution in any court having jurisdiction,"—exempted independent executors from the operation of the other provisions of said act, providing for the survival of the power to one executor in case of the death of the other, and that, therefore, the question as to whether Willis had power to sell after Nancy McCown's death must be determined, under the common law, adversely to such power. We do not understand that the decision in *Johnson v. Bowden* was based upon the statute, or, in other words, that it would have been ruled differently had there been no statute on the subject. The learned judge, in delivering the opinion, after quoting from several authors, used this language: "By this will the power was given the executors without naming them. The payment of the debts, and the general management and settlement of the estate, were committed to their charge. And whether, in doing this, it would be to the advantage of the estate to sell these lots, was certainly intrusted to the discretion of her executors *virtute officii*. As the duty of settling the estate devolved alone on Gooch by the renunciation of Herrill, he was unquestionably intrusted with the same discretion in the exercise of the powers with which the executors were intrusted for this purpose. If this was not so, the renunciation of the trust by one executor would render the qualification of the other nugatory. \* \* \* As the testatrix must have known by the death, renunciation, or neglect of one of the parties she nominated as executors of her estate its administration would be committed to the sole charge of the others, we may infer that she contemplated and intended the powers committed to them as executors should not be regarded as a personal or individual trust, but should be exercised by such one of them as might discharge the duties of the executor—

ship." Our probate laws from an early day have provided that a testator might, by will, direct that no action should be had in the probate court in the administration of his estate. This law was in force when McCown executed his will. He availed himself thereof, and appointed executors to administer his estate outside of the court. His leading intent was that his estate should not be administered by the probate court, and the appointment of his executors was merely a means of effecting such intent. In providing such means he used no language indicating that one should not act, and that the estate should be thrown back into the probate court in case of the death of the other. In such an event it is but fair, and in accord with the general purpose of the testator, to presume that he intended the survivor to act, for, in the absence of such a presumption, the leading intent of the testator would be defeated. We indulge a similar presumption in cases where the testator provides that the probate court shall take no action in the administration of his estate, appoints an executor, but omits to confer upon him any power; for in such case we presume he intended the executor to have power to sell property to pay debts, since, in the absence of such a power, the estate must be administered in the probate court contrary to the expressed intent of the testator. If, in such case, a power to sell is to be raised by presumption or implication, certainly the power expressly conferred by the will must be continued in the surviving executor. Again, if we read the language of the will in the light of the circumstances surrounding the testator, additional grounds will be found for this presumption. The testator contemplated that one of the executors might be called upon to act alone, and provided that, if Willis should decline, his wife should not be required to give bond. He did not deem it necessary to say anything about her power of sale, probably for the reason that he was aware that if, from any cause, it should become necessary for one of the executors to act alone, the law then in force would clothe him with all the power he had conferred upon his executors as a class. We do not think section 160 of the act of 1870 was intended to change the rule of law upon this question. The latter part of the section shows clearly that it did not intend to return the estate, in a case like this, into the probate court, for it provides that the property in the hands of the independent executors "shall become," etc., showing clearly that the creditors were expected to reach it in all events in the hands of the executor. Therefore it would seem necessary for Willis' power of sale to be continued under this new statute, for otherwise he would have been compelled to allow the property to be subjected to execution for the payment of the debts. We are of opinion that the power of sale survived to Willis upon the death of Nancy McCown, and that the assignments referred to above are not well taken.

Under other assignments of error it is urged that, since said power of attorney shows on its face that Willis thereby attempted to delegate to Tarver the discretionary power to sell conferred upon him by the will, such power of attorney is void, and was not admissible in evidence. It has been held in this state, in accordance, as we think, with sound principle, (1) that an executor cannot delegate the discretionary powers conferred upon him by the will, (2) that he can delegate such of those powers as do not involve the exercise of discretion, and that the mere execution of deeds in accordance with terms satisfactory to the executor is not the exercise of a discretionary power. This latter proposition was distinctly decided by the court of civil appeals in a well-considered opinion in *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247, and an application for writ of error therein, complaining only that the court erred in holding that proposition of law, was refused by this court. In so far as the instrument attempted to delegate the first class of powers, it was ineffective, but, in so far as it delegated the mere power to execute deeds in the name of Willis, it was valid. Therefore it was admissible in evidence, and said assignments are not well taken.

The fifteenth assignment of error is as follows: "The trial court erred in the fifth subdivision of its general charge to the jury, as follows: 'The court instructs you further that said P. J. Willis had no power to confer by power of attorney upon W. B. Tarver the authority of taking control and disposing of any of the estate of Alex. McCown, or of exercising acts of discretion in reference to the sale of any of the estate; and said power of attorney, in so far as it undertook and purported to convey such power and authority to W. B. Tarver, would be inoperative and ineffective; but the said Willis was authorized by law to confer upon said Tarver authority to negotiate sales, deliver deeds, and receipt for purchase money; and, in the event you find that Tarver did negotiate sales, and exercise acts of discretion concerning the sales and disposition of said lands belonging to the estate of Alex. McCown, then you will inquire whether or not the said P. J. Willis, executor as aforesaid, was informed of such sales, and whether or not, with full knowledge of all the facts, he ratified and confirmed same, and accepted and appropriated the proceeds thereof to the estate of Alex. McCown; and, if you so find, then such sales, as made by Tarver, would be binding upon the heirs of said Alex. McCown;' and in refusing to give the jury the special instruction No. 2, requested by the appellants, as follows: 'The recitations in the power of attorney from P. J. Willis, executor, to W. B. Tarver, under which some of the defendants claim title, and the uncontroverted testimony of W. B. Tarver himself, show that P. J. Willis, executor, attempted to delegate to said Tarver the discretionary power of selling and making title to the lands which were conveyed to the several defendants claiming under that

power of attorney. Said power of attorney is void, and the defendants claiming under such conveyances by W. B. Tarver took no titles to the land thus attempted to be conveyed to them, and you will therefore find against those defendants claiming title under the conveyances made by said Tarver in favor of such of the plaintiffs and interveners as you may find are not barred by the statute of limitations, in accordance with other instructions herewith given you,—because such special instruction is the correct interpretation of the power of attorney, and said general charge is an erroneous statement of the law in telling the jury that ‘the said Willis was authorized by the law to confer upon said Tarver the authority to negotiate sales, deliver deeds, and receipt for purchase money,’ all of which are acts of discretion, and did not leave the jury any room to determine what acts of discretion were to have been exercised, or may have been exercised, under said power of attorney, and the acts of ratification were insufficient in law.” From what has been said above, it results that, if Willis, in the exercise of his judgment and discretion, determined that it was to the interest of the estate to sell property, that this particular land should be sold, that it should be sold in parcels, and the terms of sale, then Tarver, under the power of attorney, could, for him, and in his name, have executed the deeds and received the consideration, such acts being merely executive in character. Therefore, if the executor had, in person, before the sales were made, determined all the questions involving the exercise of any judgment or discretion, he could legally have consummated the sales in accordance with such determination, through the agent, without having in person signed any instrument except the power of attorney. It logically follows that, if he performed some of those discretionary acts before the agent executed the deed, and thereafter, with full knowledge of all the facts, performed others, approving the sale, the deed would bind the estate. We think it also follows that, if the agent, in the first instance, executed the deed in the name of the executor, and thereafter, when informed thereof, with knowledge of all the facts, the latter, in the exercise of his discretionary powers, approves of and ratifies the sale, the deed will bind the estate. *Giddings v. Butler*, 47 Tex. 535. The true principle underlying the whole question is that the mere act of executing the deed by such an agent is never, of and by itself, sufficient to bind the estate, but needs to be supplemented by the exercise of the executor’s discretionary powers in favor of the transaction evidenced thereby; but at the same time it is not, even standing alone, a void act. In order to fully execute the power of sale conferred upon the executor, two classes of acts must be performed: (1) Those involving the exercise of discretion or judgment, and (2) those which do not, but are merely executive in character. But, while it takes both to so execute the power as to bind the estate, and

while the former must be performed by the executor, and need not be evidenced by writing, the latter may be done through an agent; and there is no rule of law requiring that both classes of acts be performed at the same time, or prescribing which shall be done first. In *Newton v. Bronson*, 13 N. Y. 587, the will authorized the executors to sell and convey, in their discretion, at public or private sale, and upon such terms as they might deem proper. Only one executor qualified. “Ogden & Jones executed the contract sought to be enforced in the name of the defendant as executor. There was no proof that they were authorized in writing by defendant to do so, or that they had any express authority from him to execute the contract at the time it was made; but there was evidence of declarations and acts by the defendant as executor acknowledging the validity of the contract; and letters written by him as executor to the plaintiff, acknowledging receipts of payment upon the contract, were read in evidence.” It was urged there, as here, that the contract was void, even if Ogden & Jones were authorized to make it, because defendant could not delegate authority to contract for the sale of the land, and that no ratification or acceptance of money upon it could render it valid. In passing upon this question the court said: “The reason of the maxim, ‘*Delegatus non potest delegare*,’ however, is that, in the cases to which it applies, the first constituent has a right to the personal judgment, care, and skill of his agent. Assuming that Ogden & Jones, in this case, acted without authority from the defendant, the latter had a right, when the contract came to his knowledge, either to repudiate or to confirm it. In determining upon one or the other course, he brought into exercise those personal qualifications on account of which he is presumed to have been selected by the testator. The law does not allow him to commit the power with which he is intrusted to another, for perhaps that would bind the estate to a transaction which the former might not have considered advantageous and safe if he had acted directly upon it. The reason fails where the person actually intrusted with the authority has, with a full knowledge of the facts, ratified the act of one who has assumed to act as his agent.” We think it inaccurate to characterize the subsequent approval of the terms of the contract by the executor as a ratification, for it is a mere exercise by him of the discretionary powers which he could not delegate. So, in the case before us, if the executor, after Tarver executed a deed or deeds upon being fully informed of all the facts, approved of the terms of the sale or sales, such approval was not, accurately speaking, a ratification of the act of execution of the deed or deeds, but was a performance by him of the discretionary acts necessary, in addition to the execution of the deed by Tarver, to a complete execution of the power of sale conferred by the will.

Having determined the principles of law applicable to such transactions, we must, in

order to test the correctness of the charges set out in the above assignment, look to the evidence submitted to the jury upon the issue as to whether Willis did, in fact, exercise the discretionary powers conferred upon him by the will. The power of attorney executed a few months after the death of Nancy McCown shows on its face that the executor had then determined upon a sale of this very land in bulk or in parcels, as might be most advisable, thereby exercising one of the most important discretionary powers vested in him. The sales were mostly in small tracts, for part cash and part on time, the notes for deferred payments being payable to Willis as executor, and reciting that the deeds had been signed by "Peter J. Willis, executor of Alexander McCown, deceased, by W. B. Tarver, agent," the dates of such sales extending over a period of several years, and the deeds being placed on record from time to time as such sales were made. R. J. Sledge, one of the purchasers under deed executed by Tarver soon after the date of the power of attorney, testified, "My recollection is that W. B. Tarver showed me the land, and I closed the trade with Willis." He also testified that he thought he paid the cash payment (\$2,000) to Willis, and that he executed, and afterwards paid, to Willis, his note for the balance of the purchase money, \$2,250. The agent, Tarver, testified that he sold the lands in parcels to various parties, taking in payment part cash and balance in vendor's lien notes of the respective purchasers, payable to P. J. Willis, executor of Alexander McCown; that he remitted the proceeds of such sales to Willis from time to time; and that "P. J. Willis acknowledged the receipt of said money in each and every instance, sometimes by letter, and several times by personally saying so. His letters to me uniformly expressed that he was well satisfied with the sales I made, and the payments thereon. When I ceased to act as agent and attorney in fact for said Willis, about '73 or '74, I turned over to his order, to Abbott & McDonald, attorneys at Hillsboro, Texas, such papers as belonged to said business, together with itemized and full written statement of the transactions I had had with reference to the sale and conveyance of said land." Witty, one of the purchasers, testified: "I was with P. J. Willis about three times, and I never conversed with him on any other subject except this land. The first time was in March, 1871, when he was first at my house, and wanted to sell the land. I cannot repeat all the language, but have stated the substance. The second time I met him was in Hillsboro. I was paying him some money that I owed him, in W. B. Tarver's office. Myself, Tarver, and Willis were the only ones present. The time I cannot tell. The third time I met him was in Hillsboro, in W. B. Tarver's office. I cannot recollect the year, but think it was in 1872." The record shows that Willis procured judgments upon some of the notes for the amounts there-

of, and for foreclosure of the vendors' liens, and was prosecuting suits upon others at the time of his death; and that, after Tarver had, in his name, sold most of the lands, he in person executed two deeds to portions of what was left, and received a reconveyance from Sledge of part of the tract Tarver had deeded him as aforesaid. There is no evidence in the record that he at any time questioned the titles of any of the purchasers, and none of the heirs are shown to have claimed that Willis did not exercise the discretionary powers vested in him while he was living, and could make known the extent of his knowledge of, and participation in, the sales; and the record does not show that any effort was made by the heirs to ascertain whether the papers in Willis' possession at the time of his death, relating to the estate of Alexander McCown, tended to rebut the testimony of Tarver to the effect that Willis was cognizant of, and approved by letter and otherwise, all said sales. The record further shows that, though said numerous conveyances were, soon after execution, placed of record, and the claimants thereof went into possession, making valuable improvements, this suit was not brought by the heirs of Alexander McCown until July 8, 1890, and by the intervention of the heirs of Nancy McCown on March 3, 1891. From this brief reference to the testimony it is clear that the jury might have found therefrom that Willis determined to sell this particular land in small tracts; that he thereupon authorized Tarver to negotiate sales, and subdivide to suit purchasers; that as the sales were made, the facts concerning same were, from time to time, as the business progressed, reported to him; that upon such reports he considered the sales to be advantageous to the estate, and assented thereto. If these things be true, then Willis exercised all the discretionary powers conferred upon him by the will, and such action on his part, in connection with the execution of the deeds by his agent, Tarver, was all that was necessary to a full execution of the power to sell conferred by the will. The fact that Willis availed himself of the judgment and services of Tarver in the performance of these discretionary powers would not render the sales void. When a purchaser dealt with Tarver the law charged him with knowledge of the fact that, notwithstanding the general terms of the power of attorney, the agent's powers were not general; that he could only bind the estate by the exercise thereunder of powers of an executive character; and that as to discretionary matters, such as fixing price and terms of sale, his acts could not bind the estate, but at most could only be advisory to the executor, whose assent thereto was necessary. If the purchaser accepted the deed from Tarver, and delivered to him the consideration in advance of the exercise by the executor of such discretionary powers, taking his chances as to whether their exercise would result in a com-



pletion of the sale, so as to bind the estate, and if Willis thereafter, upon knowledge of all the facts, accepted the terms agreed upon between the purchaser and Tarver, we see no reason for holding that the transaction is any less binding upon the estate than if Willis had exercised all his discretionary powers before Tarver signed the deed. We understand the charge of the court set out in the above assignment as being in accord with these views. We think the jury could not have understood from it that Willis could confer upon Tarver any power to agree upon the terms of any sale except subject to his subsequent approval. From what has been said, it results that we are of opinion that there was no error in giving and refusing the charges set out in the assignment as therein stated. We are of opinion that the "judgments of the district court of Hill county, Texas, in the suits of P. J. Willis, executor of Alexander McCown, against J. M. Moore and various persons, for parts of the purchase money for portions of the land in controversy purchased by them from W. B. Tarver under the power of attorney to him from P. J. Willis, executor," were properly admitted in evidence as circumstances tending to show the acquiescence and consent of the executor to the sales, and also the manner in which the purchasers paid for the land, and that the assignment calling in question the action of the lower court in admitting such testimony is not well taken.

On the trial defendants offered in evidence a deed executed by certain named heirs of Alexander McCown through their duly-constituted attorney, and by John T. Pierce, one of the administrators of the estate of Nancy McCown, which deed was substantially as follows: "Whereas, Willis, executor of Alexander McCown, by his agent, W. B. Tarver, did, on the 13th of May, 1871, execute to J. J. Gathings a deed to 430 acres of the land in controversy; and whereas, said Gathings is desirous of having said deed ratified by the heirs of Alexander McCown: Therefore, in consideration of \$180 in gold, being balance of purchase money of said land, we, John T. Pierce, acting for his wife, Annie E. Pierce, and as administrator of the estate of N. A. McCown, and J. G. McCown, agent and attorney in fact for certain named heirs of Alexander McCown, do hereby ratify and confirm said deed, and relinquish all claim and title in the land by reason of our heirship as aforesaid." The record shows that the parties named in the instrument as heirs of Alexander McCown had given J. G. McCown full power to act for them. In connection with the admission of this deed in evidence, the record states the following facts: "The said instrument was admitted, not as a conveyance binding on the estate represented by John T. Pierce, but as evidence of payment of purchase money to John T. Pierce, husband of intervener, Annie E. Pierce, and to the heirs of Alexander McCown, and as an act of rati-

fication in those who had legally signed it; and the jury were so instructed at the time the deed was admitted. Some of the appellees claim under J. J. Gathings." One of the assignments of error complains of the action of the trial court in admitting said deed in evidence. This deed was dated March 6, 1878, after the death of Willis, and therefore the heirs of Alexander McCown, who were asserting claim to a portion of the property and the estate of Nancy McCown represented by Pierce and wife, clearly had authority to collect and receipt for the balance of the purchase money paid by Gathings, and the deed was admissible as showing such payment. Gathings, having purchased under a deed reserving a vendor's lien, had the right, when sued herein by the heirs, to show that he had paid the balance of the purchase money. The heirs of Alexander McCown also had the right to ratify the deed in so far as they might be supposed to have any interest in the land deeded to Gathings, and for that purpose the deed was admissible. We do not understand, from its terms, that it purports to ratify on the part of the heirs of Nancy McCown; but, even if it had done so, the court could not have excluded it from the jury, but it might have been its duty, upon request of the heirs of Nancy McCown, to have instructed that it could not be considered as against them for any purpose other than showing the payment of the money to the executor of Nancy McCown, through whom they inherited. We therefore are of opinion that the assignment complaining of the introduction of the deed in evidence must be overruled. We are also of opinion that the testimony of Witty and Tarver, referred to above, was admissible as circumstances tending to show Willis' knowledge of and assent to the sales, and that the assignments complaining of the action of the trial court in admitting same must be overruled.

It is claimed that the court erred in giving the following charge: "If you believe from the evidence that P. J. Willis, executor, instituted suit in the district court of Hill county to collect the purchase money for lands which had been conveyed to the defendants in this case, or those under whom they claimed, by W. B. Tarver, agent and attorney in fact for P. J. Willis, executor, and that in such suits Annie E. Pierce and John T. Pierce, as administratrix and administrator of the estate of Nancy McCown, and certain of the heirs of Alexander McCown, who are parties to this suit, or whose descendants are parties to this suit, made themselves parties in said suits for the purchase money, and prosecuted the same to judgments, which were paid by the defendants, or those under whom they claimed, you will find for the defendants claiming the land on which said liens were foreclosed as against the heirs of Nancy McCown and as against such of the heirs of Alexander McCown as became parties to such suit." As above stated, the power of attorney on its face shows that

Willis had determined to sell this land in bulk or in parcels. The notes taken in his name informed him that the sales had been made in small tracts. The deeds executed by him through his agent were referred to in the notes, and both informed him fully as to the terms of the sale. By filing suit upon the notes, he demanded the payment of the balance of the purchase money. The doing of all these things involved a complete exercise of all the discretionary powers vested in him by the will in favor of the sales, and, taken in connection with the deeds executed by him through Tarver, shows a complete execution of the power of sale contained in the will, and the estate was thereby bound. Therefore both plaintiffs and interveners who claim herein through such estate were bound by such sales. The fact that the suits were prosecuted by the heirs and executors, as recited in the charge, after Willis' death, is of no consequence except as indicating how the notes were paid for. As above stated, the record facts as they existed at the date of Willis' death showed a complete execution of the power of sale conferred by Alexander McCown upon his executors as to the tracts of land referred to in this charge. We are therefore of the opinion that there was no error in the charge, and that the assignment must be overruled.

Error is assigned upon the action of the court in refusing to give the following charge: "If you find from the evidence that there were no valid debts against the estate of Alex. McCown existing at the date of the power of attorney from P. J. Willis, executor, to W. B. Tarver, or at the date of the conveyances made by P. J. Willis to the defendants Terrell and Gee, then said Willis, as executor of Alex. McCown's estate, had no power or authority to make said power of attorney, or to make said conveyances; and if you so find you will return a verdict against all the defendants in favor of all the plaintiffs and interveners whom you may find, under other instructions herewith given you, not to be barred by the statute of limitations. With reference to the question of the existence of debts against the estate of Alex. McCown at the time hereinbefore mentioned, you are further instructed that the burden of proof is upon the defendant to establish by a fair preponderance of the evidence that there were valid debts existing against said estate at the time hereinbefore mentioned. Unless they have done so, you will find against them on this issue." This charge was properly refused, because, in no event, could a recovery have been had against defendants for all the lands sold by Pierce and wife as administrators of the estate of Nancy McCown, and by the heirs of Alexander McCown through their attorney. That part of the charge relating to the burden of proof, whether correct or not, was properly refused, because included in the general charge of the court.

Another assignment of error is as follows: "The trial court erred in overruling appel-

lants' objection to the answer of the witness J. R. Peel to the third cross interrogatory propounded to him by the appellees as follows: "Third Cross Interrogatory. You only remember that Foster was satisfied by the transfer of said judgment to one Smith, or to some one else, do you not? You could not undertake to say when or how the McCown estate paid the judgment, could you?" To which witness answered: "Peter Willis stated to me that he was going up in the northern part of the state to sell lands belonging to the estate to pay off the judgment,"—for the reason that said testimony is hearsay of the rankest kind, and said answer is not responsive to said cross interrogatory." We do not think the answer was hearsay, because the declarations of Willis were direct evidence of the fact that he had, in the exercise of the discretionary powers conferred by the will, determined to sell this land, and because his declaration to the attorney who was seeking to collect the judgment against him was evidence that it had not then been paid, and of the source from which the means to pay it was to be derived. It was responsive because the witness could not, with this information from the executor in his possession, have fully and truly answered the questions without disclosing that the declaration of Willis was all the information he had on the subject. The answer, in connection with his entire testimony, tended to show that he knew more than was implied by the first question; that the judgment had not been paid at the time of the conversation, and that it was paid out of these sales. This assignment is therefore not well taken.

The testimony as to whether there were debts against the estate of Alexander McCown at the time of these sales was conflicting. That tending to show that there were was mainly the conferring upon the executors of power to sell to pay his debts; the fact that the executor did sell, aided by the ordinary presumption that he was not, in so doing, violating the trust, and by such inferences as the jury might have drawn from long acquiescence in such acts until, by reason of the death of the executor, his evidence cannot be had as to the condition of the estate; the fact that there is no evidence showing expenses incurred by the executors in the management and preservation of the estate during so many years, nor what portion of proceeds of sales of personal property, if any, was received by Nancy McCown during her life; and the fact that on September 20, 1870, in the district court of Montgomery county, a judgment was rendered in favor of Foster against the estate of Alexander McCown for \$1,556.44, with interest from April, 1861, and \$3,320, with interest from June, 1857, amounting in all to nearly \$10,000; coupled with the fact that Peel, one of the attorneys for plaintiff, therein testified that collection of the judgment was "held up at request of Peter J. Willis, who promised to use every effort

in the settlement of it," and that his testimony leaves it in doubt whether the last payment of \$2,800 was made prior to "some time in June or July, 1873," he stating: "The final settlement thereof was made with me, as hereinbefore stated. Peter Willis stated to me that he was going up in the northern part of the state to sell lands belonging to the estate to pay off the judgment did afterwards pay the balance as above stated." The evidence tending to show that there were no debts was mainly the inventory of estate of Alexander McCown, showing real and personal property valued at \$55,000 in January, 1856; that the estate was always considered a wealthy one; a number of witnesses who did not claim to have had any personal connection with the matter testified that they understood that the Foster judgment was paid before the death of Nancy McCown, but do not show the source of their information; testimony to the effect that after the death of Alexander McCown there came into the hands of the executors, from sales of negroes and other personal property, and rents, large sums of money, and that Mrs. McCown always appeared to have money, and be in easy circumstances. While this is the general nature of the evidence upon this issue, we deem it unnecessary to attempt to set it out in full. Enough has been stated to show that it was clearly a question of fact for the jury. As above indicated, the court, in its charge, submitted the issue as to whether there were debts at the time of such sales to the jury, and informed them that the burden was upon defendants claiming under the executor to establish same. The verdict of the jury finding for defendants for the land determined the issue in their favor. The only assignment of error which can be construed to raise the question as to whether there was evidence from which the jury could have so found is as follows: "The trial court erred in refusing to grant appellants a new trial because the verdict of the jury and the judgment of the court entered thereon \* \* \* are contrary to the evidence, in this: that, \* \* \* If there were any debts against the estate of Alex. McCown, the evidence shows that there were ample funds in the hands of the executor, derived from the sales of cotton, slaves, stock, notes, judgments, land certificates, and other personal property, to have paid more than five times the amount of the Foster judgment, which was the only debt proved to have existed against Alex. McCown's estate; and the proof shows it was paid before said land was sold." We omit all that portion of the assignment which refers to other matters. There being ample evidence to support the verdict upon this question of fact, we would have no difficulty in overruling the assignment, were it not for the following language, used by the court of civil appeals in their opinion herein: "In the will of Alexander McCown appointing Nancy McCown and Peter J. Willis his executors,

the power to sell lands was given only for the purpose of paying the debts of the estate, and it follows that if no debts existed the power of sale did not exist. On the former appeal of the case we think it was properly held by the court of civil appeals that the burden rested on those claiming under deeds from the executor to show the existence of debts at the time the deeds were executed. If it had appeared, as it did in regard to several of the appellees, that all of them claimed through deeds executed by the executor himself, still the evidence does not show that there were any debts due by the estate at the time the sales were made. The only evidence that tended to establish debts was the testimony of J. R. Peel, who appeared to have very confused ideas on the subject, and who finally declared that the debts of the estate at the time of the death of Mrs. Nancy McCown did not amount to two hundred dollars. The very fact that twenty thousand dollars of land was sold—an amount entirely out of all proportion to any debt even attempted to be established—was a circumstance that tended to show that the executor did not have the payment of debts in view when he sold the land." If this language of the court was intended as a finding of fact that there were no debts, we would be bound thereby, so long as they left the question to the jury on another trial, and we would not disturb their judgment of reversal if we should hold the law to be that the mere non-existence of debts would necessarily avoid sales to purchasers who, in good faith, received the conveyances, and paid therefor without any notice that any fact existed destroying the apparent power of the executor to sell. We do not understand, however, that this is the purpose or effect of their language. We understand them to affirm the following propositions: (1) That, if no debts existed, Willis had no power of sale; (2) that the burden was upon defendants claiming under deeds from him to make it affirmatively appear from the evidence that such debts existed at the time of their execution; and (3) that the evidence failed to do so, in that it did not show that the judgment, which established a debt as a matter of law, had not been paid at that time. The first proposition is well settled. If the second proposition is erroneous, then the finding of fact embraced in the third does not lead to a reversal of the judgment, because, if the burden was not, in law, upon defendants to show the existence of debts at the date of the sales, they are not to be prejudiced by the fact that the evidence did not establish the nonpayment of the judgment. We are therefore brought to a consideration of the correctness of the second proposition. The power of an independent executor to sell may be either express or implied. Where a will appoints executors, and provides that the estate shall be administered outside of the probate court, but confers no power of sale, it may be that, in order to

raise the power by implication of law, it is necessary, under our decisions, to show the existence of debts as one of the conditions necessary to the implication. We are not, however, called upon by the facts of this case to express any opinion upon this question. *Blanton v. Mayes*, 58 Tex. 422; *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626. Here the power to sell is expressly conferred by the will; and, since it is not necessary to resort to implication to raise the power, it cannot be necessary for the claimant thereunder to establish by proof any of the conditions upon which the law would raise such implication. It is fair to assume that the testator knew the condition of his business, and was in a position to form some idea as to what would be necessary to be done by the executors in the administration of his estate; and he having, in the will, which speaks as of the date of his death, conferred the power to sell to pay his debts, it would be against reason not to assume, at least prima facie, that there were debts to support such power; otherwise we begin the task of construction with the assumption that he did an unnecessary and unreasonable thing in inserting the second subdivision above quoted in his will, for, if the burden be upon the purchaser to show debts before he can claim under such power, then that clause conferring the power becomes wholly nugatory, since it is clear that, where the will appoints an executor, but makes no provision for power of sale, and provides for administration outside of the probate court, and the proof shows the existence of debts, the law implies a power of sale as necessary to a carrying out of the general intent of the testator that the administration should be independent of the orders of the court. The testator probably considered that under an express power of sale conferred by the will his executor could sell property to a better advantage than if compelled to resort to such powers as the law might raise by necessary implication. He had the right to prevent his estate being depreciated in value in the hands of his executors by placing their power of sale beyond doubt, and, having done so, the courts have no right to practically nullify his wise precaution by imposing upon the purchasers the burden of showing the existence of debts before they can claim under such power. So long as it is the policy of the lawmaking power to permit a testator to provide for the administration of his estate by his trusted friends, independent of the courts, instead of allowing it to drift into the hands of merciless creditors or designing strangers, through the forms of an administration in the probate court, so long should the powers expressly conferred by the will be upheld. In this case it would have been going quite far enough to have held, as against these innocent purchasers who paid their money to the executor, who was permitted by the owners of

the estate to continue to exercise the power of sale conferred by the will, that the power of sale could be shown by the heirs to have terminated by the full payment of the debts before they purchased. *Cooper v. Horner*, 62 Tex. 356. The burden of proof then being, at all events, upon plaintiffs and interveners to show the termination of the power of sale by the payment of the debts previous to the sales of this land, the finding of the court of civil appeals above referred to, that the evidence failed to show the nonpayment of the judgment, when taken as true, does not show that Willis' power to sell had terminated, and therefore would not justify us in reversing the case on the facts. Since we find no error of law committed on the trial, it becomes our duty to set aside the judgment of the court of civil appeals, and affirm the judgment of the trial court, which is accordingly ordered.

**STATE ex rel. BROWN et al. v. CALLAGHAN, Mayor.**

(Supreme Court of Texas. Dec. 6, 1897.)

SCHOOLS—GOVERNMENT—SUBMITTING QUESTIONS TO ELECTORS—APPEAL AND ERROR—QUESTIONS CERTIFIED TO SUPREME COURT—WHEN DETERMINED.

1. The supreme court will not refuse to determine a question certified by the court of civil appeals because there are other questions in the case which must be determined before a decision of the point certified becomes necessary.

2. Rev. St. 1879, art. 3781 (Rev. St. 1895, art. 4004), provides that all cities and towns which have assumed control of the public free schools within their limits, or may determine to do so at an election held for the purpose, may have exclusive control of such schools. Act April 3, 1879, §§ 1-3 (Rev. St. 1895, arts. 4005-4007), provide that the mayor of any city shall, on written application of 50 or more electors, order an election to decide whether such city shall acquire the exclusive control of the public schools, and whether the same shall be under the control of a board of trustees or of the city council; that if it be decided that the city acquired such control, and that the same shall be under the management of a board of trustees, the mayor shall order an election of six trustees. *Held*, that where a city, prior to Act 1879, had decided by election to assume such control, the mayor, after said act, had no power to call an election to determine whether such schools should be under control of a board of trustees or of the council.

Certified question from court of civil appeals of Fourth supreme judicial district.

Mandamus by the state of Texas, on the relation of J. N. Brown and others, against Bryan Callaghan, mayor of the city of San Antonio. From a judgment in favor of defendant, relators appealed to the court of civil appeals, which certified a certain question to the supreme court for determination.

C. A. Keller and Mason Williams, for appellants. John A. Green, Sr., for appellee.

GAINES, C. J. The following question has been certified and submitted for our determination by the court of civil appeals for the Fourth supreme judicial district: "The

city council of the city of San Antonio, a municipal corporation, on the 19th day of September, 1876, duly submitted to a vote of the majority of the property taxpayers of said city the proposition as to whether said city should assume control of the public free schools within its limits; and at an election duly held on the 16th day of October, 1876, upon the question submitted, it was decided, by a vote of the majority of the property taxpayers of said city, that it should assume control of the public free schools within its limits. Immediately thereafter the city of San Antonio assumed exclusive control of all the public free schools within its limits, and has continued to exercise such control over them ever since. Since said election no proposition involving the control of the public free schools of the city has been submitted to the electors of said city. On the 15th day of April, 1897, the following application in writing, signed by more than fifty of the qualified electors of the city of San Antonio, was made and presented to the Hon. Bryan Callaghan, mayor of said city, to wit: "To the Honorable Bryan Callaghan, Mayor of the City of San Antonio—Sir: Under the statute laws of Texas, the citizens of this city have a right to determine, by a vote, whether or not the public schools of this city shall be managed by a board of trustees to be elected by the people. We, therefore, respectfully petition you, as mayor of the city of San Antonio, to order an election, at an early day, in order that the voters of this city may determine whether or not the public schools of the city of San Antonio shall be placed under the control of a board of trustees, as provided by the statute laws of this state." Question: Under these facts, was it the legal duty of Bryan Callaghan, as mayor of the city of San Antonio, to order the election applied for?" The question has been submitted together with a motion to dismiss.

We are of opinion that the motion should be overruled. It is not a certificate of the whole case, as in *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 87 Tex. 112, 28 S. W. 1063. Nor is it a sound objection that there are other questions in the case which must be determined before a decision of the point certified becomes necessary. The statute contemplates that when a question arises in the court of civil appeals which that court may deem difficult, and necessary to be decided in the disposition of the case, it may be certified for determination to this court; and when a question is certified we must indulge the presumption that the court of civil appeals so regard it. If the "very question" is not certified, neither party is injured; for after the final disposition of the case in the court of civil appeals he may apply to this court for a writ of error, and have "the very question" decided in the light of the entire record. So, in his application, he may show that the determination of the question was

not necessary, if in truth there were other questions the decision of which ought to have determined the disposition of the case in his favor. The motion is overruled.

In the briefs of counsel the various statutes enacted during the last 20 years, which bear upon the question of the control by the incorporated cities and towns in this state of the public free schools within their limits, have been elaborately discussed. But, in determining the question submitted, we have not found it necessary to review at any great length the history of these laws. The statutes upon the subject indicate that the progressive tendency of the legislation has been towards promoting the acquisition of the control of their public schools by the incorporated towns and cities of the state, and to leave it optional with the people of the respective municipalities whether the schools shall be under the management of the governing body of the corporation or under a board of trustees. But we have found no statute which undertakes to make a general law covering the whole subject and applicable to all municipal corporations in the state. The Revised Statutes of 1879 contained the following articles:

"Art. 3781. All cities and towns which have heretofore under the act of May 2, 1875, or any subsequent law, assumed control of the public free schools within their limits, and have continued to exercise the same until the present time, or may hereafter determine so to do by a majority vote of the property tax payers of said city or town voting at an election held for that purpose, may have exclusive control of the public free schools within their limits.

"Art. 3782. The election required to be held by the preceding article, shall be ordered by the city or town council upon the petition of twenty property tax payers, and shall be held and conducted, and the returns canvassed, and the result declared as other elections."

The act of April 3, 1879, contained, among others not necessary to mention, the following provisions:

"Section 1. That any city or town in this state may acquire the exclusive control of the public free schools within its limits.

"Sec. 2. The mayor of said city or town shall, upon the written application of not less than fifty of the qualified electors of such city or town, order, within twenty days of such application, an election by the qualified electors of such city or town, to be conducted as other municipal elections, to decide by a majority of the votes cast by the qualified electors of such city or town at such election, whether such city or town shall acquire the exclusive control of any or all of the public free schools and institutions of learning within its limits, and whether the same shall be under the control of a board of trustees as hereinafter mentioned, or of the council or board of aldermen of such city or town.

"Sec. 3. If, at such election, it shall be de-

cided that such city or town has acquired the exclusive control of said public free schools and institutions of learning, and that the same shall be under the management of a board of trustees, then the mayor of such city or town shall, within ten days from the ascertainment of such result, order an election, to be conducted as other municipal elections, by the qualified electors of such city or town, of six trustees, to take charge of and manage said public free schools and institutions of learning. The six persons receiving the largest number of votes cast at such election shall, thereupon, become such trustees, and shall hold their offices for four years: provided that at the first election, held under the provisions of this act, the trustees receiving the smallest majorities shall only hold their offices for two years, and at the end of every two years thereafter there shall be elected, in like manner, three trustees. Any vacancy, from any cause whatever among said trustees, to be filled by an election as herein provided for, for the unexpired term of such trustees: and, provided further that said trustees may continue to act until their successors may have qualified." Laws 1879, p. 76.

In the Revised Statutes of 1895 all those provisions are incorporated in precisely the same language, except article 3782 of the Revised Statutes of 1879, which was probably thought to be repealed by the second section of the act of 1879. Rev. St. 1895, arts. 4004-4007. Article 4006, which is section 2 of the act of April 3, 1879, is the only general law which we have found which authorizes any of the incorporated towns and cities of this state to hold an election to determine whether the free schools within their respective limits shall be under the control of a board of trustees or "of the council or board of aldermen of such city or town." And we are of opinion the true construction of this provision is not difficult to determine. It is apparent that article 4005 applies only to such cities and towns as had not acquired control of their schools; for, certainly, the legislature could not have intended to confer upon the towns and cities of the state which had already assumed control of their schools the power to acquire that control. Article 4006 does not require the mayor of every city or town in the state to order an election upon presentation of a proper petition. The language is, "the mayor of said city or town," and means, doubtless, the mayor of the city or town mentioned in article 4005. This becomes obvious by referring to the original act of April 3, 1879, for that was the only preceding provision in that act. It seems to us, therefore, that the purpose of the legislature was to make provision for such towns and cities as had not assumed control of their public free schools, and to direct that they might do so by holding an election to determine at the same time two questions: (1) Shall the city or town take control of its schools? (2) If so, shall the schools be under the management of a board of trustees? It

does not authorize either question to be submitted separately. It must be a dual election. It is clear, therefore, even if the words, "the mayor of said city or town," had not already made it clear, that the provision could not apply to any town or city which had already assumed control of its schools. It was the evident policy of the legislature to have the question of trustees settled by the same election at which the question of control was determined, and to leave untouched the subject of trustees as to all cities and towns which were already in lawful exercise of control over their schools. If it should be asked, why, in providing a mode by which the question of trustees or no trustees could be decided as to cities which might subsequently acquire the right of control over their schools, did the legislature omit to make a like provision for those which had already assumed such control? it may be difficult to give a satisfactory answer. But it is unimportant whether a good reason may be assigned for their action or not, since it is clear that, if they contemplated making such provision, they have not done so. The 18th legislature, in 1883, doubtless seeing that there was no law in force which authorized cities or towns which had already taken control of their schools to place them under the management of trustees, enacted the following provision: "That the city council of every city or town of one thousand inhabitants or more, incorporated under the general law, that has or shall assume control of its public free schools, may appoint six persons of good moral character and qualified voters of such city or town, as a board of trustees for such schools, of which board the mayor shall be ex-officio chairman." Laws 1883, p. 112. This is now article 4018 of our present Revised Statutes. So that articles 4006 and 4018, taken together, provide a mode by which every city or town in the state, except those acting under special charters, which had already acquired control of their schools, may determine whether the management shall be by a board of trustees or not,—the one by appointment, the other by election. It was probably deemed best to leave the matter for special legislation as to those cities which were acting under special charters. Since San Antonio had already assumed control of its public free schools when the petition for the election was presented to the mayor, it follows that he had no power to order it. The question is therefore answered in the negative; and our opinion will be so certified.

#### BEXAR COUNTY v. VOGT.

(Supreme Court of Texas. Nov. 29, 1897.)

TRESPASS TO TRY TITLE—DISCLAIMER—COSTS.

In trespass to try title, where defendant first disclaims as to part, and afterwards again disclaims as to a portion of that part, and plaintiff proceeds to trial of the issue raised by the second

disclaimer, and a judgment goes for defendant, plaintiff is entitled to costs up to the time of the second disclaimer.

Application for writ of error to court of civil appeals of Fourth supreme judicial district.

Trespass to try title by John G. Vogt against Bexar county. The court of civil appeals reformed a judgment for defendant (42 S. W. 127), and defendant applies for a writ of error. Writ refused.

Otto Staffel, for applicant.

GAINES, C. J. John G. Vogt, against whom the writ of error is sought in this application, brought suit against Bexar county, the appellant, to recover a tract of land. The defendant county, in an amended answer, disclaimed title as to all the land sued for except three roads, each of which is claimed to be a public highway. It subsequently again amended its answer, enlarging its disclaimer, and restricting its defense to an easement over one of the roads. Upon the trial, judgment was rendered for the defendant county for the road claimed by it in its last amendment, and for all costs of suit. Upon appeal the court of civil appeals reformed the judgment so as to tax against the county all costs which accrued up to the time of filing the second disclaimer. The sole ground upon which the applicant prays for a writ of error is that the court of civil appeals erred in reforming the judgment as to the costs. We are of opinion that that court did not err in its ruling, and would have deemed it unnecessary to express in writing our views upon the question but for the fact that it seems, from their opinion, that they had difficulty in following the decision of this court in the case of *Keyser v. Meusback*, 77 Tex. 64, 13 S. W. 967. It is a well-established rule in this court that a defendant in an action of trespass to try title, who does not desire to contest the title of the plaintiff, may absolve himself from the payment of costs by entering a disclaimer as to the land for which suit is brought, provided the plaintiff sees fit to prosecute the matter no further, and accepts the disclaimer. The plaintiff may, however, recover his costs by establishing that the defendant had trespassed upon the land, or probably that he had asserted an adverse claim thereto. See Rev. St. 1896, art. 5254. But our statutes provide that, "where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs." *Id.* art. 5270. The statutes are silent as to the case where there is a disclaimer as to a part only of the land sued for, and the plaintiff recovers a part of that which the defendant claims. But the article quoted is in consonance with the general rule which provides that "the successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except where it is or may be other-

wise provided by law." *Id.* art. 1425. If, where the defendant claims title to the whole of the premises in controversy, and the plaintiff recovers only a part, the latter is allowed his costs, we do not see why the same result should not follow when the defendant claims only a part, and the plaintiff recovers a part of that which is so claimed. If there is a full disclaimer, there is no controversy; if a partial one, the controversy is narrowed down to the part claimed by the defendant. Where the plaintiff recovers a part of that which is in controversy, whether it be the whole or a part of the premises sued for, and whether it be by reason of a subsequent disclaimer or upon the trial, he is the successful party. When a disclaimer as to a part is filed in the first instance, the costs which have accrued up to that time are, as a general rule, the same that would have accrued had the suit been brought for the part only which the defendant claims; and hence the general rule should apply, namely, that the plaintiff, if successful in part, shall recover his costs. A defendant, after pleading title in himself, cannot absolve himself from liability for the costs of the suit by subsequently disclaiming. *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467. If this be the rule where the defendant has asserted title to the whole in the first instance, why should it not apply when he first claims a part, and subsequently disclaims as to that part, or to a part of that part? Viewing this case in the light of the principles announced, let us ask the question: If the plaintiff, upon the filing of the second disclaimer, had taken judgment thereon, and had declined to prosecute his suit as to the road finally claimed by the county, in whose favor should the costs have been adjudged? Clearly, he would have been entitled to recover his costs. Having continued to prosecute his suit, and having failed to recover the road claimed in its last answer by the defendant, his position was no worse as to the costs incurred before that answer was filed. By reason of the last disclaimer he was the successful party as to a part of the land to which the defendant in the inception of its defense had set up title. He rightfully prosecuted his suit to the time of the second disclaimer, and he was entitled to his costs previously incurred. He failed in the subsequent prosecution, and was justly chargeable with the costs which thereafter accrued. The writ of error is accordingly refused.

#### EARLE et al. v. CITY OF HENRIETTA.

(Supreme Court of Texas. Dec. 6, 1897.)

#### TAX DEED FROM CITY—PRESUMPTIONS—LEVY OF TAX—EVIDENCE.

1. A deed of city real estate, issued by a municipal corporation in pursuance of a sale of the property by the city tax collector for taxes due the city, is not *prima facie* evidence that the tax had been levied according to law. Such levy must be proved by proof of the ordinance passed by the city council, making the levy.

2. Rev. Civ. St. 1895, art. 518, providing what facts shall be established prima facie by the admission in evidence of a tax deed issued by a municipal corporation, and what facts shall be conclusively established thereby, does not include any provision as to the levy of taxes being proved by the admission of such deed.

3. The tax rolls are not competent to prove the levy of a tax by a municipal corporation. Such proof must be made by proving the city ordinance levying the tax.

Certificate of dissent from court of civil appeals of Second supreme judicial district.

Action of trespass by N. S. Earle and others against the city of Henrietta. Opinion by majority of court in favor of defendant, and certain questions certified up for opinion of supreme court.

W. G. Eustis, for appellants. Emmett Patton, for appellee.

BROWN, J. The following questions, upon dissent, have been certified to this court by the honorable court of civil appeals for the Second supreme judicial district: "In this suit, of trespass to try title, the appellee recovered from the appellants certain real estate, described in the petition as the north one-half of block No. 34 in Earle's addition to the city of Henrietta, Clay county, Texas. Plaintiff's title rests upon a purported sale of the property by the city tax collector of Henrietta, had on March 7, 1893, for the taxes due the city for the year 1892, and upon a deed executed in accordance with that sale. This court concludes, without dissent, that the deed is not void for want of sufficient description. The majority further conclude that as the description is sufficient the provisions of article 447, Sayles' Civ. St., apply to the sale and the deed; and they hold, in this connection, first, that the deed constitutes prima facie evidence, among other matters, that the property was subject to assessment, and had been assessed according to the requirements of the law, and that the tax had been thus levied. From this conclusion, that the deed is prima facie evidence that the tax had been legally levied, Justice Hunter dissents; holding that proof of the levy of the tax must be made allunde the recitals in the deed, and by the introduction in evidence of an ordinance of the city providing a levy. So that we certify to your honors: (1) Conceding the description in the deed to be sufficient, does the deed constitute prima facie evidence that the tax had been levied according to law? The majority further hold that the tax rolls introduced in evidence in this case show what taxes had been assessed or levied by the city for the years 1892, 1893, 1894, and 1895, thus meeting the requirement of the proof of a sufficient levy. From this conclusion, Justice Hunter dissents; holding that the assessment rolls in question constitute proof that the property was legally assessed, but not that the taxes were legally levied, and that such levy can only be proved by the ordinance embodying the levy, as passed and recorded by

the city council. So that we further certify to your honors: (2) Do the tax rolls, admittedly introduced in evidence in this case, show what taxes had been assessed or levied by the city for the years 1892, 1893, 1894, and 1895, thus meeting the requirement of the proof of a sufficient levy, or can such levy be only proved by the ordinance embodying the levy, as passed and recorded by the city council? For a more detailed exposition of the questions thus arising, and of their materiality, we refer to the majority and dissenting opinions filed in this court, respectively, on July 3 and July 5, 1897, in this cause (41 S. W. 727), and in cause No. 2,543 (Homes v. City of Henrietta, Id. 728), which opinions accompany this certificate."

So far as it bears upon the first question propounded, article 518, Rev. Civ. St. 1895, reads as follows: "The assessor and collector shall, when any property has been sold for the payment of taxes, make, execute and deliver a deed for said property to the person purchasing the same, and such deed shall be prima facie evidence in all controversies and suits in relation to the right of the purchaser, his heirs and assigns, to the premises thereby conveyed, of the following facts: First. That the land or lot or portions thereof conveyed was subject to taxation or assessment at the time the same was advertised for sale, and had been listed or assessed in the time or manner required by law. Second. That the taxes or assessment were not paid at any time before the sale. Third. That the land, lot, or portion thereof conveyed, had not been redeemed from the sale at the date of the deed, and shall be conclusive evidence of the following facts: (1) That the land, lot, or portion thereof sold was advertised for sale in the manner and for the length of time required by law. (2) That the property was sold for taxes or assessments as stated. (3) That the grantee in the deed was the purchaser. (4) That the sale was conducted in the manner prescribed by law. And in all controversies and suits involving the title to land claimed and held under and by virtue of such deed, the person claiming title adverse to the title conveyed by such deed shall be required to prove, in order to defeat said title, either that the land was not subject to taxation at the date of the sale, that the taxes or assessment had been paid, that the land had never been listed or assessed for taxation and assessment as required by this title or some ordinance of the city, or that the same had been redeemed according to the provisions of this title, and that such redemption was made for the use and benefit of the person having the right of redemption under the law." The city of Henrietta was incorporated under the general laws of the state, and by article 484, Rev. St. 1895, the city council was empowered to levy taxes. That article reads as follows: "The city council shall have power within the city, by ordinance, to annually levy and collect taxes, not exceeding one-fourth of one



per cent. on the assessed value of all real and personal estate and property in the city not exempt from taxation by the constitution and laws of the state." By the terms of this article the council of any city may levy any rate of tax not exceeding one-fourth of 1 per cent., which levy must be made by ordinance. This involves the exercise of discretion on the part of the city council, which is necessary before any tax can be collected from the citizens. It also requires action on the part of the city council, and prescribes that such action shall be evidenced by an ordinance, which must be in writing, properly passed, and recorded on the minutes of the council. Without this action, legally taken, by the council, no officer has any authority to take any steps to enforce the collection of any sum whatever. The ordinance of the city council bears the same relation to the tax rolls, when properly made up, that the judgment of a court does to the execution issued for its enforcement. A sheriff's deed will not support a recovery, without proof of the judgment upon which it was issued. Independent of article 518, the deed of the tax collector made in pursuance of a sale for the collection of taxes due to a city would be void if no valid levy was made by the city council, and such deed would not be admissible in evidence in the trial of any case involving the question of the title under it until the authority for making the assessment of the property (that is, the ordinance of the city council levying the tax) had been first proved, without which, upon objection made, the court would reject the deed, when offered as evidence. *Greer v. Howell*, 64 Tex. 683; *Dawson v. Ward*, 71 Tex. 72, 9 S. W. 100; *Clayton v. Rehm*, 67 Tex. 52, 2 S. W. 45. Article 518 prescribes the effect that the deed of the tax collector shall have as evidence after it has been regularly admitted under the rules of law governing the admissibility of testimony, but does not affect the rules which prescribe the mode of proving the deed, nor any other matter which is necessary for one claiming under such deed to establish before it can be admitted as evidence. It is to be presumed that the legislature knew the law, and enacted the provisions embodied in the article quoted in view of the existing rules upon this subject. The levy of the tax having been proved by the production of the ordinance of the city council, and the deed otherwise being admissible, and admitted, the statute gives it the effect of proving a prima facie case for the plaintiff, because, with the proof of the levy, and the presumptions arising upon the deed, under article 518, the party claiming under the deed would be entitled to recover the property conveyed unless the opposing party should show some reason for avoiding the conveyance. It was the intention of the legislature to prescribe that, in order to defeat the case made by the deed as prima facie evidence, "the person claiming adverse to the title conveyed by such deed"

should disprove one of the facts prima facie established by the deed; that is, he must prove that the property was not subject to taxation at the date of the sale or that the taxes had been paid, or that the land had never been assessed (that is, placed upon the tax rolls in the manner prescribed by law), or that the same had been redeemed according to law. The proof that either of these facts did not exist would meet the plaintiff's prima facie case, and would defeat his right of recovery. But it was not intended by the legislature, by the use of this language, to deny to the defendant the right to present any other defense which denies the power of the officer to sell, and which would overthrow the plaintiff's right; nor was it intended to relieve the party who claimed under the tax deed from making all proof necessary to make that deed admissible before the jury. If the law had provided expressly that the person claiming adversely to the tax title should not be permitted to make any other defense thereto, except as named therein, it would be contrary to the constitution of the state, and void. *Lufkin v. City of Galveston*, 73 Tex. 340, 11 S. W. 340; *Eustis v. City of Henrietta* (Tex. Sup.) 39 S. W. 567. We will not here discuss the constitutionality of the law, because, under our construction of this portion of that statute, the question does not arise. Article 518, as above quoted, provides what facts shall be established prima facie by the deed when admitted as evidence, and what facts shall be conclusively established thereby, and in neither class is the levy of the taxes included. There is no express provision that the deed should be proof of the levy of the taxes, but it is excluded by the mention of other things, and no implication of an intention of the legislature to so provide can arise out of the language used. We conclude, therefore, that the levy of the tax by the city council was not proved by the introduction of the deed of the tax collector of the city of Henrietta. We therefore answer the first question in the negative.

A state tax is levied by act of the legislature at a fixed amount, and the act making the levy is a public law, of which courts will take judicial notice. It is therefore unnecessary, where the deed is made in pursuance of a sale for state taxes, to make proof of the levy, because it is proved by the law itself. But, as before shown, the city council is authorized to levy taxes within a given limit. In order to give effect to the law, the council must act, and determine the rate to be collected, and must express that determination in the form and manner prescribed by the statutes. In every instance in which it becomes necessary to judicially determine the question of the levy of taxes by the city council, the proof must be made by the ordinance by which the levy was made, and the production of tax rolls could not establish the fact of the levy. *Greer v. Howell*, 64 Tex. 683; *Clayton v. Rehm*, 67 Tex. 52, 2 S. W. 45; *Daw-*

son v. Ward, 71 Tex. 72, 9 S. W. 106. To hold otherwise would be to give greater force to tax rolls than to executions issued by the officers of courts, the recitals in which are not evidence of the judgment. As we understand the last question, it does not relate to the levy of the tax for which the land was sold, but of taxes levied by the city after it had purchased the land; and upon this proof is based the requirement that the defendant in this case should pay the taxes levied for those years, in order to entitle him to defend against the claim of the city under the tax deed. If we correctly understand this question, such proof, whether made by ordinance or otherwise, could not operate to deprive the defendant of his right of defense, no matter how the defense arose; for the law, in so far as it imposed such restrictions upon his right, would be unconstitutional and void. *Lufkin v. City of Galveston*, cited above; *Eustis v. City of Henrietta* (Tex. Sup.) 39 S. W. 567. We answer the second question, that the tax rolls were not competent evidence to prove the levy of a tax for the years named. The levy could be proved only by proof of the ordinance by which the levy was made.

#### TEXAS & N. O. R. CO. v. CARR.

(Supreme Court of Texas. Dec. 16, 1897.)

##### DAMAGES—INTEREST—WHEN RECOVERABLE.

In an action for injuries, interest for the period intervening between the dates of injury and judgment cannot be allowed.

Error to court of civil appeals, Fourth supreme judicial district.

Action by H. A. Carr against the Texas & New Orleans Railroad Company. From a judgment of the court of civil appeals (42 S. W. 126) affirming a judgment in favor of plaintiff, defendant brings error. Reversed and rendered.

S. R. Perryman, Baker, Botts, Baker & Lovett, and A. L. Jackson, for plaintiff in error. Ford, Martin & Jones and C. A. Teagle, for defendant in error.

DENMAN, J. On April 20, 1896, H. A. Carr recovered judgment against the Texas & New Orleans Railroad Company for \$13,742.86, for personal injuries received April 24, 1894, which judgment was affirmed by the court of civil appeals. The petition, after stating the circumstances, alleged "that, by the reason of the injuries aforesaid, plaintiff has been actually damaged in the sum of ten thousand one hundred and seventy dollars (\$10,170); and that, by reason of the crushing, mangling, and bruising of plaintiff's leg as aforesaid, plaintiff has suffered great physical pain and mental anguish and agony, to his damage in the further sum of five thousand dollars." The trial court instructed the jury that, if they should find for plaintiff, they might assess his damages at a sum "not to exceed the amount sued for, to

wit, fifteen thousand one hundred and seventy dollars, with six per cent. interest per annum from date of injury to the present time." The action of the court of civil appeals in overruling the assignment of error complaining of this charge is assigned as error here. We think the charge was on its face erroneous, in that it permitted the jury to allow interest for the period of 1 year, 11 months, and 26 days, intervening between the dates of the injury and judgment. *Watkins v. Junker* (Tex. Sup.) 40 S. W. 11. This erroneous statement of the law may have resulted in the addition of such interest, and to that extent, but no further, may have prejudiced defendant. The judgment will therefore be reversed, and the cause remanded, unless plaintiff below, within 10 days from this date, files a remittitur reducing the original judgment to \$12,277.75, that being the sum which, put at interest at the rate of 6 per cent. per annum for 1 year, 11 months, and 26 days, will amount to the original judgment \$13,742.86; but, if such remittitur be filed, the judgment will be reversed, and here rendered for plaintiff below for \$12,277.75, with interest thereon at 6 per cent. per annum from the date of the judgment below, and all costs of the trial court, plaintiff in error to recover all costs of appeal and writ of error.

#### Supplementary Opinion.

(Dec. 23, 1897.)

Plaintiff below having filed the suggested remittitur, judgment will be here rendered in his favor, for the amount above indicated. We deem it proper to say that, while we are of opinion that the question decided by us was properly raised by the assignment made in the court of civil appeals, yet it was not urged there in the written argument contained in appellant's brief, and for that reason was doubtless overlooked by the court. We therefore do not understand that honorable court to have intended to hold the converse of the proposition of law upon which we have decided this case.

#### BLANKS v. STAMPS.

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

##### JUSTICES OF THE PEACE—APPEAL FROM JUDGMENT.

The bond filed upon appeal from the judgment of a justice of the peace need be for double the amount of the judgment only, and not for double the amount of the judgment and costs, under Rev. St. 1895, art. 1670.

Error from district court, Irion county; J. W. Timmins, Judge.

Action by W. H. Blanks in justice court against W. S. Stamps. Judgment for plaintiff was reversed by the district court, and plaintiff brings error. Affirmed.

Milton Mays, for plaintiff in error. T. C. Wynn, for defendant in error.

**KEY, J.** Plaintiff in error sued defendant in error in justice court, and obtained a judgment for \$70. Defendant in error appealed the case to the district court, where it was tried, and judgment rendered for him. Defendant in error's appeal bond, filed with the justice of the peace, was for the sum of \$140,—double the amount of the judgment without the costs. Plaintiff in error moved the court to dismiss the appeal, because the bond was insufficient in amount. This motion was overruled, and this ruling is the only question involved in this writ of error. The statute controlling the matter (Rev. St. 1895, art. 1670) only requires the bond to be in double the amount of the judgment, and not in double the amount of the judgment and costs. *Colorado Co. v. Delaney*, 54 Tex. 280; *Yarbrough v. Collins* (decided by our supreme court at its present term) 42 S. W. 1052. The ruling complained of was correct, and the judgment is affirmed. Affirmed.

**ELDER v. FIRST NAT. BANK OF GALVESTON.<sup>1</sup>**

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

**VENDOR AND PURCHASER—BREACH OF WARRANTY—ABATEMENT OF PRICE.**

Where a vendee is sued on a note given for the price of land,—though the contract, as between the parties, is executed,—if the vendor is insolvent, the vendee, in defense, may urge a breach of the warranty of title.

On motion for rehearing. Overruled.  
For prior report, see 42 S. W. 124.

**FISHER, C. J.** In the original opinion filed in this case, we stated, as a general proposition of law, that, where the "vendee holds under an executed contract, in order to abate the purchase price, as agreed on in the note, he should repel the presumption that at the time of the purchase he knew, and intended to run the risk, of the defect"; and the effect of that ruling was that the vendee could not, in such a case, assert a breach of the warranty of his title, and urge the damages resulting, in offset to plaintiff's suit upon the note. What we there stated is the general rule upon the subject, but we doubt its application to the facts of this case, for it appears from the record that the vendor is insolvent. We understand it to be an exception to the general rule that when the vendee is sued upon a note executed for the purchase price of land,—although the contract, as between the parties, is executed,—if the vendor is insolvent, the vendee, in defense, may urge a breach of the warranty of title, and we think that the principle here stated is applicable to the facts of this case; and upon this question, to the extent as here stated, we qualify the ruling in our former opinion. But our change of front upon this question will not affect the disposition, as originally made, of the case; for, upon the other grounds stated in the original opinion,

the judgment below must be affirmed. The testimony of the defendant himself clearly establishes that he purchased the land with the risk of title, as to quantity, and that the sale was in gross, and not by the acre. Therefore the motion for rehearing is overruled.

**WEBB v. PAHDE.**

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

**PROMISSORY NOTES—DISCHARGE OF SURETY—INDEFINITE EXTENSION—MUTUALITY—USURY—INTEREST IN ADVANCE.**

1. After the maturity of a note on which defendant was surety, it was agreed by and between plaintiff, who was the holder thereof, and the principal maker, without the knowledge or consent of defendant, that, on certain monthly payments, such principal should have from one to three years, if necessary, in which to pay such note, and he then and there paid \$10 thereon. Held not binding on the principal, so as to discharge defendant, for want of mutuality, as there was no extension for a definite period.

2. Where the interest on a loan was deducted from the face of the note, as paid in advance, and such note bore interest only from maturity, such transaction was not usurious.

Appeal from Tom Green county court; T. C. Wynn, Judge.

Action by Henry Pahde against M. W. Morris and others. From a judgment for plaintiff, defendant J. W. Webb appeals. Reformed and rendered.

Dubois & Allen, for appellant.

**COLLARD, J.** Suit was filed on the 19th day of December, 1895, by appellee against M. W. Morris, Bob Hillis, W. S. Cunningham, and J. W. Webb on a promissory note for the sum of \$300, executed by all the defendants jointly and severally to the plaintiff, of date June 1, 1893, payable six months after date, bearing 10 per cent. interest per annum from maturity, and stipulating for 10 per cent. attorney's fees, in case it should be placed in the hands of an attorney for collection. It is indorsed, "Received \$10 interest on this note," August 18, 1894. Defendant Webb answered, setting up that he and all the defendants, except Morris, were sureties on the note, Morris being the principal, and that on the 18th day of August, 1894, plaintiff, without the knowledge or consent of defendant, for a valuable consideration, contracted with the principal, Morris, to extend the time of payment of the note, as follows: "That on said date plaintiff told said Morris that if he (Morris) would pay monthly payments on said note, in sums of five, ten, or twenty dollars, to plaintiff, that he (Morris) could have one, two, or three years, if necessary, in which to pay off said note; that Morris accepted the terms as proposed by plaintiff; and the said Morris did then and there, in pursuance of said agreement, pay to plaintiff the sum of ten dollars;" wherefore he (defendant) was discharged from liability on the note. The court sustained special exceptions to the foregoing an-

<sup>1</sup> Writ of error denied by supreme court.

swer, upon the ground that the extension of payment was for no definite period of time. This action of the court is assigned as error.

The assignment is not well taken. The alleged extension for one, two, or three years, if necessary, did not bind Morris to make no payment on the note at any time, and certainly not for any definite time. Contracts must be mutual to be binding. Morris, under the terms of the alleged agreement, could pay the note at any time thereafter, the note being due at the time of the agreement. The extension of the time of payment of a note bearing interest for a definite time, accepted by the payee, would be a valid agreement for a valuable consideration, and could be enforced; but it must be for a period certain and fixed, so that the payee will be bound. *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061; *Woodall v. Streeter* (Tex. Civ. App.) 89 S. W. 169.

Defendant pleaded usury. The proof was that Morris borrowed \$300 from plaintiff, and the latter was allowed to take out \$15, the interest for six months. The note did not bear interest from date, but from maturity, six months after date. There was no usury in this transaction. It was merely payment of interest in advance, which the parties might agree to without violating the statute of usury. It was correct to submit the issue, and the verdict is sustained by the proof.

Defendant pleaded his suretyship, and proved it, and the jury found that he was a surety only. Judgment was rendered against all the defendants as principals. The assignment of this error in the judgment is sustained. Judgment will be here rendered so reforming the judgment of the lower court as to appellant Webb that he will be bound thereby only as a surety. Doubtless the court below would have corrected the judgment if his attention had been called to the error. This was not done, though there was a motion for a new trial by defendant. This being true, the costs of this appeal are adjudged against the appellant Webb. Judgment reformed and rendered.

#### STALEY v. HANKLA et al.<sup>1</sup>

(Court of Civil Appeals of Texas. May 22, 1897.)

#### PUBLIC LANDS—TRANSFER OF HEADRIGHT CERTIFICATE—EVIDENCE—HARMLESS ERROR—TRESPASS TO TRY TITLE.

1. Where the holder of a land certificate made a written transfer thereof, and at the same time executed to the transferee a power of attorney to act as his agent in regard to the land and to make location of the certificate, parol evidence is admissible to show that the transaction was an absolute sale of the certificate.

2. The admission of the testimony of parties as to transactions by a decedent, though the testimony was inadmissible under 1 Sayles' Civ. St. art. 2248, is not reversible error where the case is tried to the court, and there is other testimony tending to prove the same facts.

3. The sale of an unlocated headright certificate may be made by parol, and, where a written transfer of the signer's headright does not identify the certificate, it may be identified by parol evidence.

4. The objection that a claim is stale cannot be urged by a plaintiff in an action to dispossess parties claiming land under a transfer of a headright certificate, where the defendants are in possession and have been since the certificate was located.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Suit by J. C. Staley against J. F. Hankla and others to recover possession of land. From a judgment for defendants, plaintiff appeals. Affirmed.

Lee R. Stroud, for appellant. Dashiell, Crumbaugh & Roberts, for appellees.

FINLEY, J. Plaintiff brought suit, as only heir of Horatio N. Staley, for the recovery of 320 acres of land situated in Kaufman county. The cause was tried without a jury, and resulted in a judgment for defendants, from which this appeal is taken.

#### Conclusions of Fact.

The evidence of plaintiff showed: (1) Patent to the land issued in the name of Horatio N. Staley and his heirs, December 20, 1840. (2) Plaintiff was the only heir of Horatio N. Staley, who died between 1844 and 1855. (3) Patent was issued upon a certificate issued to Horatio N. Staley. (4) Horatio N. Staley sold this certificate in 1844, before location, to Randolph A. Hankla, Hankla paying a money consideration therefor. (5) The sale of the certificate is in writing, signed by two witnesses, dated March 12, 1844, but has not been acknowledged or recorded. (6) On March 12, 1844, Horatio N. Staley executed to Randolph A. Hankla a written power of attorney to act as his attorney and agent in locating the certificate, and to act as his agent generally in regard to the matter. (7) Randolph A. Hankla had the certificate located, obtained the issuance of the patent, and he and his heirs have continuously controlled the land and paid taxes thereon ever since. (8) Randolph A. Hankla died in 1878, willing all his property to his wife, Martha N. Hankla. She died pending this suit, without will, and appellees are her only heirs.

#### Conclusions of Law.

1. It is insisted that the written transfer and power of attorney, being executed contemporaneously, were to be construed together; that they showed the creation of an agency and trust, not the sale of the certificate; and that it was error to admit testimony of witnesses proving an absolute sale of the certificate. The objection urged against the evidence was that it was contradicting a written instrument by parol testimony. This proposition was passed upon in *Cox v. Bray*, 28 Tex. 247, and decided ad-

<sup>1</sup> Writ of error denied by supreme court.

versely to appellant's contention. See, also, *Thomas v. Hammond*, 47 Tex. 54.

2. Appellant contends that the court erred in permitting the testimony of Martha Hankla and J. F. Hankla, defendants, to the effect that they were present when the instruments were executed, saw Randolph A. Hankla pay to Horatio N. Staley the purchase money for the certificate, and other facts then occurring showing an absolute sale. It was objected that they were not permitted, under article 2248, 1 Sayles' Civ. St., to testify to transactions between plaintiff's intestate and their ancestor under whom they claim. The court tried the case without a jury. Another witness, whose competency is not questioned, testified to facts showing an absolute sale of the certificate, and a number of the established facts supported his testimony. Then the transfer itself showed a sale of the certificate. Though we were to hold the evidence inadmissible under such conditions, its admission would not be regarded as reversible error.

3. Appellant further contends that the transfer of the certificate does not identify the certificate, and is therefore insufficient to convey the same. The transfer showed the sale of Horatio N. Staley's headright, and the quantity of land,—320 acres. The other evidence satisfactorily showed that the certificate upon which the patent to the land in controversy issued was the one intended to be conveyed. It was not necessary that the conveyance of the unlocated certificate should be in writing, and the evidence adduced would establish a sale independent of the writing.

4. The proposition that the plea of stale demand should have been sustained is without merit. The defendants were in possession, and the plaintiff was attempting to dispossess them. The doctrine of stale demand did not apply. *Cox v. Bray*, 28 Tex. 247. No other propositions are urged as grounds for a reversal, and the judgment is affirmed.

#### DAVIS v. WEATHERED et al.

(Court of Civil Appeals of Texas. Oct. 28, 1897.)

#### BILLS AND NOTES—CONSIDERATION—WITNESS—TRANSACTIONS WITH DECEASED PERSON.

1. After payment of the agreed price by a purchaser of land, the execution by him of a note for an additional sum, in order to get possession of the deed, which was withheld, and because he was afraid, if he did not do so, he would lose the money already paid, is voluntary, and part of the consideration for the land.

2. In an action, brought by one in her separate right, on a note given to her deceased husband as part of the purchase price of her separate property, the admission of evidence as to the transaction between defendant and deceased is not error, where it appears that the husband acted only as plaintiff's agent.

Appeal from district court, Sabine county; Tom C. Davis, Judge.

Action by E. E. Davis against M. R. and S. M. Weathered. Judgment was rendered for defendants, and plaintiff appeals. Reversed.

Jas. T. Polley, for appellant. A. D. Hamilton and Hugh B. Short, for appellees.

GARRETT, C. J. The appellant brought this action to recover of M. R. Weathered upon a promissory note, payable to one N. A. Davis, her deceased husband, and to foreclose a vendor's lien therefor upon land against the said M. R. Weathered and one S. M. Weathered, to both of whom it was alleged the land had been conveyed by appellant and her husband. Appellant averred in her petition that the land was her separate estate; that the note was her separate property, and that it was executed to her husband for her benefit; that her husband had died before the institution of the suit. The petition further alleged that the note sued on was executed in settlement of a controversy about the price to be paid for the land, or that in substance; the allegation being that it was given by way of compromise, in consequence of misapprehension when the deed was made, subsequent to the date of the deed. The petition set out the note as follows:

"On or before the 1st of November next I promise to pay N. A. Davis eighty-six and  $\frac{25}{100}$  dollars, with interest at ten per cent. from date. This 25th February, 1891. [Signed] M. R. Weathered.

"The above note was given by way of compromise in consequence of misapprehension when the deed was made by N. A. Davis, February 25th, 1891. [Signed] M. R. Weathered."

The deed was executed on the 3d day of January, 1891. The appellee M. R. Weathered pleaded in defense of the note a want of consideration. It was shown by the evidence that the land and the note were the separate property of the appellant, E. E. Davis, and there is no question here of her right to sue. Briefly stated, the evidence as to the execution of the note showed that the said N. A. Davis and appellant, his wife, were represented by one N. S. Williams as agent to sell the land in the first negotiations about the sale. Appellant and her husband lived at Jacksonville in Cherokee county, about 100 miles distant from where the land was situated, in Sabine county. Williams resided near the land. The appellee M. R. Weathered, desiring to purchase the land, went upon it with Williams, and examined it, and they had 103 acres of a large tract surveyed in a shape to suit him, and he agreed with Williams to pay for the land three dollars per acre; \$250 to be paid in cash, and the balance to be evidenced by his note. Appellee and Williams agreed to go together, and visit Davis and wife at Jacksonville, in order to carry out the trade, and get the deed. When Weathered got ready to start, Williams was unable to

go. He delivered to appellee Weathered a letter addressed to Davis, inclosed in an envelope with the field notes of the land. When Weathered reached Davis' residence, as he testified, he told Davis of the contract that he had made with Williams, but asked him to let him have the land for \$300, of which he would pay \$250 in cash and give his note for \$50. Davis, after consulting with his wife, the appellant, agreed to sell appellee the land on these terms. On the following day, appellant, joined by her husband, N. A. Davis, executed the deed conveying the land to the appellee M. R. Weathered and S. M. Weathered, who was his mother. He paid Davis only \$150 of the amount, since, by mistake as to the amount of a bill, he had not carried all the agreed cash payment with him. The parties agreed that the deed should be left with the notary, and that Davis should send it to Williams as soon as Weathered forwarded the \$100 balance of the cash consideration. Weathered executed his note for \$50, and left it with Davis. After he returned home, the appellee M. R. Weathered sent Davis the \$100, but Davis sent the deed to Williams, with instructions that appellee must execute the note sued on,—\$86.25, for the balance of the purchase money, as agreed upon with Williams in the first place. Williams told appellee that he had the deed, but his instructions were not to deliver it until the note sued on was executed, and that, if appellee did not execute it, he should return to him the money, and keep the deed. Weathered at first declined to sign the note, but at length, after signing a note for \$60, and sending it to Davis, and having it returned to him, decided that he would execute the note sued on, in order, as he said, to get possession of the deed, and because he was afraid he would lose the money he had already paid.

We have stated the evidence in the most favorable light to the appellee, adopting his own version of the facts. Upon this state of facts the court instructed the jury that, if appellee bought the land from N. A. Davis and wife for \$300 on terms then agreed upon by the parties, and that appellee was to pay \$150 in cash, and execute his note for \$50, and send the remaining \$100 as soon as he came home, and they further found that appellee complied with his part of said contract, and that N. A. Davis and wife agreed to and did make the deed introduced in evidence, and deposited the same with the notary public, who was to deliver the same to the appellee, and the contract was complied with, and further that the appellee complied with said contract of purchase, then he would be entitled to possession of said deed, and that, if said deed was sent to Williams by the notary or Davis, and, before the said Williams would deliver it to appellee, he demanded of appellee the note sued upon in this case, and, in order to secure the possession of the deed, he executed the note, then the note would be without consideration, and to find for the appellee. This

charge was clearly erroneous, because the uncontroverted facts show that the appellee executed the note voluntarily, and as a part of consideration of the purchase money of the land, at the end of the negotiations, which extended for at least a time sufficient for him to send the vendor a note for a less sum than the amount required, and during which he was offered the return of the money already paid by him if he did not comply. Under this state of evidence, and the court having charged the jury as above stated, the appellant requested the court to instruct the jury as follows: "That the recitals of the consideration contained in the said deed from plaintiff and N. A. Davis to M. R. and S. M. Weathered are not conclusive against the plaintiff, but that parol evidence is admissible to prove a different and greater consideration than that recited in the deed; and if you find that the note herein sued upon was executed by defendant M. R. Weathered for a part of the purchase money for said land conveyed by said deed, executed by plaintiff and N. A. Davis to M. R. and S. M. Weathered, though executed by way of compromise, then you are instructed that said note was executed for a valid consideration." This instruction was sufficient to have directed the attention of the court to the error of his own charge, although not sufficiently clear to have aided the jury much. It was developed on the motion for a new trial that S. M. Weathered had died pending the suit. As the case must be reversed for the error above stated, it will be remanded, in order to give the appellant an opportunity to have the legal representative of S. M. Weathered made a party, so as to authorize a foreclosure as to her interest in the land. There is no error in allowing the appellee M. R. Weathered to testify as to the transaction with N. A. Davis, husband of appellant. He was only her agent in the matter, and she sued in her separate right. Judgment of the court below will be reversed, and the cause remanded. Reversed and remanded.

#### BELDEN v. PULLMAN PALACE-CAR CO.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 17, 1897.)

#### SLEEPING-CAR COMPANIES—DUTIES AS TO PASSENGER'S EFFECTS—NEGLIGENCE—EVIDENCE.

1. The duty of a sleeping-car company to its passengers is only to use reasonable care in guarding the latter's property from thieves, and the high degree of care applicable to carriers generally does not apply.

2. In an action against a sleeping-car company for the value of a valise left by plaintiff, when he retired, by the side of his berth in the aisle, the evidence was that the car had two servants, whose duty it was to sit by turns at the end of the aisle to wait on passengers and see that nothing was stolen, and that during the first part of the night one of these kept watch; that when this one left the car to wake the other, the

<sup>1</sup> Rehearing denied.

valise was in its place; that during the latter part of the night, while the second servant was on watch, several persons came into the car; that the servant woke the passengers for A., and they got off, taking their valises; that the servant could not identify particular valises where there were a number of passengers each having one; that no passengers got off that night except at A. *Held*, that a finding that the valise was taken at A., and that its loss was not caused by the negligence of defendant's servants, was sustained by the evidence.

Appeal from district court, Webb county; A. L. McLane, Judge.

Action by Francisco Belden against the Pullman Palace-Car Company for the loss of plaintiff's baggage while a passenger on one of defendant's cars. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. O. Nicholson, for appellant. Percy Roberts & Boatner and Clark & Guinn, for appellee.

JAMES, C. J. Appellant was a passenger on the I. M. and I. & G. N. R. R., and occupied a berth in one of appellee's coaches en route from St. Louis to Laredo. On the second night out, when the car was in Texas, before it reached Austin (reaching Austin about 5 in the morning), plaintiff retired, leaving his valise by the side of his berth in the aisle, where it had been placed by one of the employes. When he arose, about 7 in the morning, after the train had passed Austin (where several of his fellow passengers got off), his valise was gone, and it has never been found. He brings this action to recover the value of the property, alleging that it occurred from the negligence of defendant's servants.

The court concluded from the testimony that the valise was taken at Austin by one of the passengers who got off at that place, and that its loss was not occasioned by reason of negligence of defendant's servants, nor by the negligence of the plaintiff, and that plaintiff knew of defendant's rule not allowing its servants to take charge of passenger's effects.

It is settled that defendant's duty to its passengers is to use reasonable care to guard the property from depredations of thieves while they sleep, and that the high degree of care applicable to carriers generally does not apply. See cases cited in *Stevenson v. Car Co.* (Tex. Civ. App.) 28 S. W. 112. Upon this principle of degree of care the court based its action in this case, and the assignments of error complain that the conclusions of the trial court are not supported by the evidence. An examination of the testimony discloses evidence which supports the finding that defendant's servants did not fail to exercise reasonable care in reference to the valise, and, this being so, it is decisive of the case. The following testimony appears: That this car had two servants, whose duty, among other things, was to sit by turns at the end of the

aisle during the night to wait on passengers and see that nothing was stolen. During the first part of the night, to about 3:30 o'clock in the morning, one of these kept watch, and he testified that when he left at that hour to wake up the other, who was sleeping in the smoker, the valise was in its place. He then went to bed in the smoker, and the other then took his place. No passengers got off that night except at Austin. The front door of the coach was left unlocked, as was the rule, for the train crew to pass through, and during the first watch some of the train crew passed through, as testified to by the servant then on watch; and during the latter part of the night several persons came into the car, as the servant then on watch stated. This servant stated that he woke the passengers for Austin, and they got off, taking their valises; that he did not assist them off, because he was busy; that it was the usual custom for passengers to take their own valises off with them; that he could not identify particular valises, where there are a number of passengers each with a valise, and he did notice the valises as they were taken off by the passengers at Austin. The conductor testified that one could not keep in mind a certain man's valise, where there are several passengers all having valises. Any man could pick up another passenger's valise without it being known.

In the light of these facts, it cannot be definitely ascertained how or where the valise was lost. While it might have been taken by one of the persons who came into the car during the latter part of the night, the trial court concluded such was not the case. As the valise was shown to have been in its place at 3 o'clock, and the train arrived at Austin at 5 or half past 5, and the porter testified that he was at his place on watch during this time, we certainly, if inclined to do so, would not allow that possibility to disturb the judgment, over the finding of the trial judge to the contrary. It occurs to us that the conclusion that the valise was lost at Austin, and in the manner found by the judge, was a fair and reasonable solution of the evidence and circumstances. The court was authorized to come to the conclusion that the servants maintained a reasonably effective watch during the night, and that Austin was the point where the valise disappeared. Circumstances might arise which would call for the exercise of more than the usual or reasonable diligence on the part of the employes in guarding the effects of a sleeping passenger. But there was nothing in the conditions and circumstances existing on this coach when at Austin which made it, as a matter of law, the duty of the servant to inspect and identify the baggage which the passengers carried off with them. It was simply a question of whether the servant exercised reasonable care in not observing the taking of the valise in question under the circumstances then existing, and this, we conclude, could

properly be resolved in the affirmative from the evidence, as was done. The absence of negligence on the part of the defendant's employees entitled defendant to a judgment, and it is affirmed.

# JACKSON v. J. A. COATES & SONS, Limited.

(Court of Civil Appeals of Texas. Oct. 30, 1897.)

## APPEAL FROM JUSTICE—TIME—CONSTITUTIONAL LAW—TRIAL BY JURY.

1. The 10 days limited for filing an appeal bond on an appeal from a justice runs from the date of overruling a motion for a new trial, where such motion is ruled upon within 10 days after entry of judgment.

2. Under Const. art. 5, § 17, which provides that a county court jury shall consist of six men, such court cannot discharge one of the jurors, and force a trial by the remaining five.

Error from Marion county court; James A. Armistead, Judge.

Action by J. A. Coates & Sons, Limited, on an itemized verified account for \$105, against J. O. Jackson. Plaintiff obtained judgment. Defendant brings error. Reversed.

Geo. T. Todd, for plaintiff in error. W. T. Armistead, for defendant in error.

FINLEY, C. J. It is first insisted that the appeal from the justice's court to the county court should have been dismissed by the county court, for the reason that the appeal bond was not filed within 10 days after the rendition of the judgment. The appeal bond was not filed within 10 days from the rendition of the judgment, but it was filed within 10 days from the overruling of the motion for new trial, the motion for new trial having been filed and acted upon within 10 days from the date of the judgment. It was first held by the court of appeals, exercising jurisdiction in civil matters, that the appeal bond was required to be filed within 10 days from the date of the judgment. *Conally v. Gambull*, 1 White & W. Civ. Cas. Ct. App. § 90. The commission of appeals, about the same time, also held that the bond was required to be filed within 10 days from the rendition of the judgment. *Back v. Ginacchio*, 1 White & W. Civ. Cas. Ct. App. § 1310. Both of these cases were subsequently overruled in the case of *Missouri Pac. Ry. Co. v. Houston Flour Mills Co.*, 2 Willson, Civ. Cas. Ct. App. § 571. This last decision appears to have been made in 1885, while the overruled cases appear to have been decided in 1881. Again, in 1886, this question was passed upon by the court of appeals, and it was again held that the bond may be filed within 10 days from the date of the rendition of the judgment overruling the motion for new trial. *Grant v. Fowzes*, 3 Willson, Civ. Cas. Ct. App. § 105. In 1888 the question was presented to our supreme court in the case of *Jones v. Collins*, 70 Tex. 752, 8 S. W. 681.

In that case, Mr. Walker, J., says: "Judgment was rendered in a justice court May 1, 1885. Motion for new trial was filed May 2d. It was not acted on within 10 days, and on May 15th, at request of the defendant, it was overruled, and he gave notice of appeal. On the 21st of May he filed an appeal bond. The appeal was dismissed, and from the judgment an appeal to this court was prosecuted. The court of appeals in *Grant v. Fowzes*, 3 Willson, Civ. Cas. Ct. App. § 105, has held: 'If a motion for new trial has been filed within five days after the rendition of the judgment, but no action has been had thereon within ten days after the rendition of the judgment, such motion would be considered as overruled on the tenth day after the date of the judgment, and a party would in such case have ten days thereafter within which to file his appeal bond.' The rule of decision upon this subject ought to be the same in all the courts. The subject being peculiarly within the jurisdiction of the court of appeals, we regard the decisions of that court as authoritative, and we are unwilling to revise them." The statute is practically the same now as when these decisions were rendered, and we will not now enter into the question of an original construction of the statute, but will follow the line of decisions indicated.

2. It appears that the case was tried in the county court by a jury. After the jury had had the case submitted to them, and had been out a considerable time, being unable to agree, one of the jurors was taken sick, and was discharged from further service by the court, and the verdict was rendered by the five remaining jurors. The sick juror was discharged by the court over the protest of the defendant; and the point is made here before us that the law does not sanction the action of the court in discharging the juror, and forcing the issues to be decided by five men as a jury. This assignment we think well taken. Section 13, art. 13, Const., provides that a jury in the district court shall consist of 12 men; and the article also provides for a verdict being rendered by a less number than 12. Section 17 of this same article of the constitution provides that a jury in the county court shall consist of 6 men, but there is no provision made for verdicts being rendered by a less number than 6. Articles 3228, 3229, Rev. St. 1895, also provide for a jury of 12 men in the district court, and for verdicts being rendered by a less number. Article 3230 provides that a jury in the county court and justice's court shall be composed of 6 men. Article 3231 provides that no verdict shall be rendered in any cause except upon the concurrence of all the jurors trying the same. It is urged by appellee that authority for this action of the court is to be found under the general provision that the rules of practice in the county court should be according to the laws governing the practice in the district



court, in so far as applicable. The question presented is not a mere question of practice. It is one of constitutional right, and where the constitution prescribes that the jury shall be composed of a certain number of men, and does not give authority for a verdict being rendered by a less number, the trial court has no right to authorize such a course over the protest of either of the parties litigant.

The third, fourth, fifth, and sixth assignments of error are not in accordance with the rules; and the record before us does not indicate that any good purpose would be subserved by a discussion of the merits of this cause, as it is attempted to be brought before us under such assignments. On account of the error pointed out, the judgment of the court below is reversed, and the cause remanded.

#### SAN ANTONIO & A. P. RY. CO. v. YEAGER.

(Court of Civil Appeals of Texas. Nov. 24, 1897.)

##### RAILROADS—INJURY TO ANIMALS ON TRACK.

Circumstantially it appeared that a cow went on the track, and grazed along it for some distance, till struck by a train. The track was straight, and the engineer could have seen the cow in time to avoid the injury. *Held*, that the company was chargeable with negligence.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by C. Yeager against the San Antonio & Aransas Pass Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Franklin & Cobbs and Yale Hicks, for appellant. C. S. Robinson, for appellee.

FLY, J. Appellee sued in the justice court to recover \$75 for a cow alleged to have been killed by appellant. Appellee obtained judgment in the justice court for the full amount of his claim, and the case was appealed to the district court, where it was tried without a jury, and judgment again rendered for appellee for his claim. The cow was killed at a point in the city of San Antonio where the land was laid off into blocks and streets, and partially occupied by residences. The railroad company was not compelled to fence its track under the circumstances, and to recover it was incumbent on appellee to show that the death of the cow resulted from a lack of ordinary care on the part of appellant; or, in other words, that it had been guilty of negligence. No one saw the cow struck by the engine or cars of appellant, and the fact of the injury and negligence could be shown only by circumstantial evidence. The circumstances showed that the cow was seen last on Sunday, and that it rained on that day, and the ground was muddy. On Monday morning appellee went in search of the cow. He found where a cow had gone on the railroad track, and had grazed for some distance

down it, to a point where he saw blood, hair, and pieces of bone, and saw where the cow left the track, and, following the trail for about 70 yards, he found the cow, with one leg cut off. The track down which the cow had grazed was straight for a long distance. The evidence indicates that the cow, when struck, was eating grass on the track, and had been doing so for some distance. The track was straight, and therefore the inference cannot be indulged that the cow suddenly appeared on the track, and was not seen by the engineer. The circumstances, on the other hand, tend to indicate that the cow was moving very slowly along the track, and, the track being straight for a long distance on either side of where the cow was struck, the engineer, with the exercise of proper diligence, must have seen her in time to have prevented her injury. This belongs to a class of cases where the party seeking redress must necessarily be confined to circumstances to establish negligence, and we conclude that there are circumstances which tend to show negligence, and the judgment will be therefore affirmed.

#### TEXAS & P. RY. CO. v. HALL.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 23, 1897.)

##### APPEAL—REVIEW—CONFLICTING EVIDENCE—NEG- LIGENCE OF RAILROAD—INSTRUCTIONS— CREDIBILITY OF WITNESS.

1. Where the testimony is conflicting, the verdict will not be disturbed on appeal.
2. Where a railroad voluntarily constructs a bridge over ditches along its right of way, as a private way for the use and convenience of occupants of abutting land, it is liable to a party, for whose use it was built, for injuries caused by its failure to keep the bridge in proper repair.
3. To determine whether there is a conflict in the instructions, the court will consider only the charges shown by the transcript.
4. Where all the issues are sufficiently covered by the charges given, the refusal to give a special charge is not error.
5. Statements which would otherwise be self-serving are admissible when offered to sustain the credibility of a witness, who is shown to have made conflicting statements.

Appeal from district court, Taylor county; T. H. Conner, Judge.

Action by R. P. Hall against the Texas & Pacific Railway Company. There was judgment for plaintiff, and defendant appeals. Affirmed.

B. G. Bidwell, for appellant. John Bowyer, for appellee.

##### Conclusions.

STEPHENS, J. This appeal is from a judgment awarding damages for injuries sustained by appellee while crossing a bridge on appellant's right of way. The case made by the pleadings and evidence on the last trial was not materially different from that stated in the opinion of Justice Hunter on the former appeal, to which we refer for a careful

<sup>1</sup> Writ of error denied by supreme court.

statement of the facts, according to appellee's version. 35 S. W. 321. The sole defense was a general denial.

Appellant concedes that the evidence was conflicting as to the condition of the bridge, and as to what caused the accident, but contends that the verdict is against the great preponderance thereof. If appellee, who was the only eyewitness to the accident, was worthy of credence, the verdict is supported by the evidence. True, in some things he was contradicted by other witnesses, and it may be that, if we had heard his testimony and that of the other witnesses, we would have found against him; but, without disregarding a long line of precedents, we could not now set aside the verdict, supported as it is by the positive testimony of the only eyewitness, of whose credibility the jury and trial judge had the better opportunities of judging.

1. Our first conclusion therefore is that the verdict is sustained by the evidence in affirming as true the material allegations of the amended petition, upon which the case was tried; and the facts there stated we adopt as our conclusions of fact.

2. The first assignment of error re-raises the question of law disposed of on the former appeal, and is consequently overruled.

3. The contention under the second assignment is that the court gave conflicting charges; but, as we find no such conflict in the charges copied in the transcript, though as stated in the brief there may be conflict, this assignment is overruled.

4. The issues made by the pleadings and evidence were sufficiently covered by the charges given, and consequently the court was not required to give the fourth special charge, to the refusal of which the third error is assigned. It bore upon the credibility of a witness, rather than upon any issue made by the pleadings, and would, perhaps, have given undue prominence to a particular feature of the evidence.

5. The objection to the testimony of appellee, his wife, and son, urged in the fourth assignment, is removed by the court's explanation appended to the bill of exceptions. Statements which would otherwise be self-serving are admissible when offered to sustain the credibility of a witness whose character has been attacked by proof of conflicting statements. *Stephens v. State* (Tex. Cr. App.) 26 S. W. 728; *Hyden v. State*, 31 Tex. Cr. R. 401, 20 S. W. 764.

6. The fifth and last assignment is covered by conclusion first above announced. Judgment affirmed.

#### JAMES v. DANIELS.

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

#### HOMESTEAD—NOTES—OVERPAYMENT.

1. Defendant, being sued on four notes, proved that he had overpaid them. *Held*, that he was

entitled to a judgment against the plaintiff for the amount so overpaid.

2. When notes, which were a vendor's lien upon certain premises, which became the homestead of the maker of the notes after they were delivered, are paid, the homestead rights of the maker's wife attach to the premises.

Appeal from district court, Fayette county: H. Telchmuller, Judge.

Action on promissory notes by T. H. James against Ross Daniels. Judgment for defendant. Plaintiff appeals. Affirmed.

J. C. Kindred, for appellant. Brown & Lane, for appellee.

NEILL, J. This suit was brought by appellant against appellee on four promissory notes, and to foreclose a vendor's lien on certain lands, for which they were given for the purchase money. The appellee pleaded a general denial, and that he had overpaid the notes sued upon, and prayed judgment for the excess he had paid over the amount due. He also pleaded that the premises upon which the lien was sought to be foreclosed became the homestead of his family immediately after the notes were given, that no lien was reserved in his deed to the land to secure the notes, that they were barred by the statute of limitations when he renewed them by his promise in writing indorsed thereon to pay them, and that such renewal could not affect his homestead interest in the premises. Appellee's wife intervened in the suit, alleging substantially the same matters in reference to the homestead interest in the land, and that the vendor's lien thereon had ceased to exist, by reason of the notes becoming barred by the statute of limitations, and that it did not reattach by the renewal of the notes. The case was tried by the court without a jury, and judgment was rendered against appellant for appellee for the sum of \$176.24, and in favor of intervener for her costs. From this judgment, Mr. James has appealed.

#### Conclusions of Fact.

The third conclusion of fact found by the trial court is as follows: "(3) It is established by undisputed evidence that Ross had made payments on said notes in addition to the admitted credits by plaintiff, as alleged in his answer, except the amounts as changed in the judgment rendered by the court, and that it appears, therefore, that he has overpaid his indebtedness to plaintiff and his agents, to the extent of \$176.24." From a careful consideration of the evidence, we have concluded that it sustains this conclusion; and, while we deem the other findings of fact by his honor equally well sustained, we think they are not necessary to a proper disposition of this case, and omit them from our conclusions. We will say, however, that the evidence shows that the land on which the lien is claimed was the homestead of appellee and intervener when the suit was instituted.

### Conclusions of Law.

The evidence upon which the court found the conclusion quoted was properly admitted and considered, and, as it shows that \$176.24 was paid in excess of the amount due on the notes, the debt evidenced by them, as well as any lien that may have existed upon the premises, was discharged, and appellee entitled to recover the excess which was adjudged him.

It is assigned as error that the court erred in rendering judgment in favor of intervenor for costs, because she had no homestead rights in the premises until the purchase money was paid. We have found that the purchase money was paid. Therefore the ground upon which the error assigned is predicated does not exist. The judgment is affirmed.

### LOHNER v. WILCOX.

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

#### PLEADING AND PROOF.

Where an attorney sues for professional services, alleging a contract by which he was to receive a certain sum, it is error to admit evidence as to the reasonable value of the services.

Appeal from El Paso county court; James R. Harper, Judge.

Action by A. G. Wilcox against J. H. Lohner to recover for professional services. Verdict for plaintiff. Defendant appeals. Reversed.

Leigh Clark, for appellant. A. G. Wilcox, in pro. per.

**FLY, J.** This is a suit by appellee to recover the sum of \$200, which it was alleged was agreed to be paid by appellant for services rendered in preparing for appeal in the case of Coldwell against Lohner. The suit was instituted in justice court, and resulted in a verdict for \$25 for appellee; and on appeal to the county court the case was tried by a jury, and resulted in a verdict and judgment for \$100 for appellee. Appellant excepted to the introduction of testimony to show that the services of appellee were reasonably worth \$100. The evidence should not have been admitted. Appellee, having sued on an express contract, cannot recover on a quantum meruit. *Gammage v. Alexander*, 14 Tex. 414. The only issue presented by the pleadings of appellee was as to whether appellant had agreed to pay him a certain fee for certain services, and the testimony should have been confined to that issue. The testimony as to the contract was quite conflicting, and the evidence objected to may have influenced the verdict. It was not error to admit the explanation that the fee mentioned in the receipt given by appellee referred only to the fee in the district court and not to the fee in the court of civil ap-

peals. For the error in admitting testimony as to quantum meruit, the judgment will be reversed and the cause remanded.

### SPICER et al. v. HENDERSON.

(Court of Civil Appeals of Texas. Nov. 18, 1897.)

#### ADVERSE POSSESSION—EVIDENCE—APPEAL—REVIEW—TRESPASS TO TRY TITLE—PARTITION—IMPROVEMENTS.

1. Uncontradicted testimony that "M. went into possession of the land soon after G. left it," followed by the statement that "the land in controversy has been continuously occupied since 1881, when G. took possession, up to the present time," is sufficient to support a finding that the land had been continuously occupied during that time, where such testimony, though objectionable as a conclusion of the witness, is not objected to at the trial.

2. Abstract questions of law raised by the briefs, but not arising upon the facts found in the record, will not be considered on appeal.

3. In trespass to try title, it is error to make the payment of one-half the value of the improvements a condition precedent to plaintiff's right to partition, where it does not appear that the land is incapable of an equitable division.

4. Where the rental value of land is due to improvements made by defendant in trespass to try title, he should not be required, on decree for partition, to account for the same.

Appeal from district court, Jack county; J. W. Patterson, Judge.

Action of trespass to try title by L. A. Spicer, Cora A. Spicer, Clark E. Coe, Parmella A. Compton, and others against W. M. Henderson. There was judgment awarding one-half the land to Cora A. Spicer, Clark E. Coe, and Parmella A. Compton, and decreeing a partition thereof, on payment of one-half the value of defendant's improvements. Plaintiffs appeal. Affirmed as to the issues of title, and reversed upon the issue of improvements and partition. Remanded.

Walton & Hill and S. Stark, for appellants. E. W. Nicholson and T. D. Sporer, for appellee.

#### Statement and Conclusions.

**STEPHENS, J.** This suit was brought December 20, 1895, by the sole heirs, the nephews and nieces and their descendants, of John G. Coe, who fell at Goliad, to recover of W. M. Henderson 160 acres of land in Jack county, patented November 23, 1875, to the heirs of John G. Coe. The defense relied on was 10 years' adverse possession, with claim for improvements made in good faith. In avoidance of the limitation plea, the disabilities of coverture and minority were set up. The court, no jury being called, upon conclusions of law and fact filed, sustained the limitation defense, except as to Cora A. Spicer, who prevailed over it on the ground of coverture, and Clark E. Coe and Parmella A. Compton, who prevailed on the ground of minority, decreeing one-half the land to defendant, Henderson, and the other half to the last-named plaintiffs. There was a further

finding in favor of Henderson on his claim for improvements, valued by the court at \$600, while the land, without the improvements, was valued at \$400. Upon this finding the court, after appointing commissioners to divide the land, decreed that no writ of partition or of restitution should issue without the previous payment to Henderson, within 12 months, of one-half the value of the improvements. To this judgment plaintiffs below, appellants here, now assign errors.

1. The finding that Henderson, and those under whom he claimed, had had and held the requisite 10 years' adverse possession was, we think, warranted by the evidence. This possession began in the early part of the year 1881, when T. A. Griffin "moved on this land" under a deed made to him the previous year. While so in possession he made a deed to Thomason & Hedrick, dated July 23, 1885, and recorded April 23, 1887, who in turn conveyed to S. A. Massey by deed dated January 6, 1886, and recorded December 21, 1888. Thomason & Hedrick seem never to have taken any personal possession of the land, but Griffin appears to have remained in possession till about the time Massey took possession under his purchase. The possession was continuous from Massey to and in Henderson, under consecutive conveyances, down to the institution of the suit. Whether there was a break between the possession of Griffin and Massey is the question. Upon this point two witnesses only testified, and, while their combined testimony was by no means conclusive, it tended to show a continuous possession; the one (Bottoms) having the best opportunities of knowing testifying, *inter alia*, as follows: "The land in controversy has been continuously occupied since 1881, when Griffin took possession, up to this present time." Possibly this statement was to some extent the conclusion of the witness, as he had already stated that "Massey went into possession of the land soon after Griffin left it." This statement also embodied a conclusion, as the witness was not required to state whether it was one day, one week, or one year afterwards. Unless such conclusions be objected to on the trial below, or the precise facts be elicited by the party against whom they are offered, it is too late after the trial to complain of the court's conclusions founded thereon as being without evidence to support them. But, conceding that the adverse possession was continuous for the requisite period, appellants yet insist that it was not a bar to the entire recovery sought by Grace Lee Anderson (née Phillips) and Ella Coe Rice (née Phillips), because after the death, in 1863, of their mother (who was a niece of the John G. Coe to whose heirs the land was granted), their surviving father was entitled to a life estate in one-third of the share descending to them from their mother; contending, therefore, that they were not required to sue for this third

part pending the life tenure of their father. The question of law which we are thus invited to consider does not seem to arise upon the facts found in the record, for that it does not appear therefrom when the father of said appellants died. Grace Lee Anderson and Ella Coe Rice were both married during minority (in 1882 and 1883, respectively), and after the adverse possession began, and, if their father was then dead, no part of their interest was any longer covered by the estate for life. As they could not tack disabilities, the statute began to run as soon as coverture was added to minority, and, if their father was then dead, it ran against their entire interest. As the burden was on them to avoid the limitation by sheltering under coverture, and the evidence failed to make out this part of their case, they cannot have a reversal of the judgment upon this ground. We need not, therefore, determine the abstract question of law raised by the briefs, but not by the record. Upon these conclusions we overrule all the assignments complaining of the judgment in favor of appellee for one-half the land.

2. But the judgment, in so far as it in effect denied appellants' prayer for partition, we cannot approve. The court did not find, nor was it even alleged, that the land was incapable of partition. The appellants who recovered a one-half interest were therefore entitled, not only to have commissioners appointed, but also to have them make an equitable division of the land, or to report that it could not be so divided. It was manifestly erroneous to require of appellants the prepayment to appellee of one-half the value of the improvements as a condition precedent to their right to partition. It may be that the land could have been so divided, without material injury to any of the parties interested, as to set off appellants' share from such part of the premises as had no improvements, or improvements of small value, upon it; and the commissioners should have been instructed to so divide it, it being the well-settled rule in this state, as well as elsewhere, that partition in such cases should be so made, if possible, as to set apart the improvements to the tenant making them. *Yancy v. Batte*, 48 Tex. 46 (see page 53 for decree); *Johnson v. Bryan*, 62 Tex. 623; *Thompson v. Jones*, 77 Tex. 626, 14 S. W. 222; *Bailey v. Laws* (Tex. Civ. App.) 23 S. W. 20; *Branch v. Makeig* (Tex. Civ. App.) 28 S. W. 1060; *Taylor v. Taylor* (Tex. Civ. App.) 26 S. W. 860; *Freem. Co-Ten.* § 510. That partition is the appropriate method for adjusting equities growing out of improvements in such cases is equally well settled, as will appear from the authorities just cited. We need not, therefore, determine whether the plea claiming the value of the improvements, to which exception was taken, sufficiently stated the grounds of the claim, as required in article 5277 of the Revised Statutes of 1895. While the owner of an undivided interest in land,

who improves the common property upon the faith of owning the whole, may, it seems, claim the benefit of this article of the statute, as was held in *Thompson v. Jones*, 77 Tex. 626, 14 S. W. 222, it is well settled that he is not required to do so. Mr. Freeman, in his work on Co-Tenants (section 510), quoting from *Hall v. Piddock*, 21 N. J. Eq. 314, states the rule correctly, as follows: "The only good faith required in such improvements is that they should be made honestly, and not for embarrassing his co-tenants or incumbering their estate or hindering partition;" and he might have added, continuing the quotation, "and the fact that the tenant making such improvements knows that an undivided share in the land is held by another is no bar to equitable partition." The right of one tenant to claim the value of improvements, made as above defined, is founded upon his right in the land, and the extent of the allowance is measured by the extent of benefit derived therefrom in the partition by his co-tenant. To the extent only that the value of the land received in partition by such co-tenant is enhanced by the improvements placed thereon is he bound to reimburse the tenant making the improvements. If, however, appellee desires to state the grounds of his claim for improvements, as provided in the article referred to, the objections urged by appellants to his plea may be easily obviated by amendment upon another trial; and for that additional reason we need not pass upon its sufficiency. We approve the court's action in not requiring appellee to account for the rental value of the premises, in so far as the same was due to his improvements. For the rule upon this subject, see *Neil v. Shackelford*, 45 Tex. 119; *Osborn v. Osborn*, 62 Tex. 496; *Akin v. Jefferson*, 85 Tex. 137. Our final conclusion upon the whole record is that the judgment should be affirmed in its determination of the issues of title, but that it should be reversed upon the issue of improvements and partition, and the cause remanded for further proceedings therein, in accordance with the views here expressed.

#### COPE v. LINDSEY et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 6, 1897.)

#### EXECUTION—RANGE LEVY—ISSUANCE ON AFFIRMANCE.

1. Rev. St. 1896, art. 2350, providing that a range levy may be made upon stock, where it cannot "be herded and penned without great inconvenience and expense," does not authorize such levy upon stock in an inclosure containing 1,280 acres.

2. Where a judgment is rendered on affirmation by the appellate court, the district court to which the mandate is addressed may issue execution thereon.

Appeal from district court, Taylor county; T. H. Conner, Judge.

Action by M. W. Lindsey against R. H.

Parker, M. C. Cope, and others. Judgment for plaintiff. From an order refusing to quash a levy under execution, defendant M. C. Cope appeals. Reversed.

Cockrell & Hardwicke, for appellant. Wm. H. Lockett, for appellees.

TARLTON, C. J. The appellee, M. W. Lindsey, held a judgment, in the principal sum of \$2,729.54, against R. H. Parker, R. E. Carter, M. C. Cope, H. A. Hancock, and R. H. Logan, upon which the clerk of the district court of Taylor county on February 8, 1897, issued execution. The judgment had been rendered by the court of civil appeals for the Second supreme judicial district on appeal by R. H. Parker from a judgment of the district of Taylor county previously entered on March 13, 1894. The sheriff of Taylor county, to whose hands the execution came, levied it on certain property, as property of the appellant, M. C. Cope, the terms of the levy being as follows: "Fifty stock cattle and sixty horses. All of said cattle and horses are now running and ranging in the Cope pasture, it being a part of the Webb & Sowell pasture, south of J. M. Cope's, known as the 'Merrill pasture'; all of said stock and pastures being in Taylor county, Texas, on the waters of Jim Ned creek. This levy is a range levy, made in the presence of M. C. Lambeth and J. A. Thomas, two credible persons, and said stock will be sold as they run on said range. Levied on as the property of M. C. Cope." It appears that the Merrill pasture, referred to, consisted of 1,280 acres, all under fence, and that the other pasture consisted of 586 acres, all under fence; that the stock were within the inclosure; and that the horses were in the Merrill pasture. Subsequently the sheriff again levied the execution upon certain property, the levy being in the following terms: "191 head of horses, mules, and horse and mule colts; 80 head of said stock being mares branded PRK; 18 two year old mules (if branded, brands unknown); 35 head one year old mules (if branded, brands unknown). The remaining 15 head are of all ages, of both horse and mule stock (if branded, brand unknown). All of said stock running on their range, in the Shelley pasture, and adjacent range, on the waters of Rainey creek, in Taylor county, Texas. This levy is a range levy, made in the presence of A. L. Turner and J. P. Daniel, two credible witnesses, and said stock will be sold as they run on said range. Levied upon as the property of R. H. Logan, R. E. Carter, H. A. Hancock, and M. C. Cope."

In this proceeding the appellant moved the court to quash this levy, on the ground, briefly stated, that the stock were not running at large in the range; that the levy made was not in accordance with law, the location of the stock not justifying a range levy; that a sale of the property under such a levy would subject it to an unfair price; that it

<sup>1</sup> Writ of error granted by supreme court.

would result in damaging confusion to the possession and the rights of appellant,—with averments of like character. On exception, the court declined to entertain this motion. In this, we think, there was error. The allegations show that the facts did not justify a range levy, such as contemplated by the statute; that the stock were not running at large in a range, but that they were confined in pastures all under fence, the largest containing 1,280 acres. The allegations negative the existence of the conditions which would justify a range levy, as prescribed by article 2350, Rev. St. 1895. They negative the fact that the stock could "not be herded and penned without great inconvenience and expense." In fact, they indicate that the horses and cattle could be herded and penned without great inconvenience and expense. No reason is perceived, under the facts alleged by the plaintiff, why, in this case, the sheriff could not follow the method prescribed as ordinarily necessary to the validity of a levy upon personal property, viz. why he could not take possession and control of the stock, situated, as they were, in inclosures of moderate size. *Gunter v. Cobb*, 82 Tex. 608, 17 S. W. 848. The area of these pastures was so limited that, it seems to us, but little inconvenience or expense would have been necessitated in gathering the stock and taking care of them. Indeed, this slight inconvenience and expense would be greatly overbalanced by the injurious consequences which would attach were the provisions of article 2350, Rev. St. 1895, applied to a state of facts such as here presented. As the levy was an illegal levy, it was proper for the district court to entertain a motion to quash it; and, though the judgment was rendered upon affirmance by the appellate court, the district court, to which the mandate of the appellate court had been addressed, was the proper tribunal to issue the execution. This execution, however, should not have included, as in this instance, the costs, of \$23.10, incurred in the appellate court (*Bonner v. Wiggins*, 54 Tex. 149); and as to these costs, but no further, the execution itself should have been quashed, as appellant prayed. Reversed and remanded.

#### MOCK v. HATCHER.

(Court of Civil Appeals of Texas. Nov. 15, 1897.)

#### INSTRUCTIONS—WEIGHT OF EVIDENCE—BOUNDARIES.

1. An instruction that a certain fact "must be shown to the satisfaction of said jury by a preponderance of the evidence" is error.

2. In an action to determine boundary lines between surveys, the court erred in charging the jury that the intention of the surveyor that a line should run the distance called for in his field notes must be determined by evidence outside of the called-for distance in the notes themselves.

Error from district court, Tarrant county; S. P. Greene, Judge.

Action by S. A. Hatcher against J. L. Mock. There was judgment for plaintiff, and defendant brings error. Reversed.

Robt. G. Johnson, for plaintiff in error. Hogsett & Orrick, for defendant in error.

#### Reasons for Reversal.

HUNTER, J. This case involves the question of boundary lines between surveys. The evidence is conflicting, and of such character that we deem it improper to discuss it, as we have concluded to reverse the judgment, and remand the cause for a new trial, on account of errors in the charge, which we are unable to say did not operate injuriously to plaintiff in error upon the minds of the jury in weighing the testimony.

The fifth, sixth, and seventh paragraphs of the court's general charge are as follows: "(5) But, if there be inconsistency in the calls of a survey, either on the face of the field notes thereof or when said field notes are applied to the ground, then a call in such field notes for distance must yield to a call for a well defined and established corner of an adjoining survey, and the line called for must be held to be located at and to said corner, even though the same be found to be a greater or less distance than that called for in the field notes from the beginning points of said survey or such call, unless the jury trying such issue shall be satisfied from all the facts and circumstances surrounded and connected with said survey and the location thereof, as shown by the evidence, that the true intention of the surveyor who made the field notes thereof in making out such field notes, as to the location of said disputed lines, can be more certainly determined by adhering to the call in said field notes for distance, and rejecting the call for a corner; and this must be shown to the satisfaction of said jury, by a preponderance of the evidence outside the mere call for such distance in the said field notes. (6) The plaintiff contends that there is an inconsistency in the second call of the field notes of said Roberts survey, when the same is applied to the ground, in this: that said call is for too great a distance from the beginning point of said call to the corner named therein as the end of said line; and contends that he has established by outside evidence that the said corner so called for is, and was at the time of the making of said field notes of said Roberts survey, well defined and established on the ground, and that the same is identical with the southwest corner of the land sued for by him, as described in his second amended original petition, and that the same is the corner of the said Roberts survey from which said field notes call for said Roberts survey to run north 684 vrs., as shown in the third call thereof. (7) Now, bearing in mind the foregoing instructions, if you believe from the evidence that the corner named in the second call of the Roberts field notes as the end of the line called for thereby

is, and was when said Roberts field notes were made, well defined and established on the ground, and that it is at a point identical with the southwest corner of the land sued for by plaintiff, or is located at some point on the south line of said land as described in plaintiff's amended petition, then you will determine and fix the line called for by the third call in the said Roberts field notes to begin and run north from said point, and find that all the land sued for by plaintiff lying east of the said line so fixed is in the Roberts survey, unless you are satisfied from the facts and circumstances surrounding and connected with the said Roberts survey, and the location thereof, as shown by a preponderance of the evidence outside and beyond the call for distance merely in said second call, that it was the intention of the surveyor who made said field notes, in making them, that the line run by the said second call thereof should extend from the beginning point thereof the full 1,000 varas called for therein, and should end at a point reached by so running the same for said distance, and that the third call of said field notes should begin and run north from such point so reached, in which event you will find that only the land lying east and south of said point and said line so running north from said point, is included in said Roberts survey." The court gave special charge No. 2 asked by defendant Mock, which is as follows: "The call for distance east in the second call of the A. S. Roberts field notes may be taken by you in connection with other things therein called for, and the surrounding facts and circumstances attending the making of said field notes in evidence before you, in determining where it was the intention of the surveyor Lacy to end said second call." The following explanation, however, was added: "This charge is given with the explanation that it shall not be considered by the jury as in any way modifying the instructions given in the seventh paragraph of the main charge, to which the jury is referred in considering this special charge." The second sentence of the fifth paragraph is, we think, erroneous, because it requires a greater and higher degree of proof than the law demands. It requires the defendant to show the fact in question "to the satisfaction of said jury by a preponderance of the evidence." This court has held, as well as has our supreme court in quite a number of cases, that the jury may find any fact in civil cases upon the preponderance of evidence, whether that preponderance produces satisfaction in their minds or not. See *Moore v. Stone* (Tex. Civ. App.) 36 S. W. 200, and cases there cited. This error is repeated, and thereby emphasized, in the seventh paragraph, which also repeats the error contained in the fifth, to the effect that the jury should find the intention of the surveyor from all the facts and circumstances outside of and apart from the 1,000-varas call for distance. This is clearly erroneous, because the jury should be permitted to consider every

fact proven in coming to their conclusion as to where the surveyor intended to end the second line, and establish this third corner of the Roberts survey. The special charge asked by defendant, with the appended explanation, did not suffice to correct this error. Indeed, the error was left substantially unmodified. The establishment of this corner might determine the disputed line between the parties, and, as there is a conflict of evidence as to its true location, the error was very material. For these reasons we think the judgment in this case ought to be reversed, and the cause remanded for a new trial, and it is ordered accordingly.

### LEBRETON et al. v. LEMAIRE.

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

#### EXECUTION INSTANTER—AFFIDAVIT—SALE—SUBSEQUENT PURCHASER—NOTICE OF DEFENSES—BURDEN OF PROOF.

1. The fact that an affidavit has been filed to obtain an execution instanter need not appear in or upon the execution.

2. Where a constable's deed to lands sold under execution is apparently valid, and the execution defendant seeks to avoid it as against a subsequent purchaser for value, he must show affirmatively that the purchaser had notice of extrinsic defenses.

Appeal from district court, El Paso county; C. N. Buckler, Judge.

Suit by A. C. V. Lebreton and another against W. H. Burges and G. Lemaire. From a judgment in favor of defendant Lemaire, plaintiffs appeal. Affirmed.

The original petition was in trespass to try title. An amended petition was filed, presenting additional averments, in substance, as follows: That appellants (plaintiffs) and defendants claimed the several parcels of land under E. V. Lebreton as common source; that said E. V. Lebreton owned the same on August 12, 1891, on which day E. Krause obtained a judgment against him before a justice of the peace, upon which an execution was issued same day, and a levy made on the said property. Then follow allegations of certain matters relative to the execution and sale, upon which plaintiffs claimed the sale to have been void or voidable (hereinafter indicated), and offering to do equity; that the purchaser at the sale was W. H. Burges, under whom the other defendant, Lemaire, held, with notice,—and praying that plaintiffs have judgment for title to the property, and that the constable's sale be set aside, and that defendants be required to accept the tenders made, etc. Judgment was in favor of plaintiffs, against W. H. Burges, for one parcel of the property, and against plaintiffs, in favor of Lemaire, for the other parcels. Mr. Burges does not appeal. The material facts are as follows: E. V. Lebreton, who died prior to July, 1895, was the common source of title. A. C. V. Lebreton was his devisee, and the latter had conveyed an interest in the prop-

erty to his co-plaintiff. The justice's judgment above referred to was for \$77.40 and interest. The plaintiff, on the date of the judgment, made and filed the statutory affidavit, authorizing an execution to issue instant, which was done, and the sale was had thereunder. The return on the execution recites that it was levied on the lands in question; that the property was advertised on August 5, 1891, the sale to take place on October sale day, by posting three notices in El Paso county,—one at the court-house door. The return does not state the terms of the advertisement, but shows that the lands were sold in separate parcels to W. H. Burges on October 6, 1891, for the aggregate sum of \$90.50. In all other respects the return is admitted to have been regular, but it contains no notation or statement showing that the affidavit had been filed, to authorize its issuance, before the expiration of 10 days. The constable's deed to Burges was read, dated October 6, 1891, which sets out the levy and advertisement as the law requires, and the sale in separate parcels; giving what each parcel brought, and showing by its recitations a regular sale, in all respects. The deed from Burges to Lemaire was in evidence, being a special warranty deed, dated November 7, 1891. It was shown that Lemaire paid \$700 for this deed, conveying to him five of the six tracts sued for, and that he had improved certain of the tracts, to the extent of \$700. The evidence also showed that Burges acted as agent for Krause's attorneys in purchasing at the constable's sale. The prices bid were about one-fifteenth the value of the property. The above are all the facts necessary to be stated, in our view of the case.

W. B. Brack and Millard Patterson, for appellants. Z. B. Clardy and Falvey & Davis, for appellee.

JAMES, C. J. (after stating the facts). The suit is in reality a proceeding in equity to annul the constable's sale. There is no statute which requires the fact that an affidavit has been filed to obtain an execution instant to appear in or upon the execution. In this instance such affidavit was filed, and the execution issued thereupon was valid. Appellants' brief has no proposition relating to, nor do they discuss, the alleged irregularity touching the return on the writ of execution, and we take it that that contention is abandoned. The point seems to have no merit whatever.

The court concluded "that the gross inadequacy of price, coupled with the irregularities in the execution, and the fact that the real purchasers at the execution sale were the attorneys for the plaintiff in execution, render the sale invalid, as to the purchaser at the execution sale, Burges." It is possible that where the plaintiff in execution's attorney buys in the property, and the bid is grossly inadequate, this fact is a sufficient additional circumstance to set aside a sheriff's sale, but

we seriously doubt it. It is, however, not a necessary question on this appeal, so far as the rights of appellee Lemaire are concerned. If he bought from Burges, without notice of the existence of such circumstance, paying him a valuable consideration, the sale cannot be set aside, to affect him; and this was the judgment of the court. The evidence shows that plaintiffs were asserting an equitable demand to have the constable's deed set aside, and the title restored to them, as against defendants. It devolved upon them to show affirmatively that Lemaire had notice of the facts or circumstances going to defeat the deed; and the court properly found, in the absence of any proof on the subject, that Lemaire was an innocent purchaser. There being nothing on the face of the execution giving plaintiffs the right to invalidate the sale, and Lemaire being an innocent purchaser as to any outside fact affecting the validity of the sale, paying a valuable consideration in the purchase, the decree in his favor should be affirmed.

#### CUNNINGHAM v. FAIRCHILD et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

#### GAMBLING CONTRACTS—DEALING IN FUTURES—RECOVERING BACK MARGINS PAID.

Plaintiff paid money to cotton brokers, who agreed to place for him contracts with defendants for the purchase and sale of cotton for future delivery. Actual delivery was not contemplated, and the sums to be received or paid by plaintiff depended on the fluctuation of the cotton market. Plaintiff was not known in the transactions between the brokers and defendants, and the money paid by him was deposited without condition by the brokers to the credit of defendants, who had contracted to pay the brokers one-half of the commissions received by them. Held to be a gambling transaction, precluding a recovery of money so deposited, whether the brokers and defendants were partners or not; since, if they were, the illegality of the transaction and the fact that the money had been paid would prevent recovery; and, if they were not, such illegality, and the fact that there was no privity between plaintiff and defendants, would prevent it.

Appeal from district court, Bastrop county; Edward R. Sinks, Judge.

Action by W. M. Cunningham against Fairchild & Hobson and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Fowler & Fowler, for appellant. Dyer Moore and Orgain & Garwood, for appellees.

FISHER, C. J. This suit was brought by appellant against Fairchild & Hobson, brokers, residing in New Orleans, La., to recover the sum of \$1,250, alleged to be due to plaintiff from Fairchild & Hobson. The bank was garnished, and it appears from its answer that it had in its possession, on deposit, as the property of Fairchild & Hobson, more than the amount sued for. Fairchild & Hobson, in effect, answered that they were not indebted to plaintiff, and never had any

<sup>1</sup> Writ of error denied by Supreme court.



transactions with him, but that they received the money on deposit in the bank to their credit from W. G. Hatchett and W. J. Brooks, and that plaintiff was not known in the transaction between them and Hatchett and Brooks. The court below rendered judgment in favor of the defendants, and to the effect that plaintiff recover nothing. The pleadings are voluminous, and it is unnecessary to state all of the questions therein raised, as the findings of fact and conclusions of the trial court, which we here set out in full, indicate the issues in the case. These findings are as follows:

"(1) That one W. G. Hatchett from the 22d day of November, 1895, up to the 16th day of March, 1896, was engaged in Bastrop, Tex., in the business of procuring contracts, commonly known as 'future contracts,' for the sale of cotton and other produce, and that thereafter, from March 16, 1896, to May 8, 1896, one W. J. Brooks was engaged in like business in Bastrop, Tex. (2) That said Hatchett and Brooks had an arrangement with defendants, Fairchild & Hobson, of New Orleans, La., who were brokers in said city, to secure from them one-half of the commissions charged by Fairchild & Hobson for placing contracts for futures in cotton, which commissions were one dollar per bale of cotton. (3) That in such contracts there was no intention nor contemplation by the parties that the cotton so bought or sold would be delivered, but that the difference between the market price of cotton bought or sold and the price named in the contracts would be paid in money when such contracts would be closed. (4) That the plaintiff, W. M. Cunningham, at different times between the 19th day of December, 1895, and the 1st day of April, 1896, arranged with said Hatchett and Brooks to place for him contracts with the said Fairchild & Hobson, for the purchase and sale of cotton for future delivery, and that it was not contemplated by the plaintiff nor any of the parties that actual cotton should be delivered on said contracts, but that if the cotton market should become unfavorable to plaintiff he would pay the difference between his contract price and the market price, and if favorable to plaintiff that the difference between the contract price and the market price would be paid to plaintiff by Fairchild & Hobson. (5) That said contracts were mere gambling contracts, wherein the plaintiff would bet on the future rise or fall of the cotton market. (6) That Hatchett and Brooks agreed with plaintiff that the money paid by him, as margins, would remain in the First National Bank of Bastrop until said contracts were closed. (7) That said Fairchild & Hobson did not know the plaintiff in said transactions, but dealt with and made the contracts with Hatchett and Brooks only, who acted for the plaintiff. (8) That in making such contracts said Fairchild & Hobson would require of said Hatchett and Brooks, as a condition precedent,

that they should place to their credit, unconditionally, in the First National Bank of Bastrop, located at Bastrop, Tex., what is commonly known as a 'margin,' ranging in amount from \$1 to \$3 per bale of cotton, either bought or sold, and in the contracts placed with Fairchild & Hobson by said Brooks and Hatchett for the plaintiff such margins, in various sums, were paid to Hatchett and Brooks by plaintiff, through drafts drawn on him in their favor on said defendant the First National Bank of Bastrop, and were by them collected, and the money placed to the credit of said Fairchild & Hobson, subject to their orders, in said bank, without any conditions. (9) That on or about the 8th day of March, 1896, said Brooks, without notice to the plaintiff or any of his patrons, left Bastrop, and has not been heard of since, and prior to his leaving said Hatchett had turned over to him his said cotton-future business, which he operated. (10) That at the time the said Brooks so left plaintiff had various of the said future contracts for the purchase and sale of cotton still open and unclosed, which were afterwards closed for lack of margin required by the same. (11) That the plaintiff telegraphed to Fairchild & Hobson in reference to his said contracts as soon as said Brooks left, and they replied that they only knew Hatchett and Brooks in these transactions, and had no contracts with plaintiff. (12) That had plaintiff had the opportunity to put up further margins on such contracts to meet the change in the market price of cotton, that he would have done so, and thereby saved himself from loss, but said contracts were closed without such opportunity, and he lost money in excess of the \$1,250 sued for. (13) That there is now, and was when this suit was brought and garnishment served on defendant bank, the sum of \$1,550 to the credit of Fairchild & Hobson in said First National Bank of Bastrop, subject to their order. (14) At the time Brooks left plaintiff had paid to him and said Hatchett, on contracts that then remained unclosed, \$1,250. I am unable to find or determine whether the money so paid by the plaintiff was or was not a part of said \$1,550 to the credit of Fairchild & Hobson."

#### "Conclusions of Law.

"(1) I hold that, as the contracts were mere gambling contracts, they can neither be enforced by the courts, nor can any relief be granted for any violation of the same. (2) That the money paid by plaintiff to Hatchett and Brooks was for the purpose of enabling them to make the contracts with defendants Fairchild & Hobson, and cannot be recovered under any phase of the case. (3) They received the money, and would then place it to the credit of Fairchild & Hobson in the First National Bank of Bastrop, and cause the bank to notify them the money was there to their credit, after which noti-

fication they would place contracts for Hatchett and Brooks in their name. (4) Fairchild & Hobson made no contract with plaintiff, but only with Hatchett and Brooks. (5) If they did not put up the margins, the contracts closed themselves, and the custom seemed to be that, when they were called on for margins, they would call on their customers for the money, and, if not paid, they would allow the contract to become closed. (6) It is contended that the fact that Fairchild & Hobson gave Hatchett and Brooks one-half of the commissions which they charged made them partners. To that proposition I do not assent, but, if so, it was clearly a gambling contract, and the money, having been paid them, cannot be recovered; and, if the identical money is still in the bank to their credit, it is not held by the bank as a stakeholder, but unconditionally, and has been as fully paid as if the money was in the private safe of defendants. (7) The plaintiff cannot recover in either state of the case. If Fairchild & Hobson and Hatchett and Brooks are partners, he cannot recover, because the contract is illegal and the money has been paid. If they are not partners, he cannot recover for two reasons: First, because he had no contract with Fairchild & Hobson, but only with Brooks and Hatchett; second, because the contract is illegal. (8) I therefore hold that judgment should be rendered for defendants."

The assignments of errors are addressed to these findings, and complain of them in a number of ways. There is evidence in the record upon which to base all the findings of fact by the trial court, and to justify the conclusions of law reached by that court. We adopt the conclusions reached by the trial court as the facts and law found by this court. We find no error in the judgment, and it is affirmed. Affirmed.

#### SMITH v. HOUSTON & T. O. R. CO.

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

#### RAILROADS—PERSON INJURED IN YARD—CONTRIBUTORY NEGLIGENCE.

There was no error in charging that defendant was not liable for injuries received by plaintiff by being struck by a moving car while walking through defendant's yards, where it appeared that plaintiff was guilty of contributory negligence, and that defendant's servants operating the train failed to discover his danger in time to prevent such injury, though they could have done so by the exercise of diligence.

Appeal from district court, Travis county; F. G. Morris, Judge.

Action by John Smith against the Houston & Texas Central Railroad Company. From a judgment on a verdict directed for defendant, plaintiff appeals. Affirmed.

Henry Faulk, W. D. Hart, and William M. Walton, for appellant. Frank Andrews, for appellee.

FISHER, C. J. This suit was brought by appellant, Smith, against the railroad company, for \$10,000, damages on account of injuries sustained by him as the result of being struck and run down by the cars on appellee's road. After the testimony was all introduced before the court and jury trying the case, the court instructed the jury to return a verdict for the railroad company, for the reason that the evidence showed that the appellant was guilty of contributory negligence. The question presented is whether the evidence was of such a character as authorized the court to withdraw from the jury the questions of the exercise of proper care and caution on the part of plaintiff, and to peremptorily instruct them that he was guilty of contributory negligence. The facts bearing upon this question are as follows: The appellant, when walking near the railway track in the yards of appellee's road in the city of Austin, was struck by a car which was then, with others, being pushed by an engine, and knocked down upon the rails, and his arm run over and crushed, and, as the result, it had to be amputated. The car that struck him came from behind him. It appears that that part of the track where he was walking when struck was frequently used by the public as a pathway, and that such use was known to the employés and servants of the appellee. Plaintiff, when walking near the track, heard a noise behind him, which proved to be an approaching car; and he thereupon stepped away from the track, and out of the reach of the car; and, after it had passed him, he again stepped back so near and in such close proximity to the track as put him in danger of being struck by a passing car. When the car passed him, and when he returned to the track, continuing his walk in the direction that he was going, he did not look back, in order to ascertain if another car or an engine was approaching him from behind, but continued to walk on the track until he was struck by the car that caused his injuries. This car, with others, was being pushed by an engine in the rear. When he returned to the track, and put himself in the place of danger, he heard behind him the puff of the engine, and supposed that it was going back, and not approaching him. He did not look in order to ascertain if this supposition was well founded, but continued to walk on the track until he was struck. The space between the car that passed him and the one that struck him was 30 or 40 feet. The accident occurred in the daytime, and there was nothing to prevent the plaintiff from seeing the approaching car behind him, if he had looked. After testifying about his walking upon the track, and the cars passing him, he says: "I didn't see those first two cars [which were the ones that passed him] until they got even with me. I heard a little noise, and stepped out of the path, and walked along until they passed; and, after they passed, I got back

in the path again, and kept on my way until the car struck me. When I heard a little noise, I didn't turn around. I just stepped out of the path. As soon as the cars passed me, I got back in the path. When these cars passed me, I didn't turn and look around to see if any more were coming. I didn't stop to listen, and never did turn my head back at all to look. I heard the engine puff, and thought it was going back. It was broad daylight, and there was nothing to have kept me from seeing if I had looked. I have been about the yards of railroads a good deal, in different places. When I see a railroad yard, I know the purposes of its use is to switch cars up and down, and that this is constantly done, without regard to any schedule, and without regard to whether it is day or night. I never heard of any objection to people passing through the yards. I have seen people passing through all the time. I never asked permission of anybody to pass through there; didn't think it was necessary. I had been there twice before, and on those occasions, I had seen cars switching back and forth. I was walking along by the side of the track, and knew that the cars extended over the rails about two feet. I was on the outside of the rails. The yard was graded from Comal street back up past the roundhouse, and covered with cinders, and perfectly level. A man could walk as well several feet away from the track as he could close to it. It is as level as a floor, covered with cinders, and dry. There was just as good walking all along there as there was by the rails. I don't know the names of the streets along there. I was in a hurry to get home. I was paying no attention to the cars, but hurrying to get home." He further also says: "I heard and saw the first car, and stepped out of the way till it passed. I did not look nor listen for any more, but stepped back near the track, and was struck before I had gone ten steps." It is further shown that there was a brakeman upon the cars that passed the plaintiff, who saw the plaintiff on the track before the cars that passed him reached him, and saw him get off of the track out of the way of the cars; but the facts show that the engineer and fireman and other of appellee's servants operating that part of the train of cars which struck the plaintiff did not see him or know of his perilous situation until after he was struck and injured. It further appears that the servants of appellee kept no lookout in order to discover if persons were upon the track.

We understand the rule to be that if the evidence tending to establish an issue is of such a character that men of ordinary minds and intelligence will not differ as to the effect thereof, and there can be only one conclusion reached from it, the court, in such a case, is authorized to inform the jury what that conclusion is, and to peremptorily instruct them to shape their verdict in accordance with it. The facts, when tested by this rule, clearly

justify the charge of the court. The appellant knew when he placed himself near the track that he was in the yards of the defendant, where it was constantly using its tracks for the purpose of moving and switching cars; and when he heard an approaching car behind him, and stepped out of the way, and saw that car pass, in the nature of things, he must have known that some force propelled it, and that the defendant was then using the tracks in its yards in the usual way. As a man of ordinary intelligence, he further should have known that the force generally in use in propelling cars is a locomotive. To remove any doubt upon this question, his own evidence shows that he actually heard the locomotive behind him, and no conclusion can be reached but that the locomotive that he heard was the one that he understood had propelled the cars that just passed him. He heard the puff of the engine. Notwithstanding this, without further listening or looking back in the direction from which he knew the cars that passed him had just come, and in the direction from which he heard the puff of the locomotive, he stepped back in close proximity to the track, putting himself in a place of danger, and, before he had walked 10 steps, he was struck by the approaching car from behind. There was only a space of 30 or 40 feet between the car that had passed him and the car that struck him. He placed himself in this space, between two cars, hearing the puff of the locomotive, without any effort upon his part to use his senses of sight or hearing to discover whether the engine that made the noise behind him was approaching or receding. He says that he thought it was going back, and the conclusion is that, acting upon this supposition, he put himself upon the track, and continued to walk in front of the approaching car; but he made no effort to verify this supposition, although he heard the noise behind him. There was nothing to prevent him from discovering the approach of the cars. It was broad daylight, in a place where he knew cars were being frequently operated; and with the knowledge that one had just passed him, and that one was behind him, for he heard the engine, he was negligent to act upon the supposition that the engine was going back the other way, when he could have readily discovered, by turning and looking, in what direction the engine and cars were moving.

There is nothing in the facts of this case to invoke the doctrine of liability of the appellee, arising upon the ground of the discovery of the dangerous situation of the appellant by the servants of the appellee operating the train in time to have prevented the accident. If the servants of appellee operating the train had discovered the perilous situation of the plaintiff in time to have prevented running him down, and thereafter failed to exercise proper diligence to have averted the accident, the railway company would have

been liable, notwithstanding the contributory negligence of the plaintiff; and, upon this branch of the case and the contributory negligence of the appellant, we are unable to distinguish this case from the following cases, recently decided: *Sanches v. Railway Co.*, 88 Tex. 117, 30 S. W. 431; *Railway Co. v. Staggs* (Tex. Civ. App.) 37 S. W. 600; *Railway Co. v. Breadow* (Tex. Sup.) 36 S. W. 410; *Railway Co. v. Staggs* (Tex. Sup.) 39 S. W. 295. The doctrine established by these cases is to the effect that where the plaintiff is guilty of contributory negligence, although he may not be a trespasser, the railway company will only become liable when they actually discover his peril in time, and, by the exercise of diligence, could have averted the accident; and, if the plaintiff is guilty of contributory negligence, he cannot recover, although the servants operating the train could have, by the exercise of diligence, discovered his danger, and failed to do so. We hold that there was no error in the charge of the court. Therefore the judgment below is affirmed. Affirmed.

**PACE et al. v. AMERICAN FREEHOLD  
LAND & MORTGAGE CO  
OF LONDON.**

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

**FRAUD AND MISTAKE—RULE OF EVIDENCE—  
INSTRUCTIONS—ERROR.**

1. On a foreclosure, where defendants alleged that their homestead had been included in the deed of trust, either through mutual mistake or through mistake on their part and fraud on the part of plaintiff's agents, it was error to charge that the issue thus raised must be established "beyond a reasonable doubt."

2. The fact that certain matter was not embraced in a charge, which was correct as far as it went, constituted no error, where no instruction thereon was requested.

Appeal from district court, Travis county; F. G. Morris, Judge.

Suit by the American Freehold Land & Mortgage Company of London against Charles Pace and others. From a judgment on a verdict for plaintiff, defendants appeal. Reversed.

Hogg & Robertson, for appellants. T. W. Gregory and Geo. F. Pendexter, for appellee.

**FISHER, C. J.** This suit was brought by the appellee against Pace and his wife and one W. H. Richardson on a note executed by Pace for the sum of \$2,500, and to foreclose a lien created by deed of trust against all of the appellants upon certain lands described in plaintiff's petition. Pace and wife in effect alleged that the land described in the deed of trust in part embraces their homestead, and that at the time of the execution of the deed of trust, and its subsequent renewal, it was understood between the parties that certain lands set out and described in

the defendants' answer should not be embraced in the deed of trust, and that by mutual mistake of the parties the land that was intended to be excepted from the operation of that instrument was included in the deed of trust; and, further, that if it was not so included by mistake, it was so included by the wrongful and fraudulent acts of R. L. and J. Gordon Brown, to whom the notes were formerly executed, and who prepared the deed of trust, and who stated at the time of its execution, and at the time at which it was subsequently renewed, that the land intended to be excepted from its operation was not included. Appellant alleged that he had confidence in the integrity of Brown Bros., and relied upon their statements, and, believing those representations to be true, he and his wife executed the deed of trust, and that he never discovered the mistake or fraud until long after these instruments had been executed; that the deed of trust did embrace the land that was intended to be reserved from its operation, and did include his homestead. Appellants asked that the deed of trust be reformed so as to exclude this land. Appellee addressed to this answer general and special demurrers, which the court overruled. The case was tried before a jury, who returned a verdict for the plaintiff, and thereupon judgment was rendered.

There is some evidence in the record tending to establish the issues raised by the answer of appellants. The court, after submitting to the jury the issue of mistake and fraud, gave this charge: "In cases like this, wherein it is sought to prove by parol evidence mutual mistake or fraud in a written contract for the purpose of having the written contract changed, the law requires that, in order to authorize the change, the evidence must be such as to leave no reasonable doubt in the mind of the jury as to the extent of the mistake or fraud; and if, in this case, you do not believe, beyond a reasonable doubt, either that there was a mutual mistake, as pleaded by the defendants, or mistake on the part of defendant Charles Pace, and fraud on the part of the agents of plaintiff, as alleged by defendants, you will return a verdict for plaintiff on the issues as to reforming the deed of trust." This charge was clearly erroneous. We cannot recall to mind any controversy of a civil nature between litigants which may be instituted in the courts of this state, under the rules of law and practice that obtain with us, where it would be proper to require either party to the controversy to establish the issues raised beyond a reasonable doubt. *Sparks v. Dawson*, 47 Tex. 139; *Rider v. Hunt*, 6 Tex. Civ. App. 241, 25 S. W. 314; *Wallace v. Berry*, 83 Tex. 330, 18 S. W. 595; *Balnes v. Ullmann*, 71 Tex. 529, 9 S. W. 543.

We cannot say that error is shown, as complained of in appellants' second assignment of error. The charge of the court in submitting the issue of mistake and fraud was cor-

rect, as far as it went, except in the particular just pointed out; and, if the appellants had desired it to have embraced the question presented in the second assignment of error, they should have asked a charge upon that question; and, if the charge had been correctly framed in presenting the point suggested in the assignment, the court should have given it, and doubtless would have done so, if the appellants had made the proper request.

We do not think there is any merit in the points presented by the cross assignments of error. The court correctly overruled the demurrers, and properly refused the special charge asked by the plaintiff. For the error of the charge as pointed out the judgment is reversed, and the cause remanded. Reversed and remanded.

### MCCRAY v. FREEMAN.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 17, 1897.)

#### ACTION TO CORRECT JUDGMENT—EXCUSING LACHES—RES JUDICATA.

1. Where the original petition in an action to correct a judgment was filed more than 5 years, and an amended petition for its reformation more than 10 years, after judgment was rendered, a holding that the suit was not brought within a reasonable time will not be reversed on appeal; no excuse being given for failure to move for a new trial at the term at which judgment was rendered, or for the delay in bringing the suit to reform.

2. In a suit to enjoin the execution of a judgment rendered more than five years before, brought after an appeal, and the execution of a supersedeas bond describing the judgment, a petition alleging that plaintiff did not know that the judgment included, contrary to an alleged agreement between the parties, the title to or possession of certain land claimed by plaintiff, but failing to explain the long delay, or to allege that plaintiff did not know that the judgment had been entered as it was, before adjournment of court, so as to move for a new trial or to correct the judgment during the term, is insufficient to bring plaintiff within the exception of Sayles' Civ. St. art. 2875, providing that no injunction to stay execution shall be granted after one year unless it appears that the application therefor has been delayed by the fraud or false promises of the judgment plaintiff, practiced or made at the time of, or after, the rendition of the judgment, or unless for some equitable matter or defense arising after its rendition.

3. A defendant in trespass to try title, who neglects to set up a title acquired after suit brought, is precluded from claiming under such title in a subsequent action between the same parties.

4. Where the issue presented by the pleadings was whether the land in suit was included in the survey under which plaintiff claimed, or in that under which defendant claimed, evidence is not admissible in a subsequent suit between the same parties, to show that only the issue of boundary, and not that of title, was determined, as a decision of the former issue necessarily involved a decision of the latter. 27 S. W. 97, followed.

Error from district court, Bell county; W. A. Blackburn, Judge.

Action by Daniel McCray against John D. Freeman. There was judgment for defendant, and plaintiff brings error. Affirmed.

L. W. Goodrich, A. M. Monteith, and Jones & Sleeper, for plaintiff in error. Geo. W. Tyler, for defendant in error.

COLLARD, J. On December 2, 1878, John D. Freeman sued, in form of trespass to try title (file No. 1,311, district court of Bell county), J. F. McAninch and Daniel McCray, to recover 622½ acres of land, alleged to be a part of the Joseph Washington one-third of a league, in Bell county. On October 3, 1883, defendants in that suit filed an amended original answer, consisting of general demurrer, general denial, and plea of not guilty. Judgment was rendered for plaintiff, October 5, 1883, for the entire 622½ acres of land sued for; awarding writ of possession and execution for costs. On appeal from the judgment, the supreme court, on April 29, 1887, affirmed the judgment in cause No. 1,311. 4 S. W. 369. On November 12, 1887, Freeman sued J. F. McAninch and McCray, and the sureties on their supersedeas bond, to recover rents of the 622½ acres in controversy in suit No. 1,311; which last suit was numbered 3,040. March 23, 1888, McCray having failed to surrender possession of all the land recovered in suit No. 1,311, Freeman sued out writ of possession, returnable June 4, 1888, which was not executed; and on August 10, 1888, he applied for another writ of possession, the clerk certifying copy of the original writ, and it was retracted. August 15, 1888, McCray sued, in action of trespass to try title (cause No. 3,137), John D. Freeman, to recover 134½ acres of the land embraced in the 622½ acres sued for in suit No. 1,311. October 1, 1888, Freeman obtained a pluries writ of possession in cause 1,311, and was proceeding to have the same executed, when, October 8, 1888, McCray sued out an injunction against Freeman, and to correct the judgment in suit No. 1,311, and restrained the execution of the pluries writ; the suit being numbered 3,159. Suits Nos. 3,040, 3,137, and 3,159 were consolidated. On the trial of these consolidated suits, July 6, 1889, the jury returned a verdict for the 134½ acres of land, and judgment was accordingly so rendered thereon. Freeman brought the judgment to this court for review, and on January 24, 1894, this court affirmed the judgment; Justice Key dissenting. 24 S. W. 922. The supreme court, on writ of error, reversed the judgment of this court, and remanded the causes for further trial. 27 S. W. 97. On January 12, 1895, McCray amended his pleading in cause No. 3,159, for injunction, and to cancel and set aside the judgment in suit No. 1,311; amending his first original petition in cause No. 3,159,—to which Freeman replied July 9, 1895, by supplemental answer. July 9, 1895, Freeman filed his first amended answer in cause No. 3,137. The consolidated causes were called for trial in the district court of Bell county July 25, 1895; and, by agreement, cause No. 3,048 was separated from the other suits, and continued until the other two suits should be finally determin-

<sup>1</sup> Writ of error denied by supreme court.

ed; and it was agreed that the other two suits (Nos. 3,137, trespass to try title by McCray for 134½ acres of land, and 3,159, by McCray to cancel and set aside the judgment, in part, in suit No. 1,311) should be tried together. The court sustained general and special exceptions of Freeman to McCray's first amended petition in suit No. 3,159, dissolved the injunction, and (plaintiff, McCray, declining to amend) dismissed the cause. The court found for defendant, Freeman, in cause 3,137, and rendered judgment for him, from which judgments in both cases (3,159 and 3,137) McCray prosecutes his writ of error to this court.

#### Findings of Fact.

McCray deraigned title to the 134½ acres of and sued for by him, and because of which he sought to set aside the judgment in cause No. 1,311, from John D. Freeman, originating in a deed of trust from Freeman to Solon Joins, trustee, to pay certain specified debts, of date January 17, 1879, after suit No. 1,311 was brought; it being filed December 2, 1878. Freeman was the admitted owner in fee of the 134½ acres of land at the time the deed of trust was executed. The deed of remote vendees of Freeman under the deed of trust to McCray was dated December 12, 1882. The judgment in suit No. 1,311, in favor of Freeman, against McCray, for 622½ acres of land, which included the 134½ acres, was dated October 5, 1883.

Defendant, Freeman, read in evidence the pleadings of the parties in suit No. 1,311, and the final judgment in the district court, of date October 5, 1883, whereby, on the verdict of a jury, John D. Freeman recovered from both defendants (McCray and McAninch) the 622½ acres sued for, which included the 134½ acres subsequently sued for by McCray in suit No. 3,137. Defendant also read in evidence the motion of McCray and McAninch for a new trial in cause No. 1,311, filed October 6, 1883, based upon alleged errors of the court in its charge upon the subject of disputed boundary, and that the verdict of the jury was contrary to the evidence. He also read the petition of McAninch and McCray in suit No. 1,311 for writ of error, filed June 2, 1884, and the supersedeas bond filed in said cause, reciting the judgment in the same, praying for citation in error to Freeman. The citation in error issued July 31, 1884, returned August 5, 1884. Also, the assignment of errors, to the effect that the court erred in the charge, in that it was vague, contradictory, and calculated to mislead the jury in locating the Washington survey, and required the jury to follow the lines of other surveys called for in the Washington patent; because the charge gave undue prominence to calls for unmarked lines, as controlling calls for course and distance; because the court refused charges asked by the defendants, and erred in overruling the motion for a new trial; because the verdict is unsupported by the evidence, in certain par-

ticulars pointed out; and because the charge of the court, the verdict, and the judgment were not supported by the evidence, but inconsistent with the pleadings of the plaintiff. Defendant also read in evidence the mandate of the supreme court of Texas in cause No. 1,311; reciting judgment in cause 1,311, before set out, which was in all things affirmed by the supreme court on the 29th day of April, 1887, which mandate was filed in the district court June 23, 1887. It was admitted by McCray on the trial, in open court, that the 134½ acres described in his petition lay partly north of the north boundary line of the Joseph Washington survey, as claimed by McAninch and McCray on the trial of cause No. 1,311, and that the north boundary of the 134½ acres extended to, and was identical with, the south line of the George Allen 198.78 acres claimed by them in suit No. 1,311, and that no portion of the 134½ acres was included in the boundaries of the George Allen 198.78 acres. The principal controversy in suit No. 1,311 was one of boundary between the J. Washington one-third of a league and the Allen survey; Freeman claiming under the former, and the defendants claiming 198 acres out of the Allen survey. Freeman recovered the land so claimed by the defendants in that suit. The 134½ acres now in suit is on the Washington survey. We deem it unnecessary to recite other testimony of defendant at this time.

Plaintiff, McCray, in rebuttal, read a portion of the statement of facts in cause No. 1,311. First, it was agreed by the parties that plaintiff, Freeman, was the owner of the Joseph Washington one-third of a league survey, and that defendants were the owners of the title to the George Allen 198-acre survey, and that the question at issue was whether the land covered by the patent to the George Allen survey was included in the boundaries of the Joseph Washington one-third league. Also, another portion of the statement of facts in cause No. 1,311, viz.: "The patent to the Jos. Washington one-third league, dated October 13, 1854, the field notes of which are as follows [setting out the field notes, which we do not deem important to this case]." Also, portion of the statement of facts in cause No. 1,311, viz.: "The patent to Geo. Allen for 198 acres of land, dated — day of —, 18—, the field notes of which are as follows [giving the field notes]." Plaintiff also read in evidence the charge of the court in cause No. 1,311, which explains the suit, as follows: "This is a suit brought by plaintiff to recover of defendants the tract of land described in his petition, situated in Bell county; alleging the same to be a part of the Joseph Washington one-third of a league, patented to Jos. Washington in 1854; claiming title to said land under said Joseph Washington patent, and the meane conveyances down to himself, in evidence before you. The defendants claim [title] to the land in controversy under patent issued to Ellsha

Allen, assignee of George Allen, for 198 acres, July 6, 1871, and conveyances to themselves under said patent, in evidence before you; and they deny that the land they claim in controversy is embraced within the boundaries of said Washington one-third league. The principal and only question for your determination in this case is one of boundary. If the land in controversy is included within the boundaries of the said Joseph Washington one-third league survey, then the plaintiff is entitled to a verdict in his favor; but if the land claimed by defendants, in controversy, is not included within the boundaries of said one-third league grant, then in such case defendants are entitled to a verdict in their favor; and upon this issue the burden of proof is on the plaintiff to show, by evidence reasonably satisfactory, that the land claimed by defendants is embraced within the boundaries of said Washington one-third league grant." The charge then proceeds to instruct the jury as to the rules governing boundary, and questions of boundary, and submits no other issue, having instructed the jury peremptorily as to title.

#### Opinion.

The first and third assignments of error relate to the same subject, and will be considered together. The first assignment, in effect, complains of the ruling of the court in sustaining exceptions of defendant, Freeman, to the first amended original petition of McCray in cause No. 3,159, because the allegations of the petition show that the writ of possession, execution of which was sought to be enjoined, was issued upon a judgment for a tract of land, in an action of trespass to try title, filed December 2, 1878, by Freeman, as plaintiff, against McAninch and McCray, as defendants (No. 1,311), pending which cause, on the 17th day of February, 1879, Freeman conveyed the land in suit to one Solon Joins, and, by mesne conveyances, McCray, on the 12th day of December, 1882, acquired title to the land; and because it appears from the petition that the title under which McCray claims the land was not in issue in suit No. 1,311, and McCray was entitled to the possession of the land, notwithstanding the judgment in cause 1,311. The third assignment is to the same effect, and, more particularly, that the court erred in sustaining defendant's general demurrer and special exceptions of stale demand, and statutes of limitation of 4 and 10 years, to the first amended original petition in cause 3,159,—the facts alleged being substantially the same as alleged in the original petition,—and because the facts alleged in the amended petition exhibited a case which entitled plaintiff to equitable relief. The original petition, as appears from the amendment, was filed October 9, 1888,—more than four years after the judgment was rendered in cause No. 1,311, decreeing title to Freeman. The original petition is not in the record. The suit, by the amended pe-

tition, was to amend the judgment in cause No. 1,311, and to correct the same so that it would not include in the recovery the 134½ acres now in suit. It (the amendment) was filed January 12, 1895. It is predicated upon the fact that, pending the suit No. 1,311, McCray became the owner of the 134½ acres of land included in the recovery, and that the only question tried was one of boundary, the title not being litigated. There is no proposition under the third assignment of error, but there is one under the first and second, considered together, which asserts that in the action of trespass to try title the judgment rests upon the title held at the beginning of the suit, and if, pending the suit, the plaintiff mortgages the land in controversy, defendant can buy it in on foreclosure, or acquire it through the conveyance made by plaintiff, and the title thus obtained will inure to his benefit, notwithstanding the fact that subsequently judgment is rendered in a suit for plaintiff for the land, against defendant, and such judgment does not conclude the defendant to set up and maintain the title so acquired. From the statement made under the third assignment, we infer that plaintiff in error complains of the court's sustaining the exceptions which invoke stale demand and limitation. The petition does not show reasonable diligence in bringing the suit to reform the judgment in suit 1,311, nor is any excuse assigned for the failure to move for a new trial before the adjournment of the court rendering the judgment. It was rendered October 5, 1883. The case was appealed to the supreme court, and was there affirmed April 29, 1887. No steps were taken to correct the judgment until October 8, 1888, if done then, when the original suit for injunction, and to correct the judgment, was instituted. The amendment making the case as it is now presented was not filed until July 12, 1895, after the opinion of the supreme court in the consolidated causes had been rendered, reversing the judgment of the lower court. Under the circumstances, we cannot say that the court was in error in holding that the suit to reform and set aside the judgment in cause 1,311 upon equitable grounds was not within a reasonable time. *Murchison v. White*, 54 Tex. 78; *Fleming v. Seeligson*, 57 Tex. 524; *Rutherford v. Stamper*, 60 Tex. 450.

The branch of the suit for injunction was filed too late to entitle McCray to the relief sought. The statute prescribed that no injunction to stay execution should be granted after the expiration of one year, unless it be made to appear that an application for such injunction has been delayed in consequence of the fraud or false promises of plaintiff in the judgment, practiced or made at the time or after the rendition of the judgment, or unless for some equitable matter or defense arising after the rendition of the judgment. *Sayles' Rev. St. art. 2875*. We do not believe the petition shows such diligence on the part of McCray as would en-

title him to reform the judgment in cause No. 1,311, or to the injunction. The petition sets up the facts of the original suit by Freeman in cause 1,311 for the 622½ acres of land, part of the Washington one-third league, including the 134½ acres now in suit, the answer, and the judgment; that McAninch and McCray claimed the Allen 198 acres, and none of the Washington; that the issue was only as to boundary between the two surveys, which was decided against defendants; that, after final judgment, McCray surrendered to Freeman the 198 acres, and hoped to be spared further annoyance, but Freeman on the 10th day of August, 1888, had issued a writ of possession under the judgment, and placed the same in the hands of the sheriff, and under color thereof, by fraud and threats of force, intimidated the tenant of McCray (one James Huddleston), and induced him to surrender possession of the 134½ acres now in suit: that subsequently, on the 27th day of August, 1888, Freeman, being advised that the writ was void and did not authorize him to disturb the possession of the tenant, restored him (the tenant) to his former allegiance, and afterwards, on October 1, 1888, Freeman fraudulently caused another writ of possession to issue in his favor against McCray by virtue of the judgment, placed the same in the hands of the sheriff, demanding that the officer execute the same, and threatened to take possession of the 134½ acres of land, whereupon McCray was compelled to resort to his injunction suit, and the writ was granted on the 8th day of October, 1888; that it was agreed on the trial of suit No. 1,311 that only the 198 acres of land was in litigation, the question being admitted to be one of boundary, as before explained; and that it was agreed between counsel for Freeman and McCray that no judgment would be taken, except for the 198 acres, if the Allen survey, claimed by Freeman, was found to be within the bounds of the Washington survey, and, relying upon said understanding, he did not offer in evidence his evidence of title to the 134½ acres; but, notwithstanding said agreement, upon a general verdict in favor of plaintiff, Freeman prepared and caused to be entered a judgment of the court, whereby he recovered from defendant title and possession of the entire 622½ acres of the Washington survey, including the 134½ acres, which McCray had acquired subsequent to the institution of the suit by title emanating from Freeman, who was invested with title thereto, prior to the 22d day of October, 1881, on which date he (Freeman) conveyed the 134½ acres of land to S. C. Armstrong and J. B. Rowlett, who afterwards, on the 12th day of December, 1882, conveyed the same 134½ acres to him (McCray). No excuse is given or attempted, to explain the failure of defendants in suit 1,311 to file a motion for a new trial before the expiration of the term of the court; nor is any excuse offered for the long delay in seeking to reform the judg-

ment. It is alleged that McCray supposed the judgment would be entered in favor of Freeman for the 198 acres of land only, and, believing that Freeman would have the proper judgment entered, McCray was induced not to look after the judgment, as he would have done but for the agreement; but, instead of that, judgment was entered in the usual form in such cases, including all the land described in the petition, which was said 622½ acres; that McCray did not know said judgment included the title or possession of his 134½-acre tract. This averment fails to show that McCray was not aware of the fact that the judgment had been entered as it was before the adjournment of the court, so as to move for a new trial or to correct the judgment during the term. Having taken the case to the supreme court, executing a supersedeas bond for that purpose, in which the judgment was described, he was certainly advised of its form and effect many years before the suit to enjoin and reform was instituted,—so long before that, in our opinion, the court below was not in error in sustaining exceptions to it.

Plaintiff in error complains of the judgment rendered in favor of John D. Freeman in consolidated cause No. 3,137, which was tried by the court. Plaintiff in error insists that he showed title to the 134 acres of land sued for, emanating from Freeman after suit 1,311 was filed, in which he obtained judgment, after McCray had acquired the title. We cannot sustain plaintiff in error's view of the question. It is an elementary rule of practice, in actions of trespass to try title, that plaintiff, without amending his suit, cannot recover on a title obtained after suit, but that defendant can prevent a recovery against him by title acquired pending the suit, or by showing outstanding, superior, legal title in some person other than the plaintiff. It was defendant's privilege to use his title acquired from Freeman in defense of the action, and, having failed to do so, he cannot complain. No valid reason is shown by the testimony why he did not put his title in evidence. This question was settled adversely to McCray by the supreme court on the former appeal. *Freeman v. McAninch*, 87 Tex. 132, 27 S. W. 97. Chief Justice Stayton says: "Pending the former action, McCray may have acquired title to so much of the Washington survey as he now claims; but, if so, it was his right to assert it when the case was tried, and his failure to do so does not now entitle him to relief he might then, by diligence and care, have secured." We note the fact that no testimony was offered in consolidated suit 3,137 (trespass to try title, which was tried), as alleged in consolidated suit 3,159, to the effect that during the trial of suit 1,311 the parties agreed that, if the boundary question was decided in favor of Freeman, judgment should be rendered for him for only the 198 acres of the Allen survey. There was testimony to the effect that the only question to be tried by the jury was



that of the disputed boundary. Nor was there anything disclosed in the record of suit 3,187, read in evidence, by which the judgment in suit 1,311 could be corrected and reformed as claimed in suit 3,159. So the judgment in the original suit was not impeached by any legitimate testimony. The agreement that Freeman owned the Washington survey, and that McCray and McAninch owned the Allen 198 acres merely withdrew that question from the jury, and dispensed with any proof upon the respective titles of the parties; but it does not follow from this that the issue of title was withdrawn from the case to be adjudicated. The title was admitted, and dispensed with further proof, but still it was adjudicated by the verdict and the judgment. The question of boundary was dependent upon the titles of the parties, and would have been an idle controversy if the issue of title had been out of the case. The court, after the admissions of title, had nothing to submit to the jury but the issue of boundary; and he therefore correctly informed the jury as to ownership, and submitted only questions of boundary. The judgment in the former suit adjudged the title to the Washington survey to be in Freeman, and there is nothing found in the record of that suit by which the judgment can be reformed.

The only question remaining to be determined is that raised by the ruling on the trial of suit 3,137, excluding certain parol testimony of parties, which undertook to show what was the intention of the parties in an agreement on the trial of suit 1,311 that it was not the purpose of the parties to contest their respective asserted titles. This court, on that issue, decided that such testimony (that of Judge Goodrich) was admissible, and affirmed the judgment rendered; but, on error to the supreme court, our decision was reversed,—the court holding that such testimony could not be heard to dispute the judgment record. The judgment of the supreme court is now the law of the case, and we are bound by it. There was therefore no error in excluding the testimony. There was no error in the judgment of the lower court in consolidated suits 3,187 and 3,159, and they are affirmed. Affirmed.

#### FINLEY et al. v. JACKSON et al.

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

#### APPEAL—DISMISSAL—REINSTATEMENT.

An appeal dismissed for failure to make a defendant below a party to the appeal bond will be reinstated on a showing that the action was dismissed in the court below as to such defendant before judgment was rendered, and no appeal was taken from the order of dismissal, and no objection thereto was made by any of the parties.

Appeal from district court, Llano county; W. M. Allison, Judge.

On rehearing. Granted.

For former opinion, see 40 S. W. 427, 1032.

John C. Oatman, for appellants. Wm. J. Berne, Jr., for appellees.

FISHER, C. J. Appellants brought this suit by injunction against I. M. Jackson, Mrs. S. A. Bower, and her husband, F. C. Bower, and N. R. Porter, sheriff of Llano county, to enjoin the enforcement of an execution then in the hands of the sheriff. In the trial court judgment went against the appellants, from which they appealed to this court. In executing the appeal bond Sheriff Porter was not made a party, and at a former day of this term, upon motion of appellees, we dismissed the appeal for the defect in the bond in this respect. Since the order to that effect was made, the appellants made a motion for rehearing, in which they call our attention to an order entered by the trial court previous to the rendition of final judgment by that court, which order the appellants have brought up as a part of the record in this case, to the effect that the case, as to defendant Porter, was dismissed prior to the rendition of the final judgment entered in the case. There is no appeal from that order dismissing the case as to him, nor is it complained of by any of the parties. The effect of that order was to drop Porter from the case as a party; and, such being the case, the appellants, in perfecting their appeal, were not required to make him a party to the bond, unless they were complaining of the judgment dismissing the case as to Porter, and sought to have it revised in this court, which they are not seeking to do. Porter, being dismissed from the case without objection, consequently ceased to be a party, and it was not necessary that he should be joined in the appeal. Therefore the judgment heretofore rendered, dismissing the appeal, will be set aside, and the case ordered reinstated on the docket.

#### HODGE v. JONES.

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

#### ELECTIONS—INTIMIDATION.

Where, by reason of disturbance and intimidation, so large a number of voters are prevented from voting that what would have been the result of the election if they had been allowed to vote cannot be ascertained, the election will be set aside.

Appeal from district court, Robertson county; W. G. Taliaferro, Judge.

Proceeding by C. H. Hodge to contest the election of T. B. Jones to the office of sheriff of Robertson county. From a judgment setting aside the election, contestant appeals. Affirmed.

W. O. Campbell and W. I. Purdom, for appellant. Field & Taylor and J. L. Goodman, for appellee.

KEY, J. At the last general election in this state appellant and appellee were opposing, and the only, candidates for sheriff of Robertson county. Returns were regularly made from all the voting precincts of the county except Sutton precinct No. 11. As required by statute, the commissioner's court canvassed the returns, and it appeared therefrom that appellee received 2,745 votes and appellant 2,707 votes, whereupon the county judge issued to appellee a certificate of election, and he qualified as sheriff of the county. Thereafter appellant instituted this proceeding to contest said election. He admitted that the returns before the commissioner's court showed that appellee had received a majority of 38 votes, but alleged that at Sutton box, precinct No. 11, an election was held in the manner prescribed by statute, at which box he received 127 votes, and appellee received 32 votes; that, after the returns from said box were made out and signed by the officers holding the election, said returns, together with the poll lists, tally lists, and ballots were destroyed by an armed force of men, who, in the nighttime, entered the house of the presiding officer of said election, and compelled him to deliver the same to them; and that said returns, poll lists, tally lists, and ballots were not considered by the commissioner's court in canvassing the election returns. Appellant also alleged that there was a mistake in the returns from the Hammond box, and, as shown by the tally sheets, he was entitled to 10 more votes at that box than were counted for him by the commissioner's court. Other grounds of contest were set up by appellant, but, as there was no testimony bearing upon them, it is unnecessary that they be stated. Appellee, in his answer, admitted that appellant was entitled to the 10 votes claimed by him at the Hammond box; also admitted that the returns, ballots, etc., from the Sutton box were seized by a mob, and destroyed. He also alleged that for certain stated reasons the election held in the Sutton precinct was irregular, illegal, and void, and denied that the returns prepared by the managers of said election showed that appellant received 127 votes and appellee only 32 votes. He also charged that there were a number of illegal votes cast at said box. Appellee also alleged that, if appellant should be allowed all the votes he claimed at the Sutton and Hammond boxes, he would not be entitled to the office, because at Hearne voting box, in precinct No. 2, the fairness and freedom of the election were interfered with by acts of violence and intimidation; "that on the day of the election, and after the polls were opened, and before they were closed at said box, in the forenoon of the election day, when a very large number of the legal qualified voters of said precinct were in the town of Hearne, and near the polls, and for the purpose of casting their ballots as rapidly as they could approach the polls, a number of armed men, with a view of preventing said

electors casting their ballots, suddenly, and without any provocation, with guns and pistols and other deadly weapons, assaulted such voters at the polls and in the streets of Hearne, when great fear came upon the electors, and, through fear of their lives, and to escape threatened and real danger, more than 700 legally qualified electors fled in great terror and confusion from the polls through the town of Hearne, and to their several homes for safety, and did not return to the polls, and did not cast their ballots at said election." He also alleged that a large majority of the voters thus intimidated and prevented from voting intended and would have voted for him. In his supplemental petition, appellant made the following admission concerning the alleged violence and intimidation at the Hearne box: "And, further replying to the said amended answer, contestant says that it is true that a mob of armed men was guilty of the acts of violence and intimidation against the voters, and did commit the outrages against the public peace, good order, and good government complained of by contestee at the polling place at Hearne voting box No. 2, on the day and at the time and in the manner alleged by contestee." The case was tried by the court without a jury, and judgment rendered declaring the election for sheriff null and void, and directing the county judge to order another election in the manner required by law to fill said office. The contestant has appealed, and claims that the court erred in declaring the election null and void, and in not rendering judgment establishing the fact that he was legally elected sheriff of Robertson county.

There was testimony tending to show that the election was held at the Sutton box, that the returns were prepared and signed by the election officers in the manner required by law, and that appellant received 127 and appellee between 30 and 40 votes at said box. Therefore, if the intimidation which occurred at Hearne could be ignored, it may be, as contended by appellant, that he is entitled to judgment ousting appellee, and awarding the office to him. Article 1804f of the Revised Statutes of 1886 reads as follows: "Should it appear on the trial of any contest provided for in article 1801 that it is impossible to ascertain the true result of the election as to the office about which the contest is made, either from the returns of the election or from any evidence within reach, or from the returns considered in connection with other evidence, or should it appear from the evidence that such a number of legal voters were by the officers or managers of the election denied the privilege of voting, as had they been allowed to vote would have materially changed the result, the court should adjudge such election void and direct the proper officers to order another election to fill said office which election shall be ordered and held and returns thereof made in all respects as required by the general election laws of the state." It is con-

tended on behalf of appellant that the first part of this statute does not apply, because, from the testimony in the case, it is easy to ascertain the result of the election; and it is also contended that the second part of the statute has no application, because the voters at the Hearne box were not denied the privilege of voting by the officers or managers of the election. The testimony fails to show that any of the officers or managers of the election were connected with, or in any wise responsible for, the riotous conduct at Hearne, and it may be that the case does not fall within the strict meaning of the statute; but, without regard to the statute, we are of the opinion that the action of the court in declaring the election null and void is sustained by the common law on the subject. That law is announced by a text writer in the following language: "If it clearly appear that the fairness, purity, or freedom of an election has been materially interfered with by acts of violence, intimidation, or armed interference, such election should be set aside. Slight disturbances frequently occur, and are often sufficient to alarm a few of the more timid, without materially affecting the result or the freedom of the election. The true rule is this: The violence or intimidation should be shown to have been sufficient either to change the result, or that, by reason of it, the true result cannot be ascertained with certainty from the returns. To vacate an election on this ground, if the election were not in fact arrested, it must clearly appear that there was such a display of force as ought to have intimidated men of ordinary firmness." McCrary, Elect. § 515. In section 517 the same author says: "If it be made to appear that there was an armed force at the polls, and that a number of voters, sufficiently numerous to affect the result, or render it doubtful, considered the presence of such force so menacing to them as to render it unsafe for them to vote, and that they had reasonable cause so to think, and if for this reason they declined to go to the polls, the election ought to be set aside." See, also, 6 Am. & Eng. Enc. Law, pp. 358-362, and cases cited.

It was admitted by appellant in his pleadings, and proved by the testimony of witnesses, that on the morning of the election a considerable number of gun or pistol shots were fired in the vicinity of the polls where the election was being held in the town of Hearne, by persons whose identity is not disclosed by the testimony in this record; that such conduct caused quite a sensation, and prevented more than 700 electors from voting. It is asserted in appellant's brief that this disturbance was not calculated to prevent men of ordinary firmness from voting, and did not, in fact, prevent any legal elector who desired to do so from casting his ballot. The testimony shows that the persons who were intimidated and prevented from voting were colored people, and there is testimony in the record, aside from appellant's admissions,

amply sufficient to warrant a finding that the disturbance was calculated to produce in the minds of such voters of ordinary firmness apprehension of danger to themselves should they attempt to vote. Appellee put about 20 of the intimidated voters upon the stand, and they all testified that they refrained from voting on account of the disturbance referred to, and that, if they had voted, they would have voted for appellee. J. F. Lane, a witness for appellee, testified as follows: "I am a practicing attorney, and live in Hearne. On the day of the last general election, I was standing near the polls about nine or ten o'clock in the morning. All at once the shooting and hallooing began, and every one ran. I ran, too. The crowd was pretty badly frightened. It [the shooting] started up, and continued for a few seconds, 15 or 20 shots being fired, and the streets were nearly cleared. After a while they began to gather around the polls, when there was more shooting, and the streets were cleared again. The people ran over each other, and every one seemed to be thoroughly frightened. A good many of the people left the town, and some went to the suburbs, and stayed there. They never came up on the streets at all. There were some negroes who left their horses, and ran off without them. I saw others jump on their horses, and leave town. There were a good many people prevented from voting through fear. I think there was such an appearance of danger that it kept them from voting." The testimony of A. G. Taylor and John E. Bishop shows that many colored voters were frightened, left town, and did not vote. Taylor stated that a good many negroes were afraid to go up to the polls to vote; that there were 600 or 700 who wanted to vote that did not. Bishop testified that about 600 left town, and did not vote. He said he was about 250 yards from the polls when the shooting began. He said: "There was shooting all around in that part of town, and every one, both white and colored, ran; that it frightened the people, and a great many left town, and never came back at all; that the Presbyterian preacher left town, and never came back; that the negroes were nearly all scared to death. Excitement was pretty intense. The people thought there would be bloodshed. The excitement was of such a nature as to frighten an ordinary man."

Appellant stated in his supplemental petition that more than 700 qualified voters at the Hearne precinct did not vote on account of said acts of violence and intimidation. It is true that some of the witnesses did not regard the disturbance as of serious consequence, and the testimony shows that some persons present were laughing just after the shooting occurred, and appeared to regard it in the light of a joke; but the testimony above referred to, and the admissions in appellant's pleadings, justify the conclusion that it was intended to and did intimidate the voters. Appellant alleged that the voters so in

intimidated and prevented from voting would have cast their ballots for him. On this question, however, there was a diversity of opinion among the witnesses. Witnesses for appellant were of the opinion that a majority of the colored voters in the Hearne precinct were supporting and intending to vote for appellant. He failed, however, to produce a single voter to swear that he was prevented by the disturbance from voting for him. Quite a number of witnesses, the most of them colored men, who stated that they were prevented by the disturbance referred to from voting for appellee, gave it as their opinion that a majority of the colored voters in the Hearne precinct were supporting and intended to vote for appellee. It is true that appellee was running on the Democratic ticket, and appellant was the candidate on a fusion Republican and Populist ticket, and some of the witnesses stated that nearly all of the colored people in the Hearne precinct were Republicans, still some of the witnesses who stated that they themselves were colored Republicans affirmed positively that it was their intention, had they not been prevented by the violence referred to, to vote for appellee, and that such were the intentions of a great many others who were similarly situated. Appellant's witness T. C. Reagan gave it as his opinion that appellee had more influence with the colored voters than any other man in the county.

If the Sutton returns had reached the commissioner's court, and the mistake of 10 votes from the Hammond box had been corrected, appellant's majority would have been only 67 votes. There is testimony in the record, much of it given by colored witnesses, tending to show that a majority of the voters who were intimidated and prevented from voting would have voted for appellee; and, as the court filed no conclusions of fact and law, we presume that it was unable to determine which candidate would have received a majority of the entire vote of the county had there been no disturbance and intimidation at the Hearne box. There is ample testimony in the record to support this conclusion, and we would not be justified in overruling the trial court on that question.

If the intimidated voters had cast their ballots, and appellee had received a majority of 68 of their votes, he would have been elected by a majority of 1 vote, reckoning the Sutton and Hammond boxes in accordance with appellant's contention. Therefore, what would have been the result had there been a fair election at Hearne, is a matter of doubt, and in such case the courts have the power, and it is their duty, to declare the election void. It is true that appellant testified that a majority of the witnesses who swore that they were prevented by the intimidation from voting for appellee had, previous to the election, promised to vote for him. This, however, only intensified the uncertainty as to what would have been the result had there been

a fair election. When a voter promises to vote for one candidate, is prevented from voting, and then swears that he intended to vote for the other candidate, the most that can be said is that his vote is uncertain; and nothing but an actual test, wherein he will be compelled to vote for one man, will decide the matter.

Appellant charged appellee with complicity in the misconduct complained of at the Hearne and Sutton boxes, but the testimony does not sustain the charge. Therefore we decide the case upon the theory that he is not responsible for the violence and misconduct at either place. And, before closing this opinion, we desire to express in unmistakable terms our disapproval of the unlawful conduct referred to. Such interference with the right of the people to elect their officers assails the foundation of free government, and cannot be sanctioned by the courts. We limit our decision to the questions presented in the briefs, and hold that the trial court committed no error in declaring the election void, and in refusing to render judgment for appellant for the office. Judgment affirmed.

COLLARD, J., did not participate in the decision of this case.

#### DAVIS v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. Nov. 18, 1897.)

##### APPEAL—PRACTICE—TRIAL—INSTRUCTIONS.

1. An appellant who has assigned the giving of a certain instruction as error, and stated why it is so, is not restricted in argument to the reason assigned, since that is not an essential part of the assignment.

2. Where plaintiff, in an action based on negligence, has alleged several independent acts of negligence, it is error to charge that "the burden is upon the plaintiff to prove each of the material allegations in his petition," since proof of any one of the acts alleged would be sufficient.

3. Where documents which are independent evidence are attached to a deposition, they may be detached and taken by the jury.

Appeal from district court, Harris county; Samuel H. Brashear, Judge.

Action by Butler Davis against the Missouri, Kansas & Texas Railway Company of Texas. Defendant obtained judgment. Plaintiff appeals. Reversed.

J. D. Wolverton, O. T. Holt, and Joe H. Eagle, for appellant. Baker, Botta, Baker & Lovett, for appellee.

WILLIAMS, J. Appellant brought this action to recover, of appellee, damages for personal injuries sustained by him while traveling as a passenger on one of appellee's passenger trains, in a wreck of the train, alleged to have resulted from appellee's negligence. Besides the general allegation of negligence, the petition contained special averments, by which the acts of negligence

were specified. They were, in substance: First, that the defendant's agents and employees negligently operated the train; second, that defendant's roadbed was in a dangerous and unsafe condition, in that it was not properly ballasted, and was unsafe and insecure, and the cross-ties rotten; third, that the train was negligently operated at a high rate of speed; fourth, that a bridge or culvert upon which the train ran was improperly constructed and unsafe, in that it would not let the water pass under it in ordinary rain-falls.

The evidence upon which appellant relied to show negligence was directed principally to the manner in which the culvert was constructed, and it was sufficient to require the submission of the issue to the jury. There was no evidence—at least very little—to sustain some of the other charges of negligence. The court, at the request of the appellee, gave the following instruction to the jury: "You are charged that the burden is upon the plaintiff to prove each of the material allegations in his petition, entitling him to recover, including allegations of injuries to him; and the defendant is not required to disprove any of the allegations in the plaintiff's petition simply because they are alleged by the plaintiff. You are the sole judges of the weight of the evidence and the credibility of witnesses, both as to nature and extent of plaintiff's injuries and otherwise." And this instruction is assigned as error, the assignment of error giving the following reason: "Because said charge was misleading, and calculated to lead the jury to believe that there was nothing for the defendants to prove, although it set up special defenses. This should have been explained and stated in the charge." In answer to this assignment it is insisted by appellee that inasmuch as appellant, in his assignment, has undertaken to state the reasons why the assignment is erroneous, he must be restricted to the proposition there made, and will not be allowed to urge any other reason in this court. We do not understand this to be the law. All that appellant was required to do by his assignment was to specify the particular instruction complained of. The reason why it is claimed to have been erroneous forms no part of the assignment, but belongs more properly to the brief. *Agency Co. v. McClelland*, 86 Tex. 192, 23 S. W. 576, 1100.

The objection now urged in appellant's brief to the instruction is that it puts too great a burden upon the plaintiff, and we think this objection was well taken. While the plaintiff might have shown a sufficient cause of action by a general allegation that the wreck was caused by the negligence of defendant, he did not choose to do so, but elected to specify the particular acts and omissions in which the negligence consisted; and to entitle him to recover, therefore, it was necessary that the proof sustain one or more of the allegations, but it was not nec-

essary that all of them should have been proven. Proof of any one would have entitled plaintiff to recover; but it is nevertheless true that each one of them was sufficient, if proven, to entitle plaintiff to recover, and the instruction in question, when it told the jury that plaintiff must prove each of the material allegations entitling him to recover, put upon him the burden of proving them all. The general charge of the court was so shaped as to make this instruction especially mischievous. It contained nothing to inform the jury as to what were the particular facts necessary to be proved by the plaintiff. It consisted wholly of very general propositions of law, and rested the right to recover upon proof of negligence. By giving the requested charge, the court virtually instructed that the plaintiff could only show negligence, as required by the general charge, by proof of each of the allegations in the petition, the proof of which would entitle plaintiff to recover. The case is very different from that of *Cattle Co. v. State*, 80 Tex. 687, 16 S. W. 649. In that case the court charged: "The burden is upon the plaintiff to prove by a preponderance every material allegation in the petition and its right to recover. You are the exclusive judges of the facts proved, the weight to be given to the testimony, and of the credibility of the witnesses." But in that case the petition contained no material allegation which the plaintiff was not bound to prove in order to recover. The general charge of the court stated to the jury that issue on which its decision depended, and defined the facts necessary to be proven. The charge, therefore, could not have been misleading. For this reason it was held that it was not error to give it. In the present case, as we have pointed out, the petition alleged various grounds for recovery, but it was not incumbent on the plaintiff to establish all of them. Since the case is not one which the court below could properly have controlled absolutely by its charge, this error necessitates a reversal.

The court did not err, as claimed by appellant under its fifth and sixth assignments, in submitting to the jury the question whether or not the defendant had been guilty of negligence. The court did not assume in its charge, under the facts of this case, that negligence was so clearly established as to authorize the taking of the question from the jury. We think, however, the court should not have submitted the question whether or not appellant was a passenger. That was a conceded fact. This may not be such an error as would of itself require a reversal of the judgment, but the submission of such a question had a tendency to withdraw the attention of the jury from the contested issues.

The defendant, among its other defenses, set up a release executed by the plaintiff, by which, for a valuable consideration, plaintiff had relinquished all claim for damage

for injuries either to his person or property received in this wreck. The plaintiff, in order to avoid this release, alleged that it was obtained by fraud, and, further, made some allegations tending to show that at the time of its execution he was mentally incapable of contracting. Upon the questions thus presented, there was some conflict of evidence. The court, in its charge, instructed in very general terms that the release would constitute a bar, unless it was obtained by fraud, or was executed when the plaintiff was mentally incapable of contracting. The plaintiff asked for the following special charge: "If you believe from the evidence that Butler Davis made an agreement and settlement with the defendant, the Missouri, Kansas and Texas Railway Company of Texas, through its agents, by which it paid him forty dollars, and he executed a release, and that the same was to be for his baggage only, then the said release is no bar to this action, and does not affect his right to recover in this suit." This charge was properly refused, because, without condition or qualification, it sought to contradict the plain terms of the written contract. This could only be done upon the condition that the plaintiff established one of the grounds upon which he sought to avoid it. We think it true, however, that the court, in some form, ought to have given more specific instructions as to what would constitute a fraud or incapacity which would avoid the release. We do not hold, however, that the failure to do so of itself would be ground for a reversal of the judgment.

The agent, before the trial, had taken the ex parte testimony of plaintiff upon interrogatories to which were attached the release and a check which the agent had given as a consideration of the settlement, and their execution was proved by the depositions of the plaintiff. After the jury had retired, they came into court, and asked that they be allowed to take the release and check with them in their retirement. The court thereupon detached those papers from the interrogatories, and gave them to the jury. This action was excepted to by plaintiff's counsel, and is made a basis of the ninth assignment of error. The objection urged to the action was that the papers in question constituted part of the deposition which the jury were prohibited by article 1303, Rev. St. 1895, from taking with them. We do not think the objection was sound. The release and check were independent evidence, which the defendant had a right to use. They were offered in evidence along with the deposition. The fact that they were attached to the interrogatories did not destroy their character as evidence. The decisions relied on by appellant—*Snow v. Starr* (Tex. Sup.) 12 S. W. 675, and *Chamberlain v. Pybas*, 81 Tex. 516, 17 S. W. 50—do not sustain the contention here made. In those cases the papers were attached to the depositions, and

were made part of the answers of the witnesses, and were not evidence except as part of the deposition. For the error of the court in giving the special charge, the judgment is reversed, and the cause remanded. Reversed and remanded.

#### FALL v. NATION.

(Court of Civil Appeals of Texas. Nov. 11, 1897.)

##### TRESPASS TO TRY TITLE—TITLE TO MAINTAIN.

Under Rev. St. 1895, art. 5259, declaring that "all certificates for headright, land script, bounty warrant or other evidence of right to land recognized by the laws of this state which have been located and surveyed, shall be deemed and held as sufficient title to authorize the maintenance of the action of trespass to try title," the action cannot be maintained on a right lower than that acquired by survey of, as well as location on, the land.

Appeal from district court, Nacogdoches county; Tom C. Davis, Judge.

Action by J. C. Nation against H. V. Fall and others. Defendant Fall appeals from a judgment for plaintiff against him. Reversed.

Ingraham & Ratcliff and E. W. Smith, for appellant. Branch & Garrison and E. B. Lewis, for appellee.

GARRETT, C. J. The appellee, J. C. Nation, brought this suit in the district court of Nacogdoches county against H. V. Fall, the appellant, and also against J. J. Shirley, justice of the peace, and the sureties on his official bond, and against R. J. Lindsey, constable, and the sureties on his official bond, for the recovery of damages for that he was wrongfully dispossessed of a tract of land by virtue of a writ of restitution that had been illegally issued by said justice in a suit of forcible entry and detainer, and executed by said constable at the instance of the appellant, and for the recovery of the land of which appellee had been dispossessed. Upon trial in the court below a demurrer was sustained as to the justice of the peace and constable and their sureties, and they were dismissed from the suit. No appeal has been taken from the action of the court in this respect. The case was tried by jury, and resulted in a verdict and judgment against the appellant for the recovery of the land, but without damages.

The first assignment of error is upon the action of the court in overruling the appellant's demurrer to the petition, it being contended that the plaintiff did not have such a title to the land as was sufficient to sustain the action of trespass to try title. Sufficient title to maintain the action is defined by the Revised Statutes of 1895, as follows:

"Art. 5259. All certificates for headright, land script, bounty warrant or other evidence of right to land recognized by the laws of this state which have been located and sur-

vayed, shall be deemed and held as sufficient title to authorize the maintenance of the action of trespass to try title."

The petition based appellee's right to recover upon the following facts: It averred that plaintiff was in possession of the land on February 4, 1894, when he was dispossessed thereof by a writ of restitution illegally issued by the justice of the peace at the instance of the defendant. The tract of land was fully described in the petition, and was alleged to be 160 acres, with about 15 acres inclosed and improved. It was alleged that the land belonged to the state, and was vacant; that on November 14, 1881, one William Woodson made his application to file on the same under the homestead donation act, and it was surveyed for him by the county surveyor on this file on January 16, 1882; that afterwards said Woodson died, and his claim was never perfected; that on February 21, 1885, his widow, Mary Woodson, made an application to file on the land; that she sold her interest in the improvements to M. Mast, and that said Mast, as assignee, presented his application for file thereon to the county surveyor, October 30, 1889; that plaintiff was the head of a family, without any other home, and on December 1, 1893, believing the land to be vacant, he moved upon the same with the consent of said Mast, after having purchased the interest of himself and his tenant, one George Woodson, and began to improve it with the view of making it his permanent home, and of complying with the law prescribed for obtaining the homestead donation, and that thereafter, on the 18th day of January, 1894, he presented his application to the county surveyor of Nacogdoches county to file thereon and to have the same surveyed as required by law. It appears from the petition that the right of William Woodson, for whom the land had been surveyed, was never perfected; and it was not shown that any survey was made on either of the subsequent applications; nor did the appellee show that he was the assignee of a claim that had been preserved by settlement and survey. It is only shown that appellee took possession of the land with the consent of Mast. It is not averred that Mast ever settled on the land or that it was ever surveyed for him. Hence appellee did not show by his averments that he acquired any right as assignee of a prior claim, nor that it was necessary for him to have the land surveyed upon his own application. Rev. St. 1895, art. 4160 et seq. It will be seen from the foregoing averments of the petition that the land had not been surveyed upon the appellee's application, even if it should be considered that it had been located by the description contained therein. In the case of Thomson v. Locke, 66 Tex. 383, 1 S. W. 112, the supreme court, in construing the statute above copied, said that the action could not be maintained on a right lower than that acquired by location and survey. Prior to

the adoption of the Revised Statutes, the law only required the location upon the land as sufficient to authorize the action. Pasch. Dig. art. 5303. The cases cited by the appellee in support of the ruling of the court below, upon examination, do not appear to be decisive of the question here presented. Traylor v. Hubbard, 22 S. W. 241, decided by this court, was a suit by a purchaser of the land from the state against a party in possession who was claiming it under the homestead donation law and had the right of possession, and the question decided was as to the sufficiency of his possession to entitle him to perfect his claim. He was not the plaintiff in the suit, and did not have to show title sufficient to maintain the action of trespass to try title, but only the right of possession. Nor do any of the other cases cited present such a case as this. The practice in bringing suits upon this character of a claim to land has been to join the surveyor with the party asserting the adverse right, and pray for a mandamus against him to compel him to make the survey; but in this case the appellee brought the suit, which, stripped, as it was, of its character as an action of damages against the officers and their sureties, became a suit for the recovery of the land in the nature of an action of trespass to try title. The statute plainly shows that the title of the appellee was insufficient to maintain such an action. Thomson v. Locke, supra. We are therefore of the opinion that the court below erred in not sustaining the demurrer to the petition, and that the judgment of the court below should be reversed and the cause dismissed. The appellant has presented several other assignments of error in his brief. Some of them appear to have been well taken, but, since we have concluded that the demurrer should have been sustained, it becomes unnecessary to consider these questions. Reversed and dismissed.

#### BOLTZ et al. v. ENGELKE.

(Court of Civil Appeals of Texas. Nov. 10, 1897.)

#### CHATTEL MORTGAGES—FRAUD—TRUST DEEDS FOR CREDITORS—PARTIES—INTERVENTION.

Where the mortgagors remained in possession of their store after giving a deed of trust of their stock, and transacted business as usual, and the trustee never took possession, and in explanation of the mortgagors' possession there was evidence that the trustee had employed them as clerks, the question of fraud, as against creditors, was for the jury.

#### On Motion for Rehearing.

1. Where goods held by a trustee in a deed of trust for creditors are attached by a creditor of the grantor, the preferred creditors may intervene, although their interests may be fully protected by the trustee.

2. Where there was no delivery of the property to a trustee for creditors, the preferred creditors had no interest in the property as

against an unpreferred attaching creditor, even though the preferred creditors were free from fraud.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Attachment proceedings by Boltz, Clymer & Co. against Schrader Bros., in which H. O. Engelke claimed the property as trustee under a deed of trust. From a judgment in favor of the trustee, plaintiffs appeal. Reversed.

Martin & Summerlin, for appellants. Swearingen & Brooks and E. R. Guenther, for appellee.

FLY, J. On August 19, 1896, Schrader Bros., a firm in San Antonio, dealing in wines and liquors, executed a deed of trust to H. O. Engelke, as trustee, to secure the payment of a number of debts, in the order named. The goods were afterwards attached by appellants, who were creditors of Schrader Bros. when the deed of trust was executed. The trustee filed an affidavit and claim bond, and a trial of the right of property resulted. The trial judge, after hearing the evidence, instructed the jury to return a verdict for the claimant. Before the trial several of the preferred creditors were permitted, over the objections of appellants, to intervene. The only points before this court are as to the propriety of the action of the trial court in permitting the intervention and in instructing a verdict for the appellee. The intervention should not have been allowed. The creditors desiring to intervene could not do so without filing a claimant's bond. *Ryan v. Goldfrank*, 53 Tex. 356. The title to the property was in the trustee, and he was representing the creditors, and there was no necessity for the intervention of the creditors. The evidence in this case shows that the Schraders were in possession of the goods levied on. They had never quitted the store after the execution of the deed of trust, but remained therein selling goods, as before. The rule in this state is that possession on the part of the seller after the sale is not fraud per se, but is prima facie evidence of fraud, subject to be rebutted by other evidence explanatory of the possession, showing that it is consistent with a fair transaction. *Edwards v. Dickson*, 66 Tex. 613, 2 S. W. 718, and cases therein cited. The possession of Schrader Bros. was a matter, therefore, that required explanation, and the explanation given was that they had been employed as clerks. Was the explanation given a true one, and one consistent with fair dealing? This was a question of fact for a jury to determine in the light of all the circumstances and facts surrounding the case. There was evidence which tended to show that appellee had never been in possession of the goods, and that Schrader Bros. were conducting the business as they did before the deed of trust was executed. A further discussion of the facts would be improper, in

view of another trial. The cause should have been submitted to the jury under proper instructions, and the judgment will therefore be reversed, and the cause remanded.

On Motion for Rehearing.

(Dec. 15, 1897.)

We conclude that while the intervention of the creditors was not necessary, and there is nothing in the pleadings to indicate that their rights would not be fully protected by the trustee, still they could be permitted to intervene in the case, and that part of our former opinion holding otherwise will be stricken out. As stated in our former opinion, there is evidence tending to show that the goods were never delivered to the trustee, but that the grantors remained in possession of the same. If there was no delivery of the goods, no right to the goods had attached to the creditors, no matter if they were free from fraud in the matter. We recognize that it has been held in this state that the fraud of both trustee and grantor will not vitiate a deed of trust if the creditors in good faith accept. Except in so far as to allow the intervention, the motion for rehearing will be overruled.

#### CITY OF GALVESTON v. REAGAN.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 21, 1897.)

#### MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE.

In an action against a city for damages resulting to plaintiff from having cut his foot on glass in the streets, a judgment for plaintiff was proper, where the evidence showed that at the place where the glass was lying there were piles of other refuse, containing broken glass, etc.

Appeal from Galveston county court; William B. Lockhart, Judge.

Action by Pat Reagan against the city of Galveston. Judgment for plaintiff, from which defendant appeals. Affirmed.

R. W. Smith, for appellant. Jas. B. & Chas. J. Stubbs, for appellee.

GARRETT, C. J. We are of the opinion that the judgment of the court below in this case should be affirmed. In reaching this conclusion, we did not deem it necessary to pass upon the question as to the extent of the duty of the city to keep the beach clear of obstructions, and hence its liability for a failure to do so, since there was evidence to show that the glass upon which appellee cut his foot was in the street. Nor do we hold that the city would have been liable if this piece of glass had been the only obstruction in the street, for the evidence shows that, at the place where the glass was, there had been piles of night soil thrown, containing other refuse matter, consisting of broken glass, etc. The judgment will be affirmed.

<sup>1</sup> Rehearing denied.



## BLAND v. SMITH.

(Court of Civil Appeals of Texas. Nov. 16, 1897.)

## BOUNDARIES.

Where a survey of land borders on a marsh or lake, a strip of three acres of land extending into the water beyond a straight line called for by the surveyor, and shown on a map of the land, is part of such survey; and this, though the law requires the court to follow the footprints of the surveyor in determining the boundary of a given tract.

Appeal from district court, Orange county; Stephen P. West, Judge.

Trespass to try title by H. W. Bland against W. T. Smith. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Holland & Link, for appellant.

PLEASANTS, J. There is no brief in this court for appellee. The nature and result of the litigation is thus stated in brief of appellant: "On the 22d day of February, 1892, appellant, H. W. Bland, filed his original petition in trespass to try title to about five acres of land described in his petition against appellee, W. T. Smith, and alleging that he had purchased the same from the defendant, Joseph Watson, paying therefor \$200 cash, and executing to him a certain vendor's lien note for \$100, balance of purchase price, which note was past due, and had been transferred to A. Gilmer after its maturity. That Watson had executed to him his warranty deed for said premises, and that Gilmer had before that time sold said land to Watson, and executed to him his general warranty deed for same, and that, in case appellant's title should fail, then he asked for judgment over on the respective warranties of said Watson and Gilmer. Neither Watson nor Gilmer answered, but W. T. Smith, on the 25th day of April, filed his answer, consisting of a general denial, and disclaiming any interest in the land sued for, except such as might be embraced in the field notes of a certain tract described in said answer. No jury being demanded, the case was tried by the court, and judgment was rendered on the 19th day of November, 1896, in favor of appellant, for such of said land as was not embraced in the boundaries of the land claimed by appellee, W. T. Smith, in his answer, and for appellee, Smith, for such land as was claimed by him in his answer; and judgment was also rendered in favor of appellant over against his said warrantors, Watson and Gilmer. To this judgment the appellant promptly excepted at the time it was rendered, and in open court gave notice of appeal."

The appellant's contention is that the land claimed by him is a part of the Alexander Calder survey, and appellee claims the land by virtue of a location and survey of the same as public domain, and his occupancy thereof. It is strenuously, and with much force, insisted by counsel for appellant that there was no vacant land subject to location,

at the time of appellee's entry, between the Calder grant and Adams bayou, inasmuch as the marsh bordering the bayou is a part thereof, and as the bayou is a navigable stream, and the Calder field notes call for the bayou on its western boundary. We understand the law to be, as stated by counsel, that in navigable streams, in which the tide ebbs and flows, the boundary of a riparian proprietor extends to the high-water mark; and if it be, as insisted, that the marshes bordering the bayou are parts thereof, then doubtless the edge of the marsh would be the high-water mark of the bayou, and would constitute the boundary of the Calder survey. But, from the facts before us, we are not prepared to hold that the marshes are indeed but parts of the bayou. That they are affected occasionally by high tides in the bayou does not, we are inclined to think, necessarily make them such. But, from our view of the case, it becomes unnecessary to decide whether or not the marshes should be treated and held to be parts of the bayou. The suit, though in form of trespass to try title, is, in fact, one to settle disputed boundary.

The judge trying the case held, as a conclusion of fact, that the surveyor, as a matter of fact, in running the lines of the Calder survey after he left the Sabine river, made the meanders of the marsh the boundary of the land. If this be so, and as to that part of the boundary upon which the land in controversy is situated, we are of the opinion that the evidence sustains such finding. The court, we think, erred in not holding that the plaintiff should recover all the land sued for. The evidence shows that, at the point at which the surveyor first reached the bayou, the line called for, if extended its full length, would carry the survey across the bayou; which we know, as matter of law, could not be done. If, therefore, we stop at the bayou, and make it the boundary of the survey, until it intersects with the next line called for in the field notes, and continue thence in the footprints of the surveyor, except where his lines cross the bayou, and where this occurs adopt the bayou as a boundary, until it intersects with the next line called for, it is evident, we think, from the map in evidence and from the finding of the court, that the land in dispute must be held to be wholly within the Calder survey. While it is true that if we establish the boundary of the survey as above proposed a fraction of the five acres might be west of a line drawn in accordance with the call in the field notes, we think it is as clear, as matter of law, in a survey of this size, bordering on a marsh or lake, that a strip of three acres of land extending into the water beyond a straight line called for by the surveyor, and shown upon a map of the land, is part and parcel of the survey; and in so holding we do not violate the rule of law which requires us to follow the footprints of the surveyor in determining the boundary of a given tract of land. We think the court was

right in holding that the surveyor made the meanders of the marsh the boundaries of the Calder survey, and it necessarily follows that the defendant has no legal claim to the land in dispute. The judgment of the lower court is reversed, and judgment is here rendered for the appellant. Reversed and rendered.

### SIMON et al. v. STEARNS.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 28, 1897.)

SCHOOL LANDS—SETTLEMENT—TIME—ACTION TO RECOVER—PLEADING—EVIDENCE—HARMLESS ERROR—ESTOPPEL BY DEED.

1. In an action to recover school land on a certificate, a petition is sufficient, if it contains the allegations required by statute in a complaint in trespass to try title.

2. In an action to recover school land on a certificate, it is not error to admit in evidence the applications made by plaintiff for the purchase of the land.

3. Nor to admit in evidence the application made by plaintiff for the purchase of the adjoining portion of the same section, on which he had settled, to show his right to purchase the portion in controversy.

4. In an action to recover school land on a certificate, the admission in evidence of a former rejected application made by plaintiff for land, only part of which was the land in controversy, was harmless error.

5. Where two persons assert claims to a section of school land, but neither has perfected his title, and one gives to the other a deed conveying all his rights, title, and interest to one-half of the land, in consideration of a compromise of the controversy over said land, with a warranty clause to the effect that neither he, nor his heirs, nor persons claiming under him, shall at any time claim any right or title to said premises, the grantor is not estopped thereby from afterwards acquiring from the state a title to the land covered by the deed.

6. One who settles on a section of school land is entitled to purchase all or any part of it.

7. Where the husband was the only person making application for the purchase of school land, the fact that the wife dies does not entitle their children to another year's time in which to make payment for the land, under the statute which makes such provisions for the heirs when the purchaser dies.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Action by W. D. Stearns against J. P. Simon and his minor children, Fred and Hattie Simon. Judgment was rendered for plaintiff, and Thomas J. Russell, guardian ad litem for the minor defendants, appeals. Affirmed.

Tom J. Russell, in pro. per.

WILLIAMS, J. Appellee, Stearns, brought this suit to recover of J. P. Simon and his two minor children, Fred and Hattie Simon, the east half of section No. 4, surveyed for the school fund by the H., T. & B. Railway Company, by virtue of certificate 5/279. The petition contained only the allegations required by statute in an action of trespass to try title. Appellant, Thomas J. Russell, was

appointed by the court guardian ad litem for the minor defendants. The defendants answered jointly, seeking judgment against plaintiff, not only for the east half of section 4, but for the whole of it, and setting up their claims as will appear further on. Judgment was rendered for plaintiff for the east half of the section, and all of the defendants gave notice of appeal, but J. P. Simon failed to properly perfect his appeal, and the cause is before us upon the appeal of the guardian ad litem for the minors.

The titles of the parties will be best understood if stated in the order of time in which the facts out of which they grew transpired. On the 6th day of March, 1894, J. P. Simon was the head of a family, consisting of wife and children. He then became an actual settler, with his family, on section No. 4, locating his improvements on the eastern portion thereof. On March 12, 1894, his application to purchase the section, accompanied by one-fortieth of the purchase money, required as the cash payment, was filed in the land office. His application was rejected by the commissioner, for the reason stated that the land had already been sold to Wynne and Bordages, who had transferred their claim to Stearns, as shown by the transfer in his office. An abstract from an entry in the land office also shows that Stearns had made application for the purchase of the section, March 3, 1894, but the papers relating to this claim of Wynne and Bordages and that of Stearns are not in evidence, and it is not further explained. There was no settlement on the land prior to that of Simon. The commissioner, upon rejecting Simon's application, returned him the cash payment, which was received and kept by Simon, and no further effort was made by him to perfect this claim. He remained upon the land, however; and, there being a dispute about it between him and Stearns, they made a compromise in the summer of 1894, and exchanged deeds, the substance of which is thus stated in the record: The deed from plaintiff and his wife bears date July 23, 1894, and was properly acknowledged same day, and expresses a consideration of \$52, and a further consideration of a compromise of the controversy therefore between plaintiff and defendant J. P. Simon as to said section No. 4. The conveying clause in said deed is to defendant Jacob P. Simon, as follows: "Do by these presents bargain, sell, release, and forever quitclaim unto the said Jacob P. Simon, and unto his heirs and assigns, all my right, title, and interest in and to" the east half of said section No. 4. The warranty clause is as follows: "So that I, the said Wilfred D. Stearns, nor my heirs, nor any person or persons claiming under me, shall at any time hereafter have, claim, or demand any right or title to the aforesaid premises or appurtenances, or any part thereof." The deed from Jacob P. Simon and wife to plaintiff bears date July 23, 1894, is properly acknowledged for record,

<sup>1</sup> Writ of error denied by supreme court.

expressed the consideration to be a compromise of the controversy theretofore existing between plaintiff and Simon relative to said section No. 4, is similar in its terms to the one from plaintiff to defendant, and conveys to plaintiff the west half of said section No. 4. After these deeds were exchanged, Stearns, during 1894, built a fence from the northern to the southern line of the section, intended to divide it equally, but which, by mistake, was put about 60 feet upon the east half at the south side. Stearns also caused a house to be built on the west half in 1894, and his family occupied it awhile, but did not settle there permanently until later, as stated below. On October 20, 1894, Simon made out an application for the purchase of the east half of the section, which was filed in the land office December 11, 1894. It was complete in all respects except that the money required for the cash payment did not accompany it. On December 13, 1894, the commissioner, by letter, notified Simon of the receipt of his application, stating, which was true, that the treasurer had been notified to accept first payment on same of \$16.06, which amount must be sent to the state treasurer, if not already sent, before award can be made. On or about April 20, 1895, Stearns, with his family, settled permanently on his improvement of the west half of the section, and has since resided there. About April 25, 1895, he presented to the commissioner an application to purchase the east half of the section and the east half of the west half of the same. He had sold the west half of the west half to another person. The commissioner rejected this application, informing Stearns that separate applications must be made for the parcels. On the 27th day of April, 1895, Stearns filed two separate applications, in compliance with the ruling of the commissioner, complying in all respects with the requirements of the statute for the purchase of such lands. On May 2, 1895, the state treasurer notified the commissioner that Simon had not forwarded the money for the cash payment upon the east half of the section; and on the same day the commissioner wrote Simon that his application was rejected, because of such nonpayment. On May 4, 1895, the commissioner notified Stearns that the east half of the section was awarded to him upon his application. The indorsement of the award upon the papers bears date May 7, 1895. On May 17, 1895, the commissioner received from Simon the money for his cash payment. It was forwarded by the commissioner to the state treasurer, with instructions to return it, as the application had been rejected. This was done by the treasurer on June 6, 1895, and on June 12, 1895, the money was returned to the treasurer by Simon, with the request that it be kept on deposit until withdrawn by him, as he had statements and affidavits to file with the commissioner which would cause him to cancel the award to Stearns. Since

their first settlements on the land, both parties have continued to reside there, and Stearns has made all payments and complied with all requirements of the law.

The first assignment of error complains of the rulings of the court in refusing to sustain the exception to the petition. The petition contained all the necessary allegations for the action of trespass to try title, and it was therefore not subject to exception.

The point which appellant seeks to make, that the proof of title was not sufficient to authorize the recovery, could only arise after the evidence was developed, and the real question is whether or not the plaintiff's evidence supports his allegation. If the title he shows was sufficient to entitle him to possession as against defendant, it was sufficient to sustain the action he brought. If he had complied with the laws regulating the purchase of school land, this entitled him to possession against every one, unless some prior right was shown. This question, therefore, necessarily depends upon the decision of the main issue in the case, as to whose claim to the land is the superior one. The court did not err in admitting in evidence the several applications made by plaintiff for the purchase of the land. His application for the purchase of the east half of the section was the basis of his title, and was therefore admissible. His application for the purchase of the other land was admissible to show his right to that portion of the section upon which he had settled, and his consequent right to purchase the portion in controversy. The application in which he sought to purchase both tracts simply aided in the development of the transaction, and, whether necessary or not, was harmless to the defendant. It may be admitted that by his application of March, 1894, Simon acquired the right to purchase the land, superior to any other claim; but the uncontroverted evidence in the case shows clearly that he did not perfect his right under that application, but voluntarily abandoned it. When the money was returned to him, he accepted and kept it. He subsequently relinquished his prior claim to the west half to Stearns, and still later he filed another application for the east half. At the time he filed such application for the east half, he had the right to purchase it by complying with the law; and this right was recognized by the commissioner, and full opportunity was given him for its exercise; but he could only mature his application into a right to the land by payment of the money required by the statutes to be deposited. He failed to make this payment, and his application was finally rejected, because of such noncompliance. Although he had made application to purchase the land, inasmuch as he failed to do one of the things required by law to perfect his right, the land remained a part of the unsold school land of the state, subject to be sold to any one who would make application in accordance with the law. The

plaintiff made such an application while the land was subject to be sold, and did everything which the law required of one desiring to purchase the school land. All the right of the state to sell the land remained in full force. It is evident that the right to it was acquired by Stearns when his application was accepted, unless he was in an attitude which precluded him from purchasing. If he was precluded from purchasing, it was by force of the compromise which had been made between him and Simon, and of the deeds exchanged between them. These deeds show on their faces that each party was asserting a claim to the section, and that their purpose was to compromise and adjust the claims which they then asserted. The granting clause of the deed of plaintiff to Simon in terms conveys only his right, title, and interest to the east half of the section. The warranty clause, in view of the language of the granting clause, and the recital, in the deed, of the purpose for which it was made, should, in our opinion, be held to operate only upon the subject of the conveyance,—that is, the claim which Stearns then had,—and to bind him and his heirs not to assert such claim thereafter. It is obvious that there was no purpose on the part of either of these persons to convey to the other a new title to any part of the land, or that either undertook to assure the other against anything but the subsequent assertion of claims theretofore existing. Such being the case, it cannot be held that a title afterwards acquired by one would pass by estoppel to the other. Nor is the case like those, sometimes found in our Reports, in which one party has assumed the duty to acquire the title from the state for the other. Stearns did not assume any such duty by this contract. At the time this compromise was made, as far as this record shows, the title to the whole section, and a perfect right to sell it to any one, remained in the state. By the compromise, each party freed himself from the claim previously asserted by the other; but the land remained open to purchase, and either, in order to acquire the right, was bound thereafter to do the acts which the law required in order to entitle him to a purchase. We cannot see that, if either failed to do this, their settlement of a prior controversy precluded the other from doing so.

It is urged that, as Stearns was not an actual settler upon the east half of the section, he was not, at the time he made his application, entitled to purchase it; but we think that the commissioner of the land office correctly ruled that his settlement upon the section entitled him to purchase all or any part of it. It is further alleged that inasmuch as Mrs. Simon died in September, 1894, the statute allowed her children one year's time in which to make payment for the land. Such provision, where a purchaser dies, is made in behalf of his heirs. But Mrs. Simon was never a purchaser. The only person who

made the application was Simon, and Mrs. Simon's death could not affect the proceeding by which he was to complete his purchase. The judgment of the district court is correct, and is affirmed. Affirmed.

#### HARRIS COUNTY v. STEWART.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 28, 1897.)

##### CITY ATTORNEYS—FEES—PLEADING.

The city attorney of Houston sued to recover his fees from Harris county for the prosecution of criminals in the recorder's court of that city. It is the law that, if there was a county attorney in Harris county, the city attorney had no right to represent the state. *Held*, that the petition was insufficient in not alleging that there was no county attorney in said county.

Appeal from district court, Harris county; S. H. Brashear, Judge.

Action by John S. Stewart against Harris county. From an order overruling a general demurrer to the plaintiff's petition, defendant appeals. Reversed.

F. L. Schwander and John G. Tod, for appellant. W. H. Wilson and Lock McDaniel, for appellee.

WILLIAMS, J. Upon careful examination of the record, we find that it does not sustain the statement, made in the certificate to the supreme court, that no complaints or affidavits were filed with the recorder against the parties who were tried and convicted as stated. What we took to be a statement to this effect was in the testimony of the officer giving what appeared on his record, but this we find, on closer examination, to be only a statement of the contents of his docket. We cannot assume that no affidavits were made, and other parts of the record indicate that there were. The opinion of the supreme court holds (41 S. W. 950), that, if there was a county attorney in Harris county, the city attorney had no right to represent the state, and consequently no right to recover the fees sued for. It results from this ruling, we think, that the general demurrer to the petition should have been sustained. It does not allege that there was no county attorney in Harris county, nor does it allege that there was a resident criminal district attorney. If this last fact would give rise to the inference that there was no county attorney, as to which we express no opinion, it should have been alleged, as the court could not judicially know the residence of the criminal district attorney. As no allegation was made upon this point, the plaintiff failed to show a state of facts which entitled him to appear and represent the state in the prosecution; and, consequently, under the decision of the supreme court, he failed to show the right to recover the fees sued for. For the error of the court below in overruling the general demurrer, the

<sup>1</sup> Rehearing denied.

judgment is reversed, and the cause remanded. The decision of the supreme court disposes of all other questions. Reversed and remanded.

### MATTFELD v. HUNTINGTON.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 4, 1897.)

DEEDS—RECORDATION—DESTRUCTION—NOTICE—POSSESSION—LANDLORD AND TENANT—EVIDENCE—APPEAL—RECORD.

1. The record of a deed in but one of the two counties in which the land lies is notice of the grantee's title to the part of the land lying in the other county.

2. The record of a deed was notice, though it had been destroyed by fire, and there was no record in existence at the time of a subsequent purchase of the land, where the deed was again recorded after the purchase, and before the passage of the act relating to destroyed records.

3. The possession by a lessee of a part of a tract owned by the lessor is notice of the latter's title to the entire tract.

4. A lessee held over after the expiration of his lease, and after his death his heirs occupied the land. Both lessee and his heirs claimed the land as their own, but no such claim was ever brought to the lessor's knowledge. *Held*, that such continued occupation, although for a period of more than 20 years from the date of the lease, did not terminate the relation of landlord and tenant between the lessor and his successors and such occupants, and it made no difference that the lessor did not acquire title until after the tenancy began. Therefore, as against a purchaser of the premises, the occupancy was notice of the lessor's title.

5. An assignment of error based on the refusal of the court to consider a will as evidence will not be considered, where neither the bill of exceptions nor the statement of facts contains a copy of the will, although the record contained a copy of a paper purporting to be a copy of the will and its probate.

6. At the time a copy of a foreign will was submitted in evidence, opposing counsel, without stating the nature of his objection, stated that before the trial was finished he would interpose an objection looking to the exclusion of said will, which he did after all the evidence was in, grounding his objection on a defect in the recording of the copy and its probate. The objection being sustained, the defect in the record was corrected; and before the arguments of counsel were finished the copy was again offered, but rejected by the court. *Held* an abuse of its discretion amounting to positive error.

Appeal from district court, Angelina county; James T. Polly, Judge.

Trespass to try title by Brune Mattfeld against O. P. Huntington. There was a judgment for defendant, and plaintiff appeals. Reversed.

Wheeler & Chesnutt and John C. Walker, for appellant. T. W. Ford and Jones & Wheeler, for appellee.

GARRETT, C. J. This was an action of trespass to try title, to recover 2,252 acres of land, part of the L. S. Walters league, in Angelina and Jasper counties. Plaintiff (the appellant in this case) claimed title both by conveyance from the original grantee, and under the statutes of limitations of 3, 5, and

10 years. The defendant answered by plea of not guilty, and pleaded possession and title to the land claimed by plaintiff, and prayed to be quieted in his title, and for cancellation of the deeds under which plaintiff claimed. There was a trial without a jury, and judgment was rendered in favor of the defendant, and also on his plea in reconvention against plaintiff, Brune Mattfeld, for the title and possession of the land claimed in the suit. The league was granted to L. S. Walters on March 10, 1835, and a translated copy of the original grant was filed for record in Angelina county on January 1, 1873. On September 10, 1836, L. S. Walters conveyed the entire league to Isham Palmer by his deed, which showed, by the file marks upon it, that it had been filed for record in Jasper county on August 15, 1843, and was recorded in Book G, p. 41. It also showed that it had been filed for record again in Jasper county on September 24, 1859, and recorded in Book F, pp. 202, 203. It was also filed for record and recorded in Angelina county March 8, 1860. In October or November, 1849, the court house of Jasper county, and all the county records, were destroyed by fire. Pending the time that there was no actual record of the deed from Walters to Palmer, the former executed a deed of conveyance for said league to W. H. Cundiff, dated May 16, 1855, which was filed for record in Angelina county May 17, 1855. Cundiff obtained also a conveyance from Isham Palmer, dated December 28, 1859, for the north two-thirds of the league, and thereby acquired a perfect title to the same; but this deed was not recorded until March 27, 1893. In the meantime, in December, 1858, Cundiff went upon the land with a surveyor, and caused the league lines to be run out. He found two persons settled upon it with the intention to pre-empt, under the belief that it was vacant public domain. Their names were Alonzo Smith and Minor Best. He executed contracts with them by which he leased to Smith 200 acres thereof for the term of three years from January 1, 1859, and agreed to sell him the land at the end of that time at a stipulated price. He made a similar contract with Best, by which he leased him 120 acres, with an agreement to sell. The Smith tract was surveyed, and the lines thereof defined, by the county surveyor, Gibson, who had run out the lines of the league for Cundiff. The evidence in the record fails to show how long Best held under his lease, but it is shown that Smith held the land occupied by him until 1874, when he died. It was afterwards held for the benefit of his children for a number of years, and finally by a married daughter, who was still in possession of it in 1894, —about the time this suit was filed. It was shown by the defendant that, after the expiration of the term of his lease, Smith made declarations to the witness Jordan, claiming the land as his own, and that after his death it was claimed by his heirs, but there was no

<sup>1</sup> Writ of error denied by supreme court.

evidence that Cundiff had notice of any such claim. Appellant's title was derived from Cundiff, who in 1868 executed a deed of trust to W. P. Ballinger and A. Drouilhet, in favor of a creditor. This trust deed was filed for record in Angelina county August 4, 1868. Ballinger sold the land under the deed of trust, and it was bought by and conveyed to Gustave Ranger. The latter conveyed it to Louis Fatman. He died, and left a will, which was probated in the surrogate's court in the county and state of New York. Appellant offered in evidence a certified copy of this will and its probate, which was at first admitted by the court, but afterwards excluded, on the motion of the appellee, on account of the defective registry thereof in the records of Angelina county. To the action of the court in excluding this evidence, the appellant objected, and has presented it as a ground for the reversal of the judgment below. The appellant then put in evidence a deed from Solomon Fatman and Simon Fatman, executors of the last will of Louis Fatman, to himself, for the land in controversy. This was appellant's title. The lease above referred to, between W. H. Cundiff and Alonzo Smith, was in writing; but, having been lost, its contents were shown by oral testimony. Appellee's title was deraigned as follows: He put in evidence the deed from Walters to Palmer. A copy of the will and probate thereof of Isham Palmer, bequeathing his estate entirely to his wife, Laura E. Palmer. The date of the will was August 14, 1871. A deed from Laura E. Palmer to Mason D. Cole for the Walters entire league. Deed from Mason D. Cole to P. S. Pfouts, dated August 8, 1881, for 2,952 acres of the north part of said Walters league. A power of attorney from P. S. Pfouts to W. A. Stewart to sell the north two-thirds, 2,952 acres. A deed from P. S. Pfouts, by his attorney, W. A. Stewart, to J. W. Davis, dated September 15, 1881, filed for record April 1, 1882, for the 2,952 acres. A deed from M. D. Cole to J. W. Davis, dated October 25, 1881, filed for record April 1, 1882, conveying the remaining one-third of the league. A deed from J. W. Davis to P. B. Watson, dated January 7, 1882, for the entire Walters league. A deed from Watson to the appellee. It was shown that J. W. Davis paid a valuable consideration, to wit, one dollar per acre, for the land, and had no actual notice of the deed of Isham Palmer to W. H. Cundiff. Appellee claims that he acquired the land as an innocent purchaser. Appellant contends that the occupation of the land by Smith, and after his death by his family, as the tenants of Cundiff and his subvendees, was notice of the conveyance from Isham Palmer to W. H. Cundiff.

The record of the deed of Walters, the original grantee, to Isham Palmer, in Jasper county, for the league, was notice of Palmer's title, although only a part of the land was situated in Jasper county, and although the records had been destroyed by fire, and there

was no actual record in existence at the time of his purchase from Palmer. Pasch. Dig. art. 4980; *Fitch v. Boyer*, 51 Tex. 336. The deed had been registered some years before the passage of the act of the legislature requiring another record of a deed thus destroyed, and had been again recorded before the passage of that act. *Barcus v. Brigham*, 84 Tex. 538, 19 S. W. 703. Soon after the beginning of the tenancy of Smith, Cundiff procured a deed from Palmer which cured the defect in his title to the land in controversy, but, having neglected to record it, there was no record to give constructive notice of it; and, when he bought, Davis had no actual notice thereof. It is sought, however, to bring notice to Davis of this deed by Cundiff's possession of the land through his lease to Smith as above stated. *Hawley v. Bullock*, 29 Tex. 216. Smith had possession only of 200 acres of the land, which was defined by metes and bounds. The question, then, is whether or not possession of a part of a larger tract of land by a tenant is notice of title of the owner to the larger tract. This seems to have been definitely settled in the case of *Watkins v. Edwards*, 23 Tex. 443. In that case the tenants held only small tracts, as lessees of the owners of a much larger tract; and, although the question was not discussed in the opinion, it was directly involved in the decision of the case. It remains, then, to inquire whether or not the continued possession of the land in behalf of the children of Smith, and afterwards by his daughter, would continue the relation of landlord and tenant between Cundiff's vendees and them. The relation of landlord and tenant attaches to all who may succeed the tenant, immediately or remotely. *Flanagan v. Pearson*, 61 Tex. 302; *Oury v. Saunders*, 77 Tex. 278, 13 S. W. 1030. This seems to be carrying the doctrine rather far, since more than 20 years had elapsed from the date of the lease until the purchase by Davis, and the parties in possession when Davis purchased were claiming the land as their own, though no repudiation of the Cundiff title had been made by them, that Cundiff ever heard of, or was shown to have been known to Davis; yet it is the logical deduction from the authorities. It is conclusively settled by the decisions of this state that a holding over by a tenant continues the tenancy, and that the tenant cannot hold adversely to the title of the landlord, without open repudiation thereof; nor can he dispute his title, or claim under any other, without surrendering the premises. *Juneman v. Franklin*, 67 Tex. 411, 3 S. W. 562. It is true that Cundiff's deed from Palmer was not executed until after the tenancy commenced, but it can make no difference that the tenancy did not commence with the title. *Wade, Notice*, §§ 302, 304. From the foregoing, the conclusion is that Davis had notice of this deed, and was therefore not an innocent purchaser.

In order to complete the appellant's chain of title, it was necessary to introduce the will of Louis Fatman. The bill of exception taken at the trial to the action of the court in refusing to consider the will as evidence does not furnish this court a copy thereof, so that it could be seen whether or not it authorized the conveyance, and any injury was done to appellant by refusing to consider it. There is a paper copied in the record which purports to be the will and the probate thereof, but we cannot consider it, because it is not made a part of the bill of exception, nor of the statement of facts. However, no objection was made to the will on account of its insufficiency to authorize the conveyance of the land by the executors; and the court refused to consider it only upon the ground that it had not been duly registered, with the probate thereof, and no doubt considered it sufficient in terms to authorize the conveyance. It was error to sustain the objection of the appellee, and to refuse to admit the will in evidence. The facts attending the exclusion of the copy of the will were that, when it was first offered by the appellant, it was admitted, with the statement on the part of the counsel for appellee that he would interpose an objection later on, perhaps, to exclude; and when all the evidence on both sides had been concluded the appellee then moved to strike out the certified copy of the will and the probate thereof, for the reason that the copy of the will only appeared to have been recorded in the records of Angelina county, and that the copy of the probate did not appear to have been recorded. The court sustained the motion, and struck it out. Appellant then moved for a continuance, on the ground of surprise, which the court refused. It was then Saturday evening, and the court adjourned until the next Monday; and when the case was resumed on Monday the plaintiff, who had in the meantime had the copy of the will and the probate thereof duly recorded, again offered it in evidence, but, on objection being made, the court again refused to admit it. The defendant's counsel had concluded his argument, but the trial had not ended, and no injury could have been done by receiving the evidence. The appellee failed to state his objection when the copy was first offered. If he had done so, the objection could have been cured with a little delay. A trial judge is invested with much discretion in enforcing the rules to be observed in the order of the trial of a case, but the appellant has made it appear in this case that this discretion was abused, to his injury, and such abuse was positive error. For the reason given, the judgment of the court below must be reversed, and the cause remanded for another trial.

Appellant also complains of the admission in evidence of the judgment rendered by the district court of Angelina county, December 2, 1880, in the case of Laura E. Palmer

against H. P. Spier, W. H. Cundiff, and others, for the recovery of the Walters league of land. In this there was no error, because the appellant had put in evidence the conveyance from Spier to William A. Anglin and Mary Anglin for 640 acres of the land; and it was also immaterial, and the court could only have disregarded it. The possession of the land in controversy only extended to the 200 acres, so far as the record shows; and, even if the plaintiff could have availed himself of that, no description of the tract is given. Reversed and remanded.

#### O'CONNOR v. VINEYARD et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 8, 1897.)

#### DEED—RESERVATION—GUARDIAN'S SALE—TRANSCRIPT OF RECORD—BONA FIDE PURCHASER—NOTICE—TRESPASS TO TRY TITLE.

1. Reservation in a deed, of the right to control as guardian said estate for the benefit of the grantee, gives the grantor no power to sell the property.

2. A decree of confirmation of a sale of a ward's property by his guardian is void, where the record of the proceedings in the guardianship showed that there was no order of sale, but that the sale was made before the commencement of the guardianship.

3. A certificate of a clerk of court that "the foregoing 25 pages of manuscript contain a true and correct copy of all the proceedings had in the probate court \* \* \* in the estate of the minors \* \* \* as they appear of record in volume 2, transcribed probate records of said county, on the margins thereof," is sufficient to show that the record purported to be a complete transcript of all the proceedings in the estate.

4. Where parents sell as their own land of their children, for whom they are afterwards appointed guardians, the children can recover the lands without returning the money received from the purchaser; it not being shown that the money was expended for their benefit, or that their parents, whose duty it was to support them while minors, had been unable to do so.

5. One is charged with notice of equities shown by recitals in his chain of title.

6. Plaintiff in trespass to try title may recover though having only an equitable title at commencement of the action, the legal title having thereafter been conveyed to her.

Appeal from district court, Aransas county; M. F. Lowe, Judge.

Action by Samuel C. Vineyard and another, guardians of Lillian Vineyard, against D. M. O'Connor. Judgment for plaintiffs. Defendant appeals. Affirmed.

This was an action of trespass to try title, brought in the district court of Aransas county by the appellees, Samuel C. Vineyard and his wife, Anna W. Vineyard, as guardians of their minor daughter, Lillian Vineyard, to recover of the appellant, D. M. O'Connor, certain lands situated in the said county of Aransas. The appellant disclaimed as to a portion of the lands sued for, and the controversy was about 4,214 acres, which comprised a part of several tracts described

<sup>1</sup> Writ of error granted by supreme court.

in the petition. The trial was before the court without a jury. Appellees recovered  $\frac{11}{32}$  of the land. The case was before this court, and the supreme court on a former appeal, which will be found reported in 35 S. W. 1084, and 36 S. W. 424.

J. W. Byrne was common source of title, and at one time owned about 13,500 acres of land upon Lamar peninsula, in Aransas county, about 200 acres of which had been laid out in blocks and lots, and called the town of Lamar. The entire property was known as the "Lamar Property." The seven tracts of land sued for are correctly described in the petition. The tract of 4,214 acres in controversy is composed of several tracts, which are correctly described in the defendant's answer. The title of the plaintiff Lillian Vineyard was deraigned by the following conveyances: (1) J. W. Byrne to William G. Hale and Ebenezer Allen, dated February 12, 1850, deed duly acknowledged and recorded, by which Byrne conveyed to Hale and Allen, jointly, an undivided  $\frac{1}{2}$  of all the lands described in the petition. (2) James Byrne to R. B. Marcy, dated April 1, 1856, an undivided  $\frac{1}{32}$  interest. (3) James W. Byrne to Erastus Williams, of date April 26, 1856, an undivided  $\frac{1}{32}$  interest. (4) James W. Byrne to Samuel Colt and J. B. Colt, dated April 2, 1856, an undivided  $\frac{1}{32}$  interest. Receipt of purchase money was acknowledged. (5) William G. Hale and Ebenezer Allen to Samuel Colt and J. B. Colt, an undivided  $\frac{1}{8}$  interest, dated April 22, 1856. Full payment of purchase money acknowledged. (6) James W. Byrne, William G. Hale, and Ebenezer Allen to Samuel Colt, an undivided  $\frac{1}{12}$  interest, dated January 30, 1858. Full payment of purchase money acknowledged. (7) James W. Byrne to Samuel Colt, an undivided  $\frac{2}{16}$  interest, dated April 2, 1861. Full payment of purchase money acknowledged. (8) William G. Hale and Ebenezer Allen to Samuel Colt, dated April 2, 1861, an undivided  $\frac{2}{16}$  interest. Full payment of purchase money acknowledged. From the foregoing conveyances it will appear that the title to the land became vested in undivided interests, as follows: R. B. Marcy and Erastus Williams, each,  $\frac{6}{144}$ ; J. B. Colt and Samuel Colt, jointly,  $\frac{24}{144}$ ; Samuel Colt, in his own right,  $\frac{6}{144}$ ; James W. Byrne,  $\frac{22}{144}$  and one-half of the town lots; William G. Hale and Ebenezer Allen, jointly,  $\frac{12}{144}$  and one-half of the town lots. All of the foregoing deeds were duly acknowledged and recorded, and those that follow were also. Dates of acknowledgment and record will not be stated, unless they are material facts. (9) Sheriff's deed, dated May 24, 1858, conveying to James W. Byrne, William G. Hale, and Ebenezer Allen, jointly, the interest of J. B. Colt. It was admitted by the parties that this deed conveyed title according to its purport. This conveyance vested in Byrne an undivided interest of  $\frac{24}{144}$ , making his entire interest  $\frac{27}{144}$ . (10) On the 8th day of August, 1870,

Elizabeth H. Colt and others, as the heirs and legal representatives of Samuel Colt, executed a quitclaim deed to William G. Hale, Sylvira J. Allen, and Anna William Vineyard to the entire tract of land, as follows: "In consideration of a release of all further demands against the estate and legal representatives and heirs of Samuel C. Colt, deceased, duly made and executed by William G. Hale, Sylvira J. Allen, Anna W. Vineyard, and her husband, ——— Vineyard, \* \* \* the receipt whereof is hereby acknowledged, have remised, released, and quitclaimed, and do by these presents remise, release, and quitclaim, unto the said William G. Hale, Sylvira J. Allen, and Anna William Vineyard, all the right, title, claim, and interest whatever had and held by us, or either of us, as heirs or devisees of said Samuel Colt, or otherwise, in and to the following parcel of land, to wit: A tract of land composed of various smaller tracts, in the county of Refugio and state of Texas, at and on the peninsula called Lamar, embracing all the lands in said peninsula as the same is bounded by Aransas Bay, Copano Bay, and St. Charles Bay, and extending back or northward to a line running from Copano Bay to Cavasso creek, and fronting the western boundary line of surveys on land script numbered 1882/1486 and 22, and also including the flats, shoals, and islands in front of said peninsula, according to the several deeds of conveyance and a mortgage deed made to said Samuel Colt by said William George Hale, Ebenezer Allen, and Jas. W. Byrne, now deceased, with full release and acquittance of the mortgage debt expressed in the deed thereto,—to have and to hold, all and singular, the said premises, together with all and singular the hereditaments and appurtenances to the same belonging, unto the said William George Hale, Sylvira J. Allen, and Ann William Vineyard, their heirs and assigns, forever, as tenants in common, the said William G. Hale and Sylvira J. Allen having each an undivided one-fourth part, and the said Ann William Vineyard having one undivided half part, thereof; and we do hereby covenant with the said Hale, Allen, and Vineyard to warrant and forever defend the premises hereby conveyed to the said Allen, Hale, and Vineyard, heirs and assigns, against all persons lawfully claiming or to claim the same under, from, or by us, or either of us." This deed was duly acknowledged and was filed for record in Aransas county, June 30, 1876. It was agreed by the parties to the suit that by it all the title of Samuel Colt to the land in controversy was conveyed, and the legal title thereto vested, as specified in the conveyance. (11) Deed from J. W. Vineyard, as administrator of J. W. Byrne, to Samuel Vineyard, dated May 28, 1872, executed by order of the probate court of Refugio county. Among other property, it conveyed 3,372 acres, more or less, and all unsold town lots, of the tracts known as the "Lamar Property," owned by Hale,



Allen, and testators (meaning J. W. Byrne), being two-eighths of 13,500 acres undivided, and which is set down in the report of sale as item 5; also three-eighths interest in a claim for property in "Lamar Property," sold Samuel Colt, now deceased, and not paid for, which interest amounts to about 2,531¼ acres of land, more or less, or the corresponding price to be paid for the same, say \$6,750, in the hands of William G. Hale for settlement. (12) The following deed from S. C. Vineyard to Samuel Harvey Vineyard: "State of Texas, County of Aransas. Know all men by these presents that I, Samuel C. Vineyard, of the state of Texas and county of Aransas, for the sum of one dollar, and out of affection for my son Samuel Harvey Vineyard, do hereby grant, release, and convey, to have and to hold forever, all my right, title, and interest in the estate of James W. Byrne, purchased by me at administrator's sale in behalf of my son Samuel Harvey Vineyard, and heirs of S. C. Vineyard and Anna W. Vineyard; hereby reserving the right to control as guardian said estate for the benefit of S. H. Vineyard and heirs of S. C. Vineyard and Anna W. Vineyard. And I, the said Samuel C. Vineyard, for and in consideration of the sum of one dollar to me in hand paid, do hereby bind myself by these presents to warrant and defend and protect unto the said Samuel Vineyard and heirs of S. C. Vineyard all the possessions hereunto conveyed this, the 8th day of October, 1873, A. D." The deed was acknowledged and filed for record on the day of its date. (13) Deed from Harvey S. Vineyard to his sister, Lillian Vineyard, the appellee, for his entire interest in the foregoing conveyance from S. C. Vineyard to him. This deed was dated November 23, 1888; acknowledged January 20, 1892; and recorded in Aransas county, June 10, 1892. (14) A conveyance from Anna W. Vineyard and her husband, Samuel C. Vineyard, to the minor plaintiff, Lillian Vineyard, dated August 6, 1896, declaring that the property conveyed to Anna W. Vineyard by Elizabeth Colt and others, as heirs and devisees of Samuel Colt, in August, 1870, was conveyed in trust for the Byrne estate, and for the purpose of carrying out the trust she executed said instrument, and conveyed to Lillian Vineyard all her right, title, and interest in the property conveyed to her by the Colt heirs.

In order to show title in himself, the appellant introduced the following evidence: (1) The preliminary and final decree in suit in the district court of Aransas county, Tex., brought by the representatives of W. G. Hale against S. C. Vineyard and Anna W. Vineyard and the representatives of Ebenezer Allen and others, for the partition of the Lamar property. These decrees were made on November 6, 1876, and May 11, 1877, respectively. Neither Samuel Harvey Vineyard nor the appellee Lillian Vineyard was a party to this suit. The preliminary decree, disposing, also, of the interests of the other parties, adjudged

that the said S. C. Vineyard and A. W. Vineyard were entitled to  $11/24$  of the land, the Lamar property unsold by Byrne, Allen, and Hale. The report of the commissioners in partition, copied into the final decree, sets apart, in addition to certain town lots and blocks and outlots and reservations, a tract of 4,214 acres, composed of several smaller tracts, to S. C. Vineyard as  $11/24$  of the whole; and the final decree confirmed the titles of the several parties, respectively, embraced in the preliminary decree and report, to several tracts allotted to them by the commissioners. (2) Two powers of attorney from S. C. Vineyard to Anna W. Vineyard. The first, dated May 19, 1877, authorized her to sell lands in Refugio and Aransas counties; the second, dated June 21, 1877, authorized her to sell and convey all his right, title, and interest in and to all and any property he had in the state of Texas. (3) Deed from S. C. Vineyard and Anna W. Vineyard to John C. Herring, dated June 12, 1877, conveying, with general warranty of title, 4,214 acres of land described in the decree of partition. This deed was executed by Anna W. Vineyard for herself and as attorney in fact for Samuel C. Vineyard. It recited a consideration of \$2,107 in cash, and the further consideration of \$2,107, payable two years after date, with 10 per cent. interest, vendor's lien reserved. (4) Appellant proved a regular chain of transfers by warranty deed from John C. Herring to himself for the 4,214 acres of land conveyed by Vineyard and wife to Herring. Appellant offered in evidence a certified copy of a decree of confirmation of a sale by S. C. Vineyard and Anna W. Vineyard, as guardians of Samuel Harvey Vineyard, Alexander T. Vineyard, and Lillian Vineyard, made by the probate court of San Patricio county, Tex., confirming a sale to John C. Herring of 4,214 acres, and ordering the conveyance to be made; and also offered the deed of conveyance executed by the guardians in accordance with said decree, said deed dated July 14, 1883. To the introduction in evidence of these instruments the plaintiffs objected on the following grounds, to wit: Because the decree of confirmation was void on its face, and because there was no preceding order of sale made by the county court of San Patricio county shown, authorizing the guardians to make the sale for the lands described in the deed and decree of confirmation. The court sustained the objections, to which ruling the defendant excepted, and filed his bill of exceptions, fully setting out the decree of confirmation and the conveyance made in accordance with it. The substance of this decree will be found below in the further statement of the facts admitted on behalf of appellees, with a transcript of the proceedings of the guardianship, as bearing, only as limited by the court, upon the alternative plea of appellant for the restitution of the purchase money. The appellant also introduced in evidence a certified copy of a report filed by S. C. and

Anna W. Vineyard, as guardians, dated August 1, 1893, and filed in the county court of San Patricio county, Tex., on August 7, 1893, wherein they report to the court the receipt of the purchase money from John C. Herring for the 4,214 acres of land, and the disbursement of same for the benefit of their wards. It does not appear that this report was ever approved by the county court.

From a transcript of the proceedings in the estate of the minors Harvey S., Alexander T., and Lillian Vineyard, put in evidence by the appellees over the objection of the appellant, it appears that the application for letters of guardianship upon the estate of said minors was filed November 8, 1882; that the order appointing the appellees S. C. Vineyard and Anna W. Vineyard guardians was made November 25, 1882; that the guardians qualified January 1, 1883. The inventory and list of claims were filed January 15, 1883. The inventory does not contain the land in controversy, nor any reference to it; but in the list of claims is an item of \$2,500, purporting to have been deposited in the probate court of Travis county, for the benefit of said minors, as part of the purchase money of 4,207 acres sold to John C. Herring out of the Lamar tract. On January 15, 1883, S. C. and Anna W. Vineyard, as guardians of said minors, filed an application to the court, representing that on the 12th day of June they had sold and conveyed to John C. Herring, of Aransas county, Tex., 4,214 acres of land, which was fully described in the application, and is the land in controversy; that the sale was made for one-half cash, \$2,107, and the balance, \$2,107, on two years' time, secured by a promissory note bearing 10 per cent. interest; that the note, principal and interest, had been paid; and that \$2,500 had been deposited in the probate court of Travis county for the benefit of their wards, and the balance, \$2,135.40, had been expended for their education and maintenance; and prayed for an order of the court confirming said sale. On the date that this application was filed, to wit, January 15, 1883, the court entered an order in said guardianship that, "in the matter of the application of the guardians of said minors for confirmation of sale made to John C. Herring of certain real estate of said minors this day filed in court, it is ordered that the same be continued for giving notice as required by law." At the March term, 1883, on, to wit, March 19, 1883, the order of confirmation was made as above mentioned. It commenced with the recital: "This day came on to be heard the application of S. C. Vineyard and Anna W. Vineyard, guardians of the estate of said minors, for the confirmation of sale heretofore made by the said guardians to J. C. Herring of certain real property belonging to and part of the estate of said minors, described as follows, to wit." Then, following the description of the land, which is the same that is in controversy, the decree concludes: "And it appearing to the court that applica-

tion was in due and legal form, and that said sale was fairly made and in conformity with law, and that the purchase money for said land has been fully paid, it is therefore ordered, adjudged, and decreed by the court that the sale be, and the same is hereby, in all things confirmed." The order further directs the clerk to enter this in the minutes, and the guardians to execute to Herring a conveyance of the lands. There were no other proceedings in said guardianship with respect to the sale of the land. It was shown that Herring paid nothing for the conveyance executed to him by the guardians. No new sale was made to him. There was no guardianship of the minors in the probate court of Travis county. Anna W. Vineyard was a granddaughter and sole legatee and devisee of J. W. Byrne. Neither Samuel Colt nor his heirs ever owed her anything. Before the execution of the deed from the Colt heirs to her, she and her husband had signed an agreement compromising a claim in favor of her grandfather's estate against the Colt estate.

Glass, Callender & Carsner and Proctors, for appellant. Ward & James, for appellees.

GARRETT, C. J. (after stating the facts). The appellant has assigned as error appearing upon the face of the record the action of the court in awarding judgment in favor of the appellee, because she derived title from Samuel Harvey Vineyard, and he from his father, S. C. Vineyard, and the deed of S. C. Vineyard expressly reserved the right to control, as guardian, the estate granted; that Samuel Harvey Vineyard took the estate subject to the limitations of the reserved right in S. C. Vineyard to exercise over said estate all the power of a guardian, and said estate was deeded by the deeds of said father, made during said grantee's minority, to Herring. The language of the reservation in the deed is: "Hereby reserving the right to control as guardian said estate for the benefit of S. H. Vineyard," etc. Whatever this right may have amounted to, it was clearly not that of a power to sell. It was "to control as guardian," and may have amounted to nothing, since he was the natural guardian, and was entitled to the legal guardianship. A guardian in control of his ward's estate has no power to sell it without authority from the court. The deed from S. C. Vineyard to Herring for the land in controversy was without any order of the court, and was executed long before there was any guardianship pending. In the conveyance of the land Vineyard dealt with it as his own. His deed was not operative to convey any interest in the land belonging to Samuel Harvey Vineyard. As we have seen, S. C. Vineyard and Anna W. Vineyard undertook to convey the land in controversy to Herring by their deed dated June 12, 1877, as the land set aside to S. C. Vineyard in the

decree of partition in the Hale suit. When appellant offered in evidence the deed executed by S. C. and Anna W. Vineyard as guardians of the minor appellee and others, dated July 14, 1883, and a certified copy of the decree of confirmation of sale from the records of the probate court of San Patricio county, Tex., entered in the guardianship of the minors Samuel H., Alex. T., and Lillian Vineyard, the appellees objected that the deed and decree were void on their face, and because no order of sale had been made by the county court to authorize said conveyance. The other proceedings, and the record in the matter of the guardianship of the said minors, showed that no order of sale had in fact ever been entered nor could have been made. The guardianship was opened for the first time by an application for letters filed November 8, 1882. The order was entered appointing them guardians on the 25th day of November, 1882. They qualified, and at the January term of the court filed the application for the confirmation of the sale they had never made as guardians, nor by any order of the court, in which they represented that on the 12th day of June, 1877, they had sold and conveyed to John O. Herring, of Aransas county, Tex., the land in controversy, which was fully described in their application. They set out the terms of sale, and stated that the purchase money had been fully paid, and asked the court for an order confirming their said sale. In the inventory and appraisal filed by them in the guardianship, no mention is made of the land, except that in the list of claims it was stated that there was \$2,500, belonging to said minors, on deposit in the probate court of Travis county, as part of the purchase money on 4,207 acres of land sold to Herring. No guardianship of the minors had ever been pending in Travis county. So it appeared from the entire record that no application for the sale of the land had ever been made, nor had any order ever been entered directing the sale thereof, but that the decree of confirmation, offered in evidence, was made upon the application of the guardians, showing that the land had been already sold by them to Herring in 1877, before the guardianship of said minors had opened, and before the birth of said Lillian Vineyard, the minor appellee. While it is true that the decree of confirmation is the final act of the court, and that, in the absence of anything in the record to show that the proper order of sale had not been made, regularity in the proceedings would be presumed in favor of the decree, no authority, that we have been able to find, goes so far as to authorize any such presumption against the face of the record. It is clear to our minds that, while the court had the jurisdiction to sell the property of the minors, it had never in fact undertaken to exercise it, and was clearly without authority to render the decree confirming the sale. The decree of confirmation offered in

the evidence was wholly void and of no authority, and did not support the deed offered with it. It was therefore subject to collateral attack, and was properly excluded from consideration as any evidence of title in the appellant. We deem it unnecessary to discuss the authorities further than to say that we do not rest our decision upon the case of Ball v. Collins (Tex. Sup.) 5 S. W. 622, which is so vigorously assailed by counsel for appellant. It is rested, not upon the fact that no order of sale appears on the record, but that it affirmatively appears from the record that no order of sale was ever made, and that the court undertook to divest the title of the minors without any sale at all.

Objection was made by the appellant to the introduction of the certified copy of the transcript of the record of the probate proceedings in the guardianship of the Vineyard minors in the San Patricio county court, but none of the objections urged were well taken. The proceedings were proper evidence before the court, for they gave the death wound to the decree by which it was sought to sustain the guardians' deed. The objections urged against the admissibility of the transcript are: (1) The record of this case shows that it is not a complete transcript; (2) the clerk does not so certify; and, (3) as a certified copy of a transcribed record, it was not admissible. The certificate is: "State of Texas, County of San Patricio. I, Steven J. Lewis, clerk of the county court in and for San Patricio county, Texas, do hereby certify that the foregoing twenty-five pages of manuscript contain a true and correct copy of all the proceedings had in the probate court of said county in the estate of the minors Harvey S., Alex. T., and Lillian Vineyard, as they appear of record in volume 2, transcribed probate record of said county, on the margins thereof. Witness my hand and seal of office at office in Sinton, Texas, this the 4th day of August. [Signed officially.]" The article (4588) of the Revised Statutes of 1895 which provides for the transcribing of records also makes provision that such records shall have the same force and effect in court as the originals. By article 2306 it is provided that certified copies may be made of the original records and used in evidence. The certificate of the clerk was sufficient to show that the record purported to be a complete transcript of all the proceedings in the estate, and the record does not contradict the certificate. We think, therefore, that there is no error in refusing to receive in evidence the deed and copy of the decree of confirmation. Having been admitted, the record can be considered for every purpose. Upon this branch of the case, the only question remaining to be considered is whether or not the purchase money received by S. C. Vineyard and Anna W. Vineyard from Herring for the sale of the land should be returned to appellant before the appellees should be allowed to recover the

land. It seems that to state this proposition should be to answer it. Vineyard and his wife sold the land to Herring as their own property, and not as that of their wards. They dealt with it as their own. And, further, there is no evidence that the money had been expended for the benefit of plaintiff or that of her vendor, Samuel Harvey Vineyard. In the report of the guardians filed in the county court in 1893, they endeavor to show by general charges,<sup>1</sup> not itemized, against the minors, that the money had been so expended; but this report was never approved, and there is no proof that the expenditures were ever made. It was also the duty of the parents to support their minor children, and it was not shown that they were unable to do so. As held by this court in the case of *Vineyard v. Brundrett*, 42 S. W. 232, recently decided, the deed of Colt's heirs to Anna W. Vineyard vested in her the legal title to one-half of the Colt interest, and the appellee Lillian Vineyard became vested with the equitable interest thereto as owner of whatever interest the estate of J. W. Byrne had therein since a resulting trust was vested in said estate by the conveyance.

It is urged that appellant became the owner of the legal title vested in Anna W. Vineyard by the deed of the Colt heirs, and that he purchased the land without notice of the equity in the Byrne estate. It clearly appears from the examination of the chain of title and the recitals therein, of which the appellant is bound to take notice, that the conveyance of the Colt heirs was made in consideration of a claim in favor of the Byrne estate for the purchase money of the several interests conveyed by him to Samuel Colt, and with such notice he had not far to go to learn the true state of the title. He cannot be held to be an innocent purchaser. The appellee Lillian Vineyard became vested with the absolute legal title upon the conveyance to her, executed August 6, 1896, if, indeed, Samuel Harvey Vineyard had not already been invested with it by the conveyance from S. C. Vineyard as of the community property of himself and Anna Vineyard. Having the equity, it is no objection that this deed was executed to her after the institution of the suit. Samuel Harvey Vineyard not having been a party to the partition suit of *Hale v. Vineyard*, the appellee was not bound by the partition made therein, and her interest in the land remained an undivided interest, as owned by the estate of J. W. Byrne, including the claim against the Colt estate. We are of the opinion that the administrator's sale in the Byrne estate conveyed the equitable title to the Colt interest in the property to Samuel C. Vineyard, and that his deed to Samuel Harvey Vineyard vested the same in him. We have deemed it unnecessary to review the authorities discussed by counsel in their briefs, but have simply stated our conclusions; and from these it follows that the judgment of the court below in awarding the land in contro-

versy to the appellee Lillian Vineyard was right, and should therefore be affirmed. Affirmed.

# BRIGHTMAN v. FRY et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 8, 1897.)

## VENDOR'S LIEN—FORECLOSURE—PARTIES—APPEAL—INJUNCTION—DISSOLUTION.

1. As a wife has no homestead rights to land, as against a vendor's lien on said land, she is not a necessary party to a suit to foreclose such a lien.

2. Where a case is dismissed at the request of one of the parties, such party cannot, on appeal, complain of the act of the court in dismissing the case.

3. Affidavits and documentary evidence are admissible in a hearing on an answer and motion to dissolve a temporary writ enjoining the enforcement of an order of sale of land.

Appeal from district court, Coleman county; J. O. Woodward, Judge.

Action by Harriet Brightman against John J. Fry and others. Case was dismissed, and plaintiff appeals. Affirmed.

L. B. Russell, T. H. Strong, and L. H. Brightman, for appellant. Sims & Snodgrass, for appellees.

FISHER, C. J. This is an injunction suit brought by the appellant, Mrs. Harriet Brightman, against John J. Fry and her husband, Lyman Brightman, to restrain the execution of an order of sale on 87½ acres of land, an undivided interest in a 125-acre tract in Coleman county. The petition, in effect, alleges that the land in controversy, 87½ acres, was purchased by her and her husband from the appellee John Fry and his married daughter, Mrs. Green, they at the time owning the 87½ acres, which was an undivided part of 125 acres, the balance being owned by the minor children of Fry; that the land so purchased was purchased by plaintiff and her husband as their homestead, and that a deed with covenants of warranty was executed therefor, and the purchase money—\$875—was paid in cash, being the full amount due for said land; and that she and her husband thereupon moved upon the land, and occupied it as a homestead up to the date of the institution of this suit. It is also alleged that it was understood between Brightman and Fry that the land so purchased should be free from all incumbrance, and that during the progress of the negotiations for the purchase thereof and afterwards Fry, as the guardian of his minor children, agreed to sell to Brightman the balance of the 125-acre tract, and in pursuance thereof a trade was made by which Fry executed his bond for title, agreeing to convey to Brightman the balance of said land; and thereupon Brightman executed to Fry purchase-money notes, with vendor's lien retained for the interest of said minor children. The petition alleges, in effect, that the interest of the minor children

<sup>1</sup> Writ of error denied by supreme court.

agreed to be conveyed by bond for title was a separate and distinct transaction from the purchase of the 87½ acres from Fry and his married daughter, Mrs. Green, and that the vendor's lien did not cover that part of the land. It is also charged that afterwards, upon failure of Brightman to pay the vendor's lien notes he had executed, Fry instituted suit upon those notes, in which he sought to foreclose the vendor's lien on the entire tract of 125 acres, including the land claimed by plaintiff as a homestead; and in pursuance of a fraudulent conspiracy between him and her husband, Brightman, an agreed judgment was rendered in Fry's favor against Brightman for the purchase money due, and for a foreclosure of the vendor's lien on the entire tract. She alleges that she was not a party to this suit, and that judgment was obtained and procured in fraud of her homestead rights, in that no vendor's lien existed against the 87½ acres. An execution and order of sale was issued upon this judgment, the execution of which in this suit she seeks to restrain.

A temporary writ of injunction was granted, restraining the enforcement of the order of sale, and thereafter Fry filed an answer under oath, denying the equities of plaintiff's bill, and traversing the material allegations thereof, and, in effect, alleging that the trade resulting in the sale of the 125 acres was all one transaction, and that the negotiations therefor were carried on and conducted between him and Brightman, the husband of appellant; and that the vendor's lien existed upon the entire tract, and that, if appellant acquired any homestead rights in the land, the same were subject to this lien; that there was no intention upon his part or that of Brightman to defraud the plaintiff, but that, upon failure of Brightman to pay the notes, the suit was instituted by him to foreclose the lien; and that the judgment entered in that case, foreclosing the lien on the entire tract, was obtained in good faith. Accompanying this answer was a motion made to dissolve the temporary injunction, for the reason, among others, that the sworn answer negated the equities of plaintiff's case. Upon hearing the motion, the court dissolved the temporary writ, and held the case over for a hearing upon the merits. When the case was called for trial on the merits, the defendant Fry made an application for continuance, which the court granted. Thereupon the appellant dismissed her case, and from that judgment of dismissal, she prosecutes this appeal.

No motion was made in the court below to reinstate the case upon the docket. There is no statement of facts in the record, but there are some findings of the court upon which it based its action dissolving the temporary writ of injunction. It appears from these findings that the court, in addition to the facts stated in the sworn answer, heard documentary evidence, and the court states that

it in part bases its action in dissolving the writ, upon this evidence. The record does not inform us what this evidence was. The plaintiff, in prosecuting this appeal, bases most of her assignments upon error of the court in dissolving the temporary writ, taking the position that the primary purpose of the suit was to restrain the sale, and the dissolution of the writ practically ended the case. Therefore she dismissed her entire case, in order to obtain a final judgment from which an appeal would lie. The answer of the defendant Fry, if true, presented a good defense to plaintiff's case, and stated grounds upon which the court was justified in entering the order dissolving the writ. It appears from the findings that, in addition, the court heard evidence bearing upon the issues raised by the answer. If it was true, as alleged in the answer, that the vendor's lien covered the entire tract of land purchased by Brightman from Fry, plaintiff's homestead rights would be subordinate thereto. She could acquire no homestead rights as against her vendor. And if Fry and Brightman, in good faith, as alleged by the answer, agreed that judgment should be rendered in Fry's favor foreclosing that lien, the plaintiff would have no grounds upon which to complain. If such was the case, plaintiff would not be a necessary party to the foreclosure suit. No facts are brought up in the record showing the evidence heard upon the motion to dissolve that would in any wise tend to show that the court abused its discretion in dissolving the writ. If the plaintiff had desired to have contested that question in the court below, and to have revised the ruling of the court there made, she should have brought up the facts, in addition to the answer, upon which the court based its conclusions. In the absence of facts showing to the contrary, we will conclude that the court had before it evidence sufficient upon which to base its order. The appellant is not in a position to complain of the acts of the court in dismissing her case, because that was done at her request, and no motion was made in that court to reinstate the case, in order that the issues raised by the pleadings might be finally heard and determined in a trial on the merits. If, after the dismissal of the case, although at her request, she had made a motion to have it reinstated, showing good grounds therefor, and the court had refused, a different question would have been presented.

Some complaint is made as to the court admitting affidavits and documentary evidence in support of the allegations of the answer upon hearing the motion to dissolve. There was no error in this respect. It was proper for the court to hear affidavits from persons who were acquainted with the facts, in support of the averments contained in the answer. The answer was practically made a part of the motion to dissolve, and this presented to the court a state of facts which authorized the court to dissolve the writ. We

do not care to discuss the other questions presented, for, in our opinion, no error is shown. Therefore the judgment is affirmed. Affirmed.

# CITY OF PARIS v. ALLRED.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 16, 1897.)

**NUISANCES—SEWERAGE—INJURY TO LAND AND HEALTH—PERMANENT DAMAGES—SINGLE RECOVERY—EVIDENCE—INSTRUCTIONS—ERROR.**

1. In an action for damages for a nuisance the evidence showed the construction and operation of a sewer by defendant, whereby its sewage was discharged into a branch running through plaintiff's lands, rendering the water unfit for use, carrying noxious matter upon his lands, and poisoning the air about his dwelling, which nuisance appeared to be permanent in its character. *Held* sufficient to establish plaintiff's allegations as to permanent damage to his land, and to support a verdict for plaintiff on such issue.

2. Where a nuisance created and maintained by defendant was of a permanent character, plaintiff was entitled to recover, in a single action, all the damages that have accrued or may accrue in consequence of such injury, the measure thereof being the depreciation in the value of his lands by reason of such nuisance.

3. In an action for damages to land by a nuisance, it was not error to assume, in the charge, that the injury, if any, was permanent, where the evidence was of such character as to warrant such conclusion.

4. Plaintiff was entitled to recover, in such action, for money expended by him for medicine and physician's bills, and for time lost by him, by reason of sickness necessarily resulting from the existence of such nuisance.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

Action by W. R. Allred against the city of Paris. There were verdict and judgment for plaintiff, and defendant appeals. Reformed and affirmed.

The following statement, taken from appellant's brief, is substantially correct, and the same is adopted: Appellee brought suit against the city of Paris for the recovery of \$5,000 damages,—\$4,000 of which is for damage to his land, and \$1,000 as special damage; on account of loss of grass and pasture, \$20; loss of water, \$500; cost of medicine, \$15; doctors' bills (in two items), \$45; value of nursing, \$15; loss of time, \$165; medicine, \$10; digging pool, \$50; building fences, \$35. Plaintiff alleged that he owned a tract of land near the city of Paris of the value of \$4,000, on which he resided with his family, as his home; that the city of Paris, in 1894, having the authority so to do, built and extended a sewer through part of the city under ground, and emptied it into Baker's Branch, within about a mile of and above plaintiff's land, through which sewer large quantities of human excrement, urine, and other filth was emptied into Baker's Branch, and emptied therein about one mile above plaintiff's land; that said branch, and the water therein, passed over part of plaintiff's land, and that large

quantities of human feces, urine, and other filth was thereby deposited on his land, by reason of which the water in said branch, which had before been good and wholesome water for both man and beast, was polluted, rendered filthy, unwholesome, noxious, and unhealthy, totally unfit for use, and rendered a nuisance; that nauseous vapors and noxious smells were cast over plaintiff's land, and into his residence on said land, which residence was some distance from said branch; that it caused him and his family to be sick, and incur doctors' bills, and expending of money for medicine, the loss of stock water in said branch, loss of the use of grass growing on his land, expense of digging a pool for watering his stock, and fencing the stock away from said branch; making an aggregate damage of \$5,000. Defendant answered, setting up that it built said sewer under and by virtue of authority granted to it by its charter; that it was a municipal corporation; and it was for a public good, in which the city had no interest or income except to subserve a public purpose; nor did it receive from said sewer any emolument or other income, but was at the expense of operating the same for the public good; and that the sewer was constructed in the most careful and approved manner, and so operated; and that it had been guilty of no negligence in its construction or operation, and that the same was perfect, and entirely faultless, both in construction and operation. After a demurrer and special exceptions, defendant filed a general denial, and pleaded specially that the city council had determined that the branch known as "Baker's Branch" was the only proper or available outlet for sewerage for the city; that the sewer was underground, draining part only of the city; and that it carries off much of the surface drainage of the city, which would otherwise go into said branch over the surface; and that the sewer does not drain more than one-fifth part of the city, for which Baker's Branch has always been the natural outlet; and that a large part of the city not drained by the sewer is drained into said branch over the surface above and below said sewer, constituting the larger portion of the filth which goes into said branch, specifying the sources of such filth, enumerating depots, oil mills, water-closets, stock pens, slaughter grounds, etc.; that said sewer is a public necessity, tends to promote the health and comfort of the citizens, greatly lessens the noxious vapors detrimental to the health of the public. Alleged that plaintiff, if the water in Baker's Branch was so polluted that the water is unfit for the use of stock, at a very moderate expense could have prevented his stock from drinking it, and could have dug a pool, which would furnish ample supply for his stock water; that he had the opportunity and authority to do it, but willfully failed to do it, though amply able to do so. Also alleged that plaintiff does not own the land which he claims to have been damaged, but:

<sup>1</sup> Writ of error denied by supreme court.

has, in effect, only a title bond, and that he has paid but little, if anything, on it, and there is a vendor's lien on it to secure the payment of the purchase money, and that the equitable title is in his vendor; and prayed that plaintiff take nothing by his suit, that the injunction asked for by plaintiff be denied, for costs, etc. Upon trial of the cause there were verdict and judgment for plaintiff for: Actual damage to land, \$731.25; loss of time in sickness of plaintiff, \$90; medicine and doctors' bills, \$52.75; digging pool, \$35,—total, \$900.

W. E. Latimer and Hale & Hale, for appellant. Fagan & Brents and W. F. Whitten, for appellee.

RAINEY, J. (after stating the facts). We conclude that the evidence established the allegations of plaintiff's petition as to permanent damage to his land, and is sufficient to support the verdict of the jury on that issue. The main question in the case to be determined is whether or not the cause of the nuisance is permanent in its character, and entitles plaintiff to recover all the damages that he has or may sustain in one suit, or whether the nuisance is temporary in its nature, and entitles plaintiff to recover only such special damages as may have accrued up to the time of suit. The principle underlying the case of *Rosenthal v. Railway Co.* (Tex. Sup.) 15 S. W. 268, is applicable to this case. In that case Justice Gaines, speaking for the court, says: "When the injury is liable to occur only at long intervals, or when the nuisance is likely to be removed by any agency, the damages which have accrued only up to the time of the action will be allowed; but, if the nuisance is permanent, and the injury constantly and regularly recurs, then the whole damage may be recovered at once. In a case like this the resulting depreciation in the value of the property is the safest measure of compensation." We think it clear from the evidence in this case that the damages to appellee's land result from a cause permanent in its character. When the sewer—the cause of the injury—was constructed, it was evidently intended by the city authorities that it should be permanent, and it has been so treated and used ever since. As long as the sewer is used, just so long will the nuisance be constant and continuous, and injurious to appellee's land. No move has been made by the city authorities to abate the nuisance, and, the evidence showing the same to be permanent, the appellee is entitled to recover all the damages that have or may accrue by reason of the nuisance, the measure of which is the depreciation in the value of the land by reason of said nuisance.

The fourth paragraph of the court's charge is objected to by appellant on the grounds: First, that it assumes that the injury to plaintiff's land, if any, was permanent; and, second, that it is "indefinite, vague, and un-

certain, and was calculated to mislead, in that no time is fixed at which to determine the value of the land without the sewer, but leaves the jury to fix it at the time it was highest, without regard to any depreciation which may have existed at the time the sewer was constructed, or at any times previous thereto, from any and all other causes; but does fix the time of valuing the land in getting its lowest valuation after the sewer was constructed." As to the first ground of objection to said charge, we are of opinion that the evidence was of such character as to warrant the court in assuming that the injury to the land was permanent, and therefore not error. Nor do we think the charge subject to the second objection urged. While the charge might have been more explicit, it was clear enough to not have misled the jury. The evidence in relation to the depreciation in value of the land was directed only to the depreciation caused by the construction of the sewer, and the jury could not have well understood that they were at liberty to be governed by any other rule, and, considering the evidence and size of the verdict, they evidently did not so understand. In addition to the injury to the land, we think appellee was entitled to recover the amount expended by him for medicine, physicians' bills, and loss of time by reason of sickness, necessarily caused by reason of the nuisance; but we think the verdict and judgment as to the amount paid for medicine and physicians' bills excessive, as the evidence does not show over \$26 expended by appellee for those purposes.

The court erred in instructing the jury that they could find a verdict in favor of appellee as to the other items of special damage, as these items were not recoverable, not coming within the measure of damages where the nuisance is permanent. The verdict and judgment show the amount of special damages awarded, and this error does not necessarily require a reversal of the judgment. If appellee will within 20 days remit the sum of \$81.75,—being \$35 for digging pool and the excess for medicine and physicians' bills,—the judgment will be reformed, and affirmed; otherwise it will be reversed, and the cause remanded. Other assignments of error are presented, but they are without merit, and will not be considered.

#### WARD v. ARMISTEAD.

(Court of Civil Appeals of Texas. Nov. 20, 1897.)

#### APPEAL—RECORD—PRESUMPTIONS.

1. In a case tried by the court, it will be presumed it was decided on competent evidence, there being such on which the judgment could be based, though improper evidence was admitted.

2. Under Ct. Civ. App. Rule No. 27 (20 S. W. viii.), declaring that in cases tried by court assignments of error shall be governed by the same rules as in other cases, and the party desiring to appeal shall, as a predicate for specific assignments of error, request the judge to state

in writing the conclusions of fact found by him separately from the conclusions of law, it cannot, in the absence of conclusions filed by the judge, be held that he did not consider the amount realized by defendant out of the litigation wherein plaintiff rendered the services as attorney for which he sues.

Appeal from district court, Marion county; J. M. Talbot, Judge.

Action by G. J. Armistead against W. B. Ward. Judgment for plaintiff. Defendant appeals. Affirmed.

R. R. Taylor, for appellant. Geo. T. Todd, V. D. Todd, and G. J. Armistead, for appellee.

**FINLEY, O. J.** This was an action brought in the district court of Marion county, Tex., by the appellee, G. J. Armistead, against the appellant, W. B. Ward, for the recovery of an attorney's fee of \$550. On April 15, 1896, appellee filed in said district court his petition, alleging, in substance, that appellee was on or about February 5, 1894, an attorney at law, and, as such, at the request of appellant, did and performed certain labor and services in a certain cause on the chancery docket of the federal court in and for the Eastern district of Texas, at Jefferson, Tex., wherein the National Bank of Commerce of Kansas City, Mo., was plaintiff, and the said appellant, W. B. Ward, one of the defendants; that appellee, at the special instance and request of appellant, represented the interest of appellant in said cause, and on appeal to the circuit court of appeals, at New Orleans; that appellant accepted said services, and promised to pay appellee what said services were reasonably worth; that said services were of the reasonable value of \$550. On June 9, 1896, appellant filed his answer, consisting of general and special exceptions, general denial, and special answer, setting up that, if appellee was ever employed at all, the same was done for the purpose of getting the services of W. T. Armistead, the brother of appellee, and who was an old and experienced lawyer, and the said W. T. Armistead was representing the Kildare Lumber Company in said litigation, and, with the full understanding between the appellee and appellant and the said W. T. Armistead, appellant authorized appellee to answer in said cause for him; that there was no necessity for any further appearance in said cause; that, after the decree of the said circuit court was rendered, appellant told appellee that he did not want to prosecute said cause on appeal to the circuit court of appeals, and, if appellee filed a brief in said cause on appeal, he was not authorized to do so by appellant; that appellee's suit for \$550 was excessive and unreasonable and unjust, and ought not to be maintained. December 31, 1896, said cause was tried upon its merits, before the court, and resulted in a judgment in favor of plaintiff for the sum of \$500, together with 6 per cent. interest and all costs of suit.

From this judgment the defendant, Ward, has appealed to this court.

#### Conclusions of Fact.

The evidence warranted the trial judge in reaching these conclusions: (1) The appellant employed appellee as an attorney to represent him in a litigated case, as alleged by the plaintiff in his petition. (2) Appellee in good faith performed the services for which he was engaged by appellant. (3) There was no agreement as to the amount which appellee was to receive as compensation for his services, but the evidence showed that his services were reasonably worth the sum awarded him by the judgment, to wit, \$500.

#### Conclusions of Law.

The appellant, having employed appellee as an attorney, and received the benefit of his services, and not having fixed by contract the sum to be paid therefor, is legally bound to pay the reasonable value of such services. The case was tried by the court, without a jury, and the record contains no conclusions of the trial judge.

The first assignment of error complains of the admission of evidence. If we were to concede that the evidence was inadmissible, which we do not, we would not reverse the judgment on this account, for the reason that there was other evidence upon which the judgment might have been based; and in such case it will be presumed that the court decided the case upon the competent evidence.

The second assignment complains that the court did not consider the amount realized by the appellant out of the litigation wherein appellee rendered services as an attorney. In the absence of conclusions filed by the trial judge, there is no basis for this assignment. Rule 27 (20 S. W. viii.) reads as follows: "In cases submitted to the judge upon the law and facts, the assignments of error shall be governed by the same rules as in other cases, and the party desiring to appeal should, as a predicate for specific assignments of error, request the judge to state in writing the conclusions of fact found by him separately from the conclusions of law. And in agreed cases under the statute the foregoing rules as to assignments of error shall be complied with as far as practicable."

The third assignment complains that the amount recovered is excessive. This contention is not borne out by the record.

No other errors are assigned. Judgment affirmed.

**TORREY et al. v. McCLELLAN et al.**  
(Court of Civil Appeals of Texas. Nov. 13, 1897.)

**INNKEEPERS—LIEN ON DRUMMERS' SAMPLES.**

Under Rev. St. 1895, art. 3318, giving proprietors of hotels and boarding houses a specific lien on all "property" or baggage deposited with



them, for the amount of the charges against them or their "owners," if guests of such hotel or boarding house, proprietors of an hotel acquire no lien for the board bill of a traveling man or drummer, on trunks and drummers' samples therein, belonging to his employer, where the proprietors knew they contained such samples when the drummer became their guest.

Appeal from Kaufman county court; John Vesey, Judge.

Action by J. R. Torrey & Co. against Thomas G. McClellan and others for conversion. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Appellants, as plaintiffs below, brought this suit against Thomas G. McClellan, Hiram K. Brooks, and George W. Loomis, under substantially the following allegations, to wit: Plaintiffs are a mercantile firm doing business in the state of Massachusetts, and selling goods in Texas through their traveling salesmen; that one of their traveling salesmen, Frank J. Norvell, came to the St. George Hotel, at Dallas, Tex., as a guest, and brought his sample trunks with him; that the St. George Hotel was at this time a partnership, of which Benjamin F. Taylor and H. K. Brooks were partners; that said Taylor had died before the institution of this suit, and Thomas G. McClellan, of Kaufman county, was the executor, without bond; that George W. Loomis resided in Dallas, Tex.; that said hotel company refused to deliver said trunks to plaintiffs' salesman upon demand, but turned same over to defendant Loomis, of whom said salesman also demanded possession of same, which demand was not complied with by said Loomis. And plaintiffs sued the defendants for the conversion of said property, aggregating the value of \$303.17. The defendant McClellan answered that the said St. George Hotel Company was at the time of the alleged conversion, and at the time of said Norvell's having gone to said hotel as a guest, a private corporation, and not a partnership, and hence pleaded that he was not liable as a partner. The defendant Hiram K. Brooks pleaded a general demurrer and general denial, and adopted the answer of said McClellan as to said St. George Hotel Company being a corporation. The defendant George W. Loomis filed only a plea in abatement to be sued in Dallas county, Tex., the county of his residence; also, a general demurrer and general denial. Upon the trial of the case the plaintiffs announced in open court that they would no longer seek to recover a judgment against the said McClellan and Brooks by reason of the alleged partnership existing between the said Taylor and Brooks, and confined their efforts to obtaining a judgment against the said Loomis by reason of the conversion set out in the petition. The court overruled defendant Loomis' plea in abatement, to which ruling no exceptions were reserved, and the cause was tried on its merits, and resulted in a verdict in favor of all the defendants. Plaintiffs' motion for

new trial was overruled by the court, and this appeal duly perfected.

Sam A. Leake and Jack & Jack, for appellants. A. S. Lathrop and John W. George, for appellees.

FINLEY, C. J. (after stating the facts). The first and second assigned errors are presented together, and attack the verdict and judgment as contrary to the law and the evidence. They are as follows: "(1) The verdict is contrary to the law and the evidence, for the reason that the evidence shows, without controversy, that Frank J. Norvell, the person who left the property in question with the hotel, held same, not as its owner in fact, but merely as a bailee, and that the fact of his possessing same was not sufficient authority for him to either sell or mortgage it. (2) The verdict of the jury was contrary to the law and the evidence, in that the uncontroverted evidence shows that said H. K. Brooks knew at the time said Norvell brought said trunks to the hotel that they were his sample trunks, and that he was a traveling salesman." The ninth assignment may also be considered in this connection. It complains of the court's giving in charge to the jury this special instruction: "You are instructed that if you believe from the evidence the plaintiffs, J. R. Torrey & Co., put it into the power of Frank J. Norvell, their traveling salesman, to assume the appearance of ownership of the property in controversy, and that he did appear to exercise the right of ownership thereof, and that he took said property, as baggage, to the St. George Hotel, and after having contracted a bill there, for board, washing, and other things properly coming under the head of an hotel bill, to secure the payment of which an innkeeper's lien attached, and in consequence thereof said property was held by said hotel company to satisfy the said hotel bill; and if you further find that said hotel company advertised and sold said property at public sale, as the law requires, to satisfy said lien on said property, and that at said sale said property was sold to said Geo. W. Loomis, he being the highest and best bidder at said sale,—then you will find for the said defendant Geo. W. Loomis." The evidence unquestionably established that the trunks and contents were the property of appellants, J. R. Torrey & Co.; that they were put into the possession of Frank J. Norvell, to be used by him in soliciting orders for merchandise for appellants; that the trunks contained what is known as "drummers' samples," which were intended to be exhibited by Norvell to persons of whom he solicited orders, and they were in his possession, as a drummer for J. R. Torrey & Co., at the time they were by him carried to the St. George Hotel. The evidence is equally clear that the manager of the hotel (Brooks) and appellee Loomis both knew that the trunks contained drummers' samples, to be used by

Norvell in soliciting orders for appellants. The question is, was a lien acquired by the hotel upon the trunks for the board bill of Frank J. Norvell, the drummer? The statute under which the lien is claimed is article 3318, Rev. St. 1895, which reads as follows: "Proprietors of hotels and boarding houses shall have a specific lien upon all property or baggage deposited with them for the amount of the charges against them or their owners if guests at such hotel and boarding house." It will be seen that this statute only gives a lien upon property or baggage deposited in an hotel or boarding house, for the charges against the property or their owners, if guests at such hotel or boarding house. In the case of *Kohn v. Washer*, 64 Tex. 181, it was held that a drummer could not convey a legal title by sale of his samples, which were owned by his employers. The fact that he had possession of such samples was regarded as insufficient to show apparent authority to sell. In *McCreary v. Gaines*, 55 Tex. 485, it was held that a factor could not incumber, with a lien, property intrusted to him to be sold upon commission. Possession and power to sell were held not to be sufficient indicia of ownership to form the basis of a lien created in favor of a third person. In *Stott v. Scott*, 68 Tex. 302, 4 S. W. 494, it was held that a livery stable did not acquire a lien, under the statute, upon a horse placed in the stable, to be fed and cared for, by a person other than the owner, who had no authority to so place the horse. In that case the lien was claimed for a charge against the horse (that is, for feeding and caring for the horse), and not for a debt on account of the board of the person who placed the horse in the stable. To the same effect is *Dorman v. Green*, 4 Willson, Civ. Cas. Ct. App. § 322, 19 S. W. 909. These cases are all primarily based upon the principle that in dealing with personal property the rule of caveat emptor applies. One who does not possess title to personalty cannot convey title to it. *Dodd v. Arnold*, 28 Tex. 98. In *Robinson v. Baker*, 5 Cush. 137, it was held that a common carrier who innocently received goods for transportation from a person other than the owner, who did not possess authority to deliver the goods to it for transportation, acquired no lien for transportation charges. In *Gilson v. Gwinn*, 107 Mass. 126, a lien was claimed upon a leased sewing machine, for charges for transporting the same from one part of the city of Boston to another part of the city at the instance of the lessee. In deciding the question whether a lien was acquired, the court said: "The lessee of the sewing machine had a right of possession until demand of return by the owner, but she had no right of property which she could transfer, and no authority by which she could confer any right of property upon another. She could not, therefore, give the defendant a lien upon the property for its carriage, for her convenience, and at

her request, alone. The defendant not having a lien upon the property as against the owner, his possession became wrongful when he refused to surrender it to plaintiff on demand therefor." There is no question of apparent authority in this case, and, instead of giving the instruction above set out, the court should have directed a verdict for the plaintiffs. The judgment of the court below is reversed, and the cause remanded.

#### BLAIN v. BLAIN.

(Court of Civil Appeals of Texas. Nov. 27, 1897.)

##### ASSIGNMENTS OF ERROR.

An assignment of error based on the grounds that the verdict is unsupported by the evidence, and that it is contrary to law and to the evidence, which fails to point out the particulars in which it is erroneous, is too general, and cannot be considered. Tex. Civ. App. Rules 24, 25 (20 S. W. viii.).

Appeal from district court, Freestone county; L. B. Cobb, Judge.

Action by Alice Blain against Nick Blain for title and partition of land. Judgment for defendant, and plaintiff appeals. Affirmed.

W. R. Boyd, for appellant.

RAINEY, J. The only assignment of error presented by appellant is as follows: "The court erred in refusing to grant plaintiff's motion for new trial (1) because the verdict of the jury is wholly unsupported by the evidence in the case; (2) because the verdict and judgment is contrary to law and the evidence." This assignment fails to point out in what respect the verdict is not supported by the evidence, and in what particular the verdict and judgment are contrary to the law and the evidence. It is, therefore, too general, and cannot be considered by this court. Rules 24, 25, Tex. Civ. App. (20 S. W. viii.); *Sanborn v. Murphy*, 5 Tex. Civ. App. 509, 26 S. W. 459; *Winkler v. Winkler* (Tex. Civ. App.) 26 S. W. 893; *Cooper v. Lee*, 1 Tex. Civ. App. 9, 21 S. W. 908. There being no fundamental error apparent of record, the judgment of the court below is affirmed.

#### MISSOURI, K. & T. RY. CO. v. O'CONNELL et al.<sup>1</sup>

(Court of Civil Appeals of Texas. May 8, 1897.)

##### RAILROADS — ACCIDENTS AT CROSSINGS — NEGLIGENCE.

Where a long freight train had been standing for some time, at night, across a frequented street, so that the rear end was about three car lengths from the street, and a view of the front part of the train was obstructed by cars standing on other parallel tracks, it was negligence to back the train across the street without taking any other precaution to protect any one crossing the track than to ring the engine bell.

<sup>1</sup> Writ of error denied by supreme court.

Appeal from district court, Grayson county; D. A. Bliss, Judge.

Action by Nellie O'Connell and others against the Missouri, Kansas & Texas Railway Company for the death of W. H. O'Connell, caused by defendant's negligence. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. S. Miller and Head, Dillard & Muse, for appellant. C. B. Randall, for appellees.

#### Conclusions of Fact.

RAINEY, J. About 10 o'clock p. m. on July 25, 1895, W. H. O'Connell was run over by a train of cars of defendant railway company in its yards in the city of Denison, and, from the effects of the injuries received, he died in the early morning of the next day. Deceased was struck by defendant's cars at a point where its track crosses Sears street, which is a public street in the city of Denison, which street has been in use for many years; there being much travel at that point both day and night. At said point there are five of defendant's railway tracks crossing said street, near and parallel with each other. Said street runs east and west, and, just before the accident, defendant's train (consisting of 13 cars and an engine) backed in on the middle track of said five tracks, and stopped the rear end of the train about three car lengths south of said street. On the two tracks east of the track on which said train was standing, there were standing numerous box cars which obstructed the view from the east, and would prevent one approaching said crossing from the east from seeing a moving train on said middle track until he was near the middle track. On the track just immediately east of where said train was stopped, a line of cars standing on that track ran about half a car length out into said crossing. After defendant's train had stood a while on said track, some of defendant's employes went up to where the rear car was coupled onto the balance of the train, and there gave signals for said train to back; whereupon the engineer backed said train across said crossing, and, while thereon, struck deceased, and dragged him some distance north of said street. At the time of moving said train, no whistle was blown. There was no watch placed upon the rear end of the cars, but the bell was ringing. No other precaution was taken to protect any one who might have been crossing the track. The ringing of the bell being so far away from the rear end of the train, it was not sufficient to give warning that the train was backing up across said street. The defendant's servants were guilty of negligence in operating the train in the manner they did at that time. The deceased approached the crossing from the east, and, while no one saw him on the track, from the surrounding circumstances we conclude that he was not guilty of negligence. The deceased was

a man about 38 years old, strong and robust, sober and industrious, and making about \$1,800 per year over and above expenses. He left, surviving him, a wife and two small children, and a mother, whom he supported. It was shown that he was a kind and affectionate son. He had supported his mother for some time. We conclude, had he lived, he would have continued to do so.

#### Conclusions of Law.

There are various assignments of error presented by appellant, all of which we have fully considered, but we do not think they require any special discussion. They relate to the admission of evidence, alleged errors in the charge of the court, and the refusal of the court to give special charges requested. The charge of the court correctly charged the law applicable to the case, and fully covered every phase thereof. The special charges asked that were proper to be given were sufficiently embraced in the general charge. There was no material error in the admission of evidence, and the evidence was sufficient to warrant the finding of the jury, and the verdict is not excessive. The judgment is therefore affirmed.

#### TEXAS & P. RY. CO. v. MOORE.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 6, 1897.)

#### LIMITATIONS—COMPUTING TIME—INCONSISTENT INSTRUCTIONS.

1. An action is brought within a year after the accident, as limited by statute, if brought in the year following, on the day of the month of the accident.

2. An instruction that if plaintiff, when injured on defendant's train, was an employe of defendant, and, as such, was riding on a freight train going to or about his duty as such agent, he assumed all the ordinary risk attendant on the handling of freight trains, and, if the train was handled with reasonable care for handling a freight train, he cannot recover, is not inconsistent with an instruction that plaintiff did not assume any but the ordinary risks incident to traveling on the freight train, and, if he was injured by the negligence of defendant or its agent in charge of the train, verdict should be for him on that theory.

Appeal from district court, Taylor county; T. H. Conner, Judge.

Action by Henry Moore against the Texas & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

B. G. Bidwell, for appellant. A. S. Hardwicke and Cockrell & Hardwicke, for appellee.

#### Conclusions of Fact.

TARLTON, C. J. This appeal is from a judgment in the sum of \$1,370.90, recovered by the appellee from the appellant, as damages on account of personal injuries. The injuries were sustained either on the 30th or 31st day of October, 1895, while the appellee was riding on a caboose attached to appellant's freight train. The appellee was a dis-

<sup>1</sup> Writ of error denied by supreme court.

trict road master on the track and way department of the appellant. The verdict establishes the fact, which we accordingly find, that the injuries were due to the negligence of the appellant.

#### Conclusions of Law.

1. The suit was instituted on October 30, 1896. The defendant interposed the defense of one year's limitation. If the injuries were sustained on October 30, 1895, and if that day should be included in computing the time within which the action should have been brought, the defense should prevail. The court instructed the jury that, in computing this time, the day upon which plaintiff's injuries occurred should be excluded. We approve the view entertained by the court. *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049; *Hunter v. Lanus*, 82 Tex. 680, 18 S. W. 201.

2. The court gave the following special instructions, the first at the request of the defendant, the second at the request of the plaintiff: (1) "If you find from the evidence that the plaintiff, at the time he claims to have been injured on the train of defendant, was an employé of defendant, and, as such, was riding on a freight train going to or about his duty as such agent, he took and assumed all the ordinary risks usually attendant upon the handling of freight trains, including the usual jolting and jarring of the train when being stopped by the use of air brakes; and, if you find that the train was handled with reasonable care for handling a freight train, he cannot recover." (2) "You are instructed that plaintiff did not assume any but the ordinary risks incident to traveling on the freight train. If plaintiff was injured, if you find he was injured by reason of the negligence, if any, of defendant or its agent in charge of the train, you will find against defendant company on such theory." We overrule the complaint that these charges are conflicting. Connect the two by the use of the disjunctive conjunction "but," and the harmony of the instructions with reference to the phases of the evidence for and against the contention of the appellee is manifest. The court had previously given a correct definition of negligence.

3. The court gave the following charge to the jury: "Should the jury find for the plaintiff, then you should assess his damages in such sum as you may find from the evidence is reasonable compensation for the natural and actual results of the injuries received, if any, as alleged." We think the evidence justified the instruction. There was no specific allegation of lost time, as appellant seems to apprehend, or of the value of such lost time.

4. There is nothing in the record which indicates or intimates that the request by the jury of the court for additional instructions was not in open court, or was otherwise than in conformity with the provisions of articles 1307 and 1308, Rev. St. 1893. The judgment is affirmed.

#### BELL v. YORK et al.

(Court of Civil Appeals of Texas. Oct. 30, 1897.)

#### INJUNCTION—ENFORCEMENT OF JUDGMENT.

Judgment was rendered in the county court, and an injunction was sought in the district court to enjoin its execution on the ground that it was fraudulently obtained, without jurisdiction, and that the property sought to be taken thereunder was exempt from forced sale. *Held*, under Rev. St. 1895, art. 2996, providing that "writs of injunction granted to stay proceedings in a suit, or execution on a judgment, shall be returnable to and tried in the court where such suit is pending or judgment was rendered," that the district court had no jurisdiction to enjoin the judgment of the county court, or any process issued thereon.

Appeal from district court, Palo Pinto county; William P. Gibbs, Special Judge.

Action by W. K. Bell against O. L. York and others. From an order sustaining a demurrer to plaintiff's petition, and dismissing it, plaintiff appeals. Affirmed.

A. H. Culwell, for appellant. O. W. Masie, for appellees.

HUNTER, J. This suit was brought on November 21, 1896, by appellant, in the district court of Palo Pinto county, to enjoin O. L. York, the sheriff of said county, from selling a piano of appellant's under an order of sale issued from the county court of said county upon a judgment rendered in said court against appellant on the 20th day of October, 1894, for the sum of \$69.10, in favor of Alcott & Maynor, and wherein a chattel mortgage lien was foreclosed on said piano, and an order of sale thereof awarded and decreed. The petition discloses that the suit in which this judgment was rendered was begun in the justice's court on April 14, 1894, on a note for \$100, upon which a credit of \$50, it seems, was indorsed, executed by appellant to Alcott & Maynor on October 26, 1890, and due and payable April 1, 1892. Judgment was rendered in the justice's court on this note for \$57.07, principal and interest, from which judgment appellant appealed to the county court of said county, where the case was again tried, and judgment rendered against appellant for the sum named in the order of sale. The piano, it is alleged in the petition, was of the value of \$600, and no mortgage was set up, presented, or asked to be foreclosed thereon in the case as filed and tried in the justice's court; nor were the pleadings in any manner amended in the county court, so as to ask for a decree of foreclosure of any mortgage on said piano; neither was any mortgage introduced or offered in evidence. Yet it is averred the said Alcott & Maynor, by their attorney, fraudulently procured the clerk of the county court to enter and record in said judgment a clause decreeing the foreclosure of a mortgage lien on said piano; and that appellant did not know that such judgment contained such provision for foreclosure until the order of sale

herein sought to be enjoined was issued. It is further averred that that part of said judgment foreclosing a mortgage lien and ordering a sale of said piano is void, because the county court was without jurisdiction to render such decree in a case appealed to it from a justice's court, in which no such relief was asked, or, indeed, could have been granted, as the justice was without jurisdiction to foreclose a mortgage on property worth more than \$200; and also that the judgment was dormant when said order of sale issued thereon, as no execution or order of sale had ever been issued thereon since it was rendered; and also that the piano was exempt from forced sale, because the same was part of his household furniture. The learned special judge appointed to try this cause sustained a demurrer to this petition, urged upon the ground that the district court had no jurisdiction to enjoin the judgment of the county court, or any process issued upon such judgment, and dismissed appellant's petition, and this ruling is complained of in this court. We think the action of the district court was clearly correct. Article 2996 of our Revised Statutes of 1895 provides: "Writs of injunction granted to stay proceedings in a suit, or execution on a judgment, shall be returnable to and tried in the court where such suit is pending, or such judgment was rendered." *Seligson v. Collins*, 64 Tex. 314, and cases there cited. We find no error in the judgment herein, and it is therefore affirmed.

# TURNER et ux. v. CITY OF HOUSTON.

(Court of Civil Appeals of Texas. Dec. 2, 1897.)

## JUDGMENTS—APPEAL AND ERROR.

1. In a suit against two defendants a judgment against "the defendant" instead of "the defendants" is not such a defect as to render the judgment void for uncertainty, or such an error as to require a reversal.

2. When no authorities are cited in support of an assignment of error except a general reference to the constitution of the state, without specific reference to any part thereof, the record, petition, and judgment will be examined, and, no error appearing, the judgment will be affirmed.

Error from district court, Harris county; S. H. Brashear, Judge.

Suit by the city of Houston against E. P. Turner and wife to foreclose a tax lien upon city lots. Plaintiff had judgment, and defendants bring error. Affirmed.

E. P. Turner, for appellants.

PLEASANTS, J. The appellee sued appellants for the recovery of taxes due for the year 1894 upon certain lots in the city of Houston, and also interest on said amount, and penalty of 50 per cent. of the taxes due as aforesaid, and for costs incurred in effort to collect said taxes by the collector, and to foreclose the lien upon said property, given

by law to secure the taxes due thereon. The plaintiff alleged that the defendants, E. P. Turner and Mary V. Turner, were the owners of said property in the year A. D. 1894, when said taxes were duly assessed and levied by the city council of said city, and by reason thereof became liable and bound to pay said taxes, but they had hitherto failed to pay the same; and that by reason of the nonpayment of said taxes the said lots of land were duly placed upon the delinquent tax list, and, after having been duly and legally advertised, for the time and in the manner required by law, for sale, and notice published that, unless the taxes were paid by the day named in said notice, said lands would be sold, as required by law, to the highest bidder, and, said taxes not having been paid on said designated day in said advertisement, said property was sold at public auction, at the place and in the manner required by law; and that the said city, being the highest bidder therefor, said property was bought in for said city for the amount of the taxes, with two dollars for the costs of the sale, and two dollars for the deed of conveyance from the collector to the purchaser added, making the aggregate sum of \$186.40. And by reason of all which the plaintiff alleged that it had, under the laws of the state, and under the charter of said city, acquired a lien on said property, and a right to have the same enforced by judicial sale, and to recover by suit said taxes, and 50 per cent. thereof in addition; and the petition prayed for said several sums of money, with interest thereon, and for costs, and for a decree establishing and enforcing plaintiff's lien upon said property. The defendants were duly cited, and made default, and judgment was rendered for plaintiff in accordance with its prayer, and the defendants sued out a writ of error, and have brought the case to this court for revision.

The first and second errors assigned are that the suit is against two defendants, while the judgment is against only one defendant, without specifying which, and there is no disposition of the other defendant, against whom no judgment is rendered; and the third error assigned is that the basis of the suit is a claim for taxes due the city of Houston, and the judgment is a personal one. In the absence of a statement of facts, a judgment by default is presumed to be authorized unless the judgment be one which, under the pleadings, could not have been properly rendered, or unless, upon its face, the judgment is erroneous. There is no question raised by the assignments as to the service of citation upon the defendants, and the petition, by its averments, authorizes the judgment prayed for, and which was rendered. It asserts a personal liability of the defendants for the money sued for, and also a lien upon the property against which the alleged assessment and levy of the taxes sued for were made; and it prays for a personal judgment, and for a decree foreclosing the alleged

lien. Since the rule is that every presumption must be indulged in support of a judgment, we are not prepared to say that the use of the singular instead of the plural number in describing the parties defendant is such a defect as to render the judgment void for uncertainty, or such an error as to require a reversal. We have not had cited to us any authority in support of the proposition submitted by the plaintiffs in error under their several assignments, save and except that a general reference to the constitution of the state, without designation of any specific article, section, or clause, is made in support of the proposition submitted under the third assignment, and we therefore do not feel called on to make further investigation than to examine the record and compare the judgment with the petition, and, having done this, and not discovering any error which would, in our opinion, justify a reversal of the judgment, the same is affirmed. Affirmed.

#### TOMPKINS v. BROOCKS.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 11, 1897.)

##### DEED—EQUITABLE TITLE—LIMITATIONS—LACHES.

1. An instrument, while not a deed so as to pass the legal title, because not purporting to presently convey the title, but binding the obligor to make a deed on demand of the obligee, passes the equitable title; it being shown on its face that the obligor had already sold the land to the obligee, and that the consideration for it had been paid.

2. One who is invested with the equitable title by the face of an instrument entitled to record need not sue for specific performance of the agreement for a deed, and is not therefore barred by limitations from setting up such instrument against plaintiff in trespass to try title.

3. The principle of laches does not apply to the setting up, against an action of trespass to try title, of an instrument giving defendant equitable title; it not appearing that the right of those claiming under it had ever been denied or in any way disregarded.

Error from district court, Jefferson county; Stephen P. West, Judge.

Action by Frank J. Tompkins against John H. Broocks. Judgment for defendant. Plaintiff appeals. Affirmed.

Tom J. Russell, for plaintiff. O'Brien, Bordages & O'Brien, for defendant.

**WILLIAMS, J.** This was an action of trespass to try title, brought by Tompkins against Broocks, to recover the south half of the Samuel Stivers league, in Jefferson county. It was admitted that the original grantee had conveyed the land in controversy to S. S. Tompkins on the 28th day of July, 1842. Plaintiff in this suit claimed as the heir of S. S. Tompkins, and defendant claimed under the heirs of one J. R. A. Tompkins, and under the following instrument of writing, from S. S. Tompkins to J. R. A. Tompkins: "Republic of Texas, County of Harris. Know all men

by these presents, that I, S. S. Tompkins, of the county of Harris and republic of Texas, acknowledge myself held and bound unto J. R. A. Tompkins, his heirs and assigns, executors and administrators, in the sum of twenty-five hundred dollars, good and lawful money, for the faithful payment of which I bind myself, my heirs, assigns, executors, firmly by these presents, sealed with my seal, dated at Houston, county and republic aforesaid, this ninth (9th) day of August, in the year of our Lord one thousand eight hundred and forty-two (1842). The condition of this obligation is such that whereas, I have this day bargained, sold, and delivered, conveyed, and alienated unto the said J. R. A. Tompkins, his heirs and assigns, for valuable consideration, the receipt whereof is hereby acknowledged, a certain half league of land, situated in the county of Jefferson, republic of Texas, near Double point, being the south half of the league of land granted to Samuel Stivers, as a colonist in Zavallas Colony, and the same purchased of Samuel Stivers by deed dated twenty-eighth (28) day of July, A. D. 1842: Now, therefore, if I, the said Stephen S. Tompkins, my heirs or assigns, executors or administrators, shall and truly make or cause to be made to the said J. R. A. Tompkins, his heirs, assigns, executors, or administrators, or either of them, or to whomsoever they may authorize to receive the same, a good and bona fide deed to the land above mentioned whenever called upon so to do, then and in that case this obligation to be null and void; otherwise, to remain in full force and effect. In testimony whereof, I hereunto set my hand and seal, this day and date above written. S. S. Tompkins." This was acknowledged August 9, 1842, but was not recorded until October, 1878. No evidence was introduced by either party as to the circumstances under which this instrument was executed. It was not shown that there had ever been any request by J. R. A. Tompkins, or his heirs, for the execution of the deed by S. S. Tompkins, or that the latter or his heirs had ever in any way denied or repudiated the obligation assumed in the instrument, or the right of J. R. A. Tompkins to the land. Neither party has had actual possession of the land, and there is no evidence as to the assertion of claims by either. The court below held that the instrument above set out was sufficient to pass the title of obligor therein to the obligee, and gave judgment for the defendant, from which this writ of error is prosecuted by the heirs of the original plaintiff, Frank Tompkins, who died after such judgment was rendered.

The assignments of error assert propositions that the instrument in writing relied on by the defendant was not sufficient as a deed to pass the title, but that it was a mortgage to secure a sum of money named in the instrument, or, if not a mortgage, was merely a bond for title; and, under either view of it, the claim of the defendant, asserted under it for the first time in this suit, was barred by

<sup>1</sup> Writ of error denied by supreme court.

the statute of limitations, and was, in equity, a stale demand.

We do not think that the instrument was such a deed as to pass the legal title. It does not, by its terms, purport to presently convey the title, but postpones the doing of it to a future time, by another instrument. *Baker v. Wescott*, 73 Tex. 129, 11 S. W. 157. But, though it did not pass the legal title, it showed on its face that the obligor had already sold the land to the obligee, and that the consideration for it had been paid. Under these circumstances, the equitable title passed, and that was sufficient to authorize the obligee to sue for the recovery of the land, and to enjoy it against the obligor or any one else. Being thus, by the face of the instrument itself, which was entitled to registration, invested with the equitable title, there was no necessity, under our laws, for him to sue for specific performance. The mere production of his paper title would always have been sufficient to protect him in the enjoyment of the land, and, when recorded, would have been a full notice of his rights as the record of a deed. The statute of limitations is not applicable here, for the title relied on by the defendant was such as may be asserted without specific performance; and, if that statute applied, it could hardly be said that the cause of action under it would have ever accrued until after the demand upon S. S. Tompkins for the execution of the deed and his refusing to execute it.

If resort be had to the principles of equity on the subject of stale demand, the result is equally fatal to appellant's claim, for the reason that it does not appear that the right of those claiming under this instrument has ever been denied, or in any way disregarded, and that, consistently with the evidence, it may be assumed that such right had always been recognized. The case is not like those in which the obligor, in a contract for the conveyance of land, undertakes to convey the title in consideration of something to be done by the obligee in the future. *Vardeman v. Lawson*, 17 Tex. 11; *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. 300. For the reasons given, the judgment of the district court is affirmed. Affirmed.

JOHNSON v. HOLLAND, Tax Collector, et al.<sup>1</sup>  
(Court of Civil Appeals of Texas. Nov. 18, 1897.)

COURTS—JURISDICTION—TAXATION—EXCESSIVE ASSESSMENT—PLEADING.

1. The district court has jurisdiction to entertain a petition for an injunction to restrain the collection of a tax based upon an assessment that, as to the petitioner, is unreasonably excessive and fraudulently made, where the amount involved is within the court's jurisdiction.

2. A petition for an injunction restraining the collection of a tax, which states that the tax was based upon an assessment which was unreasonably excessive, and made in fraud of plaintiff's rights, and discriminates against him, states a cause of action.

3. When the board of equalization, in raising or fixing the value of property, acts from corrupt and fraudulent motives, and in violation of the laws of the state, their acts are voidable at the suit of the party aggrieved; and Rev. St. 1895, art. 5124, providing that the acts of the board of equalization "shall be final and not subject to revision by said board or any other tribunal thereafter," was not intended to preclude any person from applying to the courts for relief in such cases.

Appeal from district court, Carson county; B. M. Baker, Judge.

Petition by A. S. Johnson against A. A. Holland, tax collector, and others, for an injunction. From a judgment dissolving the temporary injunction and dismissing the petition, plaintiff appeals. Reversed.

H. E. Hoover, for appellant. Plemons & Veale, for appellees.

HUNTER, J. This suit was brought February 8, 1897, in the district court of Carson county, by the appellant, against the county of Carson, J. J. Ivers, county judge, and the other members of the commissioners' court of said county, and against A. A. Holland, tax collector of said county, to annul and set aside a certain order made by the said judge and county commissioners while sitting as a board of equalization, in June, 1896, and in which the said board raised the value of appellant's 19,840 acres of unimproved lands, as assessed by his agent to the tax assessor of said county under oath, from \$14,740 to \$66,960, and some town lots at Panhandle, the county seat of Carson county, from \$2,796 to \$14,196, whereby his taxes for 1896 were raised and increased from \$682.90 to \$1,032.33; making, as claimed, an unjust charge against him, in the taxes of that year, of \$352.43. It is averred in the petition that the lands and lots had been assessed by appellant's agent to the tax assessor at their true cash value, and at more than they could possibly be sold for or were worth on the 1st day of January, 1896, or at any time thereafter; that at said date there was no market or sale for said lands and lots, or either of them, and that appellant would at said date, or at any time since, have sold the same for even less than the amount at which the same were assessed; that said board of equalization arbitrarily and fraudulently raised the value on said lands and lots as above stated, well knowing that the value placed thereon by said board was more than the lands and lots were worth; that said board fixed the value of cattle rendered and assessed in said county for taxes for said year at less than 50 per cent. of their actual cash value on the 1st day of January, 1896, which he alleges to be an illegal and unjust discrimination against him. He also alleges that he appeared before said board, by his agent, and that said agent testified to said facts as above stated, and that no other evidence was offered or heard by said board, and that after hearing said evidence, and while considering

<sup>1</sup> Writ of error denied by supreme court.

and discussing the valuation of plaintiff's said lands and town lots, and before final action thereon, "one of the members of said board, in the presence of the other members, stated and said, in effect, that they (meaning said board) knew that plaintiff's said lands and town lots could not be sold at the price at which plaintiff had rendered the same for taxes, but that it was necessary to fix the value to which they were raised in order to obtain revenue to defray the running expenses of the county." These are substantially the facts stated upon which the allegation of fraud is predicated. Plaintiff tendered and paid into court the sum of \$682.90, the amount of taxes due according to the assessment made by him to the assessor, and prayed that the order of the board of equalization raising the valuation of his said property be declared void, and for an injunction compelling the tax collector to accept the amount paid into court in full of his taxes for 1896, and restraining and perpetually enjoining him from collecting the \$352.43 increase of taxes caused by the fraudulent order of said board as aforesaid. The defendants demurred to this petition, upon the grounds that the district court had no jurisdiction over the matters and things set up therein, and had no jurisdiction to change, modify, or in any manner revise the orders of the board of equalization in fixing valuations upon property for taxation. There were also a general demurrer and special exceptions, and a motion to dissolve the temporary injunction and dismiss the petition.

The judgment of the district court shows that the motion to dissolve the injunction and dismiss the suit was sustained; the learned judge of that court evidently being of opinion that the proceeding was an effort to revise the order of the board of equalization, and that his court was without jurisdiction to grant the relief prayed for. Whether the county court would have jurisdiction to grant an injunction in a case like this, where the amount involved is over \$200 and under \$500, in counties where the civil jurisdiction has not been taken from the county court and placed in the district court by an act of the legislature, as had been done in this instance (see Sess. Acts 1891, p. 12), we do not now determine; but we are of opinion that the district court of Carson county had jurisdiction of the case as presented, that the petition stated a good cause of action, and that the motion to dissolve the injunction and dismiss the suit should have been overruled. Our constitution provides that: "Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law." Article 8, § 1. We are of opinion that where the board of equalization, in raising or fixing the value of property, acts from corrupt or fraudulent motives, and in violation of the laws of

the state, whether constitutional or statutory, their acts are voidable at the suit of the party aggrieved, and that the courts of the state having jurisdiction over the amount involved and the subject-matter may, in a proper case, declare such acts to be void, and enjoin the enforcement thereof or compliance therewith, and that articles 5123 and 5124 of our Revised Statutes of 1895 were not intended to debar or preclude any person from applying to the courts for relief in such cases,—not, indeed, to revise the action of such board in fixing values, but to set it aside for fraud. The legislature, in declaring their official acts in valuing property for taxation to be "final and not subject to revision," had in contemplation their lawful acts, and not such as are prompted by corrupt, arbitrary, or fraudulent motives, and in violation of constitutional or statutory rights. The statute under which the board was organized limits its power to fix values on property at its "fair market value." The legislature has no power to create any board or commission, and empower it to confiscate any person's property, either directly or indirectly. To arbitrarily value one person's property for taxation at largely more than it is worth, while another's, subject to the same rate of taxation, is placed at greatly less than its value, is a clear violation of our constitution, because the tax in such a case is not equal and uniform, and the property of the county is not taxed in proportion to its value. It is an arbitrary wrong done the former in his "lands and goods," and a fraud upon his rights, for which he has a remedy in the courts of the state, guaranteed by section 13 of our bill of rights, which declares, "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law." Const. art. 1, § 13. By "due course of law," reference is here made, not only to the valid statutory enactments of the legislature, but to the general law of the land,—“a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.” Cooley, Const. Law, pp. 231, 232. Our statute (article 5120) seems to contemplate that the board of equalization shall constitute a kind of judicial tribunal. It is formed out of the commissioners' court, which is required to convene and sit as a board of equalization at a certain time and place. It shall have power to send for persons, books and papers, swear and qualify persons to ascertain the value of property, and see that every person has rendered his property at a fair market value; and, whenever they shall find it their duty to raise the assessment of any person's property, the county clerk shall give such person written notice that they desire to raise the value of the same. These provisions clearly contemplate that the value to be fixed by the board,



where a contest is made, shall be the result of their deliberate judgment, exercised in the light of the facts proven, as well as of matters within their own knowledge; the proceeding being judicial in its character. If, therefore, these boards can arbitrarily ignore the facts, the provisions of the statute requiring the party whose assessment is to be raised to have written notice thereof would be a mockery and a farce. Nor has such board the right or power to willfully assess any person's property at more than its "fair market value," and to thus discriminate against any person or corporation. And wherever, by any device, such discrimination occurs, it is the constitutional right of persons so injured to have redress in the courts of the state, by injunction and decree annulling such action on the ground of fraud; for all such arbitrary acts performed in the exercise of judicial power are fraudulent, and voidable, in the proper tribunals of the state, by direct proceedings to set them aside. The supreme court of Illinois, in *Railroad Co. v. Cole*, 75 Ill. 594, in passing upon a case where the valuation placed upon the property of the railway company by the board of equalization was arbitrary and excessive to an unreasonable extent, say: "Because the law has devolved on the board of equalization, and not on the courts, the duty of making such valuations, we hold it is not the duty of the courts to exercise any supervisory care over its valuations, so long as it acts within the scope of the powers with which it is invested, and in obedience to what may reasonably be presumed to be an honest judgment, however much we may disagree with it. But whenever the board undertakes to go beyond its jurisdiction, or to fix valuations, through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all persons of reflection, it is the duty of the courts to interfere and protect taxpayers against the consequences of its acts. Where its jurisdiction is conceded, no mere difference of opinion as to the reasonableness of its valuations will justify equitable interference; but its valuation must be the result of honest judgment, and not of mere will." This case, upon the facts, seems to be very much in point here. In *Hotel Co. v. Lieb*, the same court said: "Where, however, the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation,—must reasonably have known that it was excessive,—it is accepted as evidence of a fraud upon his part against the taxpayer, and the court will interpose." 83 Ill. 609. See, also, *Cooley, Tax'n* (2d Ed.) p. 784; 25 Am. & Eng. Enc. Law (1st Ed.) pp. 261, 262, and authorities there cited; *Tainter v. Lucas*, 29 Wis. 375; 2 *Desty, Tax'n*, pp. 656, 681, 1433. If, however, the board errs in honest judgment, under our statute, there is no appeal from its decision. Its conclusion is final, and not subject to revision by any court. This suit was not brought to revise the action of the board, but

to set it aside for fraud, and was the proper suit to file, where the facts alleged existed. We are therefore of opinion that the district court erred in dissolving the injunction and dismissing the plaintiff's petition, and order that the judgment therein be reversed, and the cause remanded for a new trial.

### QUEEN INS. CO. OF AMERICA v. MAY et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 18, 1897.)

#### INSURANCE—MISREPRESENTATION OF TITLE—NOTICE TO AGENT.

When the insured told the agent of the insurer on several different occasions while the agent was soliciting the insurance the true condition of her title, the insured will be deemed to have had notice thereof, notwithstanding the written application, made afterwards and upon the issuance of the policy, but not referred to therein, makes a different statement.

Appeal from district court, Smith county; Felix J. McCord, Judge.

Action by Mrs. D. May and others against the Queen Insurance Company of America to recover upon a policy of insurance. Plaintiffs had judgment, and defendant appeals. Affirmed.

H. M. Whitaker, for appellant. Lindsey & Butler, G. H. Gould, and J. R. Burnett, for appellees.

GABRETT, C. J. The appellee brought this action to recover upon a policy of insurance for loss sustained by her by fire of a dwelling house and certain articles of household furniture. Appellant pleaded in defense that by the terms of the policy it was void, because the appellee was not the sole and unconditional owner of the property insured; that the lot on which the property was situated was not owned by her in fee simple; that she had not truly stated her interest in the property; and that she had made material misrepresentations as to the risk. On October 31, 1893, the appellee procured the policy of insurance sued on of the appellant company through their agents, Bonner & Dorough, at Tyler, Tex., a firm composed of John T. Bonner, R. T. Dorough, and Guy Sandidge, doing business as insurance agents at Tyler, Tex. By the terms of the policy, appellant, in consideration of the premium, undertook to insure Mrs. D. May for a term of one year from October 31, 1893, against loss by fire to an amount not exceeding \$1,500 on her dwelling situated in Kilgore, Tex., and \$500 on her household furniture contained therein. The policy was issued upon an application in writing signed by the appellee, in which she stated, in answer to a direct question, that her ownership of the property insured was absolute, unqualified, and undivided, and that there was no lien or mortgage thereon, and agreed that the application should form part

<sup>1</sup> Writ of error denied by supreme court.

of the policy when issued. The following provisions appear in the policy: "This policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material facts or circumstances connected with this insurance or the subject-matter thereof, or if the interest of the assured in the property be not truly stated herein."

"This policy, unless otherwise provided by agreement indorsed thereon or added hereto, shall be void, \* \* \* If the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple." The policy does not refer to the application, or make it a part thereof. The property insured was destroyed by fire on November 13, 1893. Appellee at once gave notice of the loss to Bonner & Dorrough, the agents of appellant at Tyler, of whom she procured the insurance. An agreement was made by the parties as to facts affecting the title of appellee to the property insured as follows: "(1) At the time of the issuance of the policy of insurance sued on, the plaintiff, Mrs. D. May, was a married woman, the wife of John May, but had been, with their children, living separate and apart from him for two years or more before that time, and had then pending in the district court of Gregg county a suit for divorce. (2) On December 29, 1893, the district court of Gregg county rendered a decree granting a divorce. In that divorce suit there was no prayer or decree for any partition of property. (3) While living separate and apart from her husband, and a year or more before the policy of insurance was issued, but before her suit for divorce was filed, plaintiff contracted with the New York & Texas Land Company for the lot in the town of Kilgore on which the residence insured was situated. Said company then owned a fee-simple title to the lot. It was agreed between plaintiff and said company that she could erect a dwelling on said lot, and pay for said lot after she should obtain a divorce from her husband; but no deed has ever been made to her, and she did not obtain the divorce until after the dwelling was destroyed by fire, as hereinafter stated. The company agreed to make her a deed in her own right as soon as she obtained her divorce, and with this agreement she was placed in possession of the lot for the purpose of erecting a dwelling thereon. Plaintiff was to pay one hundred and fifty dollars for said lot. (4) Shortly after the agreement set out in the third paragraph above, plaintiff erected a dwelling house on said lot, and moved into the same with her children, and they were residing there when, on or about November 13, 1893, the dwelling was destroyed by fire." Elsewhere from the record it appears that appellee's husband abandoned her more than three years before the policy was issued, and left their four children with the appellee. At the time of the separation, appellee and her hus-

band had a home, which they sold for \$400, and divided the proceeds equally. The husband contributed nothing to the support of appellee or their children after he left her. Appellee was railroad and express agent at Kilgore, and earned upon an average \$85 or \$90 per month. The house was built with her own earnings after she had been abandoned by her husband, and \$250 given her by her brother. Appellee testified that Dorrough, one of the partners in the firm of Bonner & Dorrough, agents for appellant company, frequently during the year of 1893 solicited the insurance from her, and that on one occasion during the summer of 1893, when he had solicited the insurance, she told him of the condition of her title; that she had not paid for the lot, and that she was not to pay for it, and get a deed, until after she had obtained a divorce, and that he repeated his solicitations after that up to within two or three weeks—perhaps ten days—of the issuance of the policy. According to Dorrough's own testimony, he was well acquainted with the appellee, and knew that she was separated from her husband; had a suit for divorce pending, and had built the house. Giving full effect to the verdict of the jury, we find the facts to be as stated by appellee, and that the policy of insurance was issued upon the application which was a result of Dorrough's solicitation, and that he knew at the time it was issued all the facts concerning the state of appellee's title, and that he was told of these facts by the appellee while soliciting her insurance. The policy was actually issued by Sandidge, one of the members of the firm of Bonner & Dorrough, when Dorrough was absent from the office, and when Sandidge had no actual personal knowledge of the facts communicated to Dorrough by the appellee; neither had J. T. Bonner, the other member of the firm, any actual notice thereof at the time.

This case was before this court on a former appeal, and will be found reported in 35 S. W. 829. Some of the questions now presented were then decided, and the disposition then made of them is adhered to on this appeal. On the former appeal judgment of the court below was reversed, and the cause remanded on the ground that the representation of the appellee that there was no lien or mortgage on the lot was not true, and that it was a material misrepresentation, and that this misrepresentation was not shown to have been waived by the appellant; it being held that the company was not charged with notice of the lien by the knowledge of Dorrough upon the state of the record as it then was. Upon this appeal the facts are materially different. It was not shown on the former appeal that the communication was made to Dorrough at a time when he was soliciting the insurance, and it appeared that it was made at a time some weeks or months before the application for insurance was made. We then held that, in order that

the knowledge of the agent should be notice to the principal, it must have been imparted to him when he was transacting the business of the principal, and, the facts not showing such to have been the case, the principal could not be held to have had knowledge. Upon the second trial, the jury found that there was notice on the part of the appellant company of the true state of appellee's title. Appellee testified that Dorrough solicited the insurance on several occasions; that he was in Kilgore about once a month that summer, soliciting insurance, and usually took dinner with her at the house insured, and where she entertained travelers. He had known her for four or five years, and was first introduced to her by her husband. Every time Dorrough went to Kilgore, he would speak to appellee about insuring, and would ask her for insurance, impressing upon her the importance of insuring her property. She told him she would insure as soon as she was able to do so; as soon as she had the money. Some time in October before the policy was issued, she wrote to Dorrough that she wanted to take out the insurance, and inquired what the premium would be on \$2,000. The last time Dorrough had solicited her insurance was only two weeks—perhaps ten days—before she wrote that she wanted to insure. At one time when he was soliciting the insurance from her she had a conversation with him about the state of her title to the lot on which her house was situated. She told him that she did not have a deed to the lot; that she and her husband had separated, and that she had a suit pending for a divorce, which she expected to get at the next term of the court; that her attorney had told her not to take a deed to the property until after she had procured a divorce, as she would not get a good title before; that she had contracted with the New York & Texas Land Company for the lot, and had arranged with them to pay for it, and get her deed when she had obtained her divorce, and they had told her to go ahead, and build her house on it; that she told Dorrough what she was to pay for the lot, and that she had not paid for it. He raised no objections, but continued to solicit the insurance after that. She did not remember when the conversation occurred, but thought it was in the summer of 1893. She further testified that in reply to her letter, addressed personally to Dorrough, she received a letter from Bonner & Dorrough inclosing a blank application for insurance, which she filled out, and sent to Bonner & Dorrough, and they sent to her the policy of insurance. Dorrough denied that appellee ever told him anything about the condition of her title. He could not say positively whether it was a few days before

or after the fire that he first learned that the policy had been issued. His recollection was that it was after the fire. He was not sure. He had solicited the insurance, and knew that appellee had a suit for divorce then pending. Sandidge testified that it was not his habit to open Dorrough's private letters; that it was his impression that he had told Dorrough about the issuance of the policy before the fire occurred.

From these facts and other facts that appear in the record we think that the jury could reasonably infer that Dorrough, agent of the appellant company, had full knowledge at the time of the issuance of the policy of insurance of the state of appellee's title, and that she had never received a deed for the lot, and had not paid the purchase money therefor. He had been told that appellee had a suit for divorce pending, and knew that fact, and was informed that appellee would not pay for the lot and get a deed until after she had obtained her divorce. The fact that the representation in the application was made subsequent to the time when the appellee informed Dorrough of the condition of her title is not conclusive against the appellee upon the issue of waiver or estoppel as another and later representation of a different state of title to be relied on by the appellant, because the knowledge of the fact by Dorrough that the lot was not to be paid for until after the appellee had obtained her divorce, taken with his knowledge of other facts as shown by the evidence, authorized the jury to impute knowledge to him at the time of the issuance of the policy. This knowledge on the part of the agent Dorrough was the knowledge of the firm of Bonner & Dorrough, and must be held to have been notice to the appellant of the fact of the lien at the time the policy was issued. This being the case, appellant was estopped to set up, or must be held to have waived, the materiality of the misrepresentation as to the lien, and any statement or misrepresentation as to the condition of the title that did not amount to a warranty.

The charge of the court upon the question of knowledge of the agents being notice to the company was more favorable to the appellant than it had a right to expect, but the finding of the jury involved the finding that appellee had told Dorrough of the condition of her title while soliciting the insurance. There was no error in the failure of the court to give the special instructions requested by the appellant upon the question of notice. In view of the disposition that we make of the case, it is unnecessary to consider the appellant's twelfth assignment of error upon the question of the divisibility of the policy. The judgment of the court below will be affirmed. Affirmed.

**SAN ANTONIO & A. P. RY. CO. v. ROBINSON.**

(Court of Civil Appeals of Texas. Dec. 2, 1897.)

**RAILROADS—KILLING STOCK—RIGHT OF WAY FENCE—CROSSINGS—CATTLE GUARDS—GATES—NEGLIGENCE—UNCERTAINTY IN EVIDENCE.**

1. Under Rev. St. 1895, art. 4427 et seq., a railway company is not required to construct cattle guards at a private crossing in an inclosure through which its right of way is fenced.

2. A railway company which has fenced its track is liable for stock killed or injured by its cars, under Rev. St. 1895, art. 4528, only where such loss resulted from want of ordinary care on its part.

3. Where a private crossing communicating with gates in the right of way fence, through an inclosure, was constructed by the railway company, it was not the duty of such company to see that such gates were kept closed.

4. In an action for the value of stock killed on defendant's railway track, plaintiff failed to make a case, where it appeared that such stock entered on the right of way either through the defendant's fence or through a gate therein, but such evidence did not show that they went through such fence.

Appeal from Harris county court; W. N. Shaw, Judge.

Action by W. A. Robinson against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

O. T. Holt, for appellant. W. G. Love and G. W. Thorp, for appellee.

**GARRETT, O. J.** This suit was brought by the appellee for the recovery of the value of certain animals killed by the appellant, about August 31, 1895; the petition alleging that the appellant had negligently permitted the fence which inclosed its track and roadbed to get in a bad condition, so as to be entirely insufficient to turn the stock or to keep them from entering the right of way, and negligently constructed the crossing over its track and right of way, and failed and neglected to construct cattle guards at said crossing, so as to turn stock therefrom; so that the animals entered upon the roadbed of the appellant, and were killed by its cars.

The evidence showed that the crossing was a private crossing, where gates were put in at the request of the owner of the pasture through which the railroad ran. In such a case it is not necessary for the appellant to construct cattle guards. Rev. St. 1895, art. 4427 et seq. The track having been fenced, the company was liable for stock killed by its locomotives and cars only in cases resulting from want of ordinary care. Rev. St. 1895, art. 4528. As appears from the proviso in the statute, the company would not be held responsible if it exercised ordinary care in the maintenance of its fences. From the evidence in the record with regard to the condition of the fence, the jury might have found that the company was negligent in failing to keep it in

good repair; but it was not the duty of the company to see that the gates of the crossing were kept closed. *Adams v. Railroad Co.* (Kan. Sup.) 26 Pac. 430. It devolved upon appellee, therefore, in making out his case, to show that the stock entered upon the railroad track through the fence, and not through the gate, as the company would not be responsible for the leaving of the gate open. *Railway Co. v. Glenn* (Tex. Civ. App.) 30 S. W. 845; *Adams v. Railroad Co.*, supra. This, we think, the appellee failed to do. The testimony of the witnesses does not develop very clearly the situation of the gates and the place from where the animals escaped, but we infer that the railroad ran through a large pasture, containing about 600 acres of land, and that most of the inclosure lay on the north side of the railroad. Appellee was camping or stopping in a house some distance from the railroad, and outside of the pasture. The horses escaped from an inclosure into the pasture, and, in trying to make their way home to the city of Houston, reached the railroad at some point on the line in the pasture. There was evidence that the three top wires of the fence were down, west of the crossing, on the San Antonio side of it, and that on the east side of the crossing, towards Houston, there was only one strand of wire loose, the top strand being fast. Going from the place where the horses escaped into the pasture to the gate, or in the direction of Houston, it does not appear that they would have to pass along the fence where it was down, on the west side of the gate. One of the witnesses testified that every Saturday afternoon, when he passed the gate going into Houston, he saw it open. There was no evidence that the gate was kept closed, or that it was open on the night the animals were killed; but the evidence is such that it cannot be said whether the animals entered the right of way through the fence or through the gate. In other words, the appellee failed to show by any evidence before the jury that the horses entered through the fence. The evidence having failed to show where the animals entered, whether through the gate or the fence, the appellee failed to make out his case. *Railway Co. v. Johnson* (Tex. Civ. App.) 39 S. W. 323, and cases cited supra.

The testimony of the witness McCune, that there were no cattle guards at the crossing, was admissible to show that if the horses had entered the right of way where the fence was down, west of the gate, they would have had an unobstructed passage along the railroad to the place where they were killed at the bridge; and there was no error in receiving it for that purpose. Because the facts did not show that the animals went on the right of way through appellant's fence, the judgment of the court below must be reversed, and the cause remanded for another trial. Reversed and remanded.

## RAY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 8, 1897.)

## THEFT—RECENT POSSESSION—EVIDENCE—PRIOR CONVICTION—APPEAL—HARMLESS ERROR.

1. Evidence that a person was in possession of the stolen property shortly after the theft, and gave an unreasonable explanation of his possession, and did not account for it in a manner consistent with his innocence, and his explanation was shown to be untrue, justifies his conviction of the theft.

2. Where defendant explained his possession of a stolen horse by testifying that he purchased it of a certain person, a charge to acquit if there was a reasonable doubt as to whether he made such purchase was sufficient.

3. Evidence of a prior conviction of horse theft is competent to affect the credibility of defendant on trial for horse theft.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

John Ray appeals from a conviction of horse theft. Affirmed.

R. M. Clark, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of horse theft, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

There is no question that some person stole the horse of Sanders, the prosecutor, and recently thereafter defendant sold the horse in Dallas, executing a bill of sale, signing the name of George Greathouse. Appellant's defense is that he bought the horse from one Chester Springer, in Dallas county, and he introduced testimony in support of this contention. Chester Springer was introduced as a witness, and denied selling the horse to appellant or having any connection therewith. The prosecutor, Sanders, swears that he lived within a half mile of the defendant's father, and that the defendant knew the horse, and had ridden him.

Upon this state of case, the court instructed the jury, among other things: "If you believe from the evidence that the horse described in the indictment had been stolen from the prosecuting witness, George M. C. Sanders, and that recently thereafter the defendant was found in possession of said horse, and, when his possession of said horse was questioned, he made an explanation of how he came by said horse, and you believe that such explanation is reasonable and probably true, and accounts for his [defendant's] possession of said horse in a manner consistent with his innocence, then you will consider such explanation as true, and acquit the defendant. If, on the contrary, you believe such explanation was unreasonable, and did not account for defendant's possession in a manner consistent with his innocence, or you believe that such explanation accounted for defendant's possession in a manner consistent with his innocence, but the state has shown the falsity of such explanation, then you will take the possession of the defendant, together with his

explanation, in connection with all other facts and circumstances, if any, in evidence; and, if you believe defendant guilty beyond a reasonable doubt, you will so find; otherwise, you will acquit the defendant." Counsel for appellant complains of this charge. We think it correct, and such a charge was approved in *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 913.

The court also instructed the jury: "If, under the evidence, you have a reasonable doubt as to whether defendant received the horse in question from Chester Springer, you should acquit him." Under the circumstances of this case, the whole defense of appellant was covered by this instruction. All of his evidence was introduced for but one purpose, and that was to show that, in fact, he had purchased the horse from Chester Springer. By this charge the issue was made clear and concise in a few simple words; and, if the charge complained of above was not proper (which we do not concede), when considered in connection with this latter charge no injury could have possibly resulted to appellant. The defendant being charged with the theft of the horse, and there being no count in the indictment charging receiving and concealing the animal knowing the same to have been recently stolen, it is sufficient for the court to charge on the explanation given by the defendant as follows: "Gentlemen of the Jury: If you believe from the evidence or have a reasonable doubt as to whether the defendant purchased the horse from Chester Springer, acquit him."

Appellant testified in this own behalf, and on cross-examination counsel for the state asked him if he had been charged and convicted of horse theft before. This was objected to by defendant, and the court overruled the objection, to which a bill of exceptions was reserved. The objection stated is that he could only be tried upon the charge contained in the indictment, and not for other offenses, etc. This evidence was introduced for but one purpose,—to go to the credit of the defendant as a witness. The court explicitly limited this evidence to the only purpose for which it could be considered. The evidence being sufficient, and no errors appearing in the record, the judgment is affirmed.

HURT, P. J., absent.

## RAY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 8, 1897.)

## THEFT—INSTRUCTIONS.

1. A request to charge that if defendant "took" the horse alleged to be stolen, and, when his right to it was questioned, he gave the reasonable explanation that he bought it, the state must prove that his explanation was false, should be refused; for, if he took the horse, an explanation that he bought it would not be reasonable.

2. It was not error to refuse a request to charge on a question that had been fully covered by the charge that was given.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

John Ray appeals from a conviction of horse theft. Affirmed.

R. M. Clark, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of the theft of a horse alleged to be the property of O. H. Wilson. The horse was taken in Dallas county, and sold by appellant in Forney (Kaufman county), to the postmaster, Adams. On the trial, appellant claimed and testified that he bought the horse from Charley Denton. Denton was placed upon the stand, and denied selling the horse to appellant, and further denied having any connection with the horse. The state also proved by Constable Bane that defendant told him, after being properly warned, while under arrest, that he bought the horse from a man named Johnson. There is a good deal of testimony in the record, but this is a sufficient statement of the case for the purpose of decision.

The court charged the jury, in regard to appellant's explanation of his possession, in accordance with the rule laid down in *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 913. On several occasions we have sustained this character of charge, and see no reason for changing the views therein expressed.

Appellant also requested a charge in this connection as follows: "If you find from the evidence that the defendant took the animal mentioned in the indictment, and you further find that, the first time his right to the said animal was called in question, he gave an explanation of such possession, and such explanation was reasonable, then you are instructed that it devolves upon the state to prove the explanation false," etc. The court properly refused to give this instruction; for, in the first place, if the defendant took the horse, his explanation could not be reasonable, because that explanation was that he bought it from Denton, or, as stated to the officer, from Johnson. Neither one of these explanations could have explained the defendant's possession compatible with his innocence, if the assumption in the charge is true,—that the appellant took the animal. But, if the charge had been couched in appropriate language, the court did not err in refusing it, because he had already given a charge covering the question fully.

The other questions suggested for consideration have been decided adversely to appellant in case No. 1,733, just decided (*Ray v. State*, 43 S. W. 77). The evidence fully justifies the conviction, and the judgment is affirmed.

HURT, P. J., absent.

## JONES v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

BAIL—LIBEL—INDICTMENT—SUFFICIENCY—EVIDENCE.

1. A recognizance reciting that defendant stands charged with the offense of libel is sufficient without setting out the constituent elements of the offense.

2. An indictment for libel alleged that defendant published a libelous article against one L. and others, who were then conductors, employed by a certain city railroad. The libelous article charged that the conductors of the city railroad, as a class, were foul characters, but did not mention any conductor by name. *Held*, that it was properly alleged to affect the reputation of any one or more of the conductors of said railroad.

3. An indictment for libel in publishing that one of the conductors of a certain railroad caused a lady to be thrown to the ground while alighting from a street car, and imputing to all the conductors of such road disgraceful acts, the nature and consequence of which were to bring them into contempt, and which attributed to said conductors infamous characters, was sustained on proof of any of the allegations.

4. Where the statement in a publication was so plain and unmistakable that no intelligent person could fail to understand what was intended by it, no innuendoes were required in the indictment.

Appeal from district court, Galveston county; E. D. Cavin, Judge.

W. L. Jones was convicted of libel, and appeals. Affirmed.

Wilford H. Smith, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of libel. The assistant attorney general moves to dismiss the appeal, because the recognizance fails to recite an offense known to the law. Said recognizance recites that the defendant "stands charged with the offense of libel." This is the only recitation in said obligation of the offense. None of the constituent elements are set out or attempted to be set out. We think that the recognizance is sufficient. Libel is defined to be an offense by the statutes, and is an offense *eo nomine*, as theft, murder, slander, etc. The motion to dismiss the appeal is overruled.

Appellant filed his motion in arrest of judgment, because the indictment is fatally defective, in that the published statement alleged to be libelous fails to convey the idea that the persons referred to had been guilty of a penal offense; or that they had been guilty of some act or omission which, though not penal, was disgraceful to them as members of society, the natural consequence of which was to bring them into contempt among honorable persons; or that they had some moral vice, or physical or mental defect or disease, which rendered them unfit for intercourse with respectable society, and such as would cause them to be generally avoided; or that they were notoriously of bad or infamous character. His second contention is that the printed and published matter could be held to

refer to but one person, to wit, the conductor causing the injury to a colored woman on East Avenue L car, and the indictment fails to designate by name who that conductor was; and he generally urges that the published matter is not libelous. Omitting the formal parts of the indictment, it charges that "defendant and W. H. Noble, on the 14th of November, 1896, in the county of Galveston, in the state of Texas, with force and arms, then and there, with intent to injure A. S. Spurgeon" and others, setting them out by name, "did unlawfully and maliciously make, write, print, publish, sell, and circulate a malicious statement of and concerning the said A. S. Spurgeon" and others mentioned, "and affecting the reputation of the said A. S. Spurgeon" and others mentioned, "who were then and there conductors employed by the Galveston City Railroad Company, on the various lines in the city of Galveston, Tex., which malicious statement was of the tenor following, to wit: 'Irish Snides. It is really disgusting, to say the least, for one to take notice and see how the Irish snides employed by the street-car company (meaning the Galveston City Railroad Company) as conductors on the various lines of this city (meaning the city of Galveston) discriminate. With a few exceptions, these cowboys, escaped lunatics, and imported lords have a way of their own, and discriminate with a vim. These whelps seem to forget that they are public servants, and treat our best colored ladies with a contempt that could only be found in a Yale chump. Some few nights ago, a colored lady, while dismounting from an East L car, was thrown to the ground by the mangy ape that poses as conductor ringing the bell before she was off the step. And the lousy little puppy, that scarcely speaks English, said to a white gentleman, that spoke of the danger of such proceedings, that she was a 'she coon.' Has it come to this? Such pimps (meaning one who provides the means and opportunities for libidinous gratification; that is to say, a procurer for the lusts of others) as this, men so low that they would willingly sell the virtue of their sister for a drink, the descendants of Oscar Wilde (meaning that they commit the crime of sodomy), greasy curs, foul-smelling scavengers, are imported to this country to insult and humiliate the people that help to make these enterprises,—that build up and support these public affairs. We coons! Some of the best families of America have raised coons. I expect that foreign whelp is a coon, but the woman in question is a colored lady. Perhaps I am a coon, but I would not give one drop of my "coonery" blood for a barrel of the "blud" of such "bludy" Irish snides. It's time that the car company should right these wrongs, and employ only respectable, intelligent men, that will do justice to all alike. We pay a nickle, and we demand a nickle's worth. There is too many intelligent men in this country to import such beastly bastards to insult the people here.'" It

will be seen by this indictment that all of the parties named in the alleged libelous matter are alleged to be conductors of the Galveston City Railroad Company.

Taking appellant's grounds of his motion out of the order in which he places them, we notice that ground of said motion first which alleges the indictment is insufficient, because it only refers to one conductor causing the injury to a colored woman, etc., and fails to designate by name that conductor. By reference to the libelous matter published, it will be seen that the first sentence in said publication refers to the conductors on the various street cars of this city (meaning the city of Galveston) as a class. The libelous matter makes no exception among the conductors, but includes all of them. This has been held sufficient, without designating the names; and we hold this to be sufficient designation of every conductor in the service of said railroad company at the time of said publication. It therefore would be a violation of our statute to libel any sect, company, or class of men without naming any person in particular who may belong to said class. See 13 Am. & Eng. Enc. Law, p. 499, and notes; 2 McClain, Cr. Law, § 1044.

In reply to appellant's contention that the indictment fails to charge said conductors, either directly or by innuendo, with an offense against the laws, or with some act or omission, which, though not a penal offense, is disgraceful to said conductors as members of society, or the natural consequence of which is to bring them into contempt among honorable persons, or that they have some moral vice or physical or mental defect or disease which renders them unfit for intercourse with respectable society, and such as would cause them to be generally avoided, or that they are of notoriously bad or infamous character, we have this to say: That the first allegation in the indictment, to wit, that one of those conductors caused a colored lady to be thrown to the ground while dismounting from a street car, imputed an assault to one of said conductors, belonging to the class charged in the indictment, but does not name him. But concede that we should be in error as to the effect of this allegation; unquestionably the charge that said conductors were pimps, with the innuendo following the same, is such a charge as imputed some act, which, though not a penal offense, was disgraceful to said conductors as members of society, and the natural consequence of which was to bring them into contempt among honorable persons. So, of that portion of said publication which charged that said conductors were so low that they would willingly sell the virtue of their sister for a drink. These charges attributed to said conductors that they were of notoriously bad or infamous character; and, as the prosecution in this case was under all of said allegations, if the proof sustained any one, it was sufficient. It will be further noticed by reference to the allegations in the indictment

that there are innuendo averments contained therein, sufficiently explanatory of said statements in said publication. But, if there had not been, we hold that they were sufficient in and of themselves to constitute libel without innuendoes. The statements in the publication were so plain and unmistakable in their meaning that no intelligent person could fail to understand and comprehend what was intended by them. *More v. Bennett*, 48 N. Y. 472; 2 McClain, Or. Law, § 1043, and authorities cited in note 2.

In regard to the remaining question, that the publication is not libelous, under the views herein expressed, it will be seen that such contention is without merit. We think the indictment is sufficient, and the judgment is affirmed.

#### NOBLE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

**LIBEL—MANAGER OF PAPER—WRITER OF ARTICLE.**

In a criminal prosecution for libel, it was immaterial whether defendant was responsible for the publication of the article in question, on account of the fact that he was the financial manager of the paper in which it was published, where it appeared that he had admitted the writing of such article.

Appeal from district court, Galveston county; E. D. Cavin, Judge.

W. H. Noble was convicted of libel, and appeals. Affirmed.

Wilford H. Smith, for appellant. Mann Trice, for the State.

**DAVIDSON, J.** Appellant was convicted of libel. This is a companion case to *Jones v. State* (just decided) 43 S. W. 78. The questions on the indictment are the same in this case as in that, and upon that authority the indictment is held sufficient.

The only other question that requires consideration is whether or not appellant is guilty of the publication. In regard to defendant's connection with the publication of said article, it is shown that he was the business manager of said paper, and admitted writing the article in question; and it is a disputed fact whether he was in the city of Galveston at the time of its publication,—he claiming, and adducing evidence to show, that he was in the city of Dallas at that time. The defendant testified that he did not write the article, and did not cause it to be published, and that his only connection with the paper, as its business manager, consisted in the fact that he solicited advertisements and other financial business going to build up said paper, and for which he received a percentage. It is not necessary, in the view we take of the case, to discuss the question of his responsibility on account of the fact that he was financial manager of the paper, because the evidence for the state shows that he admitted writing the article. While he denied

this, still it was a fact for the jury. They were the judges of the credibility of the witnesses who testified pro and con in regard to this matter, and the jury decided the question adversely to him. If he wrote the article, as he admitted to the witness who testified to that fact, he would be responsible, under the facts of this case. With reference to the remarks of counsel for the state in the closing argument, which were excepted to by appellant's counsel,—appellant having taken the stand as a witness on his own behalf,—we think the inference or deduction drawn by counsel for the state was legitimate. The judgment is affirmed.

#### FOSTER et al. v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

**RECOGNIZANCES—RELEASE OF SURETIES.**

Code Cr. Proc. 1895, art. 498, providing that "when a defendant who has been arrested for a felony under a capias has previously given bail to answer said charge, his sureties shall be released by such arrest, and he shall be required to give new bail," does not apply where the second arrest is under a second indictment, though such indictment be based on the same transaction as the first.

Appeal from district court, Harrison county; W. J. Graham, Judge.

A judgment was entered in favor of the state against A. T. Foster and others on a forfeited recognizance, and defendants appeal. Affirmed.

Chas. E. Carter, for appellants. John B. Carter, Dist. Atty., and Mann Trice, for the State.

**DAVIDSON, J.** This is an appeal from a judgment final upon a forfeited recognizance, and appellants are the sureties. Their principal was indicted for theft of hogs. In answer to the scire facias, among other things, it is set up in their answer that defendant was arrested upon a capias issued from the same district court upon a second indictment, charging the same offense, and that they were thereby released from the first obligation. Both indictments were still pending. In the first indictment there was but one count, charging theft of hogs. In the second indictment there are several counts, two of which charged theft of hogs. In the first count in the second indictment the ownership is alleged substantially as in the first indictment. The second count of the second indictment charges ownership in a different party. There are then several other counts in the second indictment charging receiving and concealing the hogs, knowing them to be stolen.

Article 498 of the Code of Criminal Procedure of 1895 provides, "When a defendant who has been arrested for a felony, under a capias, has previously given bail to answer said charge, his sureties shall be released by such



arrest, and he shall be required to give new bail." Appellants' contention is that by the arrest of their principal under the second indictment, under this statute, they were relieved of their obligations under the first; and we are referred to several cases decided by our court of appeals and supreme court in support of this proposition. An examination of those authorities will show that, where the question has been so decided, it was in a case in which the principal was arrested under the same indictment, or where he was arrested after an indictment found against him on a charge founded upon a complaint filed in the justice court, and had given bail to appear before the district court to answer any indictment that might be found by the grand jury under said proceeding from the justice court. Those authorities, we think, are correct, but they are not applicable to the case in hand. Here we have two cases pending, both of which, it is conceded, grow out of the same transaction, the first being for theft only, whereas the second charges theft from different owners in different counts, as well as receiving and concealing the property after it was stolen. Taking this view of the case, it is evident that the state had the right to charge the defendant, in separate indictments, with the theft from the different owners, as well as, in separate indictments, with the reception and concealment of said property. Had the state pursued that policy, and required bond in such case, it would have appeared to appellants that their proposition would have been untenable. An inspection of the first indictment shows the allegations of ownership to be in Sanders. In the second indictment, the property is alleged in Livingstone. But suppose the indictment in the second case set up a theft only of the same property, and in the same manner as that alleged in the first; still it would not alter the question. The appellants could not be heard to complain. It is true, it may be the same transaction, but this cannot be urged to avoid a forfeiture of the bail taken in the first case. It is well settled, under the decisions of this court, that where property has been taken in one county and carried into another, and indictments have been returned against a defendant in both counties, he cannot plead freedom from arrest in the second county because of the pendency of the indictment in the first. That question was decided in *Schindler v. State*, 15 Tex. App. 394, and there have been several cases since following the rule there laid down. There is no question that, in the case put, it is the same cause; and, as put, it is a second arrest in the same case, though under different indictments. Had the defendant been arrested in this case a second time under the first indictment, the prior sureties would have been discharged; but under an arrest under the second indictment, charging an offense growing out of the same transaction, this rule does not obtain, nor was the statute intended

to cover such cases. The recognizances in both cases recited the offenses of which defendant stood charged as being theft of hogs. In the first indictment the ownership, as before stated, was charged in Sanders. In the second count of the second indictment it was alleged to be in Livingstone. The second indictment was evidently found to cover the different phases of anticipated testimony; and, if the second indictment only charged the theft in Livingstone, appellants would hardly contend that the article above quoted (496) would apply, and the theft of the hogs mentioned in the second recognizance would apply as well to the theft from Livingstone as from Sanders. So in no event do we believe there is anything in the proposition contended for by appellants. We further hold it would be immaterial that the second indictment was for precisely the same offense, and was identical with the first. The sureties on the bail bond in the first case could not plead their discharge by reason of arrest and giving bail under the second indictment. It is entirely competent for the state to hold the principal and sureties under bail or recognizance to answer both indictments, and the principal and sureties are so held, unless the prosecution is dismissed or discontinued as to one indictment, or unless, by proper proceedings, the bond or recognizance under one of said indictments is dismissed or set aside by order of the court. We accordingly hold that the statute invoked by appellants has no application to this case, and the judgment is affirmed.

#### RUSSELL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

#### CRIMINAL LAW—INSTRUCTIONS—THEFT—DEFENSES.

1. Where the law has once been fully given by the court, it is not necessary to repeat the instructions in another form.

2. Where, on trial for cattle theft, defendant claimed to have bought the animal from another, an instruction that, if defendant purchased the animal from such other person, or if the jury had reasonable doubt as to whether he did so purchase it, the defendant must be acquitted, though such other person may have stolen the animal, was a sufficient presentation of the defense.

3. Failure to give an instruction is not ground for reversal where the charge was not asked, and no exception was preserved.

4. A conviction, where there is evidence to sustain it, will not be disturbed.

Appeal from district court, Hood county; J. S. Straughan, Judge.

Tom Russell was convicted of theft, and appeals. Affirmed.

N. L. Cooper & Son, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and given four years in the penitentiary; hence this appeal.

There were two theories presented in this case in regard to the defendant's connection

with the theft: That for the state, that it was an ordinary case of cattle theft, in which the defendant participated as a principal; and the other, for the defendant, that he bought the animal from one McBeth, who was driving said animal through the pasture at the time he made the purchase. In regard to the defendant's theory, and under his testimony, the court charged the jury: "In order to warrant the conviction of the defendant, you must be satisfied from the evidence, beyond a reasonable doubt, that the defendant took the identical animal alleged to have been stolen, and that such taking was fraudulent. So, if you believe from the evidence that the defendant took the animal alleged to have been stolen, yet, if you believe that he had purchased the same from one McBeth, or have a reasonable doubt as to whether he did so purchase it, in such case the defendant would be entitled to an acquittal, and in such case it would make no difference that McBeth himself may have stolen the animal." This is a direct, pertinent application of the law to the evidence introduced by the appellant. Under that charge, if the jury believed that the defendant bought the animal in question from McBeth, they could not convict him. It has been well settled in this state, under all the decisions, that when the law has been once pertinently charged by the court, it is not necessary to repeat charges in another form, and it is not error for the court to omit charging the legal effect of such evidence in other and different forms than that given. It is contended that the court should have charged the jury, in this connection, that they should acquit although the defendant knew the fact that the animal was stolen, yet, if he bought it from McBeth, in that event he would not be guilty. This charge was not asked, and no exception was reserved to the court's failure to give it; but, if it had been requested and refused, we do not see how that could operate a reversal, because the court's charge informed the jury that, if the defendant bought the animal from McBeth, they could, in no event, convict him, although McBeth had committed the theft. If he bought the animal from McBeth, under the facts of this case, that was his first connection with it, from the defendant's standpoint, and would cut him off from the taking of the animal. We think the charge as given in this respect was sufficient.

It is contended that the testimony is not sufficient to support the judgment. As stated above, there were two theories in regard to this matter, one which fully sustains the conviction, and the other that the defendant purchased the animal from McBeth. The jury decided this conflict in the testimony, passing upon the credibility of the witnesses and the weight to be attached to their testimony; and in reviewing the testimony it is our opinion that the jury were fully justified in arriving at the conclusion they did. The judgment is affirmed.

#### Ex parte NAIRN.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

#### CRIMINAL LAW—APPEAL—STATEMENT OF FACTS.

Statement of facts, embodying, as such, in violation of court rules, the questions and answers of witnesses, will be stricken out.

Appeal from district court, Brazoria county; T. S. Reese, Judge.

Application by F. Nairn for bail was refused, and he appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. The assistant attorney general moves to strike out the statement of facts in this case, because violative of the rules which interdict the embodying, as a statement of facts, of the questions and the answers of the witnesses. Under the repeated decisions of this court, as well as of the supreme court, this motion is well taken, and the statement of facts is accordingly stricken out. In this connection it may be further noted that said statement of facts was not filed in the court below, as required by the statute. Without the statement of facts, the order of the court refusing bail to the relator cannot be revised, and the judgment is accordingly affirmed.

#### LEWIS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

#### CRIMINAL LAW—APPEAL—DISMISSAL—REVIEW.

1. Where the record on appeal contains a certificate of the clerk that the defendant "is now confined in the G. county jail pursuant to the judgment of conviction herein," it is a sufficient showing that the appellant is in jail pending an appeal, so that a motion to dismiss will be overruled.

2. In the absence of testimony, a refusal of a new trial for newly-discovered evidence cannot be considered.

Appeal from district court, Galveston county; E. D. Cavin, Judge.

Jeff Lewis was convicted of selling liquors without a license, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted for pursuing the occupation of selling malt liquors without first obtaining a license for that purpose, and his punishment assessed at a fine of \$75; hence this appeal.

The assistant attorney general moves a dismissal of the appeal, because there is no recognizance in the record, nor an affirmative showing that appellant is confined in jail pending this appeal. It is true that the record does not show a recognizance, but the clerk certifies in the record that: "The defendant, Jeff Lewis, is now confined in the Galveston county jail pursuant to the judgment of conviction herein. [Signed] O. J. Allen, Clerk of the Criminal District Court of Galveston County, Texas." We think this is a sufficient

showing that the appellant is in jail pending his appeal, and the motion to dismiss is overruled.

The record contains neither a statement of facts nor a bill of exceptions. Appellant relies upon two propositions in his motion for a new trial to reverse the judgment: (1) That since the trial he has discovered the testimony of Victor Vilas and Jules Victor, whom, he alleges, would testify that he had not pursued the occupation of selling malt liquors after March 22, 1897. He says he expects to prove the same facts by S. W. Blessner. The second ground of his motion is based upon the insufficiency of the evidence to support the conviction. The motion is sworn to by the defendant. The affidavits of the newly-discovered witnesses are not attached to the motion, and there is nothing to indicate that they would so testify, except the affidavit of the defendant himself. Without the evidence adduced upon the trial, we could not undertake to revise the action of the court in refusing to grant the motion for a new trial on the ground of newly-discovered testimony. It is well settled that the alleged newly-discovered testimony must be material, and would probably lead to a different conclusion upon another trial than that reached upon the first trial. What bearing this newly-discovered testimony would have had upon the case is not stated, and there is nothing by which we can ascertain its bearing. The proof may have been absolutely conclusive of the defendant's guilt, and, in the absence of the testimony, we presume that it was. The judgment is affirmed.

#### THULEMEYER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

##### FORGERY—INDICTMENT—VARIANCE.

Where an indictment charges that the forgery consisted in a false indorsement, purporting to be the act of "Wm. Cook, Jr.," upon the back of a genuine instrument, and the tenor clause sets out the indorsement as by "Wm. Cook, per Wm. Cook, Jr.," the variance is fatal.

Appeal from district court, Bexar county; Robert B. Green, Judge.

W. L. Thulemeyer was convicted of forgery, and appeals. Reversed.

Arthur W. Seelgson and J. H. McLeary, for appellant. Mann Trice, for the State.

**HENDERSON, J.** Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of three years; hence this appeal.

The first question presented is as to the validity of the indictment; that is, whether there is repugnance or variance between the purport and tenor clauses thereof. The charging part of said indictment is as follows: That W. L. Thulemeyer "did then and there, without lawful authority, and with intent to injure and defraud, did willfully

and fraudulently make a false instrument in writing, purporting to be the act of another, to wit, the act of Wm. M. Cooke, Jr., by then and there indorsing on the back of a genuine instrument in writing, to the tenor following:

"Treasury Warrant. \$52.77.

"[Seal.] No. 232. Comptroller's Office.

"Austin, Texas, Sept. 18, 1894.

"The treasurer of the state of Texas will pay to the order of Wm. M. Cook, pr. W. M. Cook, Jr., fifty-two &  $\frac{1}{100}$  currency dollars, for direct tax paid in Calhoun Co., and charge the same to special deposit direct tax fund.

"\_\_\_\_\_, Treasurer.

"Steph. H. Darden, Comptroller.

"Chf. Clerk."

—"the names 'Wm. Cook, pr. Wm. M. Cook, Jr., W. L. Thulemeyer,' which said indorsements made by the said W. L. Thulemeyer, as aforesaid, would, if the same had been true and genuine, have transferred said genuine instrument in writing."

Said indictment distinctly charges that the forgery consists in the false indorsement on the back of said instrument purporting to be the act of William M. Cook, Jr. In the tenor clause, in setting out the indorsement on the back of said instrument, the pleader sets out as follows: "Wm. Cook, pr. Wm. M. Cook, Jr., W. L. Thulemeyer." The contention here is that in the purport clause the pleader should have set out all the names constituting the indorsement, in order that there should be an accurate correspondence between the purport and tenor clauses of the indictment. In accordance with our decisions upon this question, the point seems to be well taken. See *Roberts v. State*, 2 Tex. App. 4; *English v. State*, 80 Tex. App. 470, 18 S. W. 94; *Campbell v. State* (Tex. Cr. App.) 32 S. W. 899; *Fite v. State* (Tex. Cr. App.) 34 S. W. 922; *Stephens v. State* (Tex. Cr. App.) 37 S. W. 425; *Gibbon v. State*, Id. 861; 2 Bish. New Cr. Proc. § 416; *Cross v. People*, 47 Ill. 152; *State v. Horan*, 64 N. H. 548, 15 Atl. 20; 2 Shars. & B. Lead. Cr. Cas. p. 101, and note; 9 Enc. Pl. & Prac. p. 575, and notes. It will be observed that the allegation in the purport clause of the indictment is "that the indorsement purported to be executed by Wm. M. Cook, Jr." If we should eliminate entirely from our consideration, as a part of the tenor clause, the name "W. L. Thulemeyer," then we have an instrument indorsed by "Wm. Cook, pr. Wm. M. Cook, Jr."; that is, we would understand from this that the indorsement was executed by William Cook, by his agent, William M. Cook, Jr. The real forgery would consist in signing, without authority, William Cook's name by William M. Cook, Jr., the latter of whom assumed to act as the agent of the former; that is, it would consist in the forgery by

some one else of both names. To make this clearer: If A. undertakes to act as the agent of B., and to execute an instrument for B., the credit given to the instrument would be on account of B's name; and, if A. had authority to execute the instrument for B., it would be binding upon B. The forgery of such an instrument would consist in the forgery by some one else of both B's and A's name. The indictment here, in its purport clause, simply charges that the indorsement was signed by William M. Cook, Jr. Looking to the tenor clause, we see at once that he merely purported to sign it for William Cook; that it was William Cook who was to be bound, and not William M. Cook, Jr. Looking to the purport clause alone, we would expect to find an indorsement simply by William M. Cook, Jr., and not at all an instrument signed by him as agent of another. Aside from the strict rule of pleading which has been followed by this court for a long period of time, and which seems to be supported by the current of authority, it obviously occurs that any other rule as applied to the indictment, in attempting to set out this instrument by its purport, would be misleading and confusing. But, however that may be, the rule of pleading on this subject has been long established, and we see no reason to depart therefrom.

Appellant assigns a number of other errors. We have examined the record in respect to the same, but, in our opinion, the court did not err in the admission or rejection of testimony, nor in the charges given or refused; but, on account of the variance between the purport and tenor clauses of the indictment, the judgment is reversed, and the cause dismissed.

#### SNIDER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

##### CARRYING WEAPONS.

Where defendant goes to a certain place to deliver a pistol which he had sold, he has the right to carry the pistol to the place of delivery, and, if he does not find the purchaser there, to return with it to his house; but if he fails to find such person at the place of delivery, and then goes about other business, carrying the pistol with him, it is a violation of the law.

Appeal from district court, Angelina county; Tom C. Davis, Judge.

Jim Snider was convicted of carrying a pistol, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of carrying a pistol on and about his person, and his punishment assessed at a fine of \$25; hence this appeal.

The evidence in this case shows that appellant, while traveling along the road, took from his pocket a pistol, and fired it four times. This is admitted by appellant to be

true. In defense, he stated that, on the night previous to having carried the pistol, he had made a trade to sell a pistol to John Berry. They were then at Moffet's school house, at a public speaking. His brother left the speaking, and went home, and appellant requested him, when he returned to the school house, to bring the pistol to be delivered to Berry that night. He says this was not done, because the pistol was locked up in his trunk, and his brother failed to get it. It is further shown for the defense that they then agreed that Berry should receive the pistol at Moffet's school house the next day, and he testified that he carried the pistol to said school house to be so delivered, and Berry failed to come. He further testified that upon reaching the school house, and not finding Berry, he did not hunt him up for the purpose of delivering the pistol, although he lived but a short distance from said school house, but went to Mr. Reynolds', with whom he had an understanding to do some work. In regard to this contract for work, Reynolds testified "that defendant was to hoe for me, and I told him that I had a granddaughter that could beat this young man hoeing; and the young man said, if the girl could beat him hoeing, he would give his work free; and he agreed to come over to my house Saturday for the purpose of doing this work. He came over Saturday morning, and, my granddaughter being sick, I had no work for him to do, and so told him. He returned home, and I did not see him any more that day."

It is contended that, under this state of case, the verdict of the jury is contrary to the law and the evidence. We do not think so. If defendant in fact had made a trade with Berry to deliver him the pistol at Moffet's school house, then, upon arriving there and failing to find Berry, he had no right to go about the country carrying said pistol, and shooting it off along the public roads.

The court charged the jury, in substance, with reference to the alleged trade between defendant and Berry, that if defendant made such contract, and went to Moffet's school house to deliver the pistol in accordance with said contract, then he would have a right to carry the pistol to the place of delivery, and from that point back to his home; but that if they found that he made said trade, and carried said pistol to said school house to be delivered to the alleged purchaser, and, failing to find him at such place, he went thence to Mr. Reynolds', in search of work, and from Reynolds' back home, and that Reynolds' residence was not on his way home, then he would be guilty of unlawfully carrying a pistol. The jury were further charged that if he had the right to carry the pistol, under the circumstances given, he would have the right to fire the same. These charges were in accordance with the decisions of this court on the subject; that is, as we understand it, the defendant would have had the right to carry the pistol to deliver to the party to whom he

sold it, but if, after failing to find the party at the place of delivery, he then diverted his course, and went about other business, and went to other places, carrying the pistol with him, this would be a violation of law. See *Stilly v. State*, 27 Tex. App. 445, 11 S. W. 458; *Ratigan v. State*, 33 Tex. Cr. R. 301, 26 S. W. 407; *Brownlee v. State* (Tex. Cr. App.) 32 S. W. 1043; *Lawson v. State* (Tex. Cr. App.) 31 S. W. 645.

Appellant asked special charges, which asserted the law to be the opposite of that given by the court with reference to carrying the pistol to Reynolds', and thence home. They were correctly refused. The judgment is affirmed.

### FRANKLIN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

#### PERJURY — POSITIVE AND CIRCUMSTANTIAL EVIDENCE — ADMISSIBILITY OF RECORD — INSTRUCTIONS.

1. In perjury predicated on the alleged false statement by defendant that he did not, on a certain occasion, see a pistol in K.'s hand, two witnesses testified that they, with defendant and K., were standing close together, on a bright moonlight night; that K. drew his pistol, and tried to strike witness with it; that defendant could not help seeing it unless his eyes were shut. Two other witnesses testified that defendant had told them he saw the pistol on the occasion in issue. *Held*, that the evidence was positive, and not circumstantial, within Code Cr. Proc. 1879, art. 746, forbidding a conviction for perjury on circumstantial evidence alone.

2. In view of the character of the evidence, and an instruction that the jury, before they could convict, must believe beyond a reasonable doubt that the falsity of defendant's statement had been established by the testimony of two credible witnesses, or of one credible witness corroborated by other circumstances, the provisions of Code Cr. Proc. 1896, art. 785, requiring that in all cases where two witnesses, or one with corroborating circumstances, are necessary to convict, the court, if the requirement is not fulfilled, shall instruct the jury to acquit, do not apply.

3. Where so much of the record of the trial in which the perjury was alleged to have been committed as will show the organization of the court and the nature of the accusation is introduced in evidence, but not the record of the judgment of conviction, it is not error to omit to instruct the jury limiting the use of such evidence.

4. Alleged improper remarks of the district attorney will not be reviewed when no request was made for a charge to the jury in relation thereto.

Appeal from district court, Red River county; V. W. Hale, Special Judge.

Willie Franklin was convicted of perjury, and appeals. Affirmed.

Shaw & Johnson, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

The only bill of exceptions contained in the record is to the remarks of the district attor-

ney in his closing argument. We see no possible injury that could result to the appellant from said remarks; and, besides, there was no request on the part of appellant for the court to charge the jury in regard thereto.

Appellant assigns as error the failure of the court to charge article 785, Code Cr. Proc. 1896. This article simply requires: "In all cases where by law two witnesses or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction." This article has heretofore been construed to mean that where, in the opinion of the court, this statute has not been complied with by the state introducing two witnesses, or, in the opinion of the court, one witness with corroborating circumstances, it was the duty of the court to instruct the jury to acquit. There can be no question in this case that this statute had not been complied with. There was testimony sufficient to go to the jury as to the falsity of the statement, as required by the statute, and the truth of the testimony of the witnesses was for the jury. The court instructed the jury "that, before they could convict the defendant of the alleged falsity of his statement, that they must believe beyond a reasonable doubt that such falsity had been established by the testimony of two credible witnesses, or of one credible witness corroborated by other circumstances"; and this, in our opinion, was, under the proof in this cause, all that the court was required to do.

Appellant contends that the proof was of a purely circumstantial character, and that, under our statute, a conviction of perjury cannot be had on circumstantial evidence alone, and cites us to the statute on this subject (article 746, Code Cr. Proc. 1879), and to *Kemp v. State*, 28 Tex. App. 519, 13 S. W. 860. Said decision is a construction of the article in question in accordance with the contention of appellant. This construction appears to have been overruled in *Beach v. State*, 32 Tex. Cr. R. 240, 22 S. W. 976, and *Plummer v. State* (Tex. Cr. App.) 33 S. W. 228. However, we do not believe the question arises in this case; the record, in our opinion, showing that the proof of the falsity of the alleged statement was made by positive, and not circumstantial, testimony. The alleged false statement on which the perjury was predicated was to the effect that appellant had sworn that on a certain occasion he did not see King with a pistol in his hand. Two witnesses testified on this point, for the state, that they were present on the occasion alluded to; that King and the appellant in this case were present; that they were all close together on the gallery, on a bright moonlight night; that King drew his pistol, and attempted to strike one of the witnesses over the head with it; that appellant was present, having come there with King; and that he had full opportunity to see King draw the pistol, and attempt to

strike the witness with it; and they both testify that, unless his eyes were shut, he did see the pistol, for he had full opportunity to do so. This, according to our view, establishes a negative pregnant, and is positive testimony to the effect that appellant saw the pistol on that occasion. Moreover, the state proved by two witnesses that defendant told them that he did see the pistol in King's hand on said occasion. This also was positive testimony.

Appellant makes the contention here that the court committed an error in not instructing the jury with reference to the admission of certain record testimony, and limiting the purpose for which the jury could consider such testimony. The record testimony complained of is the minutes of the county court of Red River county, showing that court was regularly and duly opened on April 29, 1897, and that R. H. Wells was the presiding judge, and that Nathan King pleaded not guilty before the judge and jury duly impaneled to try said King for carrying unlawfully on and about his person a pistol. Also a complaint and information, duly filed in said county and state, charging said offense. On the failure of the court to limit this testimony, appellant refers us to the cases of *Davidson v. State*, 22 Tex. App. 373, 3 S. W. 662; *Washington v. State*, 23 Tex. App. 336, 5 S. W. 119; *Maines v. State*, 23 Tex. App. 568, 5 S. W. 123; *Littlefield v. State*, 24 Tex. App. 167, 5 S. W. 650. In these cases it will be found that the judgment of conviction was introduced in evidence, and this court held in each case that it was the duty of the court below, whether asked or not, to limit such testimony to the purpose for which it was introduced; that is, merely to show the proceeding in which the perjury was committed. This view of the court is predicated upon the idea that the judgment of conviction offered in evidence in the case in which the perjury was assigned, showing that the jury found against the defendant's evidence in said case, might be used by the jury trying him in the perjury case as a circumstance corroborative of the falsity of his alleged statement. In *Estill v. State* (decided at the present term of this court) 42 S. W. 306, the same rule was announced; but in this latter case the injury was more apparent, as in said case the defendant was charged with perjury committed in a former case, in which he was charged with an offense, he having been introduced as a witness on his own behalf in said case. It is very evident in the latter case that the danger of injury was imminent, and that it was error for the court to fail to give an instruction limiting the testimony. The case at bar, however, does not come within the above rule. Here the judgment of conviction was not introduced by the state, and, accordingly, there was no necessity on the part of the court to give an instruction as to such record. The only records introduced were merely formal records showing the court and the na-

ture of the accusation against the appellant, and the jury, as far as the state was concerned, was left in the dark as to the result of that former prosecution; and, in our opinion, the court was not required to give an instruction limiting the use of such records as were introduced. There being no errors in the record, the judgment is affirmed.

### KIZZIA v. STATE.

(Court of Criminal Appeals of Texas. Nov. 10, 1897.)

#### INDICTMENT—DISTURBING PUBLIC WORSHIP.

An indictment charging a defendant with disturbing a congregation "assembled for religious worship in a lawful manner" is insufficient to charge the offense defined by Rev. Pen. Code, art. 193, of disturbing a congregation "assembled for religious worship and conducting themselves in a lawful manner."

Appeal from Waller county court; R. E. Hannay, Judge.

Ed Kizzia was convicted of an offense, and appeals. Reversed.

W. J. Poole, for appellant. Mann Trice, for the State.

DAVIDSON, J. The indictment sought to charge appellant with disturbing religious worship, the charging part being as follows: "Did then and there unlawfully and willfully, by loud and vociferous talking, and by other noise, to wit, 'kicking a joint of stove pipe,' disturb a congregation at Oakland Church, Waller county, then and there assembled for religious worship in a lawful manner." Motion to quash the indictment, as well as in arrest of judgment, was made in the trial court, because said indictment failed to allege that the congregation "were conducting themselves in a lawful manner." These motions were overruled by the court, and appellant presents this as error.

Article 193, Rev. Pen. Code, provides: "Any person who by loud or vociferous talking, or swearing, or by any other noise, or in any other manner, willfully disturbs any congregation, or part of a congregation, assembled for religious worship and conducting themselves in a lawful manner," etc. It will be seen that this statute makes one of the essential elements of this offense the fact that the congregation assembled for religious purposes were conducting themselves in a lawful manner; and, unless they are so doing, it would seem that a disturbance of said congregation would not come within the terms of this statute; hence no violation of the law. The fact that it is alleged that they had "assembled for religious worship in a lawful manner" does not meet the requirement of the statute that they were conducting themselves in a lawful manner after being so assembled. Everything might be true as alleged in the indictment, and yet they might not have continued in such lawful manner.

In order to obtain a conviction under this statute, the proof must show that the assembled congregation were at the time of the alleged offense then conducting themselves in a lawful manner. We have held that the omission of the expression "were conducting themselves in a lawful manner" in the recognizance rendered that obligation fatally defective, and the appeal in such case would be dismissed. See *Mullinix v. State*, 32 Tex. Cr. R. 116, 22 S. W. 407; *Morgan v. State*, 32 Tex. Cr. R. 413, 23 S. W. 1107. If, in reciting the offense in the recognizance, the omission of this expression would constitute an insufficient recitation of the offense, much more so would the indictment or information be defective, because in such case the offense itself is charged for which the defendant must be tried; and it is necessary in this state to set out in the indictment all the essential elements of the crime. The judgment is reversed, and the prosecution ordered dismissed.

HURT, P. J., absent.

Ex parte CANNON.

(Court of Criminal Appeals of Texas. Nov. 8, 1897.)

COURTS—STATUTE CREATING JUDICIAL DISTRICTS—AMENDMENT.

The act of 1897 purporting to amend Rev. St. 1895, tit. 4, art. 33, apportioning the state into judicial districts, by extending the terms of the district court in Orange and Jefferson counties, does not by implication supersede or repeal the original article, but is intended to be supplementary thereto.

Appeal from district court, Blanco county; W. M. Allison, Judge.

Bill Cannon was convicted of theft, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. It appears from the record in this cause that the relator, Dave Cannon, was convicted of theft in the district court of Blanco county, which county belongs to the Thirty-Third judicial district, and that the sheriff holds him by virtue of a judgment of the district court rendered upon the verdict of the jury. All the proceedings in the district court are proper and regular, there being no attack upon the jurisdiction of the court, or the right of the sheriff to hold relator, except this: Relator contends that there is no law authorizing the holding of district court in Blanco county at any time, and that, therefore, the conviction, judgment of the court, and imprisonment of relator thereunder, are illegal. Rev. Civ. St. 1895, art. 33, apportions the state into judicial districts. Blanco county is made a part of the Thirty-Third judicial district. Relator, by counsel, contends that, as the 25th legislature passed an act to amend article 33, tit. 4, of Revised Statutes of 1895 of the state of Texas, so as to extend the

terms of the district court in Orange and Jefferson counties, this act superseded and repealed by implication, and took the place of, said article 33 of the Revised Statutes of 1895. We do not agree with this contention of relator. The act of 1897 does not purport to cover the whole ground. It is not a substitute for article 33, tit. 4, of the Revised Statutes of 1895. Its only purpose was to extend the terms of the district court in Orange and Jefferson counties in judicial district No. 1. We are not called upon in this case to pass upon the constitutionality of this act of 1897. "Sufficient unto the day is the evil thereof." The judgment of the court below is affirmed.

HENDERSON, J., concurring. HURT, P. J., absent.

BAXTER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 8, 1897.)

THEFT—INDICTMENT—VARIANCE—GOOD FAITH—CIRCUMSTANTIAL EVIDENCE—NEW TRIAL.

1. Where one is indicted for the theft of a horse from an unknown owner, it is proper to allege in the indictment that the horse was an estray, and had no known owner; and the fact that the accused proved as a defense that he bought the horse from another person does not authorize an acquittal on the ground of variance.

2. Where the testimony, in a trial for the theft of an estray horse, showed that accused bought the horse off the range, and took a bill of sale of it, and that he took the horse up and claimed and disposed of it as his own, a case of circumstantial evidence was presented, and it was not error to refuse to instruct on the law applicable thereto.

3. It is not error for the court to submit to the jury the question of the good faith of accused in taking a horse by bill of sale, from another not in possession, where the accused is charged with theft of the horse as an estray.

4. It is not error to refuse a motion for a new trial asked for on the ground of newly-discovered evidence, where no affidavit that it is newly discovered is made.

5. Or where the evidence is cumulative.

6. Where it is shown that the accused relied solely on a bill of sale as his defense to taking an estray horse; that his vendor was a stranger in the community, and never had possession of the horse; that the horse was known to be an estray; and that accused did take up the horse,—the jury is justified in finding that the bill of sale was part of a scheme to secure and appropriate the horse, and the evidence is sufficient to support a verdict of guilty.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Pete Baxter was convicted of theft of an estray horse, and he appeals. Affirmed.

Bennett & Thornton, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted under an indictment charging the theft of a horse from an unknown owner, said horse being an estray. In regard to the question of ownership, we would state that it was properly alleged that the horse was an estray,—

had no known owner; and the fact that the defendant proved that he bought the horse from a man named Green did not authorize an acquittal on the ground of variance. The ownership of Green was a defensive matter, and, if true, would have resulted in an acquittal of the defendant, whether alleged or not. The state disputed and controverted this fact, and relied upon the fact that the horse was an estray, and not the property of Green.

The first bill of exceptions is reserved to the action of the court in refusing and failing to charge the law applicable to a case of circumstantial evidence. In this there was no error. This was not a case of circumstantial evidence. The defendant's testimony shows that he bought the horse as it ran upon the range together with an iron-gray colt, and took a bill of sale from a person who signed the same as Tom Green. After securing said bill of sale, he took up the horse, claimed him, and disposed of him as his property. This was positive proof of the fact that he did not receive the horse from another party, but that he took it from the range himself. This was his defense, and excludes the idea of it being a case of circumstantial evidence.

His second bill of exceptions is reserved to the action of the court in submitting his good faith in purchasing the horse from said Green. The language of the court is as follows: "If you find from the evidence that the defendant bought the horse in good faith from Tom Green, honestly believing at the time that the horse belonged to Green, and that Green had a right to sell it, then the defendant would be not guilty. But, even if defendant bought the horse from Green, such purchase would not authorize defendant to it unless he, the defendant, acted in good faith, and in the belief that Green owned the horse, and had the right to dispose of it." The objection to this charge of the court is urged in the following language: "The court should not have assumed a proposition, and then charged upon it, and such a charge was upon the weight of evidence." This exception was reserved upon the motion for a new trial. The court makes this statement: "Jim Baxter, the brother of the defendant, and under indictment for the theft of stray horses, testified, in terms, that defendant bought the horse from Tom Green; that Tom Green never had possession of the horses, which fact was known to the defendant; and that defendant took up the horse, acting alone under the purchase from Green. This being his sole defense, the case turned upon the good faith of the purchase. If his purchase was in good faith, the taking was so, and vice versa." We think the court's charge was correct. If defendant took the horse under the bill of sale, and believed at that time that he had the right under the bill of sale to take the horse, there was no theft. This is not a case where the accused received a horse from a party who had actual possession, and took a bill of sale; for, in such case, good or bad faith would not enter into the

question, for the reason that it would not be theft on his part. In order to constitute theft, there must be a taking by the party accused of the theft. If appellant procured the bill of sale to cover up a theft, he would be guilty of the taking, under the facts of this case. See *Prator v. State*, 15 Tex. App. 368; *Phillips v. State*, 19 Tex. App. 158. The authorities relied upon by appellant to sustain his exception are cases in which the appellant relied upon the fact that he received the stolen property from a party who was in possession, and in which the court instructed the jury in regard to good faith. It needs no argument to sustain that line of authorities. As before stated, if another party took the animal without the complicity of the accused as a party in such taking, it would make no difference whether the bill of sale was taken in good faith or bad faith; for, in that event, the accused could not be guilty of theft under our statutes, but might be a receiver of stolen property.

Among other grounds of the motion for a new trial, appellant sets up alleged newly-discovered testimony. It is not shown to be newly discovered. Neither the defendant nor his counsel make affidavit of the fact that the said testimony was newly discovered, and the facts set up were cumulative to testimony already adduced. As presented, we deem it unnecessary to discuss the matter.

It is also asserted that the evidence is insufficient to support the judgment. The taking of the animal was proved by the state and admitted by the defendant. To meet this, he proved that the stranger Tom Green came into the neighborhood where the two stray horses set out in said bill of sale were running, and where the defendant was living; that Tom Green represented himself to be from Collin county, and this prosecution occurred in Hunt county. Several witnesses testified that a stranger came into the neighborhood representing himself to be Tom Green, and on one, or perhaps two, occasions was seen talking to the defendant. The bill of sale given by Green to appellant was witnessed by appellant's brother, Jim Baxter, who testified that he wrote it. This brother testified that others were present during the conversation between appellant and Tom Green which resulted in the execution of this bill of sale. One of these testified that he saw Tom Green talking to appellant, but was not present when the bill of sale was made, and did not see Jim Baxter there. It is shown that appellant did take up one of the horses, and inferentially that he did not take the other. One of the horses was four years old, and the other a year old past, and were known by everybody in that neighborhood as strays. It seems that appellant relied solely upon this bill of sale as his defense for appropriating the animal. We think the jury were justified in arriving at the conclusion that the bill of sale was a part and parcel of the scheme of appellant to secure and appro-



prate the animal. This was submitted to the jury, and they so found. The judgment is affirmed.

HURT, P. J., absent.

### EDENS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 8, 1897.)

#### CRIMINAL LAW—CONFESSIONS—RAPE.

1. In a criminal prosecution, letters written by accused while not under arrest are admissible in evidence as confessions.

2. It is no defense to a prosecution for rape of a child under the age of consent that accused was told by his victim that she was above such age.

Appeal from district court, Hood county; J. S. Straughan, Judge.

Hugh Edens was convicted of rape, and appeals. Affirmed.

N. L. Cooper & Son and J. J. Hiner, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of rape, and his punishment assessed at five years' confinement in the penitentiary; hence this appeal.

Appellant's first bill of exceptions is reserved to the action of the court in permitting the state to introduce a number of letters written to the alleged ravished female, and also a letter written by defendant to a friend,—one Wes White. The objections urged by appellant are several, and seem to be based upon the proposition that said letters were simply the confessions of defendant, which did not prove the corpus delicti; in other words, that, before the letters could be introduced in evidence, the state must prove the corpus delicti. The letters themselves show the fact that the appellant and the girl had been having clandestine meetings for the purpose of having sexual intercourse. We are at a loss to understand why this testimony was not admissible. If the statements in the letters are treated as confessions, they were clearly admissible, for defendant was not under arrest at the time they were written.

In appellant's second bill of exceptions he complains of the action of the court refusing to permit him to prove by the alleged injured female, who was at the time of the trial his wife, that in the latter part of January, 1897, at their first meeting in the woods, the question of her age was discussed between them, and that she then informed appellant that she was over the age of 15 years, and on the other occasions of their assignations she always told defendant that she was over the age of 15 years. On objection by the state, this evidence was ruled out. In this, we think, there was no error. The indictment alleged that at the time the sexual intercourse occurred between the parties the girl was un-

der 15 years of age, and not his wife. The uncontradicted proof in the case shows that these were facts. The first act of intercourse occurred in the latter part of January, 1897, and was repeated at intervals for several months, until finally, to escape a prosecution, he married the girl on the 16th of August, 1897, she having become 15 years of age on the 10th of July previous to said marriage. "Where the offense is in having connection with a child under the age of consent, belief on the part of the defendant that she was over the age of consent, and that, therefore, consent on her part would prevent the act from being criminal, cannot be shown. Connection with a child under the age of consent being criminal, one who has connection with a female which would, in any event, be unlawful, must know at his peril whether her age is such as to make the act a rape." See McClain, Cr. Law, § 451. And see, also, Lawrence v. Com., 30 Grat. 845; State v. Newton, 44 Iowa, 45; State v. Hour, 109 Mo. 654, 19 S. W. 35; State v. Baskett, 111 Mo. 271, 19 S. W. 1097; Holton v. State, 28 Fla. 303, 9 South. 716; Reg. v. Prince, L. R. 2 Crown Cas. 154; State v. Grossheim (Iowa) 44 N. W. 541; People v. McDonald, 9 Mich. 150; Hays v. People, 1 Hill, 351; 2 Bish. Cr. Law, 1091; Bish. St. Crimes, § 490. Mr. Bishop says: "While, within principles explained in another connection, no one is ever punishable for any act in violation of law whereto, without his fault or carelessness, he was impelled by an innocent mistake of facts, this rule does not free a man from the guilt of his offense by reason of his believing, on whatever evidence, that the girl is above the statutory age. His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in a case where he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequences." Bish. St. Crimes, § 490. See, also, 1 Bish. Cr. Law, §§ 301-310, and note to section 303a. And see, also, sections 227, 330-340. We have found no contrary opinion, and but one dissenting opinion. The latter is found in the case cited from Grattan's Reports. We deem it unnecessary to amplify this question, for the authorities above cited fully settle it.

Objection is urged to the charge of the court, because it did not instruct the jury to acquit "unless the rape was shown to have been committed by other evidence than the confession of the appellant, or that there was corroborative evidence of the defendant's confession, tending to establish the fact of the commission of the crime." We do not believe that this charge was demanded or required by the evidence adduced on the trial. There were other facts adduced to prove the rape besides the confession of defendant, and the corpus delicti is sufficiently proved. While it may be true that the crime of rape cannot be proved alone by the confessions of the

accused, and in that character of case the charge might have been proper; yet where there is no question of the corroboration, or of evidence proving the corpus delicti, we think it is not error to refuse such a charge, though it would be the better practice to give it where such confessions are relied upon to assist in making out the case. In addition to the confession of the appellant that he had intercourse on several occasions with the alleged ravished female, there is evidence showing that he married the girl, after being informed of the fact that he had been detected in such illicit intercourse. There is also proof of the fact that he fled the country to escape the prosecution. And, besides the letters, about nine or ten of which were written for the purpose of making the appointments for the purpose of having intercourse with her, the defendant also placed his wife upon the stand, and proved by her one of said appointments, and offered to prove others, etc., but this testimony was ruled out. His purpose in introducing this testimony was to show that at said appointment, and prior to their intercourse, she informed him of the fact that she was above the age of 15 years. With these facts in the record, we are of opinion that the refusal of the court to charge the jury in this respect is not reversible error.

It is further contended by appellant that the evidence is not sufficient,—that the state relied alone upon the confessions of appellant to prove the corpus delicti. As we have before stated, we think the evidence is sufficient, and that the state did not rely upon the confessions of the appellant alone, and that the circumstances sufficiently corroborate said confessions. The judgment is affirmed.

HURT, P. J., absent.

#### COLLINS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1897.)

#### CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT.

That an indictment charges two distinct and separate offenses in different counts is not ground for a motion in arrest of judgment, where no motion to quash, or to compel the prosecution to elect between the two counts, was made.

Appeal from district court, San Augustine county; Tom O. Davis, Judge.

James Collins was convicted of perjury, and appeals. Affirmed.

Drury Feldt, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The indictment contains two counts, the first assigning perjury upon a statement

made under oath upon the trial of Kirk Marshall, charged with an assault with intent to kill and murder appellant, to the effect that he did not know whether Kirk Marshall intentionally shot at him (James Collins); and the second count assigning perjury upon a statement made before the grand jury while investigating the charge against Kirk Marshall for an assault upon appellant, to the effect that the said Kirk Marshall did intentionally shoot at appellant. The jury returned a general verdict of guilty, without specifying the count. There was no motion made to quash the indictment; there was no motion made to compel the district attorney to elect upon which count he would prosecute. After the verdict and judgment were entered, counsel for appellant moved in arrest of judgment, because the indictment contained two separate and distinct transactions. We know of no rule authorizing the court to arrest the judgment upon such grounds. If a motion had been made to quash the indictment, and overruled, appellant might complain, and this could have been done because the indictment upon its face shows separate and distinct felonies; or, if appellant had required the court to compel the district attorney to elect upon which count he would prosecute, and the court had refused to do so, the appellant would have had the right to complain. As above stated, this is not a ground for an arrest of judgment. We find no error in this record, and the judgment is affirmed.

HURT, P. J., absent.

#### On Motion for Rehearing.

(Dec. 1, 1897.)

At a previous day of this term the judgment of the lower court was affirmed, and appellant now presents a motion for rehearing, and has filed with the record in this case the motion made by him in the court below to quash the indictment, and a transcript from the judge's short minutes, showing that he in fact overruled said motion, and to this is appended the affidavit of the clerk. The judge's short minutes constitute no part of the record proper, and the affidavit of the clerk does not perfect the record in this respect. The only way by which the order of the court embodied in these short minutes could be made a part of the record of the case was by an entry nunc pro tunc of the judgment, and for this purpose the short minutes of the judge might have been used as evidence. This was not done. But if we were to consider the motion to quash, though presented in this manner, it would not alter or affect the question discussed and decided by this court in the original opinion. The motion to quash was simply "because the indictment charged no offense." Both counts of the indictment charge an offense. There was no motion made to quash because

the counts charged separate and distinct transactions, but, as above stated, "because the indictment charged no offense." Now, in the original opinion in this case we held that the appellant could have moved to quash the indictment because the counts set forth separate and distinct transactions, and this appeared upon the face of the indictment. Of course, a motion to quash because the indictment charged no offense did not call the court's attention to the fact that separate and distinct transactions were alleged in separate counts. If the motion to quash had been made upon this ground, to wit, that different transactions were set forth in different counts, the prosecuting attorney could have elected upon which count he would proceed. This was not done, and the motion to quash upon the grounds stated is equivalent to no motion at all. It did not point out the objections insisted upon here, to wit, that the counts presented separate and distinct transactions. See *Southern v. State*, 34 Tex. Cr. R. 144, 29 S. W. 780. It will be noted that in this case no request was made for the jury to say upon which count they convicted, nor was there any request made by appellant at any time for the state to elect upon which count the prosecution should proceed. And we hold, as we did in the original opinion, that these matters could not be reached upon a motion in arrest of judgment. The motion for rehearing by appellant is overruled.

#### MARTIN et al. v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1897.)

#### CRIMINAL LAW—INSTRUCTIONS—CHARGE ON THE WEIGHT OF TESTIMONY.

A charge that the jury might consider, "as evidence against" a defendant, any statement made by him, is erroneous, as a charge on the weight of the testimony, where the only statement shown to have been made was neither a confession of guilt nor an unequivocal admission of any criminative fact, but might but for such charge have been considered by the jury in connection with the other facts and circumstances as favorable to the defendant.

Appeal from district court, Childress county; G. A. Brown, Judge.

Marvin Martin and Will McCracken were convicted of stealing cattle, and appeal. Reversed.

Johnson & Fires, for appellants. Mann Trice, for the State.

DAVIDSON, J. Appellants were convicted of the theft of cattle, and given two years each in the penitentiary; hence this appeal.

At the Austin term, 1897, we prepared an opinion affirming this case, but the opinion was not rendered. The case was resubmitted at the present term of the court, and the question presented with reference to the charge of the court being on the weight of the testimony is again urged as a reason why this judgment

should be reversed. We have had occasion to examine the charge of the court more critically. The charge of the court on this subject is as follows: "In arriving at your verdict in this case, you may consider all the facts and circumstances in evidence before you, but you cannot consider, as evidence against either one of the defendants, the statements of the other made out of his presence or hearing, if any such statements were made; but you may consider, as evidence against either of the defendants, any statement made by himself, if any such statement was made." This charge was excepted to at the time by counsel for appellants.

Both appellants made statements while under arrest, after they had been warned. The witness McLaughlin stated that he asked Will McCracken whether he took his calves, and if he did not know they were his (witness) calves, to which he replied, "I did not know your calves, and, by God, I don't want to know your calves," and said defendant denied going down where the calves were tied. Martin (the other defendant), after stating that this same witness (McLaughlin) had told him about seeing him and Will McCracken among his cattle in the Kinney pasture the day his calf was taken, and about hunting the cattle the next day, and finding the calves tied out in rough country, in the head of a cañon, and about watching the calves, and finding them, and seeing the defendants going to the calves, and pass on, watching the calves, stated that he asked said defendant "if it did not look like he got his calves," to which defendant replied he supposed so, but denied that he was ever over there in the Kinney pasture where witness' calves were taken; and he said they had rode down to where the calves were in the "draw," to see whose calves they were, and he thought of turning them loose, but decided to leave them. This was all of any statement made by either of said defendants, said statements attributed to each defendant being made in the absence of his co-defendant. Said statements were not unequivocal confessions or the unequivocal admission of any criminative fact, but were mere statements that might, in connection with other facts and circumstances, be considered by the jury in arriving at their verdict. They might consider them criminative or not criminative, and for the court to suggest to them that they could consider such statements as against the defendant making them was, in effect, informing the jury that the statements were criminative as against the defendant making them, or the instruction was such as to leave the jury to infer that, in the mind of the court, said statements were of a criminative character, at least such as might be used against the defendant making the same. This, in our opinion, was a charge on the weight of the testimony, which is expressly prohibited by our statute. See Rev. Code Cr. Proc. arts. 715, 716. Undoubtedly, the learned judge, in try-

ing this case, meant merely to limit said statements as to the defendant making the same; but the language here used not only so limits the statement as to the defendant making the same, but goes further, and tells the jury that they may consider such statement as against the defendant making it. Now, looking to the statement itself, the jury ought to have been left the sole judges as to how they would construe it, and as to whether or not they would consider it at all against either of said defendants. They might, under the circumstances of the case, consider said statements in connection with the other facts and circumstances in favor of the defendant making the same, if left untrammelled by the charge of the court. For this error of the court in charging on the weight of testimony, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

### LOMAX v. STATE.

(Court of Criminal Appeals of Texas. Nov. 10, 1897.)

#### CARRYING WEAPONS—SUFFICIENCY OF INDICTMENT—INCLUDED OFFENSE—INSTRUCTIONS.

1. An information charging that the defendant "did then and there go into a ballroom and social party, and did then and there, unlawfully, have and carry a pistol," without charging that people were there assembled, while insufficient to charge the carrying of a pistol into a social gathering, is sufficient to charge the included offense of carrying a pistol on and about his person.

2. Where an information is insufficient to charge the offense intended, though it sufficiently charges a lesser, included offense, a charge which permits a conviction of the higher offense is reversible error, when the record leaves it uncertain of which offense the jury found the defendant guilty.

Appeal from Houston county court; E. Winfree, Judge.

Billie Lomax was convicted of an offense, and appeals. Reversed.

H. W. Moore, for appellant. Mann Trice, for the State.

DAVIDSON, J. The information in this case charged that defendant "did then and there go into a ballroom and social party, and did then and there, unlawfully, have and carry about his person a pistol, against the peace and dignity of the state." Motion was made to quash this information because it failed to allege that people were assembled in said ballroom, and at said social party. Motion in arrest of judgment was also filed upon the same ground. These seem to have been overruled, and the court, in its charge, instructed the jury: First, if they believed, beyond a reasonable doubt, that the defendant carried the pistol on and about his person, they would convict him, and assess the punishment prescribed under the article denouncing that offense; and, second, if they believed that he carried it under the article

prohibiting persons from going into ballrooms and social gatherings, with pistols, where people are gathered, for the purposes enumerated in that statute, then they would assess the punishment denounced against that offense. Under the first statute, the punishment would be not less than \$25, nor more than \$200, or by imprisonment in the county jail not less than 10, nor more than 30, days, or by both such fine and imprisonment. Under the other article, the punishment is by fine not less than \$50, nor more than \$500. The punishment assessed was a fine of \$50. The information did not sufficiently allege the offense of carrying a pistol into a social gathering, but was sufficient to charge the offense of carrying about the person such pistol. See *Rainey v. State*, 8 Tex. App. 62; *Pickett v. State*, 10 Tex. App. 290. This is not a case wherein the information charges the different offenses in different counts, but it is a case where the information seeks to charge the more aggravated offense, but does it defectively; and under the *Pickett Case*, supra, these matters, by which the higher offense is sought to be charged, being defective, could be treated as surplusage, and there would still remain a good indictment for carrying the pistol on and about the person. That being true, the court should not have charged the jury with reference to the greater offense, because the information did not charge that offense; and both being submitted, and the lighter punishment for the higher offense being assessed by the jury, they may have convicted him of said offense, when they were not authorized to do so, and thereby convicted him of an offense of which he was not charged. The court should have limited the jury to the consideration of that offense which was charged by the information, to wit, carrying on and about the person a pistol. The judgment is reversed, and the cause remanded.

HURT, P. J., absent.

### TRUSS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 10, 1897.)

#### JUSTICE OF THE PEACE—APPEAL IN CRIMINAL CASE—FAILURE OF RECORD TO SHOW NOTICE.

1. The provisions of Code Cr. Proc. art. 974, that "when a defendant appeals from a judgment in a criminal action he shall give notice of such appeal in open court and the justice shall enter such notice upon his docket," are mandatory, and the right of appeal depends upon the entry of the notice on the docket.

2. After the county court has acquired jurisdiction of a criminal case on appeal, by the filing of the transcript, which fails to show notice of appeal, it is too late to ask that proceedings be suspended to allow a nunc pro tunc entry to be made by the justice showing that the notice was in fact given, and the appeal will be dismissed.

Appeal from Houston county court; A. A. Aldrich, Judge.

Albert Truss was convicted of an offense before a justice of the peace, and an appeal to the county court was dismissed. Defendant appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. This is an appeal from the action of the county court in dismissing an appeal from the judgment of a justice court. The ground for dismissing said appeal in the county court was because the transcript of the record from the justice court did not show that appellant gave notice of appeal from the justice court. In the county court, in answer to the motion to dismiss, appellant asked for a certiorari to the justice court, and proposed to have entered nunc pro tunc on the justice docket the fact that he did give notice of appeal in open court from the rendition of the judgment against him by said justice. He also proposed to show by the justice of the peace who tried the case, by parol testimony, in the county court, that he did in fact give notice of appeal in open court; and he appended to the motion the affidavit of the justice, showing that in fact he did give notice of appeal, but by an oversight the justice failed to enter the same. On this subject, article 974, Code Cr. Proc., requires: "When a defendant appeals from a judgment in a criminal action he shall give notice of such appeal in open court, and the justice shall enter such notice upon his docket." This would appear to be mandatory, and upon such notice being entered of record by the justice upon his docket is based the right of appeal. We have held in a number of cases, under a statute somewhat similar in terms, where an appeal is taken from the county court to this court, and the record fails to show that the notice of appeal was given, that the case will be dismissed. See *Long v. State*, 3 Tex. App. 322; *Solari v. State*, Id. 482; *Bozier v. State*, 5 Tex. App. 220. And it has also been held that where an appeal was taken from the justice court to the county court, and the record failed to disclose that the notice of appeal had been given in open court and entered on his docket, the appeal would be dismissed. See *McDonnell v. State*, 32 Tex. Cr. R. 174, 22 S. W. 593, and *Ball v. State*, 31 Tex. Cr. R. 214, 20 S. W. 363. These two latter cases would appear to be decisive of the question here presented. We are not now discussing whether or not, before the transcript on appeal was perfected and filed in the county court, appellant may not have had the notice of appeal entered nunc pro tunc, and thus perfect the record, as that character of case is not before us. We do not believe that it was competent, after the appellate court (which was the county court in this instance) had acquired jurisdiction by the filing of the transcript, then to have stopped proceedings and awaited the action of the lower court to perfect the record by an entry nunc pro tunc of the notice of appeal. The law requires some diligence on the part of

appellant in perfecting his appeal, and it does occur to us that there was laches on his part in not having discovered sooner the failure of the justice to enter upon his docket such notice. By the use of reasonable diligence, this failure might have been discovered, if not at the time when it should have been done,—that is, when the notice was given in open court,—certainly before the transcript had been made out. It was too late after the county court had acquired jurisdiction to then ask a stay of proceeding in order to perfect the record of the lower court by a proceeding to enter a nunc pro tunc judgment. The judgment of the lower court is accordingly affirmed.

HURT, P. J., absent.

### McGLASSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1897.)

FORENRY—VENUE—EVIDENCE—RELEVANCY—BILL OF EXCEPTIONS—SUFFICIENCY—AIDED—APPEAL—HARMLESS ERROR.

1. On trial of defendant in B. county for forging a note, the evidence showed that it bore a date in B. county, when he was doing business there, and was made payable to him in B. county, and that shortly after its purported execution he went to another county, and transferred it. *Held*, the venue was sufficiently proved.

2. Evidence that the indorsee of a note was the indorser's sole creditor, and that the indorser turned over to the indorsee his entire assets, amounting to more than his debt, is immaterial, where the indorser is being tried for forging the note, though the indorsee had testified to important criminating facts.

3. A bill of exceptions on an appeal from a conviction of forging notes by the payee, reciting that the indorsee testified that the purported maker "always repudiated" the notes, thereby makes a prima facie case of the inadmissibility of the evidence, where the bill does not show that it was offered in rebuttal of evidence impeaching the maker, for which alone the maker's declarations would be admissible.

4. A bill of exceptions cannot be aided by statements in reply to a motion for new trial, nor by the statement of facts.

5. Where a payee was on trial for forging the note, error in admitting evidence of declarations of the purported maker, that he always repudiated the note, was not harmless.

Appeal from district court, Bell county; John M. Furman, Judge.

D. W. McGlasson was convicted of forgery, and he appeals. Reversed.

J. E. Yantis and Pierce & Felts, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of forgery, and his punishment assessed at imprisonment in the penitentiary for a term of two years; hence this appeal.

The forgery charged was that of a note for \$660, dated Troy, Tex., November 5, 1895, and due January 1, 1897, bearing interest at 10 per cent. per annum. The note was made payable to D. W. McGlasson, or order, at the office of McGlasson & Co., at Troy, Tex., and purported

to have been executed by W. T. Clark. Said note also retained a vendor's lien on 100 acres of land, part of the C. Bendle survey, in Bell county. The testimony for the state showed, by W. T. Clark himself, that the signature, "W. T. Clark," was a forgery, and that the handwriting, as testified by experts, appeared to be that of the appellant. The testimony on the part of the appellant tended to show that the body of said note was written by appellant, and that L. M. Cann signed the name "W. T. Clark" to said note, and Clark, who was present, authorized the same, and affixed his mark thereto, in connection with his name. In addition to this, there was other testimony, of a collateral character, tending to corroborate and support the respective theories of the parties.

Appellant asked the court to instruct the jury to return a verdict of not guilty, on the ground that no venue had been proved; but this the court refused to do, and appellant reserved his exception to the action of the court. The question presented as to this bill of exceptions is, does it sufficiently comply with the amendment to article 904 adopted by the 25th legislature? See Laws 25th Leg. p. 11. The act in effect provides that, as to the venue in all cases, the court shall presume that it was proved in the court below, unless it was made an issue there and it affirmatively appears to the contrary by a bill of exceptions, properly signed and allowed by the judge, or proved up by by-standers, as is now provided by law, and incorporated in the transcript, as required by law. It occurs to us that this statute requires this court to indulge the presumption that the venue was proved in the court below, unless the bill of exceptions shows affirmatively that it was not proved. This would seem to apprehend that, before we can treat the venue as not proved, the court must either certify that the evidence did not establish the venue, or that said bill of exceptions should contain all the testimony in the case tending to show venue, and certify that same was all the testimony bearing upon that issue; and from this statement of the testimony it affirmatively appears that the venue in the case was not proved. If this be a true construction of said article, then the bill in question does not comply with the requirements of the law. If, however, it be conceded that the bill, as contained in the record, would require us to look to the statement of facts to see whether or not the venue was sufficiently proved, then, in our opinion, the evidence sufficiently established the venue of the case. The testimony showed that appellant, at the time of the alleged forgery, was doing business at Troy, in Bell county; the note bore the date, Troy, Bell county, November 5, 1895. It was made payable at the office of appellant, at Troy, in Bell county. Rotan, to whom the note was negotiated in December, 1895, shortly after its purported execution, stated that he lived in Waco, which was connected by railroad with Troy,

Bell county, and about an hour's ride therefrom; that in December, 1895, defendant came from Troy, in Bell county, on the "Katy Railroad," to Waco, and came to his office at the bank in Waco, and told him he was just from Troy, and brought the note with him which he is charged in this case with forging, and he there received from him said note. This, in our opinion, was sufficient proof of venue, aside from the testimony of the appellant himself, which tends to corroborate the state's evidence on venue in every particular.

Appellant offered to prove by himself, when he was on the stand as a witness in his own behalf, that on the 19th of February, 1896, he gave to E. Rotan (the state's witness, to whom the proof showed the note in question had been passed, and after said Rotan had testified as a witness to important criminating facts) a bill of sale to defendant's entire stock of merchandise, worth \$15,000, and to 65 bales of cotton, and 12,000 bushels of oats, and \$72,000 worth of promissory notes, as collateral security to pay the said Rotan the sum of \$20,000; and defendant offered to prove that that was all that he owed the said Rotan or his bank; and that said Rotan had always since refused to have a settlement with defendant to see how their accounts stood with each other. On objection by the state, said testimony was excluded, and defendant excepted to the same. The relevancy of this testimony is not made manifest by the bill of exceptions, and it occurs to us that there was no error in the action of the court in excluding the same. We cannot see how said testimony would tend to disprove the fact of forgery charged against the appellant. Concede that he surrendered to Rotan all of his assets, and that Rotan was his sole creditor (which, however, is not shown in the bill), and that his assets far exceeded his liabilities, still this testimony would not, in the absence of some other showing, have any bearing on the question as to whether or not appellant forged the note in controversy. The mere fact that Rotan had testified to important criminating facts would not of itself make such testimony admissible. It may be possible that Rotan may have testified to a state of facts which made said evidence relevant; but the bill does not show this, nor does the bill show the object of this evidence. In our opinion, the court did not err in excluding said testimony.

On the trial, appellant presented the following bill of exceptions to the introduction of testimony on the part of the state: "Be it remembered, that on the trial of the above entitled and numbered cause, when the state's witness E. Rotan was on the witness stand, he was asked the question by the state's counsel if he ever showed to W. T. Clark the note charged to have been forged by the indictment in this cause, together with another note in the same amount, purporting to be made at the same time and place, and purporting to be

signed by the same party, and, if so, when was it, and what did said W. T. Clark say with reference to executing said notes or authorizing any other person to do so for him, to which question the defendant objected, on the ground that what said W. T. Clark said in the absence of defendant was hearsay and incompetent for any purpose; but the court overruled all of said objections, and permitted the said E. Rotan to answer said question as follows, and permitted said answer to go to the jury as evidence. His answer was as follows, to wit: 'It was shortly after defendant's business failure I saw W. T. Clark, and told him I had some notes against his land; but at this time I did not tell him the amount of the notes. A few days after this I saw him again, and showed him the notes, or told him the amount of each note; and he repudiated them, and said he did not sign them, or authorize any other person to do so. He said that he had signed notes against his land, but there were five of them, and of smaller amounts. He always repudiated these two \$660 notes when talking to me after I told him the number of notes and their amount.' Defendant then and there, in open court, excepted to the ruling of the court in overruling his objections to the aforesaid question, and excepted to the ruling of the court in permitting said answers to go to the jury, and he now tenders this his bill of exceptions," etc.

The first question that presents itself with reference to this bill is the sufficiency of the same to show that said testimony was admissible. We understand the rule on this subject to be as follows: The allegations of a bill of exceptions should be full and explicit, so that the matters presented for revision may be comprehensible, without recourse to inferences. Inferences will not be indulged to supply omissions in the bill of exceptions. The bill must be so full and certain in its statements that in and of itself it will disclose all that is necessary to manifest the supposed error. It must sufficiently set out the proceedings and attending circumstances below to enable the appellate court to know certainly that error was committed. See Willson's Cr. Proc. § 2368, and authorities there cited. When a bill of exceptions is taken to the admission of evidence, the bill should clearly disclose the ground or grounds of objection made to the evidence; otherwise, it is not entitled to be considered. The grounds of objection not so stated will ordinarily be considered as waived. Bills of exception should be full, clear, and specific, setting forth distinctly every fact essential to an understanding of the matters sought to be presented thereby. See Willson's Cr. Proc. § 2516, and authorities there cited; *Oline v. State* (Tex. Cr. App.) 30 S. W. 801; *Gay v. Railroad Co.* (Tex. Sup.) 30 S. W. 543; *Buchanan v. State*, 24 Tex. App. 195, 5 S. W. 847; *Smith v. State*, 4 Tex. App. 627.

Now, the question presented is: Does said

bill of exceptions make it sufficiently appear that said evidence was not admissible, it being conceded that the onus was upon the appellant to show by his bill the inadmissibility of said testimony? Of course, if it obviously appears from the bill that in no state of case was said testimony admissible, then it should not have been admitted. But suppose there is a contingency in which we would conceive the testimony is admissible; then we would be confronted with the principal difficulty in complying with the rules above laid down. In this particular case we can understand how, in a certain state of case, some of the testimony embodied in the bill was relevant. For instance, if the state's witness W. T. Clark had sworn (as he did), while on the stand on behalf of the state, that he did not sign or authorize appellant or Cann to sign said note, and then the defendant, in order to impeach him, had shown by some other witness that he had stated to them, subsequent to the transaction, that he had authorized Cann or appellant to sign said note, in such state of case, under the rulings of this court, it would have been competent for the state, in support of the witness Clark, to show that recently after the alleged forgery, or recently after it had come to his knowledge that the execution of said note was attributed to him, he had stated that he did not execute said note. Now, is there enough in the bill to exclude the idea that the contingency occurred to render said testimony admissible, and was said testimony, as shown, admissible for the purpose above indicated? It may be admitted that the bill does not directly do this, but, if it indirectly shows that the contingency had not occurred, it would still be sufficient. The bill shows that the witness answered "that, shortly after defendant's business failure, said witness Rotan saw W. T. Clark, and then told him that he had some notes against his land; and, a few days after this, witness saw him again, and showed him the notes, and he repudiated them, and said he did not sign them or authorize any other person to do so. He stated that he signed certain five notes against said land, but they were for small amounts." He always repudiated these two \$660 notes when talking to Rotan, after he told him the number of the notes and their amounts. Unquestionably, the testimony was hearsay, and the objection urged to its admission was good, unless said evidence comes within the exception above indicated. The answer of the witness does not connect it with the transaction, to wit, the alleged forgery, and its first discovery by the witness, so as to show that the statements by Clark were made to the witness Rotan recently thereafter. Indeed, the testimony is made to cover almost any space of time from the discovery up to the trial, because the witness, by his answer, says that Clark always repudiated said two notes of \$660. This testimony given in this general way, it occurs to us, was admissible under no state of case.

Under the rule above laid down, we have only gone to the extent of admitting this character of testimony in support of an impeached witness, where the statements were made recently after the event. See *Bailey v. State*, 9 Tex. App. 99; *Williams v. State*, 24 Tex. App. 637, 7 S. W. 333; *Dicker v. State* (Tex. Cr. App.) 32 S. W. 541; *Campbell v. State*, Id. 774. In our state, in this regard, we have gone beyond the rule laid down by the text writers on this subject generally. See 1 Whart. Ev. p. 570; 3 Jones, Ev. arts. 872, 873.

Furthermore, in regard to this bill of exceptions, it shows that the witness Rotan was on the stand for the state. It is not shown that he was used in rebuttal to support the witness Clark. It falls affirmatively even to show that he stated that the declarations or statements of Clark were recently after he discovered the alleged forgery, and besides, as stated above, he does not confine the statements of Clark to any particular time, but makes him state that he always repudiated signing the notes. While the bill should have been drawn more accurately, presenting the inadmissibility of said testimony, yet we gather enough from it to suggest that the contingency on the part of the state to offer such supporting testimony had not occurred, and that said testimony as offered was hearsay, and did not come under the exception above indicated, and was obnoxious to the objection urged by appellant. If the bill did not speak the truth, it was the duty of the court, in approving the bill, to show that the contingency had occurred that made said evidence admissible, and thus relieve the question of difficulty. It is true there is an attempt by the state, in reply to the motion for a new trial, to show that said testimony was properly admitted by the court in support of the witness Clark, after he had been impeached by the defendant; but under no rule that we are aware of are we permitted to look to this matter to help out the bill of exceptions, nor can we look back to the statement of facts in this connection. If we were permitted to do this, it would appear therefrom that the testimony of Rotan, which was objected to, was original testimony, offered by the state. Looking to the bill itself, we think it makes a *prima facie* case, at least of the inadmissibility of said evidence. In our view of the case, this improperly admitted testimony was upon a material issue. In fact, the vital question raised by the defendant was as to the authority of Clark to defendant and Cann to execute said note. This was a disputed question, and it was not competent for the state, by original testimony, to support the witness Clark, to the effect that he had stated (shortly after the failure of appellant in business, when he first saw said note) that he had not executed the same, or authorized its execution, and that he had since always repudiated said note as having been executed without his authority. This improper and illegal tes-

timony was thrown into the scale against the appellant, and we cannot tell what effect it may have had upon the jury. Its purpose was to corroborate Clark, and doubtless it was so regarded by the jury.

We think, under the circumstances of this case, that the court acted properly in charging on the question of principals, in view of the defendant's evidence, that he and Cann together executed the note in question. As to whether the court was in error in refusing the requested instructions on the questions involved in appellant's bill of exceptions No. 7, in regard to what transpired in the jury room, the same is not likely to occur on another trial of the case; so we pretermitt any discussion thereof.

For the error of the court in admitting the testimony of Rotan, as to the statements of Clark to him, denying the execution of said note, the judgment is reversed, and the cause remanded.

#### PRICE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

HOMICIDE—EVIDENCE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—CRIMINAL LAW—APPEAL—REVIEW—OBJECTIONS WAIVED—HARMLESS ERROR.

1. Whether defendant in a criminal case was injured by the admission of evidence afterwards withdrawn from the jury by the court will not be determined on appeal, where no ground of objection to the evidence was specified.

2. On a trial for murder, an unsigned writing, claimed by the state to be the evidence of one of defendant's witnesses at an inquest on deceased's body, and which a witness for the state said he took down at the time, was not admissible to show what defendant's witness testified at said inquest in order to impeach him, or for any other purpose, under Code Cr. Proc. 1895, art. 1023, providing that witnesses shall be sworn and examined by the justice, and the testimony of each witness shall be reduced to writing by the justice, or under his direction, and subscribed to by the witness.

3. The admission of improper evidence to impeach a material witness for defendant is not harmless.

4. Where defendant claimed he shot deceased in self-defense when deceased was about to strike him with a large stick, it was error to refuse a new trial, on the ground of newly-discovered evidence, consisting of threats by deceased a short time before the homicide in speaking of the very subject that caused it, when it could not be said that the testimony was probably untrue, though the state, by affidavits, threw some suspicion on the conduct of the witness.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

John Price was convicted of manslaughter, and appeals. Reversed.

Bob Thompson and Sheppard & Jones, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of manslaughter, and his punishment assessed at five years in the penitentiary; hence this appeal.



Appellant, by his bills of exception Nos. 1 and 2, objected to the action of the court in regard to admitting certain testimony impeaching the defendant's witnesses Dr. J. R. Walker and J. J. Mitchell. After the impeaching testimony was admitted, the court withdrew the same from the jury. Appellant, however, insists that the effect of the admission of the testimony, although it was withdrawn, was improper and injurious to appellant's rights. From the first bill it appears that the witness Walker testified on the trial that appellant shot the deceased Smith with his (Walker's) pistol; that he placed said pistol in his buggy; and that appellant must have gotten the pistol from the buggy. This witness was examined as to his testimony delivered before the jury of inquest, and he stated that he was so drunk that he did not know what he had testified at the inquest. The state introduced J. J. Peters, who testified that he wrote down the evidence taken at the inquest proceeding on the death of the deceased, Smith; that he did not remember what the witness Walker had testified to, but that he wrote his testimony down correctly; and that he read it over to Walker, and he stated it was correct, but did not sign it. The state then introduced testimony taken at the inquest trial, but which was not signed by the witness Walker, and read a portion of said Walker's testimony to the jury, as follows: "I was here at the time. Did not see him killed. Was in the house. Me and Mr. Price had had a difficulty. We were drinking, but had made friends. I had two pistols. I am satisfied Price had one of my pistols, No. 38, Harrington & Richardson. I think I had the pistol out, and think that I had showed him the pistol. Don't know how he got it. He may have taken hold of it, and pulled it out of my hand, and I didn't object to it. Had no understanding with Price to kill Smith." To all of which defendant excepts." The court directly afterwards withdrew said testimony from before the jury, and instructed them not to consider it for any purpose. It will be noted that no ground of objection is specified on which it was insisted that this testimony was not admissible. It was the duty of appellant on the trial to state to the court the ground of his objection. See *Gilleland v. State*, 24 Tex. App. 524, 7 S. W. 241; *McGlasson v. State* (decided at the present term) 43 S. W. 93. The court, however, as shown by the bill of exceptions (if we could consider the same), excluded said testimony from the consideration of the jury, and the rule in regard to said testimony so withdrawn is as follows: "When improper evidence is once admitted, and is then excluded, such testimony must clearly appear to be material and prejudicial to the defendant, before the case will be reversed on this account." See *Miller v. State*, 81 Tex. Cr. R. 636, 21 S. W. 925; *Trotter v. State* (Tex. Cr. App.) 36 S. W. 278. If

we examine the record,—that is, the statement of facts,—we find that the testimony of the witness Walker is almost identical to that of the state's witness Mrs. Smith, who was in the house with Walker at the time the homicide was committed. However, as before stated, no grounds of objection were urged to the admission of this testimony in the court below, and the bill of exceptions is incomplete.

The second bill objects to the action of the court with regard to the impeachment of the defendant's witness J. J. Mitchell. On cross-examination by the state, this witness stated that he had no recollection of stating at the inquest that Dr. J. R. Walker told him that he had given Price the pistol with which he shot deceased; that he was drinking at the time; and he further stated that Dr. Walker never did make any such statement to him. To impeach him, the district attorney introduced J. J. Peters, who stated that he wrote down the testimony taken at the inquest, and that he wrote down the testimony of the witness Mitchell; that the same was written as the witness testified at said inquest, but that for some cause the witness did not sign the same; and the paper containing the written evidence was identified by said witness. In this connection the witness stated that he had no recollection, independent of the paper, of the testimony of said witness before the jury of inquest. The state was permitted, over the objections of the defendant, to read from said Mitchell's testimony, as follows: "When the homicide occurred, he was in the house, writing a certificate; that Dr. R. J. Walker had never acted in an ungentlemanly manner at Mr. Smith's house, to be presented to the Masonic Lodge. Dr. Walker told me afterwards that he had given Price the pistol." The court admitted this testimony for the purpose of impeaching said Mitchell, and instructed the jury in his charge to consider it for such purpose only. The bill of exceptions shows that the defendant objected to the introduction of this testimony, because the same was not signed, and was inadmissible for any purpose whatever. Article 1028, Code Cr. Proc. 1895, provides that "witnesses shall be sworn and examined by the justice, and the testimony of each witness shall be reduced to writing by the justice, or under his direction, and subscribed by the witness." It will be observed that this bill does not state, as in the former bill, that said testimony was even read over to the witness, and that he admitted its correctness. The witness stated that, independent of the paper, he did not remember the testimony of said Mitchell. Merely an unsigned writing, which the witness says he took down at the time, was admitted in evidence for the purpose of showing what said witness testified on said inquest proceeding, to impeach said witness. In our opinion, it would be a bad precedent to allow this unsigned paper to be admitted in

evidence for any purpose. Possibly said paper might have been used by the witness Peters in order to refresh his memory, if it had this effect, and he might then have stated his recollection, after having so refreshed his memory; but this was not the course pursued. The witness had no recollection on the subject; but simply a writing which the law requires to be signed by the witness (but which in this instance was not signed) was adduced in evidence to establish what he swore on the inquest proceedings. This, we believe, was error. See *Grosse v. State*, 11 Tex. App. 364. The object of the testimony, as stated above, was to impeach the witness Mitchell, and was used for that purpose. If Mitchell was a material witness for the defendant, the admission of such testimony would be calculated to injure him. On examining the record, we ascertain that appellant relied on self-defense, his defense being that, at the time he shot deceased, deceased had already struck him with a large stick across the shoulder, and was in the act of striking him again when he shot him. Defendant also testified that when he left there, which was in a few minutes, he took said stick away with him in the buggy, and that he gave it to his wife to keep, and the stick was produced and identified on the trial. Mitchell testified that when he arrived at the scene of the homicide, which was almost immediately, deceased was lying on the ground with his hand on a stick, and that he went off a short distance, and, on coming back, met the defendant going off in the buggy with the stick. The state's theory was that deceased did not have the stick. The principal state's witness, Mrs. Smith, did not testify on the subject at all. The daughter of the deceased, however, Bulah Smith, testified "that when she arrived on the ground, that she did not see any stick near where her father was lying on the ground, and that the defendant did not carry a stick of any kind away from there when he left; that she had never heard of this stick before this term of the court. She saw defendant get in the buggy, and leave, shortly after shooting her father, and he had no stick about him." It will be seen from this that it was a material issue in the case whether or not deceased had a stick at the time of the homicide, and whether appellant carried said stick off with him. If this testimony should appear to be fabricated, it would be very hurtful to appellant. The testimony of the state tended to show that it was fabricated. Now, the defendant on this issue was entitled to every particle of legal testimony that tended to corroborate him; and he was entitled to have that testimony go before the jury from witnesses unimpeached by any other character of evidence than testimony legally admissible for that purpose. The testimony of Mitchell was material as supporting appellant's own evidence; but he was handicapped before the jury by illegal testimony of an impeaching character, and it

occurs to us that the error of the court in admitting said testimony was calculated to injure appellant.

Appellant filed a motion for a new trial, based in part upon newly-discovered testimony. It appears from said motion and from the accompanying affidavit of J. B. Storey that, on Saturday preceding the homicide, he (Storey) heard the deceased, Smith, say that John Price (defendant) had been talking about his family, and at the first opportunity he (the said Smith) intended to beat the head of John Price soft; and said Smith told said witness not to say anything about what he intended doing to Price. The witness further swears that he never told any one of the conversation with Smith relative to beating John Price's head soft until the 24th of March, 1897, when he told J. L. Sheppard, one of the attorneys of the appellant. This was after the trial of the case, which occurred on the 17th of March. The state contests this application, and, by its affidavit, throws some suspicion on the conduct of said witness; but it fails to show that this testimony was not, so far as the defendant was concerned, newly discovered; and the effect of said affidavit would merely be such as could go to his credit before the jury on another trial. We cannot say that his testimony is probably untrue. The testimony itself is of a material character. The difficulty between the deceased and the defendant occurred when no eyewitness, except defendant, was present; and it is a vital question in the case as to who began the difficulty, or who was most likely the aggressor, and the defendant was entitled to any testimony that would shed light on this matter. If it be true, that deceased, a short time previous to the homicide, and about the very subject that appears to have been the cause of the homicide, made threats against the appellant, such testimony was material on his behalf, as tending to show who most likely was the aggressor. For the errors discussed, the judgment is reversed, and the cause remanded.

#### MAGEE v. STATE.<sup>1</sup>

(Court of Criminal Appeals of Texas. Dec. 8, 1897.)

#### CRIMINAL LAW — APPEAL — TRIAL — REBUTTAL EVIDENCE.

1. The objection that certain witnesses were allowed to remain in the court room, and listen to the testimony of other witnesses, will not be considered on appeal, where it is not shown by the bill of exceptions whether this occurred before or after said witnesses had testified.

2. Error cannot be assigned upon the admission of evidence which the court instructs the jury not to consider.

3. Where an attorney talks with witnesses placed under the rule, it is proper for the court to reprimand him, even in the presence of the jury.

4. Where the state's witnesses identify two third persons as participating in the robbery with which the defendant is charged, and the defendant attempts to show an alibi, it is proper to per-

<sup>1</sup> For opinion on rehearing, see 43 S. W. 512.

mit the state to offer evidence in rebuttal as to the whereabouts of said third persons at the time of the robbery.

Appeal from district court, Trinity county; J. M. Smither, Judge.

Indictment of Solon Magee for robbery. Defendant was convicted, and he appeals. Affirmed.

Sam T. Robb, A. G. Cromwell, A. M. Stevenson, Bean & Nelms, Adams & Kenley, and Stevenson & Stevenson, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of robbery, and his punishment assessed at 40 years' confinement in the penitentiary; hence this appeal.

Appellant's first bill of exceptions is based on the court's allowing the witnesses William Elliott and Charles Elliott to remain in the court room, and hear the testimony of the other witnesses, both for the state and the defendant. The bill of exceptions does not show at what stage of the case these witnesses were permitted to remain in the court room. If they first testified, and afterwards were permitted by the court to remain in the court room, and were not subsequently recalled to testify, then there could be no possible injury; and, in the absence of a showing to the contrary by the bill of exceptions, we are to presume that the court did not act improperly in this matter.

Appellant objected to the testimony of William Elliott, to the effect that: "There was forty-eight or fifty-eight dollars, in currency bills. They were U. S. currency bills. The currency bills were in a book, or, may be, loose in the safe. I don't know. Charley had it. I had sold some cattle, and got the currency, and handed it to him. I can't tell just what the bills were. Think there was a twenty and a five; may be, a ten. Can't tell." Said testimony was objected to on the ground that there was no sufficient allegation in the indictment descriptive of said bills. By referring to the indictment, we find allegations descriptive of said money, as follows: "One twenty-dollar currency bill, of the value of twenty dollars; one ten-dollar currency bill, of the value of ten dollars; one five-dollar currency bill, of the value of five dollars." This description, possibly, under the decision of this court in *Jackson v. State*, 29 S. W. 285, was not a good description of said bills. The word "currency" was not used in the description in said case, and this may be a sufficient description. The court, however, in its charge to the jury, instructed them not to consider the testimony with reference to said bills, and this was equivalent to striking out said evidence. Consequently there was no error. The conviction was under that portion of the indictment with reference to the robbery of coin money of the United States of America. The observations above made apply also to the next bill of exceptions,

which is with reference to the admission of the testimony of Charles Elliott on the same subject.

There is nothing in the objection made to the action of the court in reprimanding the attorney, Cromwell, for talking with the witnesses placed under the rule, without the permission of the court. The action of the court was entirely proper, and whether it was in the presence of the jury, or not, would make no difference. The attorney knew the witnesses had been placed under the rule, and he should have known that he had no right to approach and talk with them without the permission of the court.

Appellant excepted to the action of the court in permitting the state to go into an examination of witnesses as to the whereabouts of Ben and Brock Johnson at the time of the alleged robbery. His objection was on the ground that the state, in the development of its original case, had introduced no testimony as to them, and that defendant had introduced no testimony as to them, but that such testimony as was adduced from their witnesses was brought out by the state on cross-examination of defendant's witnesses, and that the testimony of said witnesses in regard to Ben and Brock Johnson was not in rebuttal; and reference is made to the statement of facts, in support of this bill of exceptions. An examination of the statement of facts, which is thus made a part of the bill, shows that the state, by Charles Elliott, its second witness, identified Brock and Ben Johnson as being two of the parties who were present and participated in the robbery. However, if this were not true, and the state was permitted to introduce testimony in regard to Ben and Brock Johnson which was not strictly in rebuttal, still it was a matter within the discretion of the court to allow evidence with reference to said parties to be introduced pending the examination of witnesses; giving the defendant, however, full scope to bring forward testimony upon said issue. The testimony with reference to said Ben and Brock Johnson was very pertinent to this case. Indeed, we fail to see how it could have been gone into without showing their presence; and, certainly, after the defendant had gone into his alibi testimony, proof as to the whereabouts of Ben and Brock Johnson became very material. There was no error in the action of the court in this regard.

The complaint urged by appellant, that the jury only remained out the short time of 20 minutes, considering of their verdict, is without merit. They had listened to the whole case, and, no doubt, had their minds fully made up as soon as they heard the evidence and the charge of the court. Nor is there anything in the contention of appellant that the proof did not show the want of consent of William Elliott, as complained of in appellant's motion for a new trial.

The record shows that he did not consent.

Appellant complains, in his motion for a new trial, that the court erred in failing to give the special charge asked by him. This special charge was substantially embraced in the court's charge, and there was no error in refusing to give it. Appellant brings forward in his motion for a new trial the action of the court in permitting the state to prove by defendant's witness Tom Young, on cross-examination, that said Young and defendant and Brock Johnson were jointly indicted in the district court of Trinity county on the charge of aggravated assault on Polk Thornton, and in failing to charge the jury as to the object of such testimony. There is no bill of exceptions with regard to this action of the court, and, in the absence of such bill, we cannot take cognizance of it. There is also appended to the appellant's motion for a new trial the affidavit of Evans as to alleged misconduct of one of the jurors, who was allowed to separate from the other jurors and talk to an outsider, to wit, W. G. Stanley. This matter was entirely explained by counter affidavits, which show that there was no misconduct; that the jury were all present, or very near by, under the eye of the officer; and that the conversation occurred between the juror and a third party in the immediate presence of the officer, and only for a few moments, and about a matter that had nothing to do with the case on trial. There was no error in this. Appellant's complaint that the conviction is not sustained by the evidence is not well taken. The state's case was amply made out. All the circumstances attending the robbery were shown, and the defendant was thoroughly identified as being one of the parties engaged in the robbery. His alibi testimony, if it had been believed by the jury, might have authorized an acquittal; but it is evident that the jury did not credit it, and, in view of the evidence in this case, we entirely concur with them. The judgment is affirmed.

HURT, P. J., absent.

#### CHILDRESS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

#### APPEAL — BILL OF EXCEPTIONS — NEW TRIAL — HOMICIDE — MANSLAUGHTER — SELF-DEFENSE.

1. The permitting of a witness to be recalled by the jury after the argument had been closed, and to be interrogated as to a fact not testified to by him during the trial, cannot be presented as error in a motion for new trial, but should be presented by a bill of exceptions.

2. A defendant is guilty of manslaughter, where deceased was making an unlawful and violent assault on him, besides one with intent to murder or inflict serious bodily injury upon him, and he slew deceased before resorting to all other reasonable means within his power, except retreating, or if he used more force than was reasonably necessary.

Appeal from district court, Madison county; J. M. Smither, Judge.

Will Childress appeals from a conviction of manslaughter. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of manslaughter, and given two years in the penitentiary; hence this appeal.

Appellant, in his motion for a new trial, and assignments of error, complains of the action of the court in permitting a witness to be recalled by the jury after the argument had been closed, and permitting the witness to be interrogated as to a fact not testified to by her during the trial. The matter is presented in this wise: "After the jury had retired, and were considering of their verdict, they appear to have disagreed about the testimony of the witness Mrs. Childress, and by their request she was recalled. She was asked to state, 'What was your evidence in regard to deceased having a stick at the time he was shot?' to which question the witness replied, 'I said deceased had a stick in his hand.' Then one of the jurors asked the witness, 'In which hand did he have it?' and she replied, 'In his right hand.'" It is complained that this latter expression was new testimony, not elicited from the witness when she had previously been upon the stand. If such was the case, the only way by which the matter could be presented for review would be a proper bill of exception. There is no such bill in the record, and this is not a matter that can be brought forward simply in a motion for a new trial.

Appellant also urges that the court misdirected the jury in the charge on self-defense in connection with the charge on manslaughter; that is, we take it so, from excerpts taken from the court's charge, and embraced in the motion for a new trial. Said charge substantially instructs the jury as to the defendant's right of self-defense in case the deceased was making any other unlawful and violent attack on him, besides one with intent to murder or inflict serious bodily injury, and properly told the jury that in such case defendant must resort to all other means, besides retreating before he would be authorized to kill deceased. And the court further instructed the jury that if deceased was making an unlawful and violent assault on defendant, besides one with intent to murder or inflict serious bodily injury upon him, and he slew deceased before resorting to all other reasonable means within his power, except retreating, or if he used more force than was reasonably necessary, and so slew deceased, in such case he acts would not be in self-defense, but he would be guilty of no greater offense than manslaughter. The charge in question is lengthy one, but we have examined it critically, and we believe that it applies the rule of law arising from the evidence in a proper manner. The court had already given

charge on self-defense, predicated on the idea that the deceased was at the time making an assault on defendant, with intent to murder him; and there was also evidence which to our minds required a charge predicated on the idea that the appellant may have slain deceased when he was in the act of making a violent assault on him, besides one with intent to murder or take his life; and, as stated above, we believe the charge, as given by the court, was a correct enunciation of the rules of law as applicable to the case. The jury found the defendant guilty of manslaughter, and in our opinion the evidence warranted their finding. At least, we see no reason to disturb their verdict, and the judgment is affirmed.

HURT, P. J., absent.

### STEEL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 8, 1897.)

#### MURDER—EVIDENCE—CONTINUANCE.

The evidence showed that defendant left a party, and ran after some other people, then turned, and saw deceased coming after him. Defendant told deceased not to come on him, and immediately shot and killed him. Deceased was not shown to have been armed, and defendant afterwards said that he had been hired to kill him. Held proper to refuse a continuance for the absence of witnesses to prove that deceased and another were going to jump on defendant the night of the homicide, and take his pistol away from him or kill him.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Indictment of Temus Steel for murder. Defendant was convicted, and he appeals. Affirmed.

R. M. Hubbard and John J. King, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and given five years in the penitentiary; hence this appeal. Appellant's bill of exceptions is to the action of the court in overruling the motion for a continuance. The motion was predicated on the absence of certain witnesses for the defendant, to wit, Buck Carr, William Carr, James Hudson, Comer Hudson, and Arch Quinn. The Hudsons and Buck Carr were alleged to reside in Bowie county, and William Carr and Arch Quinn were alleged to reside in Miller county, Ark., near the Texas line; and said last-mentioned witnesses were often at Index, in Bowie county, Tex. The license shown is that on the 27th of September, 1897, defendant caused subpoenas to be issued to said witnesses, and that he placed them in the hands of the sheriff of Bowie county on the 29th of September, 1897, and informed the sheriff that said witnesses could be found at or near Index, in Bowie county, Ark.; and that said subpoenas were subsequently returned by the sheriff, indorsed,

"These witnesses are in the state of Arkansas." Appellant shows that the process, with the return thereon, was not filed with the clerk until a short time before the case was called for trial. The case was called for trial on October 8th. The application does not show at what time between the 29th of September and the 8th of October said process, with the return thereon, was filed in court. Of course, if it was filed a sufficient length of time before the case was called for trial to get out new process, this should have been done. As to the Arkansas witnesses, it occurs to us that some effort should have been made to get their depositions. We do not think that there was sufficient diligence used in this case to procure the attendance of said witnesses.

Appellant claimed that he expected to prove by the two Hudsons that the deceased and Dick Lewis were going to jump on him the night of the homicide, and take his pistol away from him or kill him; that said witnesses had heard the deceased and Dick Lewis, just prior to the difficulty, say they were going to jump on the defendant and take his pistol away from him or kill him. Defendant stated that he expected to prove by the two Carrs and Arch Quinn that they were present at the shooting, and that just before defendant jumped off the gallery, and started in a run to catch up with Arch Quinn, John Page and Dick Lewis and others ran after him, and Buck Carr said in a loud voice, "What are you all running after that boy for?" That defendant just then looked back, and saw John Page, the deceased, running upon him; whereupon defendant turned out of the road, and Page turned to follow him, and defendant begged him to stop, and not hurt him; but the said Page would not stop, but continued to run on the defendant, with his right hand behind him, when defendant shot the said Page; and defendant expects to prove by all of said witnesses that he had not done anything to provoke the difficulty. As to the testimony of the Hudsons, to the effect that they may have heard deceased and Dick Lewis say they were going to jump on defendant, and take his pistol away from him, it is not shown that this was ever communicated to the defendant prior to the shooting; and as to this testimony, and the testimony of the other witnesses, under the circumstances of this killing, as narrated by the defendant himself, we fail to see how it could be of any advantage to him. His statement as to the killing is as follows: That after the party broke up, and the crowd was leaving, he jumped off the gallery, and started on a run to catch up with Arch Quinn, in order to tell him to tell Alex. Lewis that he would not be down until Saturday morning; that about the time he got up with Quinn and Comer Hudson he looked back, and saw John Page and Dick Lewis running after him; that he turned out on the side of the road a few steps, and, as the deceased came up, he

threw his hand behind him, and he (defendant) told him to stop or he would blow his lights out; that the deceased continued to advance upon him with his hand behind him, and defendant shot him. He states that the reason that he shot the deceased was because he thought he was going to try and take his pistol, and when he threw his hand back to his pocket he thought he was going to get a weapon, and shot him to keep him from hurting him. Of course, notwithstanding defendant had no right to carry arms, the deceased had no right to disarm him; but the evidence of even the defendant fails to show, to our minds, any attempt on the part of the deceased to disarm him of his pistol. The evidence of the other witnesses shows that deceased was following along with the crowd in the rear of the defendant; had not spoken a word to him; nor does the defendant claim that he had said anything to him, but that, when he was within about 20 feet of him, defendant suddenly turned around, and told him not to come on him. While nothing was said by deceased, defendant thereupon shot him down. There is no proof that deceased had any weapon, and only defendant and Mary Sweet saw anything which could be construed into a demonstration signifying that he had any weapons. All of the other witnesses show that deceased, at the time he was shot, was doing nothing. He was smoking his pipe, and his hands were hanging down by his side; and, when suddenly accosted by the defendant, he stopped in that attitude, and defendant shot him down, and then fled. It occurs to us that, under the circumstances of this killing, the testimony of the justice of the peace is significant of its cause. He says that, when defendant was first arrested and brought before him, he said nothing of any demonstration by deceased against him, but stated that he killed him because he had been hired to kill him. In the light of the testimony, we do not believe that the absent witnesses would testify as it is claimed they would, and, if they did, we do not believe that their evidence would find credence with an honest jury.

Appellant complains because the court failed to charge manslaughter. To our minds, the evidence did not require a charge on manslaughter. The judgment is affirmed.

HURT, P. J., absent.

#### STEVENS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 8, 1897.)

##### CRIMINAL LAW—LARCENY—INSTRUCTIONS.

1. On a prosecution for theft of cattle, where it appeared that defendant assisted one Parker in taking the cattle, the court charged that if defendant was hired by "Robert Parker" to help drive said cattle, and you believe that "said Robert Walker" was the owner, and had the right to dispose of said cattle, and, acting under

such belief, defendant helped to drive the cattle away, you will acquit, even though said Parker, in taking the cattle, committed the theft. *Held*, that the instruction was not misleading, because in one place the name "Walker" was used instead of "Parker," and was favorable to defendant.

2. In a criminal case, the judge failed to tell the jury, in the charge as read, how to fill the blank in the form of verdict given. He then interlined the words, "You will fill the blank with the word showing the punishment you assess," called the jury's attention to the fact that he had made some interlineations, and read again the form of verdict with the added words, to show simply that portion of the charge the added words related to. *Held*, that defendant was not prejudiced, as under defendant's testimony it was a clear case of theft, and the jury assessed the minimum punishment.

Appeal from district court, Harrison county; W. J. Graham, Judge.

Tun Stevens was convicted of cattle theft, and appeals. Affirmed.

J. M. Case and Chas. E. Carter, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of cattle theft, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The first count of the indictment charges ownership in an unknown owner, and that the cattle were taken from the possession of A. P. Hope; the second count charges the theft of cattle from the possession of an unknown owner; the third charges that he fraudulently took into possession and drove, etc., the cattle from their accustomed range; and the fourth count charges receiving and concealing the cattle after they were stolen. The court limited the jury to the consideration of the second count. Appellant's defense was that he assisted one Parker to drive the cattle from where they were taken, in Harrison county, to Jefferson, a distance of about 19 miles, and was simply a hired hand, and for his services received the sum of three dollars. The uncontradicted proof for the state, as well as the testimony of defendant himself, his son, and the wife of Parker, shows that defendant and Parker took the two steers from the range where they had been running for a year or two, knowing they were estrays when they drove and placed them in the pen of Parker. The night after they were so penned, about 11 or 12 o'clock, they drove the steers from Parker's pen to Jefferson, reaching the outskirts of Jefferson about daybreak, or just before. Defendant testified that he then returned home, and left Parker to sell the steers. As to the taking and driving, and the knowledge on defendant's part that he and Parker had no right to take the cattle, the testimony is all one way. Parker told appellant the steers "had fell to him by stray." In this connection, the court charged the jury in the following language: "If the defendant was hired by Robert Parker to help drive said cattle, and you believe that said Robert Walker was the owner of said cattle, or that he had

the right to dispose of said cattle, and, acting under such belief, he helped to drive said cattle away, then you will acquit the defendant, even though you may not believe that said Parker, in taking said cattle, committed the theft; for in such case there would be no fraudulent taking on the part of the defendant, without which there can be no theft." An exception was reserved to this charge, and from the qualification by the court it seems that the exception was intended to point out the fact that the name "Robert Walker" was repeated in said charge where the name "Robert Parker" should have appeared. An inspection of the charge criticised will show that this contention is without merit. The name "Robert Parker" had been properly, in the first instance, set out, and, in using the expression "said Robert Walker," no jury could have misunderstood the plain meaning of the charge. Again, this charge was favorable to the defendant, and it may be questioned whether it should have been given; but of this the defendant cannot complain, because it authorized an acquittal upon a theory which, if suggested by the testimony at all, was so by rather a strained construction of the evidence. By the defendant's own testimony and all the facts in this case, it is shown that when he and Parker drove the cattle, and placed them in Parker's pen, and thence into an adjoining county, to the town of Jefferson during the dark hours of the night, he knew the cattle were stolen; and his subsequent payment to Hope of one-half the value of those cattle is also indicative of the fact that he assisted in the theft, as well as his statement to Hope that he helped take the cattle. To say the least of it, the charge was favorable to the defendant. Nor did the court err in refusing to give the several special instructions asked by appellant in regard to this same question of defendant being a hired hand.

Appellant reserved a bill of exceptions to the action of the court in re-reading to the jury that portion of his charge which prescribed a form of verdict to be signed by them in case they should convict. The trial court makes this statement in regard to the matter: "Upon re-reading my charge to the jury, I observed that I had not told the jury how to fill the blank in the form of verdict given. I then interlined these words, 'You will fill the blank with the word showing the punishment you assess;' called the attention of the jury to the fact that I had made some interlineations; and read the form of the verdict with the added words, to show simply that portion of the charge the added words related to." It certainly will not be denied that the court has the authority to correct its charge at any time before the jury had retired; and it has been held in this state that where errors have been committed in the charge, or phases of the law omitted from the charge, the jury can be recalled from their retirement before verdict rendered, and the court correct the char-

ges in regard to the error, or give additional charges to supply omissions. If this be correct, then there could be no error in the action of the court in this instance; and how it could have impressed the jury with the fact that the court was seeking to emphasize his idea of the guilt of the appellant we do not understand. The court explains that he made these interlineations in order that they might understand intelligently the form set out. This is not like a case where the court reiterates the charges upon law which would tend to impress the mind of the jury with a certain phase of the case which would lead to a conviction. Cases have been reversed by the court of appeals, and by this court, where the court reiterated charges in such manner as it was probable that the jury were impressed with the fact that the court believed, under the statement of facts upon which the charge bore, the jury ought to convict. Those cases are not analogous to this case or this question, and, in view of the testimony in the case, the charge could not have prejudiced the defendant in any way; for, even under the defendant's testimony, it is shown to be a clear case of cattle theft, and the jury assessed the minimum punishment. The judgment is affirmed.

HURT, P. J., absent.

#### HALLOWAY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 8, 1897.)

#### CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—STATEMENT OF FACTS.

Alleged errors, in a criminal case, in refusing to quash the venire from which the jury were drawn, in ordering the sheriff to summon talesmen, in admitting certain testimony, and in the charge to the jury, cannot be reviewed on appeal, where no bill of exceptions was reserved, and the record contains no statement of facts.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

W. T. (alias Harve) Halloway was convicted of rape, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of rape upon a girl under the age of 15 years, she not then being the wife of appellant, and his punishment assessed at 25 years in the penitentiary.

The statement of facts is not incorporated in the record, nor were any bills of exception reserved during the trial. The first two grounds of the motion for a new trial complain of the action of the court in refusing to quash the venire from which the jury were drawn. As before stated, no bill of exceptions was reserved, and we have nothing before us upon which to consider this ruling of the court. Nor is any error made to appear in the third ground, in regard to the ruling of the court in ordering the sheriff to summon

the talesmen. Outside of the ground of the motion, there is nothing to indicate that talesmen were selected. The fourth ground is "that the court erred in admitting certain testimony, as shown by bill of exceptions." The bill was not reserved. The fifth ground of the motion is predicated upon the assertion that the "court erred in its charge to the jury, as shown by the bill of exceptions that will be hereafter filed." The bill was not filed, and the alleged error is not mentioned in the motion, and the record does not contain a statement of facts. The matter is not presented in such a manner that we can act upon it. The judgment is affirmed.

HURT, P. J., absent.

### MCINTYRE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 8, 1897.)

#### RAPE—CONTINUANCE—INSTRUCTIONS.

1. Where both defendant and prosecutrix swear that no previous act of sexual intercourse had occurred between them, an application for continuance for the absence of a witness who is expected to testify to such previous intercourse should be overruled.

2. Where the act of intercourse is proved by several eyewitnesses, it is proper to refuse to instruct the jury that the testimony of the prosecutrix alone is not sufficient for conviction.

3. Where the judge charges the jury on the theory that the defendant is under 17 years of age, it is proper to refuse to charge that the burden of proving defendant to be over that age rests on the state.

Appeal from district court, Guadalupe county; M. Kennon, Judge.

Indictment of Robert McIntyre for rape. Defendant was convicted, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was charged with rape, in the first count of the indictment, upon a girl under 15 years of age, not being his wife, and, in the second count, with rape by force, and without the consent of the alleged ravished female. On the trial the jury convicted defendant under the second count, and gave him 40 years' confinement in the penitentiary. He filed his motion for a continuance on account of the absence of several witnesses. In his bill of exceptions reserved to the action of the court overruling said application, he mentions three witnesses only,—William Cavel, John Rankin, and Janie Wilcox. By Rankin and Wilcox he expected to prove that the girl was over the age of 15 years; and, further, by Rankin, that he was custodian of the church records, which showed the prosecutrix to be over 15 years of age. This phase of the continuance may be disposed of by the statement that the jury found the girl to be over 15, and convicted defendant of rape under the second count. By Cavel he expected to prove that he (appellant) and

Pinkie Wilson, the prosecutrix, were sweethearts while they attended the school taught by said Cavel, and that Cavel had intercepted notes from Pinkie Wilson to defendant, containing admissions of intimate relations between said Pinkie Wilson and defendant, and showing such relations to have been improper. Viewing this application for a continuance from the standpoint of the motion for a new trial, the testimony expected to be proved by Cavel is not probably true. The prosecutrix and defendant both testified that no such relations had ever existed between them. Appellant testified that on the Friday week before the alleged rape, at a certain school exhibition, the prosecutrix had promised to have sexual intercourse with him at Tolbert's, and that, in pursuance to that agreement, they met at Tolbert's, and the act occurred; that Manuel Given and John Ed Pitts were present, and heard this promise made to appellant by prosecutrix. Appellant further testified: "I never had anything to do with her before. Never was with her by ourselves alone. Never said anything to her before, nor she to me." Manuel Given and John Ed Pitts were placed upon the stand by appellant, and testified that they did not hear any such conversation between appellant and prosecutrix. The act occurred at Tolbert's, and was testified to by the prosecutrix and three other young people. Defendant is shown to have had his pistol; and when these eyewitnesses opened the door of the room, while the act of intercourse was in progress, he threatened the boy with the pistol, and they left that portion of the house, and went out in the yard. That the intercourse occurred is admitted by appellant. That the private parts of the girl were lacerated and torn is also shown by the physician who made the examination the day succeeding the alleged rape. In this state of the record, we are of opinion that Cavel would not have testified as set out in the application; and, if he had, it would not have been true, inasmuch as defendant himself and the prosecutrix testified that no such improper relations had ever existed between the parties. The court did not therefore err in refusing the motion for a new trial upon this ground.

Appellant asked the following special instructions: "If they find defendant Pinkie Wilson gave her consent to the copulation, they must acquit. (2) That the testimony of the alleged ravished woman alone is not sufficient to support a conviction. (3) The burden of proving the age of the defendant to be over seventeen years rests with the state." In regard to the first charge, we suppose the appellant used the wrong word in describing Pinkie Wilson as the "defendant." The court charged the jury in this respect that, if the prosecutrix gave her consent to the sexual intercourse, appellant should be acquitted. This was sufficient, and it was not necessary for the court to repeat it in a special charge. In regard to the second phase of the request-



ed instructions, it may be stated that the prosecution did not rely upon the unsupported testimony of the ravished woman. Three other eyewitnesses testified to the transaction, and defendant himself testified to the fact that he penetrated her private parts. In regard to the third phase of the special instruction, to wit, that the burden of proof was on the state to show the appellant over 17 years of age, the charge of the court submitted this question only upon the theory that the defendant was under 17 years of age. The punishment for offenders over the age of 17 was not submitted in the charge given by the court. In this charge the court gave appellant the benefit of the doubt as to his age, and eliminated the higher punishment. We think the evidence fully justifies the conviction, and the court gave appellant full, fair, and explicit charges, covering every issue suggested by the evidence. The judgment is affirmed.

HURT, P. J., absent.

#### NAVARRO v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

**CRIMINAL LAW—HOMICIDE—VENUE—COUNTY ATTACHED FOR JUDICIAL PURPOSES—BLOW IN ONE COUNTY, AND DEATH IN ANOTHER—INSANITY FROM INTOXICATION—DEGREES—MANSLAUGHTER—SELF-DEFENSE.**

1. Where an indictment for murder charged the commission thereof in a county which was attached for judicial purposes to the county in which such indictment was found, the venue was clearly shown.

2. The venue was also clearly shown where it appeared that the death occurred in the county in which the indictment was found, though such indictment charged the commission of the alleged murder in another county, in which the fatal blow was struck, as Code Cr. Proc. art. 233, provides for the prosecution of such offense in either county.

3. In a trial for murder, where the jury were fully instructed in regard to murder in the first and second degrees, and had a charge as to Pen. Code, art. 41, relating to the effect to be given to evidence of temporary insanity, produced by the recent use of intoxicating liquors, in determining the condition of defendant's mind at the time of the homicide, no further instruction on such subject was necessary.

4. Instructions relative to manslaughter and to the doctrine of self-defense were not required where it appeared that deceased was lying on the bed, in an almost helpless condition of intoxication, when the first, if not when the fatal, blow was struck, though defendant had claimed, in a voluntary statement introduced in evidence by the state, that deceased had brought out a gun, which he (defendant) took from him, as such fact, without the attending circumstances, presented no question of self-defense or manslaughter.

Appeal from district court, Webb county; A. L. McLane, Judge.

Cosme Navarro was convicted of murder in the first degree, and appeals. Affirmed.

Mann Trice, for the State.

HURT, P. J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

Appellant was charged by indictment with the murder of Ramon Perez by striking him on the head with a gun in Encinal county, which was attached to Webb county for judicial purposes. We think the venue was clearly shown; and, besides, article 233, Code Cr. Proc. 1895, provides for the prosecution of the offense of murder in the county in which the blow was struck, or where the death occurred, and there is no question in this case but that the death occurred in Webb county.

The motion for a continuance presents no matter, when the statement of facts is looked to, which would have any material bearing upon the case whatever.

The court instructed the jury fully, and very explicitly, in regard to murder in the first degree and murder in the second degree, and also gave in charge (which was required by the evidence) article 41 of the Penal Code, pertaining to temporary insanity, produced by the recent use of intoxicating liquors. The latter portion of said article makes it the duty of the district judge, in a criminal case, when temporary insanity is relied upon as a defense, and the evidence tends to show that such insanity was brought about by the immoderate use of intoxicating liquors, to charge the jury in accordance with the preceding portion of said article. When the charge of the court is viewed as a whole, no jury, in passing upon the condition of the mind of the appellant, could misunderstand the charge in regard to temporary insanity, produced by the recent use of intoxicating liquors. The jury would inevitably look to his condition, in passing upon the question as to whether his mind was calm and deliberate when the intention to kill was formed, and in passing upon whether, when he killed the accused, he was in that condition of mind which would render the killing murder in the first degree. The court was required to give no further charge upon this subject than that given. In fact, we are of the opinion that it was the intention of the legislature to require the court to give the law substantially as set forth in article 41.

Counsel for appellant complains because the court failed to instruct the jury with reference to manslaughter, and failed to submit to the jury the question of self-defense. When we look to the facts of this case, we are of opinion that this was not required. The unquestioned facts demonstrate that the deceased was lying on the bed when the first blow was struck, if not when the fatal blow was struck. The blood stains on the pillow, and the indentations made by the weapon on the headboard, conclusively establish the fact that he was in the bed when he was first attacked. When his daughter-in-law left the room, deceased was lying on the bed,

in an almost helpless condition, from intoxication. The gun was in the rack. Counsel for appellant contends that there is some testimony tending to present manslaughter, or perhaps self-defense, in the voluntary statement made by the defendant, and introduced in evidence by the state. The statement is as follows: "The deceased sent me word to come to his ranch with some mescal. I got there, and we drank together until we both got drunk. He walked in and got the Winchester, and I took it away from him. And that is all I remember." He further stated: "We both were drunk, and don't remember what happened afterwards. The deceased and I had trouble before. Juanita A. Perez was present at the ranch. The knife here in court is mine. I took the Winchester away from Perez. I don't remember whether I hit him with it or not. It was only Ramon Perez and I who drank, and no one else. We drank about four or five quarts of mescal." Appellant, in this statement, says that the deceased walked in and got the Winchester, and he (defendant) took it from him. If this were true, it evidently presents no self-defense, nor manslaughter. The circumstances attending the getting of the gun by the deceased are not mentioned. How long after, or what he was doing with the Winchester when it was taken from him by appellant, is not stated. Nor is it stated what happened after he took the Winchester away from Perez, nor the length of time that may have ensued after this before he struck him with the gun. Now, if the court had submitted manslaughter or self-defense, is it at all reasonable that an honest jury would have taken either view of this case, resting upon such a shadowy foundation as this? We think not. Chief Justice Roberts, in *Bishop v. State*, 43 Tex. 390, says: "When the evidence tends sufficiently to the establishment of a defense or mitigation of the offense charged as to reasonably require a charge as applicable, is a question of sound judgment, to be exercised by the district judge in the first instance, and afterwards by the supreme court on appeal. If its force is deemed to be very weak, trivial, light, and its application remote, the court is not required to give a charge upon it. If, on the other hand, it is so pertinent and forcible as that it might be reasonably supposed that the jury could be influenced by it in arriving at their verdict, the court should charge so as to furnish them with the appropriate rule of law upon the subject."

Appellant also contends that the court erred in admitting the voluntary statement of the accused. Why the state wanted to introduce this testimony, or what particular bearing it had upon the case, we are at a loss to understand. However, the objections urged to the same are not tenable. Appellant also complains of the refusal of the court to give a number of special instructions asked by him. We have already stated that the court gave a

general charge which covered every phase of the case suggested by the testimony, and such of appellant's charges as stated correct principles or rules of law were rendered unnecessary. The judgment is affirmed.

#### TUCKER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

#### AGGRAVATED ASSAULT—ADULT MALE—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. Evidence that defendant is a man is sufficient proof that he is an adult male, for the purpose of rendering aggravated his assault on a female.

2. Where the court charged properly on an aggravated assault and battery, defendant is not injured by the fact that, while the theory of the state was that he actually struck prosecutrix, and while there was no use of any deadly weapon, the court also instructed in regard to the ability of defendant to commit a battery, and the use of deadly weapons under circumstances calculated to alarm.

Appeal from Anderson county court; John F. Watts, Judge.

John Tucker appeals from a conviction. Affirmed.

Mann Trice, for the State.

HURT, P. J. Appellant was charged by information (being an adult male) with an assault upon Nancy Smith (a female). The evidence of the first witness shows that "Nancy Smith is a woman, and defendant, John Tucker, is a man." There are other facts, circumstances, and testimony showing that defendant was either a boy or a man, for, in speaking of him, he is referred to as "he" and "him," and that Nancy Smith was a woman, as she is referred to as "she" and "her." It is evident that appellant was a man, not only from the above testimony, but the fact that the festival at which the difficulty occurred was on his premises; the testimony showing that it was at his place. There was no question raised on the trial as to defendant's not being an adult male. The very question here raised was decided adversely to the appellant in the case of *Holliday v. State* (Tex. Cr. App.) 32 S. W. 538. And, also, see *White's Cr. Code*, § 1003, and authorities there cited.

Counsel for appellant complains of the charge of the court. When viewed in the light of the testimony, this is a remarkable charge. The court defined an assault and battery; defined an assault; instructed the jury in regard to the ability of defendant to commit a battery, and in regard to the use of deadly weapons under circumstances calculated to alarm, etc. All this was wrong, as not called for by the evidence in the case. If the state's theory be true, appellant was within striking distance of Nancy Smith; he not only struck her, but slapped her; hence the instructions in regard to the ability to commit a battery were unnecessary, altogether.

Appellant did not use any deadly weapon, or semblance thereof, in a threatening manner; hence this charge was uncalled for. But was the charge, taken as a whole, calculated to injure the rights of the appellant? We think not. The court charged the law directly applicable to the allegations contained in the indictment. The jury were instructed that an assault and battery becomes aggravated when committed by an adult male upon the person of a female. The court then gives the punishment, and concludes, "Now, if you believe from the evidence, beyond a reasonable doubt, that the defendant, in the county of Anderson and state of Texas, at or about the time alleged in the information filed herein, committed an aggravated assault and battery upon the person of Nancy Smith, you will find the defendant guilty, and assess his punishment at a fine of not less than \$25 nor more than \$1,000," etc. Here an aggravated assault and battery had been defined clearly to the jury, and they had been told, if they believed, beyond a reasonable doubt, that he committed an aggravated assault and battery, to convict him. This was clear and certain. Appellant, however, was not satisfied with this charge, and requested instructions to the effect that the jury must believe, beyond a reasonable doubt, that defendant was an adult male. We are of opinion that, under the facts of this case, the charge, as given by the court, was sufficient. If, however, there had been any doubt as to the fact that appellant was an adult male, then the court should have made the issue sharp, and given the charge requested; but, there being no question as to that fact, the refusal to give this charge was not calculated, in the least degree, to injure the rights of the accused. The judgment is affirmed.

### BLAKE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

#### CRIMINAL LAW—OBJECTIONS TO DEPOSITIONS— CONTINUANCE—EVIDENCE—CON- TRADICTING WITNESS.

1. Objections to depositions that the officer taking them was not authorized by law to take them, or some informality in the taking or return, are matters going to the form and manner of taking depositions, which under Code Cr. Proc. 1895, art. 803, and Rev. St. 1895, art. 2289, must be made at the first term after the filing of them.

2. The fact that defendant had made affidavit that he expected to prove an alibi by certain witnesses, who, when produced, he did not place upon the stand, is no reason why he should not be entitled to a continuance to obtain witnesses who will unquestionably swear to his alibi.

3. In accordance with an agreement between the parties, depositions on behalf of the defendant were taken in a criminal case, and deposited with the clerk before the first day of the term. The clerk did not file them in the case until after the parties had announced ready for trial. When defendant offered to read the depositions as evidence, the state moved orally to suppress them,

upon objection to the form and manner of taking. The motion granted, defendant moved for continuance. *Held*, that the motion to suppress should have been denied, or, being granted, a continuance should have been granted.

4. Testimony of witnesses to prove an alibi, that they saw defendant on the Friday before he was arrested, cannot be excluded because they cannot fix the date when the date of the arrest is fixed by other competent testimony.

5. Evidence cannot be rejected because other evidence in the case produced by the same party disputes it.

6. A witness who has sworn to certain facts in a former trial, involving the same matters, and contradicts them in a subsequent trial, may be contradicted by the party producing him, even though the witness, in an interview, before being sworn, declares that he will testify as he does, inasmuch as a party has a right to believe that a witness will not perjure himself.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Joe Blake was convicted of murder, and he appeals. Reversed.

L. D. Miller, J. W. Smith, Frank P. McGhee, and W. R. Parker, for appellant. Matlock, Cowan & Burney, H. E. Hoover, D. E. Decker, Dist. Atty., and Mann Trice, for the State.

HURT, P. J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

It appears from the record that defendant was indicted in the district court of Hemphill county, at the May term, 1895, for the murder of Tom T. McGee, alleged to have occurred at Canadian, in Hemphill county, on the 23d day of November, 1894; and at said term of court, at the request of the state and defendant, the venue was changed by the court to Wilbarger county. As a defense, defendant relies upon an alibi. He introduced testimony tending to show that on the 23d day of November, 1894 (the day the homicide occurred), he was at Dan McKenzie's, in Oklahoma Territory, 80 or 90 miles from Canadian, and that on the 21st and 22d of the same month he was at the village of Taloga, 8 or 10 miles from McKenzie's.

1. Appellant obtained the depositions of George H. Sexton, Jim Reilly, and M. K. McFadden, who lived in Oklahoma Territory. The depositions were filed in the district court of Wilbarger county on the 20th of July, 1896. The first term of the district court thereafter convened in August, 1896. Motion was made by the state to suppress the depositions on February 15, 1897. This motion was presented to the court on the 1st of March, 1897, before either party had announced ready for trial. The commission was directed to "any judge or chancellor of a supreme court of law or equity, or a commissioner of deeds for the state of Texas." The depositions were taken by a deputy district clerk and a United States commissioner for D county, Okl. T. Appellant objected to striking out these depositions, because the

state never filed any objections to the manner and form of taking said depositions, or in any way objected to the same, until March 1, 1897, the very day on which the case was called for trial; and because no notice of the motion in writing had ever been served on appellant or his counsel; and because, as he urged, it was agreed between counsel for the state and defendant that the depositions aforesaid might be taken before any United States commissioner of D county, Okl. T., prior to the taking of said depositions, and same were taken in accordance with said agreement, and filed in this court, as aforesaid. The court sustained the motion made by the state, and suppressed said depositions; and appellant thereupon filed a motion to continue said cause on account of the suppression of said depositions, and in order to procure the depositions of said witnesses for the next term of the court. This motion was overruled by the court.

Under our statute and the authorities, the motion to suppress went to the form and manner of taking said depositions. The motion does not inform us of the reasons assigned by the court for the suppression of the depositions, but all the grounds assigned in the motion go to the form and manner of taking. Our statute (article 803, Code Cr. Proc. 1895) provides: "The same rules of procedure as to objections to depositions shall govern in criminal actions which are prescribed in civil actions, when not in conflict with this Code." Article 2289, Rev. St. 1895, provides: "When a deposition shall have been filed in the court at least one entire day before the day on which the case is called for trial, no objection to the form thereof or to the manner of taking the same shall be heard unless such objections are in writing and notice thereof is given to the opposite counsel before the trial commences: provided however, that such objection shall be made and determined at the first term of the court after the deposition has been filed, and not thereafter." And we further refer to *Pauska v. Daus*, 31 Tex. 67; *Adams v. State*, 19 Tex. App. 250; *Lienpo v. State*, 28 Tex. App. 179, 12 S. W. 588. The above authorities show that an objection to depositions, because the officer taking the same was not authorized by law to take them, or some informality in the taking or return, is matter going to the form and manner of taking depositions. The statute above quoted we regard as imperative on this subject; and it can mean nothing less than that, if the depositions are filed, an objection to the form and manner of taking same must be made at the first term of the court thereafter; and, if not then made, such objection is waived, and cannot be made at a succeeding term.

The only question then remaining is: Were the depositions upon a material issue? As stated above, the principal, if not the sole, defense set up by appellant, was an alibi. Defendant is not speculating as to the ma-

teriality of the testimony of the witnesses whose depositions had been suppressed. We have their testimony in the depositions; and, if what they swear be true, it tends strongly to show that appellant was not present at the homicide. In explanation of the bill of exceptions, the trial judge states: The appellant had attached a number of witnesses who were present; and, when the attachment was sought, defendant made affidavit that he expected to prove by them an alibi, etc., and that he did not place them upon the stand, except one of said witnesses. It frequently occurs that a litigant, in making application for a continuance, swears that he expects to prove certain facts by certain witnesses, when in fact he fails to do so. This might be taken as a circumstance tending to show that he could not prove the alibi by the witnesses whose depositions had been taken, if it were not for the fact that they had already sworn to facts establishing the alibi. We do not understand and cannot conceive the correctness of the proposition that because he stated that he expected to prove the alibi by other witnesses, and failed, therefore he is not entitled to a continuance to obtain witnesses who will unquestionably swear to the alibi, as shown in their depositions. We deem it unnecessary to add anything further on this branch of the case.

2. Defendant presented the following bill of exceptions, which is numbered 2 in the record, to the action of the court with regard to the depositions of certain of appellant's witnesses, to wit:

"Be it remembered that on Sunday, the 28th day of February, 1897, the clerk of this court, by due course of mail, and in proper deposition envelope, received at the post office at Vernon, Texas, from the postmaster at said place, the depositions of Allen Mulkey, John Duke, George McGill, L. P. Hicks, and that the clerk of this court filed said depositions on the first day, same being the first Monday in March, 1897, among the papers of this cause. These depositions were taken and returned into open court upon the following written agreement, signed by the attorneys for the state and defendant, namely: 'It is also agreed that the original direct and cross interrogatories, or duly-certified copies thereof, may be sent by any of the parties hereto, or by the clerk of the district court of Wilbarger county, to the clerk of the district court or any United States commissioner of D county, territory of Oklahoma, who may take the answers of the various witnesses to said direct and cross interrogatories as required by law; and, when so taken, the said officer so taking the same shall transmit them, as the law requires, to the clerk of the district court of Wilbarger county, Texas; provided said answers as herein provided for shall be taken and transmitted to the clerk of the district court of said Wilbarger county, before the first Monday in March, 1897; and provided, further, that none of the witnesses herein

named shall have the right to act as that officer before whom the answers are taken; and provided, further, that said officer taking said depositions shall not be related to any of the witnesses herein named either by affinity or consanguinity within the third degree, and when so taken as herein provided for, as also transmitted, may be read by either party on the trial of said case, subject, however, to any objection which may be made by either party to suppress or quash for all lawful reasons, except the ones waived.' Signed by the attorneys for both the state and defendant, on the 26th day of January, 1897. And be it further remembered that defendant's defense, among other things, was an alibi; and state's evidence shows that Dan McKenzie's, where defendant was living, was at least 90 miles west out from Canadian, Texas, where Tom T. McGee was killed, on Friday, the 23d of November, 1894, and that said McGee was in fact killed after 8 o'clock p. m. of that day. And be it further remembered that said depositions were taken by J. H. Warren, clerk of the district court of D county, Oklahoma Territory, by May Sexton, deputy of said J. H. Warren, with certificate, and John Duke's depositions, as follows: 'Subscribed and sworn to before me, this 12th day of February, 1897, with seal impressed.' Among other statements not contradicted by the deposition itself, said John Duke testified: 'My name is John Duke. I live in county D., Oklahoma Territory. I am forty years old. Am a farmer. Yes; I know Joe Blake. I have known him since October, 1894. I knew him in November, 1894. Yes; he was at my house on Friday, before he was arrested, on Monday. He came to my house about one o'clock p. m. that day. He came after some feed that he had there. He loaded up a load, and left about 4 o'clock p. m. Mrs. Brooks and her daughter Ella and my wife were there. There was no one with him when he came. Blake made his home at Dan McKenzie's. I don't recollect any dates. As above stated, I saw Joe Blake on Friday, before he was arrested, on Monday.' Allen Mulkey says his age is 34 years. Resides in D county, Oklahoma Territory. Farmer and stock raiser. Knew Joe Blake, defendant, since the latter part of October, 1894. Defendant ate dinner at witness' house on Saturday, before defendant was arrested, on Monday. Witness also saw defendant on Sunday, before defendant's arrest, on Monday. Saw him at Dan McKenzie's house, about sundown, Sunday evening. Saw defendant at Taloga, on Thursday, before he was arrested, on Monday. Talked at Taloga with witness about trading horses. Did trade bridle bits. He then came to house of witness the following Saturday, about 11 o'clock a. m., and ate dinner at witness' house. 'I next saw him at Dan McKenzie's house, the next day, Sunday, before he was arrested, on Monday, as above stated. Can't give any dates. I can only refer to the day from the time he was arrest-

ed. The time above stated is all the times that I saw him from the time that I saw him in Taloga, on Thursday, until I saw him at McKenzie's, the evening before he was arrested, at Dan McKenzie's. I was at Dan McKenzie's on Sunday evening, before Blake was arrested, on Monday morning. I did not see any men ride up while I was there. Joe Blake was there when I went there. I went there to get a wagon sheet Dan had borrowed from me.' Witness Hicks did not remember dates, but saw Joe Blake, defendant, at Taloga in the fall of 1894, but says that the distance from Taloga, in D county, Oklahoma Territory, to Canadian, Texas, is about 85 miles. Witness McGill says: 'I am 48 years old. Live in D county, Oklahoma Territory. Am a farmer. I know Mattie McKenzie and Ella McKenzie. They came to my house to wash on Friday, November 23, 1894. They came about 9 a. m., and went away about 5 p. m., that day. Joe Blake also came there that day, about 10 o'clock a. m., and brought some clothes there for them to wash. He handed the clothes to one of the girls, and then come to where I was working on my stable. He talked with me about one-half hour; and, when he left, he said he was going to Dan McKenzie's, and take two wagon fellies that he had with him for Dan to fix his wagon. I do not know where defendant was on the 24th of November, 1894. He was at my house on the 23d of November, 1894. I know the general reputation of Dan McKenzie in his neighborhood for truth and veracity, and it is bad.' Be it further remembered that in none of the certificates is the identity and credibility of deponents certified to by the officer taking the same, but a jurat is to all; and to the witness McGill's answers, the certificate would be a good one in a civil case; and the same is true to certificate to Allen Mulkey's answers. Affidavits were made by defendant as required by law to get witnesses. And be it further remembered that said depositions were on file among the papers in this case before the state announced ready for trial, and that no written or oral motion was made to suppress said depositions before the trial began; that after the state had closed its case on its evidence in chief, and after the answers were offered in evidence by defendant, the state's attorney objected to said depositions; and that they be held for naught, because not properly certified to by the officer taking same, and because the witnesses did not fix definitely the time when they saw defendant, or that they knew when defendant was arrested. Defendant set up his agreement against state's right to quash or object to said depositions after trial had begun, and also insisted, as a matter of law, a notice in writing should have been given to written exceptions to said depositions, because same were received on February 23, 1897, and it was no fault of defendant that same was not filed on February 23, 1897, when first received by the clerk. The cou

sustained objections to all of said depositions; and the defendant then asked to be permitted to withdraw his announcement of ready for trial, and continue the case to get his testimony. The court would not allow this, but compelled the defendant to proceed, or be proceeded against, in the trial. To the action of the court in sustaining state's objection to above-named depositions, and in causing defendant to go on with the trial after same were thus suppressed, defendant at the time duly excepted, and now here tenders this bill, and asks that the same be allowed and filed as a part of the record in this case."

"The foregoing bill of exceptions allowed, with the following explanation, viz.: All of said witnesses, except the witnesses McGill and Hicks, fixed the date when they saw defendant in D county, Oklahoma, on a certain day before Blake was arrested, and do not show they know when he was arrested; and, further, the testimony of defendant's witnesses Dan McKenzie, Stella McKenzie, and May McKenzie, as given on the trial of this cause, that the testimony of witnesses who testified that defendant was in D county, Oklahoma, on the 21st, 22d, 23d, and 24th of November, 1894, was untrue; and, further, the witness L. P. Hicks was present and placed under the rule as a witness in the trial of this case. [Signed] G. A. Brown, Judge."

By reference to said bill of exceptions, it will appear that the agreement made provided that said depositions should be transmitted to the clerk of the district court of Wilbarger county on or before the first Monday of March, 1897. The point is made by the state that the depositions were not filed until the first Monday in March, the day that court convened; and that, consequently, under the statute, the state was not required to give notice of the motion to suppress the said depositions, but that it could make said motion at any time; and that the motion to suppress, made during the trial, when said depositions were offered by the appellant in evidence, was in due time. It is true that said depositions were not filed by the clerk until Monday, after court began. The bill, however, shows that they were received by the clerk on the day before, and, for all practical purposes, they were in court one day before the meeting of the district court; but, at any rate, the agreement did not refer to their filing, but simply to their reception by the clerk. So that it follows that any motion to suppress said depositions, going to the form and manner of taking, should have been made in writing, and disposed of before the appellant was required to announce ready. In this case the defendant had no notice that such a motion would be made at all until in the midst of the trial, and when he offered to read the depositions as evidence; and then, for the first time, he was confronted with an oral motion to suppress said depositions. At that juncture the court should have either refused to suppress

said depositions, or, if he did suppress the same, have granted appellant's motion to withdraw the announcement of ready and continue the case. The court, however, overruled appellant's motion in this regard.

The court, in his explanation to said bill of exceptions, shows that he excluded said depositions because all of the witnesses, except McGill and Hicks, fix the date when they saw defendant in D county, Okl. T., on a certain day before Blake was arrested, and do not show when he was arrested. In reply to this, we would simply state that this afforded no reason for the exclusion of said testimony. The date of Blake's arrest could be fixed, and was in fact fixed, by other witnesses, on Monday, November 26, 1894. The killing occurred on November 23, 1894. These witnesses, in the deposition, swear to having seen appellant at Taloga, in Oklahoma Territory, and in that vicinity, on the 22d, 23d, and 24th days of November, 1894, prior to the arrest of defendant; that is, prior to the 26th of November. The court further states that the testimony of the witnesses Dan McKenzie, Stella McKenzie, and May McKenzie, as given on the trial, shows that the testimony of said witnesses proving an alibi was untrue; and, further, that the witness Hicks was present, and placed under the rule as a witness. The question here was as to the admissibility of certain testimony. The court proposes to sustain its action in rejecting the evidence, upon the ground that it was not true, basing this conclusion upon the testimony of other witnesses in the case. The appellant may have introduced said witnesses to prove an alibi, and they may not have sustained him. Still, that did not deprive him of the right to have other witnesses, by whom he proposed to prove that fact, and who, in their depositions, had sworn to the fact of alibi. We hold that the action of the court in suppressing these depositions in the midst of the trial, without previous notice to the appellant, was not authorized by law, and that the effect of the ruling of the court was to take an unfair advantage of the appellant; and certainly, after suppressing the depositions, the court should have granted the motion of appellant to withdraw his announcement of ready, and continue the cause. Unquestionably, the testimony was material; and, as we have discussed this matter in treating of the former bill of exceptions, it is not necessary to reiterate here.

3. It appears from bill of exceptions No. 11 that the appellant introduced Stella McKenzie, by whom he proposed to prove an alibi, but that said witness not only failed to make such proof, but testified to facts strongly contradictory of the defendant's theory of an alibi. It also appears by said bill that counsel for appellant obtained the permission of the court to consult with said witness as to what she would swear upon the witness stand, and that she had informed counsel for appellant that she would testify to the facts

sworn to by her when placed upon the stand, which facts, as before stated, were very detrimental to the cause of the appellant. After having laid the predicate, appellant proposed to prove by J. R. Campbell and H. L. Hall that Stella McKenzie had testified in the Harbolt Case, 43 S. W. — (a companion case to this), and that upon that trial she swore that the defendant was at the house of Dan McKenzie, in D county, Okl. T., on the 23d day of November, 1894, and that the defendant went to John Duke's for feed on that day, only a few miles away from Dan McKenzie's, and returned that night, and that McKenzie lived 80 or 90 miles from Canadian, Tex.; that defendant was there, Saturday night, November 24th, and was there Sunday morning, before any men rode up there; that he rode off some time that day somewhere, and came back there that night, and was there on the night of the 23d of November, 1894. Counsel for the state objected to this proof, upon the ground that the defendant could not impeach his own witness, and the court sustained the motion of counsel, and refused to permit Campbell and Hall to testify to the facts sworn by Stella McKenzie on the Harbolt trial. The trial judge sustained the objection of the state upon the ground that counsel had consulted with his witness, and knew what she would swear, and therefore he was not surprised by her testimony, and, because of this, could not impeach his witness. Article 795 of the Code of Criminal Procedure of 1896 provides: "The rule that a party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner, except by proving the bad character of the witness." At common law this could not be done unless the party was surprised by the testimony of his witness, or unless the party had been misled by a witness, and, when put upon the stand, testified, not in his favor, but against him. Our statute does not provide or require that the party must be surprised; but it is clear that, if the testimony of his witness is injurious to him, he can attack his testimony in any method other than proof of bad character. We are not to be understood as holding that where the party introduces a witness knowing that the witness is going to testify against him, and without any reason to believe that the witness will testify in his favor, we would reverse the judgment because the party, under such state of facts, was deprived of the right of impeaching the witness by proof of contradictory statement. But in this case this witness, Stella McKenzie, had testified in the Harbolt Case. She had sworn to facts which, if true, established an alibi for the defendant. Now, the defendant had a right to believe that she would not perjure herself by swearing to facts in conflict with those already testified to; and this, although she may have told him that she would so testify. It frequently oc-

curs that a witness will deny knowing anything about a fact or a case, making an effort not to be used as a witness, but, when placed upon the stand and sworn, tells the truth. Was appellant surprised? Being informed that she had deliberately sworn to facts sustaining his alibi, would he not have been surprised if she had sworn otherwise; especially to facts and circumstances disproving his alibi. We are of opinion that the court erred in not permitting this witness to be impeached in the manner sought by the appellant. For the errors discussed above, the judgment is reversed, and the cause remanded.

### BRESNAN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—MOTION FOR CONTINUANCE—ERROR CURED.

1. A refusal to grant a continuance cannot be reviewed, where no motion for continuance is in the record, and the bill of exceptions does not state that the continuance was not for delay, nor that the witnesses were not absent by appellant's procurement or with his consent, nor that there was any reasonable expectation of procuring their attendance at a future day thereof.

2. The failure of the bill of exceptions to set out the allegations required by statute in an application for a continuance, where the application is not in the record, cannot be cured by allegations in a motion for new trial.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

Patrick Bresnan appeals from a conviction of sodomy. Affirmed.

Mann Trice, for the State.

HURT, P. J. There is but one bill of exceptions in the record, and it complains of the action of the court refusing to continue the case for the absence of certain witnesses therein named. There is no motion for a continuance in the record. This, however, is not absolutely necessary, if the bill of exceptions is sufficiently full. The bill of exceptions does not state that this continuance was not for delay, nor that the witnesses were not absent by the procurement of the appellant or with his consent, nor that there was no reasonable expectation of procuring the attendance of the witness during the term of the court by postponement to a future day thereof. It is true, it states that they were not absent by the "fraud of the defendant." We are unable to say what idea appellant entertained as to the meaning of "fraud," but we do say the statute in these particulars has not been complied with. In a motion for a new trial this matter is brought forward again. The allegations contained in this motion cannot aid the defense in the bill of exceptions. A bill of exceptions must be reserved to the action of the court overruling the motion for a continuance, and the bill may set forth the application, or, in the absence

of an application, it must be as full as the application itself. If a bill does not set out the application, it must be referred to and made a part of the bill. The charge of the court in this case set forth very clearly the law applicable to the facts; it was liberal to the defendant. Defendant's guilt is beyond all question, if the prosecuting witness, Charles Baldrige, was not mistaken in the identity of the accused. The jury believed that he was telling the truth, and we have no doubt but what he was correct in identifying appellant as the guilty party. That he had been outraged is rendered certain beyond all question. Finding no error, the judgment is affirmed.

### PILOT v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

#### CRIMINAL LAW—APPEAL—TRANSCRIPT.

Transcript showing that it was delivered to appellant's attorneys, and through them found its way into the appellate court, will be stricken out; Code Cr. Proc. 1895, art. 897, providing that "as soon as the transcript is prepared the clerk shall forward the same by mail, or other safe conveyance, charges paid, enclosed in an envelope securely sealed, directed to the proper clerk of the court of criminal appeals."

Appeal from district court, Shelby county; Tom C. Davis, Judge.

Henry Pilot appeals from a conviction. Transcript stricken out.

D. M. Short & Sons, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of a felony, and appeals.

The transcript bears this indorsement: "Applied for by D. M. Short & Sons, attorneys for appellant, on the 16th day of August, 1897, and delivered to D. M. Short & Sons on the 6th day of September, 1897. [Signed] J. T. Jones, Clerk District Court Shelby County." We understand by this that the transcript was delivered to the attorneys for appellant, and found its way into this court through said attorneys. Article 897, Code Cr. Proc. 1895, provides, "As soon as the transcript is prepared the clerk shall forward the same by mail, or other safe conveyance, charges paid, enclosed in an envelope securely sealed, directed to the proper clerk of the court of criminal appeals." In connection with this article, the rule prescribed by the supreme court for district courts requires the clerks to send transcripts by mail, in felony cases, postpaid, to the clerk of the court of criminal appeals, to the branch at which the case is returnable, etc. And see *Lockwood v. State*, 1 Tex. App. 749. We accordingly hold that said transcript does not come into this court through the proper channel provided by law. Moreover, on an inspection of the record, we find an agreement between the parties to correct the transcript; showing, evidently, that the record is not properly

prepared. It is accordingly ordered that the transcript in this case be stricken out, and a certiorari is ordered to the clerk, to prepare and forward a new and complete transcript of said case to this court, in the mode provided by law.

### EDWARDS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

#### CRIMINAL LAW—INSANITY—INTENT—INTOXICATING LIQUORS—PRESUMPTION.

1. One who is so insane from the recent use of cocaine and morphine that he does not understand the nature and quality of the act he is doing, and is incapable of forming an intent, cannot be guilty of an assault with intent to murder.

2. Where insanity is produced by other causes, such as morphine or cocaine, in conjunction with the recent use of intoxicating liquor, an act done in such a state of mind cannot be attributed solely to the use of the liquor.

Appeal from district court, Harrison county; W. J. Graham, Judge.

Clarence Edwards was convicted of an assault with intent to murder, and he appeals. Reversed.

Webster Blocker and Pope & Lane, for appellant. John B. Carter, Dist. Atty., and Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at three years in the penitentiary; hence this appeal.

Appellant's principal defense was insanity. He offered testimony tending to show that at the time of the alleged offense he was insane. The evidence shows that for a considerable length of time—perhaps several years—he had been addicted to the use of morphine, and for the last 18 months to the use of cocaine; and he was also addicted to the use of whisky. Some three or four days prior to the assault he had been confined to his home under the attention of a physician; had been taking morphine and cocaine, and also drinking whisky. On the same day, prior to the assault, which occurred about 4 o'clock in the afternoon, defendant had taken four or five doses of cocaine, several doses of morphine, and some whisky. Some time in the evening of the 25th of December (the day of the assault) he left his home, going to a saloon,—the prosecutor, Tyler, and his brother, and another party accompanying him. At the saloon they took a number of drinks, the party drinking about a pint of whisky. The defendant and prosecutor immediately thereafter walked out on the porch in front of the saloon, and the defendant took hold of the gallery post, and immediately, without any warning, stabbed the prosecutor with a knife. There had been no previous grudge between the parties, nor did any quarrel or altercation precede the stabbing. An officer immediately came up, and carried the defendant to jail. He asked him what he stabbed the boy for,



and he said because he had been after him all morning to go home. (There was no evidence of this fact.) On this state of facts, among other things, the court instructed the jury as follows: "If the defendant, by the voluntary and recent use of cocaine and morphine or intoxicating liquors, or all of them, put himself in a condition that he was incapable of distinguishing between right and wrong as to the particular act charged against him, and he voluntarily took said cocaine and morphine or intoxicating liquors, knowing that it would produce such state of mind in him, then, although, at the time of the commission of the act, he might not have known what he was doing, or was incapable of distinguishing between right and wrong as to the particular act charged against him, he would not be excusable for the act, if the act was otherwise criminal. If the normal condition of the defendant was that of a sane person, and his mind was not diseased, but was only temporarily dethroned by the recent use of said medicines, or intoxicating liquors, or all of them, and the defendant voluntarily took them, knowing at the time he did so that it would dethrone his mind, then no state of insanity so produced would be a defense to crime. If, however, the defendant, prior to that time, had been affected with disease or bodily suffering, and to cure the disease or allay the suffering he had contracted the use of cocaine and morphine or intoxicating liquors, and that by reason thereof his mind had become, and was at the time of the commission of the act charged against him, diseased to the extent that he had lost control of his mind, and did not know what he was doing, or, if he did know what he was doing, if he did not have mind sufficient to distinguish between right and wrong as to the particular act charged against him, then his condition of mind was such as the law would excuse him for any act done in such state of mind so produced." These charges were excepted to by appellant in the motion for a new trial. It will be seen from these charges that the court made no discrimination between insanity, whether produced by the voluntary recent use of cocaine and morphine or intoxicating liquors, or if insanity was produced by the combined use of all these. We understand our statute to regulate insanity produced by the recent voluntary use of intoxicating liquors, but it does not undertake to prescribe the rule with reference to insanity produced by cocaine or morphine. And, in our opinion, the court committed an error in instructing the jury that, if they believed appellant was insane from the voluntary recent use of cocaine and morphine, it would constitute no defense to the crime alleged, and would go only to the mitigation of the penalty. In our opinion, if appellant was rendered insane from the voluntary recent use of cocaine and morphine, and on account of that did not understand the nature and quality of the act he was doing, and was incapable of forming the intent,

then he would not be guilty of an assault with intent to murder. And we go further, and hold that, if his mind was rendered insane by the combined recent use of cocaine and morphine and intoxicating liquors, and that on such account he was not capable of forming the intent necessary to constitute an assault with intent to murder, he would not be guilty of said offense. We believe it is a correct legal principle, where there is insanity produced by other causes in conjunction with the recent use of intoxicating liquor, that an act done in such a state of mind cannot be attributed solely to the recent use of intoxicating liquors. See 1 McClain, Cr. Law, § 159; Roberts v. People, 19 Mich. 401; Terrill v. State, 74 Wis. 278, 42 N. W. 243. For the error of the court in said charges, the judgment is reversed, and the cause remanded.

### MORRISON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

#### CRIMINAL LAW—FORMER JEOPARDY.

An acquittal of one charged with carrying brass knuckles is a bar to a prosecution for carrying "knuckles made out of metal, same being hard substance."

Appeal from Anderson county court; John F. Watts, Judge.

Orange Morrison was convicted of a crime, and appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was placed on trial in the county court of Anderson county on a charge of carrying, on and about his person, brass knuckles. The jury acquitted him of this charge, and the judgment of acquittal was regularly entered. Afterwards, in the same court, he was placed on trial for carrying, on and about his person, "knuckles made out of metal, same being hard substance." At the proper time, appellant interposed in bar to this prosecution the acquittal upon the first information, which charged that he carried, on and about his person, brass knuckles. The question presented is whether or not, under the first information, appellant could have been legally convicted (the proof being sufficient) of carrying knuckles made of a hard substance, other than brass. To put the question in a different form, suppose appellant on the first trial had insisted that the proof must show that the knuckles were made of brass; would this contention have been sound? If it would, then the acquittal under the first charge would have been no bar to a prosecution under the second. But we have held, and still hold, that "brass knuckles" do not mean that the knuckles must be made of a metal known as "brass." See *Louis v. State* (Tex. Cr. App.) 35 S. W. 377; *Harris v. State*, 22 Tex. App. 677, 8 S. W. 477. This being true, appellant could have been convicted on the first trial for carrying the

knuckles shown to have been carried on the second trial. Therefore his plea of former acquittal was good. No doubt he was acquitted upon the first trial upon the supposed failure of the proof to establish the fact that the knuckles were made of brass. In this there was error. The proof clearly sustains the plea of former acquittal, and the judgment is reversed, and the prosecution ordered dismissed.

### RECORD v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

#### CRIMINAL LAW—APPEAL—RECORD—STATEMENT OF FACTS—BILL OF EXCEPTIONS—TIME OF FILING.

1. In a criminal case tried May 27, 1897, defendant's motion for a new trial was denied June 5th, and the statement of facts was not filed until July 5th, two days after adjournment of the term. There was no order allowing defendant time after adjournment to file such statement. *Held*, that sufficient diligence on defendant's part to excuse the failure to file it during the term was not shown by the facts, stated by the trial judge, that such statement and the bills of exception were in the hands of the county attorney, and, owing to press of business, were not reached in time to have been filed sooner.

2. Where the bills of exception in such case were not filed until after the term, and no excuse for failure to file them during the term was shown, they could not be considered on appeal.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

George Record was convicted of burglary, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of burglary, and his punishment assessed at 10 years' confinement in the penitentiary; hence this appeal.

The term of court at which appellant was tried adjourned on the 3d day of July, 1897. Two bills of exception appear in the record,—the first filed on July 7th, and the second on July 6th. The statement of facts in the record was filed on July 5, 1897. There is no order allowing appellant 10 days after the adjournment of court within which to prepare and file the statement of facts. The trial judge, in connection with signing the statement of facts, makes this explanation: "The above statement of facts, and also the bills of exception in this case, were filed after the expiration of the term of court at which this case was tried; but the bills of exception and the statement of facts were in the hands of the county attorney, and, owing to press of business, were not reached in time to have been filed sooner." We have held in several cases that where a statement of facts was filed after the time allowed by law, but the record showed diligence on the part of the defendant to have said statement of facts filed within the time authorized, we would con-

sider such statement; but this record absolutely fails to disclose any diligence on the part of appellant to file the same during the term, there being no order to file after the term. The case was tried on the 27th of May, and the motion for a new trial was overruled on the 5th of June, nearly a month before the final adjournment of the term of court; and it would appear that certainly during this long period of time appellant could have prepared and had his statement of facts filed. The judge's explanation or certificate as to the filing fails to show when the statement of facts came to his hands, but merely states that the bills of exception and the statement of facts were in the hands of the county attorney, and does not show that they came to his hands prior to the adjournment of the court; and it is not shown that appellant caused them to be placed in the hands of the county attorney during the time. If appellant had used due diligence to procure and have filed the statement of facts, and the court declined to give him a certificate to that effect, it was his duty, if he desired the question reviewed here, to have shown his diligence by affidavits or otherwise. As presented to us, there is a failure on his part to show any diligence whatever to have said statement of facts filed within the time prescribed by law, and we cannot consider the same.

As to the bills of exception, they should have been filed during the term, and no excuse is shown why they were not filed. Certainly, if appellant used due diligence to place said bills of exception in the hands of the judge, after the overruling of his motion for a new trial, on the 5th of June, he could have shown this; and, if said bills were placed in the hands of the judge within 10 days after the overruling of said motion, we cannot conceive how any press of business would have rendered it impossible for the judge to review and approve or disapprove said bills. This should have been done within 10 days after overruling the motion for a new trial. In this particular case, however, it was not done until more than a month had expired, and three days after the final adjournment of the term of court. Therefore neither the statement of facts nor bills of exception can be considered. We have examined the indictment and charge of the court, and, no errors appearing in the same, the judgment is affirmed.

### WOMBLE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

#### CRIMINAL LAW—APPEAL—FINAL JUDGMENT.

Where the court enters judgment and pronounces sentence upon one count in an indictment, in a case where the defendant was convicted under another and different count, there is no final judgment in the case, from which an appeal to this court can be taken.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

John Womble was convicted of attempting to pass a forged instrument, and appeals. Appeal dismissed.

Cunningham & Cunningham, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of attempting to pass a forged instrument, and appeals.

The indictment contained three counts: The first charges an attempt to pass the forged instrument; the second charges the forgery; and the third, for having it in his possession, etc. By the verdict of the jury, appellant was convicted, under the first count, of attempting to pass the alleged forged instrument. The court entered judgment upon the second count, for forgery, and the sentence was pronounced against the appellant for forgery. In the case of *Small v. State* (Tex. Cr. App.) 38 S. W. 799, it was held, in a case almost identical with this, that this court could not correct the judgment and sentence so as to conform them with the verdict of the jury; and the appeal was dismissed because this court had not acquired jurisdiction of said appeal, there being no final judgment or sentence in the case. Since that decision the legislature has amended article 904, Code Cr. Proc. 1895, by adding certain provisions, but as to the question decided in the *Small Case*, supra, made no amendment. Under the authority of that case, and of *Barfield v. State* (decided at our recent Austin term) 41 S. W. 610, the appeal in this case is dismissed.

#### WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1897.)

#### INTOXICATING LIQUORS—LOCAL OPTION—INDICTMENT.

An indictment for a violation of the local option law must allege that the sale was made in prohibited territory; an allegation that it was made in "the justice of the peace number one" being insufficient, though local option was in force in that precinct.

Appeal from district court, San Saba county; W. M. Allison, Judge.

Wiley Williams was convicted of violating the local option law, and appeals. Reversed.

Burleson & Meek and T. O. Woldert, for appellant. Mann Trice, for the State.

DAVIDSON, J. Conviction for violating the local option law.

It appears from the record that an election had been held in justice precincts Nos. 1 and 4 to determine whether or not the sale of intoxicating liquors should be prohibited in said precincts; that said election resulted in favor of prohibition; that the result had been ascertained and published, and the sale prohibited, by the proper officials of that county. The

indictment, to be sufficient, must allege that the sale took place in the prohibited territory,—that in which local option was in force. This is absolutely essential. This indictment fails to do this. It simply alleges that the sale took place "in the justice of the peace number one." We cannot tolerate such pleading. The indictment is defective, and the judgment is reversed, and the prosecution ordered dismissed.

#### KNOXVILLE & O. R. CO. v. HARRIS, Comptroller.

(Supreme Court of Tennessee. Dec. 8, 1897.)

#### PRIVILEGE TAX—EXEMPTION—CLASS AND SPECIAL LEGISLATION—MOTIVE OF LEGISLATURE—INTERSTATE COMMERCE.

1. Provision of a charter of railroad company that the stock in the company, the dividends thereon, and the road and fixtures, depots, workshops, warehouses, and vehicles of transportation of the company, shall be forever exempt from taxation, provided the stock or dividends, when the dividends exceed legal interest, may be subject to taxation in common with money at interest, but no tax shall be imposed so as to reduce dividends below legal interest, does not exempt the company from privilege taxation.

2. Acts 1895 (Ex. Sess.) p. 592, c. 4, § 7, declaring that "the following corporations shall pay the following taxes on the following privileges: \* \* \* Railroad companies, not paying an ad valorem tax, \* \* \* each" a certain amount per year, according to mileage operated or controlled,—declares the business of the class of railroad companies designated to be a privilege, and imposes a tax thereon, and does not attempt to declare to be a privilege, and to tax as such, the condition of "not paying an ad valorem tax."

3. Acts 1895 (Ex. Sess.) p. 592, c. 4, § 7, imposing a privilege tax on railroad companies "not paying an ad valorem tax," is not objectionable class legislation, though there are but two such railroad companies, as it applies equally to all corporations in like condition, and makes a natural and reasonable classification.

4. An act applying to all railroad companies "not paying an ad valorem tax" is not special legislation, though there are but two such companies.

5. An act imposing a privilege tax on railroad companies "not paying an ad valorem tax" does not diminish their corporate "powers," even if they were exempt from privilege taxation.

6. That the motive of the legislature, in imposing a privilege tax on railroad companies "not paying an ad valorem tax," was to deprive them of their advantage of exemption from ad valorem taxation, cannot be urged against the validity of the act.

7. An act does not interfere with interstate commerce because imposing a privilege tax on railroad companies according to mileage, as follows: "Each company operating or controlling 400 miles or more of road in this state, for taking up and transporting freight and passengers from one point to another in this state, per annum \$10,000; each company operating or controlling from 100 to 400 miles of road in this state, for taking up and transporting freight and passengers from one point in this state to another point in this state, per annum \$5,000;" and in like language imposing such a tax on railroads operating or controlling a less number of miles of road in the state, for the same privilege.

Appeal from chancery court, Knox county; H. B. Lindsay, Chancellor.

Bill by the Knoxville & Ohio Railroad Co'

pany against James A. Harris, state comptroller, to recover taxes paid under protest. From a decree of the court of chancery appeals reversing a decree of the chancellor overruling demurrer to the bill, complainant appeals. Affirmed.

Lucky, Sanford & Tyson and W. A. Henderson, for appellant. Cardell Hull and G. W. Pickle, Atty. Gen., for the State.

CALDWELL, J. The state, through James A. Harris, comptroller of the treasury, demanded of the Knoxville & Ohio Railroad Company privilege taxes for the years 1893, 1894, 1895, and 1896, in all \$4,820. Contravening its liability for these taxes, the railroad company, pursuant to the statute in relation to disputed revenue claimed by the state (Mill. & V. Code, §§ 926-928; Shannon's Code, §§ 1059-1061), paid them under protest, and within 30 days from the time of payment brought this action to recover from the state the sum so paid. The suit was commenced in the chancery court of Knox county against the comptroller to whom the taxes were paid.

The complainant alleged, in substance, that it was a Tennessee corporation, owning and operating a line of railroad in this state between 25 and 100 miles in length, and having rail and traffic connection at its terminus with other railroads, which deliver certain of its freight and passengers at points of destination in other states, and from which it receives freight and passengers starting in other states and destined to points on its line in this state; that it was successor, through judicial sale, to the Knoxville & Kentucky Railroad Company, and as such was, by the terms of the latter's charter, exempt from all taxation; that its successorship to that company, and consequent exemption from ad valorem taxes, had been more than once adjudged in courts of competent jurisdiction; that, notwithstanding this, the legislature of the state had attempted by various acts to impose a privilege tax upon complainant; that by virtue of these acts, though obnoxious to the federal and state constitutions in several designated particulars, the comptroller had wrongfully required the complainant to pay the sum for which it sues.

The defendant demurred to the bill upon several grounds. The chancellor overruled the demurrer, and, exercising a legal discretion (Code, § 3157; Mill. & V. Code, § 3874; Shannon's Code, § 4889), permitted an appeal. On reaching this court the cause was transferred under section 14, c. 76, Acts 1895, to the court of chancery appeals for hearing and decision. That tribunal sustained the demurrer and dismissed the bill. From the decree of dismissal the complainant appealed, and brought the cause into this court again.

Since a demurrer raises questions of law only, and causes decided by the court of chancery appeals are appealable on all questions of law (Acts 1895, c. 76, § 11), and the

complainant has prosecuted a broad appeal, the present cause is now before this court, and it was before the other tribunals, for consideration and determination of the legal questions raised by the bill and demurrer.

Owing to the state's attitude in this case, it is not worth while to decide whether the complainant is the legal successor to the Knoxville & Kentucky Railroad Company, and in that relation entitled to exemption from ad valorem taxation to the extent provided in the latter's charter, as it was held to be in *Railroad Co. v. Hicks*, 9 Baxt. 442, and in *Buchanan v. Railroad Co.*, 18 C. C. A. 122, 71 Fed. 324. The statutes lay a privilege tax on such railroad companies only as operate or control lines in this state and are not subject to ad valorem taxation; hence the state, by its demand and receipt of the money here involved, treated the complainant as in that situation, and thereby precluded itself from denying in this suit that such was its real status before the law. Therefore, without approving or disapproving the decision made in the two cases just mentioned, or deciding the question anew, it will be assumed that the complainant is really the successor to the Knoxville & Kentucky Railroad Company, and as such is entitled to exemption from ad valorem taxation to the extent provided by that company's charter. These observations, however, are scarcely more than introductory. They do not solve any of the seriously litigated questions.

Ad valorem taxation and privilege taxation are different things, having no necessary connection. They are distinct burdens laid by the government upon those receiving its protection, and, when legally imposed, must be borne as a recompense for that protection. The same person may be subject to both, or to one and not the other. Subjection to one does not mean subjection to the other, nor does exemption from one include exemption from the other. Hence the assumption herein that the complainant has the same exemption from ad valorem taxation that its predecessor, the Knoxville & Kentucky Railroad Company, had under its charter, does not imply that it has exemption from privilege taxation also. Whether it has the latter exemption is to be determined by an original construction of the charter. This question did not arise in any of the previous litigations with this complainant, but is presented for the first time in this cause. Exemption from ad valorem taxes only was involved in the former cases.

Under the constitution of 1834 (article 2, § 28, and article 11, § 7), which was in force at the date of this charter, the legislature was permitted to grant exemption from both ad valorem and privilege taxation (*Memphis v. Memphis City Bank*, 91 Tenn. 583-585, 19 S. W. 1045); and, if it did so in this instance, the state is conclusively bound thereby, notwithstanding a subsequent change and reversal of government policy and law, as shown by the

constitution of 1870 (article 2, § 28, and article 11, § 8; *Memphis v. Memphis City Bank*, 91 Tenn. 585-589, 19 S. W. 1045), and legislation thereunder. Valid corporate charters have long been held to be contracts, within the meaning of that provision of the federal constitution (article 1, § 10), and of the state constitution (article 1, § 20), which prohibits the passage of any "law impairing the obligation of contracts." *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518; *Farrington v. Tennessee*, 95 U. S. 684; *Union Bank of Tennessee v. State*, 9 Yerg. 490; *City of Memphis v. Hernando Ins. Co.*, 6 Baxt. 527; *State v. Butler*, 13 Lea, 408; *State v. Butler*, 86 Tenn. 614, 8 S. W. 586; *Memphis v. Union & Planters' Bank*, 91 Tenn. 540, 19 S. W. 758; *Memphis v. Home Ins. Co.*, 91 Tenn. 561, 19 S. W. 1042; *State v. Bank of Commerce*, 95 Tenn. 226, 31 S. W. 993. It follows, therefore, that if the charter of the Knoxville & Kentucky Railroad Company included exemption from privilege taxation as well as from ad valorem taxation, and if the complainant has acquired all the exemption of that charter (which latter proposition is assumed), the enactments, under which the complainant was required to pay the privilege taxes here involved, are obnoxious to both federal and state constitutions, in that they impair the obligation of the charter contract.

Did that charter grant exemption from privilege taxation? Taxes are the lifeblood of civil government. The right of taxation is an attribute of sovereignty. It is inherent in the state, and essential to the perpetuity of its institutions; consequently he who claims exemption must justify his claim by the clearest grant of organic or statute law. Every presumption is against any surrender of the taxing power, and every doubt must be resolved in favor of the state. Unless the intention to surrender that power is manifested by words too plain to be mistaken, it must be held still to exist. *Memphis v. Union & Planters' Bank*, 91 Tenn. 550, 19 S. W. 758; *Memphis v. Home Ins. Co.*, 91 Tenn. 562, 19 S. W. 1042; *Memphis v. Memphis City Bank*, 91 Tenn. 579, 19 S. W. 1045; *Turnpike Cases*, 92 Tenn. 373, 22 S. W. 75; *State v. Bank of Commerce*, 95 Tenn. 227, 31 S. W. 993; *Wilson v. Gaines*, 9 Baxt. 551; *Trust Co. v. Debolt*, 18 How. 435; *Delaware Railroad Tax*, 18 Wall. 226; *Erie Ry. Co. v. Pennsylvania*, 21 Wall. 498; *Farrington v. Tennessee*, 95 U. S. 686; *Railway Co. v. Loftin*, 98 U. S. 559; *Tennessee v. Whitworth*, 117 U. S. 136, 6 Sup. Ct. 645; *Railroad v. Guffey*, 120 U. S. 569, 7 Sup. Ct. 698; *New Orleans City & L. R. Co. v. New Orleans*, 143 U. S. 195, 12 Sup. Ct. 406; *Philadelphia, W. & B. R. Co. v. State*, 10 How. 376. In the case last cited, Chief Justice Taney, speaking for the supreme court of the United States, said: "This court on several occasions has held that the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." 10 How. 303. In Rail-

road Co. v. Deunis, 116 U. S. 685, 6 Sup. Ct. 625, decided many years later by the same court, Mr. Justice Gray, after quoting the foregoing language of Chief Justice Taney, said: "In the subsequent decisions the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that 'neither the right of taxation nor any other power of sovereignty will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken.' That exemption from taxation 'should never be assumed, unless the language used is too clear to admit of doubt.' That 'nothing can be taken against the state by presumption or inference. The surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the state.' That a state 'cannot, by ambiguous language, be deprived of this highest attribute of sovereignty.' That any contract of exemption 'is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require.' And that such exemptions are regarded 'as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants construed strictissimi juris.'" Chief Justice Fuller, in *Railroad Co. v. Thomas*, 132 U. S. 185, 10 Sup. Ct. 72, expressed the rule thus: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed strictissimi juris." Mr. Justice Peckham, in a more recent case, phrased the rule as follows: "Taxes being made the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must, on that account, be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to exemption is founded. It has been said that a well-founded doubt is fatal to the claim. No implication will be indulged in for the purpose of construing the language used as giving the claim to exemption, where such claim is not founded upon the plain and clearly-expressed intention of the taxing power." *Bank of Commerce v. State of Tennessee*, 161 U. S. 146, 16 Sup. Ct. 460. In a still later case Mr. Justice Brewer said: "It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter, or necessary scope, of the exempting clause." *Ford v. Land Co.*, 164 U. S. 608, 17 Sup. Ct.

232. This rule of construction, so firmly fixed in the jurisprudence of this country, is applicable in every case,—to ad valorem and privilege taxation equally, and whether the claim be of total or partial exemption. The exact measure of immunity in each case is to be ascertained from the language employed in the particular grant.

The exemption clause in the charter of the Knoxville & Kentucky Railroad Company, under which the complainant asserts immunity, is found in section 33, c. 217, Acts 1855-56, and is as follows: "That the capital stock in said company, the dividends thereon, and the road and fixtures, depots, workshops, warehouses, and vehicles of transportation belonging to said company, shall be forever exempt from taxation; and it shall not be lawful for the state, or any corporation or municipal police, or other authority thereof, or of any town, city, county, or district thereof, to impose any tax upon such stock or dividends, property or estates: provided, the stock or dividends, when the said dividends shall exceed the legal interest of the state, may be subject to taxation by the state in common with and at the same rate as money at interest; but no tax shall be imposed so as to reduce the part of the dividends to be received by the stockholders, below the legal interest of the state." To meet the condition contained in the proviso, the complainant alleged, as a matter of fact, that "no dividend had ever been paid on its capital stock." The demurrer admitted the allegation. Thus, it is established that the time has not yet arrived for the state to resume any part of the taxing power actually surrendered by the preceding portion of the section.

What part of that power was there surrendered? For reasons already stated, it is assumed, and the state is precluded from denying, that the corporation was granted complete immunity from ad valorem taxation, and it was so adjudged in the two cases cited. It cannot escape observation, however, that only certain parts of the corporation's property, present and prospective, were mentioned for exemption, and that, if the question of ad valorem taxation were now before the court, the exemption should be limited to those parts. The company's franchise and its surplus are two elements of corporate property not mentioned or included. The former of these is a subject of taxation, and when not exempt must be included in the assessment (*Railroad Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348; *Railroad Co. v. Bate*, 12 Lea, 573); and the same is true of the latter (*Bank of Commerce v. State of Tennessee*, 161 U. S. 134, 16 Sup. Ct. 456; *Shelby Co. v. Union & Planters' Bank*, 161 U. S. 149, 16 Sup. Ct. 558; *State v. Bank of Commerce*, 95 Tenn. 222, 31 S. W. 993). Corporate property has been said to consist of three separate and distinct things,—capital stock, franchise, and surplus. *People v. Coleman* (N. Y. App.) 27 N. E. 818. In this view, the word "prop-

erty" in the exemption clause of this charter might well be held to include franchise and surplus, but for its restrictive qualification. The exemption is not of "property" in the broadest sense, but of "such property," meaning that previously enumerated. The grant particularized the things to be exempt, and for that reason the exemption should be limited to the particulars of the enumeration.

About exemption from privilege taxation there appears to us less room for plausible debate. After a careful study of the exemption clause in all of its parts, this court is not able to discover even an indication of an intention on the part of the legislature thereby to grant immunity from privilege taxation, and much less is it able to discover in the language used an unmistakable purpose to do so. Such an intention is not expressed in the words employed, nor can it be legitimately implied from them. The thing upon which a privilege tax might be laid—the company's business or occupation—was not mentioned, directly or indirectly, in the whole clause. Only those things upon which an ad valorem tax might be laid—property of different kinds—were enumerated or included. The legislature well knew of the two kinds of taxation to which the company might be subjected, and of the things upon which the one tax and the other were separately leviable (Const. 1834, art. 2, § 28); and, with that knowledge, it granted immunity to certain of the things subject to ad valorem taxation, but did not mention or include that thing which alone was subject to privilege taxation. This action of that body can be explained upon no other reasonable hypothesis than that it intended, for reasons satisfactory to itself, and which no one may gainsay, to grant the immunity to the particular property named from that kind of taxation to which it would otherwise be subject, and to nothing else, and from no other taxation. "Expressio unius est exclusio alterius."

The scope of the exemption given to the preceding portion of the section is in no degree enlarged, but only conditionally limited by the proviso. The words "taxation" and "no tax," occurring in the latter, relate exclusively to the same kind of taxation previously contemplated, and to the same things previously enumerated for exemption, and do not refer to any different kind of taxation, or introduce any new or additional subject-matter. It is worthy of repetition that privilege taxation relates to a business, an occupation, or the like; and ad valorem taxation, to property; and that neither includes the other.

In the present case the complainant is treated as having complete exemption from the latter, and it is urged that this necessarily involves exemption from the former. Not so. Exemption from ad valorem taxation no more includes exemption from privilege taxation than the imposition of an ad

valorem tax includes the imposition of a privilege tax. If one imposition does not embrace both, one exemption does not embrace both. No more is it an answer to this interpretation to say that it leaves the immunity allowed less valuable to the complainant than it would otherwise be. That was a matter for the consideration of the legislature making the grant. *Memphis Gas-light Co. v. Taxing Dist. of Shelby Co.*, 109 U. S. 308, 3 Sup. Ct. 205; *Turnpike Cases*, 12 Tenn. 372, 373, 22 S. W. 75. A like objection, by the holders of exempt shares, to the taxation of a bank's surplus, though conceded to be sound in fact, was overruled as untenable in law, in the recent case of *Bank of Commerce v. State of Tennessee*, 161 U. S. 148, 16 Sup. Ct. 456.

It is not to be implied from what has been said that no exemption from privilege taxation could have been granted without naming the object of such taxation and exempting it in so many words. That result could have been accomplished by a statement that the company was to have exemption from all taxation, or by any other form of expression that would, beyond doubt, disclose such an intention. But in this case, as in that of *New Orleans City & L. R. Co. v. New Orleans*, 143 U. S. 195, 12 Sup. Ct. 406, there is "no evidence of an intention" to grant exemption from privilege taxation. The exemption clause construed in *Memphis v. Union & Planters' Bank*, 91 Tenn. 546, 19 S. W. 758, and held to include privilege taxation, recited that the charter tax named should "be in lieu of all other taxes." Of the same import were the exemption clauses before the court in *City of Memphis v. Hernandez Ins. Co.*, 6 Baxt. 527, and in *Union Bank of Tennessee v. State*, 9 Yerg. 490, where like holdings were made. Besides the great difference between the language of those grants and that of this one, which is controlling, it may be remarked, in passing, that there was some money consideration for those grants, in the form of a commuted tax, and there was none in this one. Privilege taxation was not "within the express letter, or necessary scope, of the exempting clause" (164 U. S. 666, 17 Sup. Ct. 232) of this charter; hence it was not included, and the subsequent acts imposing the privilege taxes here complained of do not impair the obligation of the company's charter contract, and thereby violate section 10 of article 1 of the federal constitution and section 20 of article 1 of the constitution of the state.

In the next place, it is alleged and urged against the validity of this legislation that the requisition made under the name of a privilege tax is not such in reality; that the so-called "tax" is not imposed on the business or occupation of the complainant, which alone could be the subject of privilege taxation, but solely upon an abstract condition,—the mere fact of its "exemption from an ad valorem tax." The constitution of the state (article 2,

§ 28) recognizes only two general kinds of taxation,—ad valorem and privilege. These cover the whole domain of taxation, and beyond these the legislature may not go in the imposition of taxes. *Memphis v. Memphis City Bank*, 91 Tenn. 588, 19 S. W. 1045; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 168, 169, 36 S. W. 1041. In respect of the subjects of the latter kind, the legislative discretion has a very comprehensive range. At the least, any occupation, business, employment, or the like, affecting the public, may be classed and taxed as a privilege. *Turnpike Cases*, 92 Tenn. 372, 22 S. W. 75; *Kurth v. State*, 86 Tenn. 136, 5 S. W. 593; *Jenkins v. Ewin*, 8 Helsk. 456; *Wiltse v. State*, Id. 544; *State v. Schlier*, 3 Helsk. 281; *Mayor, etc., v. Guest*, 3 Head, 414; *Robertson v. Heneger*, 5 Sneed, 258; *French v. Baker*, 4 Sneed, 193; *Mabry v. Tarver*, 1 Humph. 94. The legislation here impeached originated with section 5, c. 130, p. 266, Acts 1889, and without material change, except in amount of annual tax, has been re-enacted by each succeeding legislature. Acts 1891 (Ex. Sess.) p. 71, c. 25, § 4; Acts 1893, p. 145, c. 89, § 5; Acts 1895 (Ex. Sess.) p. 592, c. 4, § 7; Acts 1897, p. 76, c. 2, § 6. The provision under which the aggregate sum here sued for was demanded and collected, so far as need now be quoted, is in these words: "That the following corporations shall pay directly to the comptroller's office the following taxes on the following privileges: \* \* \* Railroad companies, not paying an ad valorem tax to the state, each" a given amount per annum, according to mileage operated or controlled. Acts 1893, pp. 143, 145, c. 89, § 5; Acts 1895 (Ex. Sess.) p. 592, c. 4, § 7. This language disclosed, as we think, an obvious intent on the part of the assembly to declare the business, occupation, or employment of the class of railroad companies designated to be a privilege, and to impose a tax upon that business, occupation, or employment. The abstract condition or fact of "not paying an ad valorem tax to the state" is not the thing declared to be a privilege and taxed as such, but it is merely descriptive, and serves only as a designation of that class of railroad companies whose business, occupation, or employment is made a taxable privilege. In this aspect, the *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75, were precisely like this one, though this feature was not there discussed. The privilege tax there was laid on turnpike companies "that collect toll both ways." Yet the circumstance of collecting "toll both ways" was not the thing privileged and taxed; it was only the means of identifying the companies whose business, occupation, or employment was taxed as a privilege. But if there was really a doubt (and there is none) between this construction of the present acts and that contended for by this complainant, and both were plausible, the former would prevail, if for no other reason, because it would sustain the validity of the legislation. All intendmen

are in favor of the constitutionality of an act passed with requisite form and ceremony, as was true in this instance; and, where one of two reasonable constructions would render the law obnoxious to the constitution and the other would not, the latter would be adopted by the courts. *Suth. St. Const.* § 332; *Cooley, Const. Lim.* (5th Ed.) 218; *Black, Const. Law*, § 28; *Brown v. State*, 12 *Wheat.* 436; *State v. Yardley*, 95 *Tenn.* 560, 32 *S. W.* 481; *Manufacturing Co. v. Falls*, 90 *Tenn.* 469, 16 *S. W.* 1045; *Ellis v. State*, 92 *Tenn.* 93, 20 *S. W.* 500; *Railroad Co. v. Crider*, 91 *Tenn.* 507, 19 *S. W.* 618.

Complainant further assails this legislation, and says that it deprives the complainant of its property "without due process of law," thereby violating section 1, art. 14, of the amendments to the constitution of the United States; and that it deprives complainant of its property otherwise than by "the law of the land," thereby violating section 8, art. 1, of the constitution of the state. This double assailable may be treated as one objection, since "due process of law" and the "law of the land" are synonymous phrases, and that which is violative of the one is violative of the other also, and vice versa. *State v. Staten*, 6 *Cold.* 234, 244; *Knox v. State*, 9 *Bart.* 207; *Ervine's Appeal*, 16 *Pa. St.* 236; *Parsons v. Russell*, 11 *Mich.* 129; *Den v. Improvement Co.*, 18 *How.* 272; *Davidson v. New Orleans*, 96 *U. S.* 97, 101; *Cooley, Const. Lim.* p. 429 et seq. A corporation is a "person" within the meaning of the provision forbidding the deprivation of property "without due process of law" (*Turnpike Road Co. v. Sandford*, 164 *U. S.* 578, 17 *Sup. Ct.* 198; *Railroad Co. v. Ellis*, 165 *U. S.* 150, 17 *Sup. Ct.* 255), and a "man" within that forbidding deprivation of property otherwise than by "the law of the land." These acts impose a tax on certain corporations. The tax is to be paid in money, and money is "property." Consequently the imposition and collection of the tax is a deprivation of property, and the acts are void as in conflict with those provisions, if it be true that the tax imposed is collectible otherwise than by "due process of law" or by "the law of the land." The precise objection pressed against the acts is that they constitute vicious class legislation, in that, as alleged in the bill, they apply to only two of the seventy-five railroad companies operating or controlling lines of road in the state, and the classification is unnatural and arbitrary. The acts do divide the railroad companies in the state into two classes: (1) Those "not paying an ad valorem tax to the state," and (2) those paying such tax; and they impose a privilege tax upon those of the former class only. This is class legislation, undoubtedly, but it is not of the vicious or forbidden kind. It applies equally to all corporations that are or may be in like situation or circumstances, and thereby meets the first requirement of valid class legislation; and it makes a natural and reasonable classification,

thereby meeting the other requirements of such legislation. *Sutton v. State*, 96 *Tenn.* 696, 710, 36 *S. W.* 697; *State v. Alston*, 94 *Tenn.* 674, 30 *S. W.* 750; *Turnpike Cases*, 92 *Tenn.* 369, 22 *S. W.* 75; *Railroad Co. v. Crider*, 91 *Tenn.* 490, 19 *S. W.* 618; *Stratton v. Morris*, 89 *Tenn.* 500, 15 *S. W.* 87; *Demo-ville v. Davidson Co.*, 87 *Tenn.* 214, 10 *S. W.* 353; *Debardeleben v. State*, 99 *Tenn.* —, 42 *S. W.* 684; *Lowe v. State of Kansas*, 163 *U. S.* 81, 16 *Sup. Ct.* 1031; *Railroad Co. v. Ellis*, 165 *U. S.* 150, 17 *Sup. Ct.* 255; *Jones v. Brim*, 165 *U. S.* 180, 17 *Sup. Ct.* 282; *Turnpike Road Co. v. Sandford*, 164 *U. S.* 578, 17 *Sup. Ct.* 198; *New York, N. H. & H. R. Co. v. People*, 165 *U. S.* 628, 17 *Sup. Ct.* 418; *Hayes v. Missouri*, 120 *U. S.* 68, 7 *Sup. Ct.* 350; *Bell's Gap R. Co. v. Pennsylvania*, 134 *U. S.* 232, 10 *Sup. Ct.* 533; *Railway Co. v. Wright*, 151 *U. S.* 470, 14 *Sup. Ct.* 396. That it meets the first of these requirements is self-evident, and that it meets the other one becomes manifest when it is considered that those companies upon which the privilege tax is imposed are not otherwise making any contribution to the support of the state government that protects their business and property in the same manner that it does those of the companies of the other class, which are contributing their part to that support by the payment of an ad valorem tax. What sounder and more natural reason could be found for a classification than that these are already bearing some of the burdens of government and those are not? A classification with such a reason to support it (and it may have been prompted by those which the court may not and need not state or discover) cannot justly be characterized as unnatural and arbitrary. The ground for the classification upheld in the *Turnpike Cases*, 92 *Tenn.* 369, 22 *S. W.* 75, was not so strong, and yet it was in some degree of the same nature. The act there questioned (Acts 1891 [Ex. Sess.] p. 67, c. 25, § 3) imposed a privilege tax on all turnpike companies "that collect tolls both ways," and not on others. Manifestly the principal, if not the only, reason for this classification was that the companies subjected to the tax were enjoying greater advantages, with the sanction of the state, than those enjoyed by the companies not so taxed. It is of no consequence that there may be but two railroad companies, as alleged in the bill, to which this privilege tax may apply; for "it matters not how few the persons are who may be included in a class. If all who are or may come into the like situation or circumstances be embraced in the class, the law is general, and not partial." *Stratton v. Morris*, 89 *Tenn.* 522, 15 *S. W.* 92; *Budd v. State*, 3 *Humph.* 492.

It is also alleged and urged that this legislation is in conflict with section 8, art. 11, of the state constitution, in that it diminishes complainant's corporate "powers" by "special laws." There are two brief and conclusive answers to this impeachment: (1) The acts in question are general, and not special, laws;



(2) they do not diminish complainant's corporate powers. The laws are general, within the meaning of this provision, because, as already seen, they include equally all persons who are or may be in the situation and circumstances contemplated. In this particular the requirement of section 8, art. 11, is the same as that of section 8, art. 1, of the constitution. *Stratton v. Morris*, 89 Tenn. 522, 523, 15 S. W. 87; *Sutton v. State*, 96 Tenn. 705, 706, 36 S. W. 697; *Debardelaben v. State*, 99 Tenn. —, 42 S. W. 684. The corporate "powers" referred to are not diminished by the imposition of a privilege tax on a corporation that has no legal exemption from such a tax. This is inevitably so, since the imposition of the tax takes away nothing that the corporation had previously. Indeed, the "powers" of a corporation with a legal right to such an exemption would not be diminished by the wrongful imposition and collection of such a tax, because corporate "powers" do not include exemption from taxation. *Memphis v. Memphis City Bank*, 91 Tenn. 589, 590, 19 S. W. 1045. The latter would be an impairment of the obligation of the contract, but not a diminution of corporate powers.

It has been suggested, with the emphasis of repetition, that these acts were not passed in good faith, but with the unjust motive of depriving the companies affected thereby of an advantage previously conferred. Of this we see no indication. Moreover, the courts have nothing to do with the motives of the legislature, nor with the policy or impolicy of its laws. Const. art. 2, § 2; *Sutton v. State*, 96 Tenn. 698, 36 S. W. 697; *Manufacturing Co. v. Falls*, 90 Tenn. 481, 16 S. W. 1045; *Williams v. Nashville*, 89 Tenn. 488, 15 S. W. 364; *Peck v. State*, 86 Tenn. 262, 6 S. W. 389; *Ballentine v. Mayor*, etc., 15 Lea, 634; *Lynn v. Polk*, 8 Lea, 229; *Nichol v. Mayor*, etc., of Nashville, 9 Humph. 253; *Louisville & N. R. Co. v. County Court of Davidson*, 1 Sneed, 668; *Ferguson v. Bank*, 3 Sneed, 609; *Cookey*, Const. Adm. 202.

A like reply must be made to the other suggestion, that this tax, if now sanctioned, may hereafter be so increased as to equal an ad valorem tax, which would make the burden upon complainant as great as if it had no exemption at all. If the legislature has the legal right to impose a privilege tax, the amount of the imposition is a matter within its discretion. "Our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." *Delaware Railroad Tax*, 18 Wall. 231; *California v. Central Pac. R. Co.*, 127 U. S. 1, 41, 8 Sup. Ct. 1073; *Home Ins. Co. v. New York State*, 134 U. S. 594, 10 Sup. Ct. 593; *Jenkins v. Ewin*, 8 Helsk. 477. If this were not so, the courts, certainly, could not anticipate legislative action and pronounce decrees in advance of it.

Finally, it is said that this legislation is unconstitutional and void because it imposes a tax on interstate commerce. The federal constitution (article 1, § 8, cl. 3) vests in con-

gress "power to regulate commerce with foreign nations and among the several states, and among the Indian tribes," and in doing so impliedly forbids any state the right to exercise such power without the consent of congress. Commerce among the states is usually and appropriately called "interstate commerce." The controlling power of congress in the regulation of this commerce, and the lack of independent power in this domain on the part of the states, have been strongly affirmed and explicitly decided in numerous cases. *Brennan v. City of Titusville*, 153 U. S. 302, 14 Sup. Ct. 829; *Crutcher v. Kentucky*, 141 U. S. 58, 11 Sup. Ct. 851; *Lyng v. Michigan*, 135 U. S. 166, 10 Sup. Ct. 725; *Robbins v. Taxing Dist.*, 120 U. S. 499, 7 Sup. Ct. 592; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *Stoutenburgh v. Hennick*, 120 U. S. 141, 9 Sup. Ct. 256; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881; *Leloup v. Hardin*, 135 U. S. 108, 10 Sup. Ct. 681; *Leloup v. Port of Mobile*, 127 U. S. 645, 8 Sup. Ct. 1380; *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. State of Maryland*, 12 Wheat. 419; *Welton v. State of Missouri*, 91 U. S. 278. Every tax on interstate commerce is a burden upon, and to that extent a regulation of, that commerce, and, when imposed by a state law and without the assent of congress, it is illegal, and the law imposing it is obnoxious to the federal constitution, and for that reason null and void. *Welton v. State of Missouri*, 91 U. S. 278; *State v. Scott*, 98 Tenn. —, 39 S. W. 1. Therefore these acts, which were passed without the assent of congress, must be adjudged invalid if the tax imposed by them should be found to be upon interstate commerce. The complainant's line of road lies wholly within this state, yet it has traffic connections with other lines extending into other states, and in that sense is engaged in interstate, as well as internal, business or commerce. The railroad companies to which the acts apply are required to pay a privilege tax according to mileage, as follows: "Each company operating or controlling 400 miles or more of road in this state, for taking up and transporting freight and passengers from one point to another in this state, per annum, \$10,000. Each company operating or controlling from 100 to 400 miles of road in this state, for taking up and transporting freight and passengers from one point in this state to another point in this state, per annum, \$5,000. Each company operating or controlling from 25 to 100 miles of railroad in this state, for taking up and transporting freight and passengers from one point in this state to another point in this state, per annum, \$1,000. Each company operating or controlling less than 25 miles of railroad in this state, for taking up and transporting freight and passengers from one point in this state to another point in this state, per annum, \$100." Acts 1893, pp. 143, 145, c. 89, § 5; Acts 1895 (Ex. Sess.) p. 592, c. 4, § 7. There can be no doubt from this language that the legis-

lative intent was to impose this tax solely and alone upon business or commerce done wholly within this state,—upon internal or intrastate commerce, as contradistinguished from interstate commerce. The imposition is made "for taking up and transporting freight and passengers from one point in this state to another point in this state," in which business there is no element of interstate commerce. The latter is effectually excluded from the operation of the law, and is in no way affected by it. That part of the business which may be interstate is permitted to go on without let or hindrance; no burden is laid upon it; nothing done to regulate or impede its free prosecution. Such legislation is valid, and not void. *Osborne v. State of Florida*, 164 U. S. 650, 17 Sup. Ct. 214; *Crutcher v. Kentucky*, 141 U. S. 58, 11 Sup. Ct. 861; *Gibbons v. Ogden*, 9 Wheat. 195; *Osborne v. State*, 33 Fla. 162, 14 South. 588; *Lumberville Delaware Bridge Co. v. State Board of Assessors*, 55 N. J. Law, 529, 28 Atl. 711. The unanimous opinion of the court is that the legislation drawn in question is without conflict with any provision of the constitution, state or federal. Let the decree dismissing the bill be affirmed.

#### SULLIVAN v. DAVIDSON et al.

(Court of Chancery Appeals of Tennessee. Nov. 13, 1897.)

#### ADVERSE POSSESSION—CLAIM OF OWNERSHIP—LIMITATIONS.

If a tax deed to defendants, of land formerly owned by a third person, describes the land by metes and bounds, and in so doing includes a portion of an adjoining larger tract owned by complainant, the occupancy by defendants to the boundaries so defined is sufficient to put the seven-year statute in operation against complainant, where the improvements and boundaries of the original smaller tract have become practically lost, and complainant knows of the extent of defendants' claim and this though complainant's grant is later than that of the person whose title passed, by the tax deed, to defendants.

Appeal from chancery court, Morgan county; H. B. Lindsay, Chancellor.

Bill by George H. Sullivan against B. T. Davidson and others to eject defendants from certain land. From the judgment rendered, complainant appeals. Affirmed.

Wright & Wright, for appellant. Yaners Bros., Staples & Staples, John M. Davis, and Templeton & Cates, for respondents.

**WILSON, J.** The original bill in this cause was filed June 28, 1895, to eject defendants from a tract of land in Morgan county embraced in Morgan county entry No. 1,792, and granted by the state under its grant No. 22,341, and to recover damages for waste committed on it. The bill avers that complainant is the owner in fee of the land, which is described; that in January, 1895, the defendants unlawfully entered upon and took possession of it; that they are still in possession,

cutting and removing the valuable timber therefrom; that they are setting up some sort of pretended claims to the land, the precise nature of which is not known, but which are invalid and fraudulent; and it is asked that they be ejected, that their pretended claims be removed as clouds upon the title of complainant, and that he have a reference to ascertain his damages occasioned by their trespasses and removal of timber, etc., from the premises. The complainant filed an amended and supplemental bill, bringing one or more additional parties before the court. But, as this amendment was filed simply for the purpose of enjoining the parties from cutting and removing timber from the premises, it need not be further noticed, under the issues and questions before us. The defendants filed separate answers for the most part, in which they set out, by metes and bounds, the lands respectively claimed by them, and disclaimed with respect to all the remainder of the land embraced in the descriptions and boundaries claimed by complainant.

It is useless, at this stage of the opinion, to set out the respective lands claimed by the different defendants. It is sufficient to say that their respective claims were defined by specific metes and bounds, and a disclaimer of occupancy and entry upon any lands except those which they respectively claimed. A large volume of proof was taken in the cause. Pending the trial below, the complainant dismissed his bill in so far as it sought a recovery of tracts designated as tracts Nos. 2, 3, 4, 5, and 6, claimed by defendant James W. Melton in his answer. It should have been stated that all the defendants claimed title, and that they were protected by a seven-years open, notorious, and adverse possession of the respective parcels of land claimed by them. Some of the defendants also relied upon the fact of 20 years' adverse possession, and the presumption of a grant based upon their long possession. The chancellor heard the cause September 8, 1896, upon the pleadings and evidence. He held and decreed that complainant was entitled to no relief against defendants B. S. Davidson and wife and James W. Melton, and that these defendants were entitled to remain in possession of the land claimed by them in their answers, respectively; that they were fully protected by the statute of limitation of seven years under their actual possession for that time before the bill was filed. The bill was dismissed as to them, and a decree for the costs incident to them was adjudged against the complainant and his security on his prosecution bond. In the decree it is recited that on the trial of the cause these defendants objected to the reading of the deed from George F. Girding to Eliza M. Girding, and to both deeds offered by complainant as evidence, dated in 1878, on the ground that said deeds were champertous and void, and not legal evidence against said defendants. The chancellor held and decreed, as to the

other defendants, that the complainant was not entitled to recover any part of entries Nos. 1,612 and 2,401, but that he was entitled to recover entry No. 2,848, claimed by defendants, outside of said entries 1,612 and 2,401 and inside of entry 1,792, and as to this land so decreed to complainant it was ordered that a writ of possession issue to put him in the peaceable possession of it. The decree recites that, in the event of an appeal of the case to the supreme court, both the original plats on file were to be sent with the transcript. He further held and decreed that complainant was entitled to recover of defendant L. T. Potter on all lands claimed by said Potter in his answer inside of entry No. 2,448, except in so far as entries No. 1,612 and No. 2,401 conflict with and lap on entry No. 2,848. The decree recites that it was agreed that defendant Potter should recover from complainant his 100-acre tract west of his 50-acre tract, and also his 50-acre tract located adjoining and immediately east of his 100-acre tract, both located on and west of Little Clear creek. It is further recited in his decree that the last and east line of the 50-acre tract of L. T. Potter was to run a straight or direct line from the corner to the beginning corner, until it reaches his present old improvements near his mill, then to run around eastward and southward with the line of the old improvements to where it would strike said direct line to the beginning. The decree recites that on the trial of the cause complainant objected to the reading of the deed from Garret Hall to O. G. Kelmbusch, and by O. G. Kelmbusch to Eliza M. Girding, on the ground that said deeds were champertous and void. The decree also states that the complainant objected to the deed from F. W. Girding, claiming to be attorney in fact, to Carl Von Forstner, because void, as Eliza M. Girding, for whom he purported to be acting as attorney in fact, was at the time a married woman. From the decree holding against complainant in favor of any of the respondents, complainant prayed an appeal to the next term of the supreme court, which was granted. The court adjudged that the cost, with respect or incident to the Pitmans and L. T. Potter, be divided equally; that is, that one-half the cost be adjudged against the complainant and his surety and the other half against the defendants Pitman and Potter. All questions of reference to the master to ascertain damages done by any of the respondents for timber cut and removed were reserved for further adjudication, and also the question of damages to any of the defendants because of the wrongful suing out of the writ of injunction by complainant.

The complainant has assigned errors. The errors assigned are: "First. The court erred in not sustaining the bill and giving complainant a decree for all the land he sued for, not covered by his dismissal. Second. Error in decreeing that complainant was not entitled to recover the land claimed by respondents J.

W. Melton and B. T. Davidson and wife, and in decreeing that said parties had good titles to the land claimed by them. Third. Error in decreeing that said defendants had perfected their title to the land claimed by them, before this suit was brought, under and by virtue of the statute of limitations. Fourth. Error in holding that complainant was not entitled to recover any land inside of Morgan county entries Nos. 1,612 and 2,401. Fifth. Error in not giving complainant a decree for all the land sued for, and not claimed by any of the defendants. Sixth. Error in adjudging any part of the cost against complainant, and in refusing to adjudge it against the defendants."

Coming now to the particular questions involved in the case, it is proper to state that defendant James W. Melton, in his answer, claims to own six or seven tracts of land inside of the boundaries sued for by complainant, and he relies on his title papers and the statute of limitations, and disclaims as to the rest of the land sued for. As before intimated, after his answer was filed, complainant dismissed his bill with respect to what are known in the record as tracts Nos. 2, 3, 4, 5, and 6. Only tract No. 1, as it is known in the record, is in dispute between complainant and defendant Melton. Davidson and wife answered the bill, and claimed title to a part of the land sued for, and relied upon the statute of limitations. Reason R. Pitman, another defendant, in his answer, claimed three separate tracts of land, and relied upon the statute of limitation. He disclaimed as to all the rest of the land sued for. Reuben W. and George W. Pitman, in their answer, claimed the separate tracts of land set out in their answers, being three in number, and relied upon the statute of limitation, disclaiming as to all the rest. L. T. Potter claimed, in his answer, the tracts of land set out in his answer, and relied upon the statute of limitation. The chancellor, with respect to the Potter claims, allowed the defendant two, so that there is no controversy between complainant and Potter except with respect to the third tract described in his answer. As before intimated, complainant claims the land under Morgan county entry No. 1,792, dated November 11, 1835, and grant from the state No. 22,341, dated August 18, 1847, and a chain of title from the grantee down to A. S. Sullivan, the complainant being the only heir of A. S. Sullivan, who died in 1887. The immediate title under which J. W. Melton claims, with respect to his land, is a tax deed from William R. Williams, tax collector of Morgan county, to Melton and Keith, dated September 5, 1870. Davidson and wife are the heirs of Keith, and they and Melton divided the land conveyed to Melton and Keith by the tax collector, and the division sets out the land respectively claimed by them, by metes and bounds. Defendants Reuben W. and George W. Pitman claim under three grants to John Pitman, who, it is alleged, was their father. These grants

Nos. 27,060, 27,061, and 27,062, all of date August 10, 1840. As before stated, the chancellor decreed that complainant was entitled to no relief against Melton and Davidson and wife, and dismissed his bill as to them, with costs. He decreed that complainant was not entitled to recover any land inside of the entries Nos. 1,612 and 2,401, but was entitled to recover entry No. 2,848, in so far as it did not conflict with the two other entries just mentioned. A consent decree was made as to two of the Potter tracts. The complainant prayed an appeal, as before stated.

The complainant has the oldest entry and the oldest grant, and, nothing further appearing, would be entitled to recover. His grant excludes all prior entries and grants embraced within the general boundaries of his grant. The defendants Melton and Davidson and wife claim under a tax deed which purported to convey by metes and bounds 1,500 acres, in dispute as to them, and their contention is that this is the 1,500 acres known in the record as the "Carl Von Forstner Tract," which was sold for taxes, and at which sale they became the purchasers. They insist that they had been in open, notorious, and adverse possession of this land ever since the tax sale, and there is no doubt from the evidence in the record that they had been in possession of it ever since. In order to avoid the effect of possession under this deed, the complainant insists that their possessions and inclosures were on parts of the land to which he had no title under his grant. In other words, they were on old grants superior to his, and which, by the terms of his grant, were excluded; and the argument is that, their possession being within the limits of grants superior to the grant of complainant, their possession only extends to the limits of those old grants, and that their possession was not adverse to him in the sense of the law, and did not extend beyond the limits of the old grant. The defendants say that they hold under, or that their possession runs back to, the deed of Eliza N. Girding to Carl Von Forstner, which was registered August 1, 1849. This deed purports to have been made by Eliza N. Girding by attorney in fact. It appears that title to complainant's grant was vested in Eliza N. Girding by a deed from her husband, George F. Girding, of date January 3, 1849, and that at this time she was a feme covert, residing in New York, and the contention of complainant is that she did not part with her title to the land embraced in the grant until she joined with her husband, George F. Girding, in a deed to William A. Kobbe, March 1, 1867. It appears that January 20, 1849, F. W. Girding, claiming to act as attorney for Eliza N. Girding, conveyed to Carl Von Forstner, 1,500 acres of land, which is known in the record as the "Forstner Tract," and this Forstner tract is the land sold by Williams, tax collector, and bought by defendants Melton and Keith, and which was thereafter

divided for partition between Melton and Davidson and wife, Davidson and wife being the heirs of Keith. The proposition of complainant is that this title bond, purporting to have been executed by Girding as an attorney in fact for Mrs. Eliza N. Girding, was null and void, and conveyed no title. The contention of defendants is that the presumption is now conclusive that the deed is valid, and that it conveyed the title to Carl Von Forstner, and that, having been executed more than 20 years before the subsequent deed of George F. Girding and his wife, Eliza N. Girding, to William Kobbe, that Kobbe acquired no title to this 1,500-acre tract from Eliza N. Girding by her subsequent deed. They cite Mill. & V. Code, §§ 2895, 2899, 2991; Shannon's Code, §§ 3761-3765. In other words, their contention is that 20 years' registration is a conclusive presumption of the authority for registration, and of the due execution of the deed. The complainant relies upon the case of *Murdock v. Leath*, 10 Helsk. 172, to show that these statutes have no application to the deed of a married woman, made under a power of attorney, where the complainants against whom the registration was set up were married women, and under constraint and disability. Defendants also say that an observance of the dates of the transactions will show that there is absolutely no merit in the complainant's claim, and that all the real equities of the contest are with the defendants. They cite that January 3, 1848, Carl Von Forstner took possession of the land in controversy under title bond from O. G. Kelmbusch; that December 30, 1847, Garret Hall had conveyed some 500 acres, including all improvements, to O. G. Kelmbusch; that January 15, 1849, O. G. Kelmbusch conveyed this same land as 1,500 acres, including all the Garret Hall land, to Eliza N. Girding; that then, January 20, 1849, Eliza N. Girding conveyed the 1,500 acres in question to Carl Von Forstner; and they say that, conceding the fact that George F. Girding conveyed the 5,000 acres now claimed by complainant to his wife, Eliza N. Girding, on January 3, 1849, it is now apparent, after this lapse of time, that Eliza N., on January 20, 1849, was redeeming, as between herself and Carl Von Forstner, the title bond of O. G. Kelmbusch previously made by Kelmbusch to Forstner. George F. Girding had conveyed, January 3, 1849, to his wife, Kelmbusch, the title-bond vendor of Forstner, also conveyed to Eliza N. Girding the 1,500 acres embraced in the 5,000 acres, January 15, 1849. So they argue that it is clear that these parties all understood one another, and that there was never any purpose on the part of Girding and his wife to claim any portion of the 1,500 acres. In this view of what defendants claim to be their equities, they say it is entirely proper and meritorious for them to claim that the deed from George N. Girding to his wife, Eliza N. Girding, of date January 3, 1849, is cham-

pertous and void, because, they say, that at the time of this conveyance Von Forstner was in actual possession of the 1,500 acres inside of the boundaries described in his title bond of January 8, 1849. The complainant answers this proposition by saying that the possession was limited to the Garret Hall lands on the ground that the title bond in describing the 1,500 acres adds the words, "including the old improvements of Garret Hall," and the insistence is that these words of local description in effect limit the boundaries of the 1,500-acre tract to the old improvements of Garret Hall. It appears that the Garret Hall lands and improvements embraced about 500 acres. The fundamental insistence of the complainant is that the occupancy of defendants was upon the smaller and superior tracts, to which theirs was a superior title; and that, although they were embraced in the general boundaries of his grant, being excluded by its terms, possession thereof was not adverse in the sense of the law.

We do not dispute the proposition that actual occupancy upon a tract embraced within a larger tract, the title to the occupant tract being superior to the title of the larger tract, will not put the statute of limitation to running beyond the limits of the superior, smaller tract; and, if there were nothing else in this case, the contention of the complainant would be unassailable. But there are three other very important facts in this case. In the first place, the Carl Von Forstner tract was recognized by its boundaries. In the second place, the improvements on the interior, smaller tract went down, and their exact location and the exact extent of the improvements are not defined with any precision. "And the weight of the proof goes to show that complainant made improvements and inclosures outside of the original inclosures. In the third place, this defendant never claimed nor recognized his rights as being limited by the old inclosures. He has claimed title, and exercised ownership, to the extent of the boundaries set forth in his title papers. These title papers specifically describe, by metes and bounds, the lands he claims. He went into possession under these title papers, and has cleared, occupied, and put improvements on his possession, holding and claiming to the extent of the boundaries described in his title papers." But, in addition to this, the central and controlling fact is that the complainant was notified of the boundaries and extent to which defendants Melton and Davidson and wife claimed, and, in a sense, recognized their rights, or, more specifically speaking, never asserted at the time any adverse claim to them. While we are disposed to recognize the doctrine contended for by complainant in its main features, we do not think that his principle is exactly applicable to the precise facts of this case. We think this case, in principle, is controlled by the case of *Lumber Co. v. Parks*, 94 Tenn. 263, 29 S. W.

130. The theory and propositions of law advanced by complainant are sustained by the cases of *Smith v. Lee*, 1 Cold. 553, and *Bleddorn v. Mining Co.*, 89 Tenn. 204, 15 S. W. 787. It results, we think, that there was no error in the decree of the chancellor with respect to the contentions between complainant and defendants Melton and Davidson and wife.

We need but observe that neither Reuben W. nor George W. Pitman nor Potter show title to themselves in any land, except as decreed by the chancellor. These defendants claim to hold under three entries, 1,612, 2,401 and 2,848. The first of these entries is older than that of complainant, and, if special, it would create the best title; but it is not special. It manifestly is not special on its face, and there is no reliable evidence in the record which, being admissible for that purpose, makes it special. These parties insist that when Eliza N. Girding became the owner of complainant's grant, January 8, 1849, the Pitmans were in possession of three of these entries. This, however, is disputed by complainant, and we agree with the contention of his counsel that the evidence does not sustain their contention, nor is there any satisfactory proof in the record of seven years' possession of any of these tracts. Holding, as we do, that entry No. 1,612 is not special, disposes of the questions made by the Pitmans. It may be remarked that the Pitman branch of this suit has once previously been before this court, the style of the case then being *Pitman v. Pitman*, in which the opinion was delivered by Judge Neil. It is sufficient to say that the proof of early and adverse possession under these entries was equally as strong, if not stronger, in that record, and yet our court held that seven years' continuous possession was not sufficiently shown. So the possession by Reason Pitman under his tax deed was before this court in the case above referred to, and we held that he was not protected beyond the extent of the land actually inclosed. In that case there was some evidence to support the question of possession and the extent of the boundaries outside of his deed. There is none outside of the deed in this case.

In conclusion, we rest our decision as to the Melton and Davidson land upon these three propositions: First. That Melton and Davidson and wife entered into possession under their tax deed, and claimed to its defined boundaries, without reference to the old improvements and smaller tracts claimed by Garret Hall. Second. That the old improvements and the boundaries of the Garret Hall smaller tracts had been practically lost, and had become obsolete. Third. That soon after they entered into possession, and more than seven years before this suit was brought, the complainant knew the lands that they were claiming, and the boundaries thereof, and at that time conceded their claims, and that they have extended their holdings outside of the old original improvements and grant

A fourth proposition, supported by the equities of the situation, is that these lands were sold by the parties through whom complainant claims to Kobbe, and by Kobbe, by title bond, to Carl Von Forstner, and the extent of the boundaries of Kobbe and Von Forstner must have been known and recognized by the Girdings, through whom complainant claims. The result is that there is no error in the decree of the chancellor, and it will be affirmed, with costs.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, November 17, 1897.

#### BROWN v. BROWN et al.

(Court of Chancery Appeals of Tennessee. Sept. 18, 1897.)

##### DEEDS—ESTATES CREATED.

A deed to a certain person, and to her bodily heirs after her decease, conveys to her an estate in fee.

Appeal from chancery court, Fentress county; T. J. Fisher, Chancellor.

Bill by A. J. Brown against Thomas Brown and others. From a judgment overruling a demurrer to the bill, defendants appeal. Reversed.

O. C. Conatsed and H. H. Ingersoll, for appellants. Young Bros., for appellee.

BARTON, J. This is a bill to recover an interest in a tract of land, and to remove certain alleged clouds from the complainant's title. The question in the case is whether a deed to B., and to her bodily heirs after her decease, conveys to B. an estate in fee or only a life estate. Lewis Anderson, on the 1st day of March, 1859, made a deed to his daughter Sallie Brown, which, so far as necessary to recite, reads as follows: "Know all men by these presents that I, Lewis Anderson, of the county of Fentress, state of Tennessee, do hereby bargain, sell, transfer, and convey unto Sallie Brown, and to her bodily heirs after her decease, for the sum of \$100, to me in hand paid for 166 $\frac{2}{3}$  acres of land, described as follows: \* \* \* I forever bind myself, my heirs and assigns, to hereby warrant and forever defend the title to the same against the lawful claims of all persons whatsoever." In the bill the complainant alleges that he is a son and heir at law of the Sallie Brown named in the deed; that some of the defendants are the other children and heirs at law. He sets out the deed, and alleges that on the 4th of August, 1882, Sallie Brown and her husband, John Brown, assumed to convey and made a deed to A. L. Crawford for the tract of land, who afterwards conveyed a one-third interest in the same to Bruno Gernt. The bill alleges that these deeds are clouds on the complainant's title; alleges that it was the intent of the vendor in the deed mentioned to convey, and

that the deed did convey, to Sallie Brown only a life estate, with remainder to her children. There was a demurrer to this bill, which was overruled, and the appeal granted, the chancellor holding that the deed conveyed an estate for life only. In this view we cannot concur. The estate was a fee simple. See Code, §§ 2006-2008; *Middleton v. Smith*, 1 Cold. 144; *Kirk v. Furgerson*, 6 Cold. 484; *Skillin v. Loyd*, Id. 508; *Wynne v. Wynne*, 9 Helsk. 308; *Boyd v. Robinson*, 98 Tenn. 34, 35, 23 S. W. 72. The decree of the chancellor will be reversed, and the complainant will be dismissed, with cost.

WILSON and NEIL, JJ., concur.

Affirmed orally by supreme court, November 17, 1897.

#### CHILDERS et al. v. RYAN.

(Court of Chancery Appeals of Tennessee. Oct. 7, 1897.)

##### ADVERSE POSSESSION—SPECIAL ENTRY.

1. By seven years' adverse possession, under a special entry of land, a person acquires title to the extent of the calls.

2. An entry of land recited that a certain person entered 100 acres of land in a stated county, on the mountain adjoining the land where such person lived, beginning at a poplar northwest of his spring, running northwardly to the top of a certain ridge, thence, by various courses, to the beginning. The evidence showed that the spring was about 100 yards west of the enterer's house, and that there were two poplars standing close together near the spring, and that the spring and the house of said person were well known in that neighborhood. The evidence as to whether the entry could be run out from the calls was conflicting. Held, that the entry was a special one.

Appeal from chancery court, Scott county; H. B. Lindsay, Chancellor.

Suit by A. L. Childers against P. L. Ryan. Subsequently there was an amended complaint filed by the complainant, in conjunction with the Jellico Mineral & Lumber Company. From the decree, defendant appeals. Affirmed.

S. E. Young and D. C. Young, for appellant. Young & Staples and Templeton, Cates & Parker, for appellees.

WILSON, J. This bill was filed March 16, 1892, by the complainant, to recover possession and establish his right to a tract of land lying in the Seventh and Eighth civil districts of Scott county, on the head waters of Gum Fork, a tributary of Jellico creek, and to attach a crop of corn raised thereon by the defendant in 1891, and to enjoin him from disposing of the same. The bill avers that complainant is the owner in fee of the land which is described by metes and bounds, and that he had been in the actual, adverse, open notorious, continuous, and peaceable possession of it for about 25 years, claiming it under grant from the state of Tennessee; that in January, 1890, the defendant wrongfully

entered upon it, and ejected complainant therefrom; and that in 1891 he cleared and fenced some eight or nine acres, and cultivated it in corn; and that he had gathered from this crop about 100 bushels, which he had removed, and put in a crib on an adjoining place, where it still was. It is further averred that at the time of this wrongful entry by the defendant, and his cultivation and removal of the corn crop, complainant was in litigation with the estate of one Van Winkle, which involved this land; and for this reason he deemed it not advisable to enter suit against defendant, but that the litigation with the estate of Van Winkle had been settled by compromise, in which it was conceded that the land belonged to complainant; that, after this settlement of that litigation, complainant replevied the crop of corn grown as aforesaid on this land by defendant, which action at law is pending undecided in the circuit court; that the defendant is now setting up some sort of pretended and fraudulent title to the land, which embarrasses his remedy at law; that the defendant is insolvent; and that, if he were to recover a judgment at law against him, it would be worthless; and that this would be the case were he to recover here; and that, this being so, his only available remedy is to go for the corn wrongfully removed from his land. Writs of attachment are asked for, to attach the corn, and for an injunction to restrain the further prosecution of the suit pending in the circuit court, and to enjoin the defendant from entering upon the land of complainant. It is asked that, upon final hearing, the title of complainant be declared; that the defendant be removed from the land; that he be given a decree for all damages, etc.; and for general relief. Writs of attachment and injunction issued under the allegations of the bill. The defendant pleaded in abatement to the attachment, and also demurred to the jurisdiction of the court. His plea to the attachment is: (1) That he did not unlawfully and wrongfully raise corn on complainant's land; (2) that the corn attached was not at the time of the attachment, and never had been, the corn of the complainant; (3) that the corn had been produced by him on land to which he had at the time, and now has, a deed in fee; (4) that it was raised on his land, in which the complainant never had any interest. His demurrer to the jurisdiction is: (1) Adequate and complete remedy at law; (2) That the bill shows a pending suit at law over the corn, and the law court having first taken jurisdiction, and being competent to administer justice in the matter, its jurisdiction cannot be ousted.

August 20, 1893, the complainant, in conjunction with the Jellico Mineral & Lumber Company, a corporation of Kentucky, but doing business and having an agent in Scott county, Tenn., filed an amended bill. In this reading, after stating the substance of the original bill, it is averred that complainant

Childers and the corporation owned the land, the former the surface, and the latter the minerals under the surface, the ownership of both, in the respects stated, being in fee; that the defendant was still in possession, and that he had cultivated the cleared land for the years 1892, 1893, and the preceding year; that defendant was insolvent; and asked that an attachment issue, and for damages. Relief was prayed appropriate to the respective interests alleged to be owned by the two complainants, and also prayed for as in the original bill. Pleas in abatement were filed to the attachment issued under the amended bill. Both the original and amended bills were answered by the defendant,—the former March 17, 1892, and the latter April 4, 1894. In these answers the right and title of complainants are denied, and title is set up in the defendant, the title papers under which the latter claims being exhibited with his answer. The adverse possession of complainant is also put in issue. It is proper to state also that the defendant filed a cross bill, claiming the land, and adverse possession of it, under color of title, and that his claim thus set up was denied. The parties, it seems, demanded a jury, and filed issues to be submitted to it; but they afterwards agreed to submit the case to the chancellor, as if no jury had ever been called for. A large volume of proof was adduced, consisting of the depositions of a number of parties, some of whose depositions were taken several times, with exhibits covering title papers and an agreement of the parties. The cause was heard before Chancellor Lindsay, February 20, 1897, upon the pleadings and proof, and agreement of parties. He held that the entry covering the land under which complainant claims, and which was made June 12, 1865, and upon which a grant was issued by the state, October 4, 1890, was a special entry, and that he had possession under the entry more than seven whole years, holding adversely, notoriously, and continuously to the extent of the calls of the entry before 1883, and before the deeds of defendant which were made and executed to him, and before defendant had any possession of the land in dispute. He thereupon gave complainant Childers a recovery of the surface of the land described in his grant from the state in 1890, and the complainant corporation a recovery of the minerals under the surface of the land, and awarded a writ of possession. He dismissed the attachment as to the corn, holding that the improvements and betterments put on the premises by the defendant were a set-off against the corn and rents. He taxed the defendant with the cost. From this decree the defendant prayed and was granted an appeal to the supreme court, and has assigned errors.

The master was directed in the decree granting the appeal to make out and certify to the supreme court a full, complete, and perfect transcript of all the pleadings, proof, exhibits, agreements, title papers, orders, and

decrees, and, in making it out, he was directed to copy two deeds from A. J. Ryan and wife to defendant, and to send up the deeds themselves, and, also, a map filed by one Risen with his deposition. This transcript may be full and complete, but it lacks a deal of being perfect. We have rarely seen one put together in worse shape, and, then, the penmanship of it is not to be compared to the excellence of the chirography of the court of chancery appeals, to say nothing of that of the supreme court. In addition, we have been unable to find with the record the original deeds to defendant, Ryan, ordered to be sent up. The errors assigned by the defendant are: First, error in holding the entry under which complainant Childers claims special; second, error in holding that Childers and the Jellico Mineral & Lumber Company had title to the land in dispute; third, error in awarding writ of possession to dispossess defendant; fourth, error in taxing the defendant with the cost; fifth, error in finding that the beginning corner of Childers under his entry was at two marked poplars and a set stone, instead of at a poplar northwest of the spring; sixth, error in finding that the entry of Childers included his old possession where he lived at the time the entry was made, instead of adjoining it.

It may be taken as conceded in the case, and, if not, it is established as a matter of fact and the applicable law, that, if the entry under which Childers claims be special, the decree of the chancellor is correct. Said entry is as follows: "State of Tennessee, Scott County. No. 257. Entry Taker's Office. A. L. Childers enters one hundred acres of land in said county on the mountain adjoining the land Childers now lives on, beginning on a poplar northwest of his spring, running northwardly to the top of a ridge between where Childers lives and where J. R. Ryan lives, and thence westwardly, and various courses for complement. Entered June 12, 1865." Childers entered into possession of the land embraced in this entry at the time, and retained possession of it for over seven years. His possession was evidenced by houses and inclosures. As before stated, the state issued him a grant in 1890, and in this grant the land is fully described by metes and bounds. It is settled law in this state that seven years' adverse possession, under a special entry of land, is protected under the second section of Act 1819, c. 28, to the extent of its calls. *Ramsey v. Monroe*, 3 Sneed, 330; *Meriwether v. Vaulx*, 5 Sneed, 307; *Sims v. Eastland*, 8 Head, 370; *Marr's Heirs v. Gilliam*, 1 Cold. 508. An entry certain to a common intent is special. *Barnet's Lessee v. Russel*, 2 Overt. 20. Says our supreme court: "The entry should in some part of it contain a reference to some place, natural mark, or thing, from which, either singly or together, the land could be ascertained with reasonable industry by those acquainted in the neighborhood. The entry must be special on its face to the extent

above indicated, and cannot be aided in this respect by parol proof." *Barnes v. Sellars*, 2 Sneed, 35; *Berry v. Wagner*, 5 Lea, 565. The early policy of our land laws was to favor the earliest enterer. *Murfree's Lessee v. Logan*, 2 Overt., top page 220; *Kendrick v. Dailum*, Cooke, 219, 220. An enterer of land is entitled to the quantity of land his entry calls for, which was vacant at its date, and which might be included by any proper mode of survey, without respect to any subsequent claim by settlement or otherwise, and the proper surveyor could be compelled by mandamus to survey the land accordingly. *Caldwell v. Watson*, 6 Humph. 498.

We are of the opinion that, under the facts and the principle announced in our cases above cited, the entry here was special, and that the chancellor committed no error in so holding. The facts are that, in 1865, Childers bought from one A. J. Ryan a tract of some 25 acres, of which some 12 or 14 acres were cleared. There was an improvement consisting of a clearing of a small piece of land adjoining this 25 acres, and on which there was a house. Childers moved into this house, it seems, with the assent of the vendor of the 25-acre tract, although the vendor had no title to the house and clearing. In June, 1865, soon after his purchase, Childers made the entry hereinbefore copied. This entry embraces the land in dispute. The proof also shows that Childers' spring was some 100 yards east of his house, and that a short distance from this spring were two poplars standing close together; and it is in evidence that the spring and improvement where Childers lived were well known in the neighborhood. Mr. Thompson, the surveyor, swears that this entry can be run out from its calls. Another surveyor seems to be of a different opinion. We are content to adopt the opinion of the former. But, in addition to this, the complainants show the superior title under a patent or warrant issued by the state of Kentucky to O'Bannon, Griffin, Morgan & Co., of date April 17, 1851. The original patent or warrant, and deraignment of title thereunder, are not in the record; but, by stipulation or agreement of counsel, this is obviated, and it is not seriously questioned but that this warrant from Kentucky covers the land in dispute. This land lies within what is known as the Walker and Latitude line, and is covered by the compromise between Tennessee and Kentucky made in 1820, under which Kentucky had the right to grant it. The title is regularly deraigned from O'Bannon, Griffin, Morgan & Co., to complainants, the minerals to the complainant corporation, and the surface right to Childers.

Defendant seeks to avoid this situation by the plea of the statute of limitations, based upon two deeds from his father and mother, one of which appears to be dated March 14 or 4, 1883, and the other February 25, 1891. This deed alleged to have been made in March, 1883, does not appear to have been



acknowledged before any one until March 16, 1891, the same day that the one dated February 25, 1891, was acknowledged. It is claimed on behalf of complainants that the date of this alleged 1893 deed has been changed. The original deeds were ordered to be sent up, so the court could have the benefit to be derived from a personal inspection of them; but, as stated, we have not found them with the record. Without them, however, we are satisfied, from the other evidence in the record, that the defendant can found no rights upon this alleged deed of 1893. Neither his father nor mother nor himself swears, with any sort of certainty or definiteness, that any such deed was made then or at such an early date. In addition, Thompson, who was surveying the land of Childers as late as 1889, swears that defendant told him then that he had no deed to this land, but that he had a warrant from Kentucky for 200 acres of land, which covered this land in dispute. The surveyor says, however, that this Kentucky warrant had no definite corners, lines, or boundaries. Taking the testimony of defendant, his father and mother, without considering the other evidence in the record, it is insufficient to establish the existence of a deed to him in 1893, and it follows that his plea of title, by virtue of seven years' adverse possession under color of title created by such deed, falls to the ground. We do not dispute the proposition that a general entry protects the enterer only to the extent of his inclosure. But, if it were held that the entry of Childers was only a general one, the defendant would be in no better fix. The complainants can claim under the title derived from the state of Kentucky, through the warrant and title of O'Bannon, Griffin, Morgan & Co. There is no error in the decree of the chancellor, and it will be affirmed, with cost.

BARTON and NEIL, JJ., concur.

Affirmed orally by supreme court, November 17, 1897.

# MILBURN MANUF'G CO. v. WAYLAND et al.

(Court of Chancery Appeals of Tennessee. Oct. 17, 1896.)

PERSONAL PROPERTY—CONDITIONAL SALES—TITLE IN VENDOR—REPLEVIN—ADVERTISEMENT AND SALE—TRUST FOR BENEFIT OF CREDITORS—BONA FIDES OF TRUSTEE—ALTERATION OF NOTES—EVIDENCE.

1. The conclusion that the alteration of certain notes, by changing the rate of interest on their face, was sanctioned by their maker, was sustained by the evidence where the testimony of the attorney who had them for collection, and of his stenographer, was to such effect, and that of the maker in denial thereof was nullified by subsequent portions of his own testimony.

2. In a suit wherein complainant sought to hold the trustee and his bondsmen, under a trust made by their co-defendant for the benefit of his creditors, liable for a negligent breach of such trust, it was not error to exclude the record

of a suit brought by such debtor and his wife against such trustee and his sureties, to which complainant was not a party.

3. Where personal property, the title to which was retained by the vendor, was retaken by replevin, and the vendee conceded the right of the vendor to its possession, but requested and was granted the control and use thereof for a specified time, to enable him to get the money, and relieve the property, the vendor was not bound, under Act 1889, c. 81, to advertise and sell such property during the period so granted, or lose his rights, forfeit his debt, and subject himself to an action for what had been previously paid thereon.

4. A trustee for the benefit of creditors failed in the proper discharge of his duties, where it appeared that he made no reports, left no accounts, misapplied the assets, and, after having promised to pay complainant's debt, unreasonably failed to do so.

Appeal from chancery court, Knox county; H. B. Lindsay, Chancellor.

Bill by the Milburn Manufacturing Company against D. A. Wayland and others. From a decree in favor of complainant, defendants N. N. Osborne, W. F. Gibbs, and J. W. Sneed appeal. Affirmed.

Cornick, Henderson & Sansom and O. H. Flournoy, for appellants. Templeton & Cates, for appellee.

WILSON, J. This bill was filed August 21, 1895, to recover against D. A. Wayland the balance due on six promissory notes maturing in each succeeding month, given for two buggies, the title to which had been retained in complainant, and to hold the trustee and his bondsmen, under a trust made by Wayland for the benefit of creditors, liable for a negligent breach of the trust, whereby loss had been caused to complainant. The bill is filed in the name of the complainant and in the name of the state for its use, and avers, in brief, that it had sold two buggies to Wayland, who was then engaged in the livery business in Knoxville, for which he had executed six notes, giving their amounts and the dates of their maturity; that the title to the buggies was retained until all the purchase price was paid; that Wayland had made some payments, designating them; and that, failing to pay the balance, the buggies had been replevied and sold in compliance with our statute, and the proceeds applied to the notes, still leaving a part of them unpaid. The bill further avers that Wayland, doing business under the name and style of the Central Livery Company, made a deed of trust to one Hudiburg, conveying his horses, vehicles, and livery stable outfit for the benefit of creditors; that Hudiburg refused to accept the trust, and that defendant N. N. Osborne qualified as trustee before the county court of Knox county, giving bond in the penalty of \$4,000, with W. F. Gibbs, J. W. Sneed, and T. C. Holloway as his sureties thereon. Holloway was not sued, being a nonresident. It is averred that the debt of complainant is embraced in the deed of trust of Wayland; that Osborne, as trustee, had afterwards promised to pay it, or the balance due thereon, but that he

now refuses to do so, although he had ample assets in his hands. It is also charged that Osborne had never filed an inventory of the assets coming into his hands, nor made any settlement with the county court. It is then averred that the wife of Wayland had filed a bill against Osborne and his bondsmen in the chancery court to recover an alleged balance due her, and to have the administration of the trust removed from the county to the chancery court of Knox county, but that it was not filed as a creditors' bill, but alone in her own behalf. It is stated that said Osborne claims to have settled with all the creditors of Wayland and with Wayland, but this is denied, as its debt had not been paid. The insolvency of Wayland is averred, and Osborne is charged to have breached his bond as trustee in refusing to pay the debt of complainant, whereby he and his sureties were liable to it. Wayland answered the bill. He agreed that Osborne had neglected and misadministered his trust, and refused to account, but denied that he owed complainant anything. The substance of his defenses against the notes is that the notes held by complainant are usurious on their face, that they had been altered without his assent or knowledge, by changing the rate of interest specified on their face from 10 to 6 per cent., thereby making them embody a different contract from that signed by him, and that complainant had recovered back the buggies, and had failed to advertise and sell them as required by the statute of the state. Osborne answered, setting up the same defenses as those advanced by Wayland, and, in addition, averring that he had not neglected to properly discharge his trust duties. He insists in his answer that these notes were never presented or filed with him for payment, and that he had paid all just debts presented, and properly verified, closed up his trust, and turned over the assets, etc., to Wayland and wife. The sureties of Osborne, in their answer, rely on the same defenses presented in the answer of Osborne. Several depositions were taken, and the chancellor heard the cause July 3, 1896. He found against the defendants, and that complainant was entitled to the relief it sought. He therefore adjudged the balance due complainant, with interest, to be \$156.11, and gave a decree therefor against Wayland. He also adjudged that Osborne, as trustee, had failed to make proper settlement, and to execute his trust as required, and in consequence thereof he and his sureties were liable for the sum adjudged to be due complainant. Osborne and his sureties excepted to this decree, and prayed and obtained an appeal to the supreme court.

Upon the trial of the cause, Osborne and sureties, having given notice to the solicitors of complainant of their purpose to do so, appeared, and tendered in evidence in their behalf the report of the master of the chancery court at Knoxville, Tenn., in the cause entitled "State of Tennessee, for the Use of D. A.

Wayland and Annie K. Wayland, vs. N. N. Osborne et als.," being No. 6,208 on the rule docket of said court, said report having been filed in said cause on October 1, 1895, and the decree rendered by the court thereon. The counsel of complainant objected to this evidence upon the ground that it was not a party to said cause, and its objection was sustained, and to this an exception was taken. The said report and decree thereon, and the action of the court excluding them, are embodied in a proper bill of exceptions, made a part of the record.

The errors assigned by appellants are: (1) Error in refusing to hold the notes sued on usurious, and therefore not collectible at the suit of complainant. (2) Error in not holding that the notes had been altered, and therefore not enforceable. (3) Error in excluding the evidence offered, it being the report of the master and decree confirming the same in the case of Wayland and wife against N. N. Osborne et al. (4) Error in refusing to hold that complainant had lost its right to proceed against appellants, because, having retained title to the buggies for which the notes sued on were given, and reclaimed possession of them, it failed to advertise and sell the same within 10 days after reclaiming them as required by law. (5) Error in decreeing against Osborne and sureties for a breach of his bond as trustee or assignee, because his bond upon which the suit is based is not filed in the record, nor are its conditions anywhere set out or proven in the record, nor is it shown or attempted to be shown or proven that Osborne violated his bond, or failed to comply with its conditions. We take up these errors assigned in their order.

As to the first, it appears that the notes were given to bear 10 per cent. interest. They remained 10 per cent. notes until after they were put in the hands of Messrs. Templeton & Cates, attorneys, for collection. Mr. Wayland promised several times to pay them, requesting each time some further delay. On one of the occasions, when payment was requested, he asked further delay, and Mr. Cates told him he would grant it, provided he would agree for the 10 per cent. rate of interest to be erased, and 6 per cent. written instead in the notes. Wayland agreed to this, and hence the alteration appearing on the face of the notes. Mr. Wayland, in one part of his deposition, denies authorizing this change in positive terms, but further on in his examination he greatly nullifies his previous evidence. Mr. Cates is positive in his evidence as to Wayland's consenting to the change, and he is directly supported by the testimony of the stenographer then in his office, where the alteration was made on the notes, then in possession of the firm, Wayland being present and consenting thereto, and agreeing that the other notes, when sent to the firm, should be similarly altered. This error is not sustained by the evidence, and is overruled, we being entirely satisfied that the

change in the rate of interest on the face of the notes was sanctioned by Mr. Wayland.

What has been said disposes of the second error, and it is overruled.

We see no reversible error in the action of the court in excluding the part of the record in the other case offered as evidence. Complainant was no party to that case, and, in addition, only a part of the record was offered. It is true, no specific objection seems to have been made on this ground. Its admissibility is insisted upon, because it is said that the bill of complainant averred that the other case had been instituted, charging Osborne with dereliction in the administration of his trust, and therefore they had the right to show the result of that litigation. It is not contended here that the adjudication in that case is binding upon complainant in this. If not an adjudication that is *res adjudicata* as to complainant because it was in no way a party to or bound by it, we are unable to see its pertinent relevancy here. Moreover, looking to the whole averments of this bill bearing upon that suit, we may fairly conclude that they were made to show that that suit was not brought for the benefit of all the creditors interested in the proper enforcement of the trust and the liability of Osborne for its improper administration, but in behalf of Wayland and wife alone. But, conceding the parts of the record of that case offered in evidence to be admissible for what they are worth, we cannot see how they can affect the result of this case. The assignment of error on this ground is not well taken, and is disallowed.

The contention of the fourth error assigned in one respect involves a question of fact and in another a question of law. Complainant replevied the buggies, under its retention of title until all the purchase money was paid, before a justice. Wayland promised to get up the money to pay the balance due on them in a short while, and after service of the writ the trial was set off some 20 or more days, at the request of Wayland, and the buggies were left in his possession. Wayland, it seems, did not dispute the right of complainant to recover in the replevin suit. It was finally tried by the magistrate, and adjudged in favor of complainant. The property was properly advertised, and sold within the time prescribed by statute after the judgment of the justice. It is insisted by appellants that, inasmuch as Wayland did not dispute the right of complainant to repossess itself of the buggies by the replevin writ, and inasmuch as it, in legal effect, left the buggies with Wayland, after the service of the writ, as its agent, it was its duty under the statute, within 10 days after regaining possession, to advertise and sell the buggies, and, having failed to advertise for sale within the 10 days after the writ was served, its failure not only extinguished the balance of the debt due under the notes, but subjected the complainant to an action by Wayland to recover what he

had paid on the buggies. This insistence, it will be noted, assumed that, as to the requirement of our act of 1889 (chapter 81), under the facts, complainant reclaimed possession of the buggies when the writ of replevin was served, and that he was required, under the act, to advertise within 10 days from the service of the writ. The case of *Lieberman v. Puckett*, 94 Tenn. 273, 29 S. W. 6, is cited in support of the proposition. Under this act it has been held by our court that in cases of the retention of title to property sold the duty of the original vendor to resell the property upon redemption is positive, and failure to perform that duty fixes upon him absolute responsibility to the purchaser for the purchase money previously paid. *Cowan v. Manufacturing Co.*, 92 Tenn. 376-384, 21 S. W. 663. And says Mr. Justice Weeks in *Lieberman v. Puckett*, 94 Tenn. 274, 276, 29 S. W. 6: "The act clearly contemplates two cases,—one where the vendor retakes possession by consent of the purchaser, and the other where it is necessary to regain possession by process of law in the absence of consent. This can be done by an action of replevin; and if the complainant's right, under his replevin, to hold the property, is not controverted, as well as where possession is gained by consent, it is the duty of the vendor to at once proceed, under the statute, to make the sale required. But, where the right to retain the possession under the replevin suit is controverted and litigated, the vendor cannot be said to have regained possession, in the sense contemplated by the act, for purpose of sale, but he is obligated to hold that possession to await the determination of the contest over the right to possession; nor can the purchaser, so long as he litigates the right of the complainant to retake and retain possession, require that he shall proceed, at his peril, to make the sale required by the statute." In short, "until the right to possession is conceded or fixed by the court, the original vendor is under no obligation to proceed to sell under the statute, nor could he properly so do." 94 Tenn. and 29 S. W., *supra*. While Wayland, under the evidence, did not dispute the right of complainant, through the officer, to retake the buggies under the replevin writ, it is not absolutely clear that he abandoned the suit, or determined, when the writ was served, to let it go by default; for he had its trial set for a day in the future, expecting to get the money with which to pay the debt. But whether he then determined, in the event of failure to get the money, to let it go by default, is a matter left in doubt. If, however, it be conceded that he did, and then intended fully to make no opposition, the further fact appears that he had the case postponed to a future day, with a request, in effect, to take no further steps, so that he could or might get up the money, and prevent the sale of his property, or preserve it for his own use; and by consent the property was left in his custody until he made the effort

desired to get the money. In such a case we do not think it was contemplated by the act that the original vendor should at once proceed to advertise and sell the property, or subject himself to loss. In other words, we hold that when the title to property is retained by the vendor, and when the vendee concedes the right of the vendor to its possession, but prefers a request, which is granted, that he be permitted to keep the control and use of the property for a given time, to enable him to get the money and relieve the property, the vendor, bringing an action of replevin, is not bound, under the act, during the granted delay, to advertise and sell the property, under the penalty of losing his rights and forfeiting his debt, and also subjecting himself to suit for what had been previously paid on the property. To so hold, it seems to us, would be to say that a debtor for property purchased could, under the act, convert a granted kindness and indulgence requested by him into a legal bludgeon to maul his lenient creditor. There is no legal or equitable merit, in our opinion, in this assignment, and it is overruled.

The fifth and last assignment involves the question of whether this trustee failed to perform his duty under the trust deed as required by law, and thereby breached his bond, causing loss to complainant. If he did fail, in the sense of the law, to properly perform the duties incident to the trust, and thereby caused loss to this complainant, he and his bondsmen are liable. It is settled law that an assignee or trustee is chargeable with the care of an ordinary owner of property, and is responsible for a loss occasioned by ordinary negligence. In *re Estate of Davis*, 5 Whart. 530; *Clark v. Craig*, 29 Mich. 398. A trustee is bound to conform to the directions of the trust, and to carry into effect its provisions, so far as they are valid, and consistent with the rules of law, unless excused by all those interested, or by the sanction of a court, where the rights of married women or infants are concerned. *Bamm*, Eq. Jur. § 1062; *Sheldon v. Rice's Estate*, 30 Mich. 296; *Wood v. Wood*, 5 Paige, 596; *Murdock v. Johnson*, 7 Cold. 605. It is his duty to keep accurate accounts, and the funds of the trust separate from his own, and a failure to do so will raise a presumption against him, and furnish a good reason for charging against him all that can be reasonably charged. 2 Pom. Eq. Jur. § 1063; *Gilmore v. Tuttle*, 34 N. J. Eq. 45; *Myers v. Myers*, 2 McCord, Eq. 214; *Bank v. Weems*, 69 Tex. 489, 6 S. W. 802. It is his duty to make reports, and to pay the debts secured in the trust as fast as he has money to do so, with reasonable safety, and as a reasonable business man would, dealing with his own affairs. In short, he should, as fast as practicable, unless the specific directions of the deed prescribe his duties and the method of their judgment, apply the funds and assets of the trust to the debts provided for. *Tuttle v. Townshend*, 31 Md. 336; *Jenkins v. Tuttle*, 69 Ill. 415; *Williams v. Williams*,

35 N. J. Eq. 100. We feel constrained to hold, in view of these well-settled principles, under the evidence in this record, that the trustee in this case did not administer his trust and perform its duties with that attention, care, and promptness required by the law. He made no reports, left no accounts, and did not fulfill the directions of the trust, under the weight of the evidence. He did not use all the assets of the trust in the payment of debts, but turned the assets undischarged of or unapplied back to Wayland and wife. He promised to pay this debt of complainant's, and afterwards failed to do so. We are not favorably impressed with the evidence of his entire good faith, as defined and required by the law, in respect to his action, or rather his final nonaction, about this debt. We think from the proof that he could have paid it, and that it was his duty to have paid it.

It is insisted that the deed of trust of Wayland is not in the record, and that, therefore, the court cannot say that any of its provisions have been broken. We find the trust deed copied in the record. In addition,—and it is not disputed in the pleadings,—that the deed was made, that Mr. Osborne qualified as trustee under it, and that in contemplation of law he had possession of all the property of its maker for the purpose of paying his debts, and that Wayland also paid him money to enable him to pay the deed. Moreover, it is not disputed that this debt was so secured in the deed. The decided weight of the evidence is, also, that the trustee knew it was contracted in the deed, and promised to pay it. That Wayland at some time told him not to pay it is no excuse. If Wayland could so direct as to this debt, he could do so as to all, and thus defeat the very purpose, and the only purpose, for which such a deed could be lawfully made. Neither is there merit in the insistence, in our opinion, under the proof, that this claim was never filed with him for payment, and that he never knew of it until he had finally settled his trust, and disposed of all the assets. On the whole case, we think the complainant has fairly, if not fully, made out its claim to the relief it seeks. It results that there is no error in the decree of the chancellor, and it will be affirmed, with costs.

BARTON and NEIL, JJ., concur.

On Rehearing.

(Oct. 29, 1896.)

This case is before us on a petition to rehear on one point. It is insisted that petitioners assign errors to the decree of the chancellor in adjudging a breach of his bond by Osborne, trustee, and in granting a decree against appellants by reason of such breach, because the bond of Osborne upon which the other appellants were sureties, and upon which this suit is based against them, is not

filed in, nor made a part of, the record, nor on any of the conditions of the bond set out or proved in the record, nor is it shown or proven, or attempted to be shown or proven, that said Osborne violated or failed to comply with any of the conditions of said bond. It is pointed out in the petition that our opinion did not respond to the assignment, but that we said: "It is insisted that the 'deed of trust' by Wayland is not in the record, and that, therefore, the court cannot see that any of its provisions have been broken. We find the trust deed copied in the record." The criticism on the opinion is well founded. It is, we think, reasonably manifest that we had in mind to say that "It is insisted that the bond of the trustee is not in the record, and that, therefore, we cannot see that any of its provisions have been broken, and that we find it copied in the record." A further examination convinces us that, if such was our intention, we were mistaken in that part of the clause of the opinion given when we say, "We find it copied in the record." The deed of trust is in the record, not the bond; but the bill avers the execution of the trust deed, and its purpose, and the answer admits it, and it also avers that Osborne qualified as trustee, with appellants as sureties on his bond as such. Osborne admits his qualification under the trust deed to execute, and the taking possession of the property assigned in it. His sureties, in their answer, admit that Osborne qualified, and gave bond in the penalty of \$4,000, with them as his bondsmen. The qualification and bond as trustee being admitted, and its penalty, nothing more appearing, the law fixed its conditions, and hence it became a matter of proof whether its conditions had been broken, the law designating and fixing his duties and the character of care and diligence required of him in executing the trust. The absence of the bond from the record, in the state of the pleadings, constituted no bar to the right of complainant to recover for its breach, provided the evidence established that it was breached. Under the averments of the bill and the admission of the answer, the court had the right to assume that a bond had been executed as required by law, and, this being so, its terms were, in contemplation of law, as much before the court as if the bond itself, or a certified copy, had been before it. The question, then, was whether the evidence established a breach of a legal bond. We found that it did, and we think that our finding was correct. The result is that our conclusion was correct, and the same is reaffirmed. But this will be filed with the record, so that the parties may have the benefit of a correction of our previous opinion, and so as to show that the bond of Osborne is not in the record.

BARTON and NEIL, JJ., concur.

Affirmed orally by supreme court, October 27, 1897.

# ADAMS et al. v. PALETZ et al.

(Court of Chancery Appeals of Tennessee. May 29, 1897.)

## ATTACHMENT—FRAUD.

Creditors may attach goods of their debtor in the hands of those who have conspired with him to conceal the goods.

Appeal from chancery court, Loudon county; H. B. Lindsay, Chancellor.

Bill by the firm of Adams & Byer against L. Paletz and others. Complainants obtained a decree. Defendants appeal. Affirmed.

C. R. Evans, G. W. Fox, Burkett, Miller & Mansfield, and D. R. Nelson, for appellants. Chambers, McQuene & Nicholas, for appellee.

WILSON, J. This bill was filed October 19, 1894, by the complainants, a mercantile firm of Cincinnati, Ohio, against L. Paletz and the other defendants, to recover on an account for \$182, due for goods sold by them to L. Paletz, who at the time of the sale was a merchant doing business at Dayton, Rhea county. The case is identical with the one of Hamburg Bros. against these parties. An attachment was issued and levied upon certain goods in the possession of I. Garry and the Blumberg Dry-Goods Company, doing business in Loudon, upon the theory that the goods really belonged to Paletz. It is alleged that the other parties were fraudulently colluding and conspiring with him to cover and conceal the goods from creditors. Publication was made for Paletz, his whereabouts being unknown. He failed to appear and answer, and the bill was taken for confessed as to him. The other defendants answered, denying all the material allegations of the bill. Proof was taken, and the chancellor heard the cause November 18, 1896. He gave the complainants the relief sought, sustained the attachment, and rendered a decree in their favor against the defendants and their sureties on their replevin bond; Garry and Blumberg having after the attachment replevied the goods. The defendants prayed an appeal to the supreme court, and have assigned errors.

The errors assigned are, in effect, that the finding of the chancellor that the property or goods attached belonged to Paletz, and that the appellants had conspired with him to cover and conceal them from his creditors, is not sustained by the evidence; and, secondly, that the bill does not proceed upon the theory of a fraudulent sale of goods by Paletz to appellants, and to set it aside because of the fraud, and that, if it did, the attachment issued was unauthorized, because not based upon the fiat of the judge; and, this being so, all proceedings based upon the validity of the attachment were void. We fully and carefully examined the evidence bearing upon the real questions in this case in the preceding one of Hamburg Bros. against these parties (42 S. W. 807). As stated

It is needless to recite the evidence. We are entirely satisfied that these parties entered into a collusive and fraudulent agreement to conceal the goods of L. Paletz, and to enable him to put them out of the way of creditors. This being so, the creditors of Paletz had the right to attach them, wherever they could be found. Under a state of facts such as exist in this record, courts will not be very nice in seeking to discover whether or not the exact amount of goods in value is in the hands of defendants sufficient to cover the indebtedness sought to be recovered. There is no error in the decree of the chancellor, and it is affirmed, with cost.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, November 6, 1897.

REEVES et al. v. JOHN. CARHART et al.  
v. SAME et al. MARTIN et al.  
v. CATE et al.

(Court of Chancery Appeals of Tennessee. June 19, 1897.)

#### WRONGFUL ATTACHMENT—DAMAGES.

1. Where property which has been conveyed in trust to secure debts is wrongfully attached by other creditors, and sold by a receiver, the actual damages, if any, to the beneficiaries under the trust deed, who receive the proceeds of the sale, is the difference between what was realized by the receiver and what could have been realized by the trustee under the terms of the trust.

2. Where goods are wrongfully attached, the damages will be based on the market value of the goods at the time and place of the attachment; and, if sold for less under the attachment, the difference should be made good.

3. The market value of goods is what they will bring at sale in the open market on due notice; and if such sale be honestly made, on wrongful attachment, the person making it is chargeable only with the sum realized.

4. Where property is wrongfully attached, the attachment plaintiff is not bound by the value reached by the sheriff in his invoice.

5. Where an attachment is wrongfully sued out, but no actual damages have resulted, plaintiff is liable for nominal damages.

Appeal from chancery court, McMinn county; T. M. McConnell, Chancellor.

Separate consolidated actions by John S. Reeves & Co. and H. B. Carhart & Co. against A. K. John and others, and by Martin Bros. and others against J. C. Cate and others, to set aside a deed of trust from defendant John to defendant Cate, in which attachments were issued and served, and a receiver was appointed. A judgment in favor of plaintiffs was modified on appeal to the supreme court (32 S. W. 312), and the consolidated cases were remanded to the lower court for further proceedings and distribution of the funds, in accordance with its opinion and decree. Afterwards the trial court referred the case to a master, to hear proof and report as to the damages sustained by defendants because of the wrongful suing out of the attachments. From a decree sustaining in part objections to the report of the master, and confirming it as

to the balance, all the parties appeal. Reversed.

Burkett & Mansfield, for complainants. Young Bros. and T. E. H. McCroskey, for defendants.

WILSON, J. These causes are before us on an appeal from the decree of the chancellor awarding damages against complainants for wrongful suing out attachments against the property of A. K. John. Both sides have brought the cases up,—the one because the chancellor gave more than nominal damages, and the other because he did not award a greater sum than he did. The following facts, appearing in the record, will present the grounds for the contention of the parties: A. K. John was a merchant, doing business at Mouse Creek, in McMinn county. June 9, 1893, he made a trust deed to John C. Cate, conveying his stock of goods to secure certain of his debts. This instrument was registered. On the next day, June 10, 1893, John, by an instrument not put of record, conveyed to the Sweetwater Mill Company and C. H. Hutcheson, two of his creditors secured in his deed of trust to Cate, his notes and accounts. J. S. Reeves & Co., the day the assignment was made to Cate, filed a bill against John, assailing it as fraudulent. An attachment issued under this bill, and the sheriff levied it on the stock of goods conveyed to Cate, and took possession of them. On the next day, H. B. Carhart & Co. filed a bill against John and Cate, assailing the assignment or deed of trust. An attachment issued under this bill, and was levied on the stock of goods, subject, however, to the levy of the previous attachment in favor of J. S. Reeves & Co. June 12, 1893, Martin Bros. and other creditors filed the third bill. John Cate, the beneficiaries in the deed of trust to Cate, and the complainants in the two previous bills, were made defendants and parties to this bill. This last bill assailed the assignment to Cate, and also the assignment or transfer of the notes and accounts to the Sweetwater Mill Company and C. H. Hutcheson. An attachment also issued under this bill. It also asked for the appointment of a receiver, to the end that the property attached be disposed of by the receiver under the orders of the court. A receiver was appointed by the chancellor, under the averments and prayer of this bill; and the sheriff turned the stock of goods over to him, and he sold them. Pleas in abatement were filed by the defendant to the attachments in each of the cases. A considerable volume of proof was taken, which, by agreement, was to be used as evidence, so far as relevant in all the cases, and before the hearing the cases were consolidated. The chancellor held the deed of assignment to Cate, and the transfer of the notes and attachments to the Sweetwater Mill Company, and C. H. Hutcheson, fraudulent, but, both in fact and in law, sustained the attachments, and ordered the proceeds arising from the sale of the goods, etc.,

made by the receiver, to be paid to the attaching creditors according to their priorities, as fixed by their attachments. John and the parties interested in his assignments appealed to the supreme court, and that court reversed the chancellor in so far as the trust deed to Cate was concerned, but held it to be valid. It held, however, that the assignment of the notes and accounts was fraudulent, and sustained the attachment issued in the Martin Bros. case as to them. The consolidated causes were immediately remanded by the supreme court to the lower court for further proceedings and the distribution of the funds in accordance with its opinion and decree. Nothing was said or done in the supreme court, after its hearing and decisions of the cases, in reference to damages for the wrongful suing out of the attachments. After the causes were remanded to the court below, and reinstated on its docket for the purpose of carrying out the decree of the supreme court, the defendants, by motion in each case, obtained a reference to the master to hear proof, and report as to the damages sustained by them, because of the wrongful suing out of the attachments. A large volume of proof was taken under this reference. It is proper to state that the complainants excepted to this order of reference in each case, on the grounds—First, that the chancery court had no jurisdiction to make it; second, that the only remedy of defendants was by suit in the attachment bonds; and, third, because the order as made was an adjudication that the attachments were wrongfully sued out. The master filed his first report, under the orders of reference May 14, 1896. Therein he stated that from the voluminous amount of proof on file, all of which he had carefully examined, John was entitled to nominal damages, but that he was unable to fix any specific amounts. Exceptions were filed to this report by the defendants, which the chancellor sustained, and the order of reference was revised and recommitted. The second report of the master was filed November 14, 1896. He reported that John had not sustained any actual damages by reason of the suing out of the attachments, but that he was entitled to \$2.50 as nominal damages. It appears that he filed a separate report of similar tenor in each case. Exceptions were filed by the defendants in each case. They all raise the question that, under the proof, the master should have reported a large sum as damages; and the basis of the exceptions will be noticed when we come to deal with the assignments of error in this cause, as the errors assigned cover the grounds stated in the exceptions to the report. The cause came before the chancellor November 28, 1896, upon the report of the master and the exceptions thereto; and it appears, by agreement of the parties, he pronounced a decree covering all the cases, as if they were not only consolidated, but in effect heard as one cause,—that is, he was to decide or dispose of all questions as he deem-

ed the merits to warrant. He held that the exceptions to the report, in so far as they seek to fix the basis of damages for wrongfully suing out the attachments, were not well taken. He held, however, the defendants entitled to some damages because of the suing out of the attachments, and on this ground set aside the report. He was of opinion that the basis of damages was the value of the stock of goods at the time the attachments were levied, taking into consideration the fact that John had conveyed them by trust deed, under the terms of which they were to be sold out in six months. On this basis he fixed the value of the goods at 75 per cent. of their invoice value as made by the sheriff when or immediately after he first attached them, and which invoice was accepted or rather acquiesced in by the receiver when he was appointed and took possession, a few days after the levies made by the sheriff. The invoice of the goods by the sheriff amounted to \$3,635.28. Seventy-five per cent. of this sum is \$2,726.46. The receiver realized from his sale of them the sum of \$2,577.50. This made the damages the sum of \$148.91; and for this sum, with interest from December 10, 1893, amounting to \$26.45, he gave a decree in favor of defendants against complainants, and the sureties on their attachment bonds, and all the costs of the reference. He further held and decreed that the complainants were liable for the above damages and costs, respectively, in relation to the amounts of their respective debts sued for. On this basis, J. S. Reeves & Co. were liable for 55 per cent., Carhart & Co. 16 per cent., and Martin Bros. and others, complainants in the third bill, 29 per cent.; and executions were awarded against them and their sureties accordingly. Under his decree the damages so found were to go to the beneficiaries in the trust deed to Cate. As stated in the first part of this opinion, both sides appealed, and both have assigned errors.

The errors assigned by complainants are: That the chancellor erred in making the order of reference to the master to ascertain damages. The predicate of this error is that the appeal to the supreme court in the attachment suits was a broad appeal, which divested the chancery court of all jurisdiction, and that, having failed in the supreme court to take any steps looking to a reference to ascertain damages sustained by reason of the wrongful suing out of the attachments, the causes were remanded by the supreme court to the court below, simply to carry out its decree, and, this being so, the chancery court was without jurisdiction in the premises. Reeves & Co. assign as error, as applicable to themselves, that the decree of the chancellor divested the damages awarded to be paid to the beneficiaries in the trust deed to Cate; and they aver that their bill was filed solely and alone against A. K. John, and that their bond was conditioned to pay him such damages as he might sustain, by reason of

wrong of their suit, and did not cover and protect the beneficiaries in his trust deed to Cate. In this connection it is insisted that, although the three cases were consolidated for convenience in their hearing, they did not thereby lose their separate identity, nor did the consolidation in any sense enlarge the legal scope of their attachment bond. The contention is further made under this assignment that, under the status of their bill, John, if any one, is the only one that is entitled to recover damages from them, and that, if he is entitled to recover, it should go as a credit on his debt to them. Martin Bros. and the complainants with them in the third bill assign errors, as applicable to them, that the chancellor was in error in awarding any damages against them, because the supreme court did not hold that their attachment was wrongfully sued out, but, on the contrary, sustained it as to part of the property they attached. It will be remembered in this connection that they attached the notes and accounts which were assigned or attempted to be assigned by John to the Sweetwater Mill Company and O. H. Hutcheson, as well as the stock of goods, which had a day or so before their bill was filed been attached under the bills filed by Reeves & Co. and Carhart & Co., and that their attachment was sustained as to the notes and accounts. All the complainants assign as error the finding of the chancellor that any damages had been sustained. This error is rested upon the proposition that, under the deed of trust to Cate, the goods were to be sold in six months, and that, under the weight of the reliable evidence, the receiver appointed by the court realized as much for the goods as could have been realized by the trustee had he been permitted, without interruption, to sell them under the terms of the trust deed. Carhart & Co. assign error to the decree of the chancellor awarding any damages against them, inasmuch as the goods were not sold under their bill or the attachment sued out thereunder. The defendants assign five formal errors. They are legally reducible to one. It is urged that the chancellor erred in fixing the basis of damages, by taking into consideration, as one element to reduce them, the fact that John had conveyed the stock of goods in trust to Cate, to be sold in six months, for the benefit of the creditors named in the trust deed, and in arbitrarily fixing their value at 75 per cent. of their invoice value, as made by the sheriff, when or soon after he attached them. Their contention in all their assignments is that the damages are the difference between the market value of the goods at Mouse Creek when attached and the sum realized by the receiver. They insist that, about two weeks before the bills were filed, an invoice made by John of his goods at cost price, not including freight, showed his stock to be worth \$5,446.74. It is further urged that John was selling his goods at an average of 25 per cent. over cost price, and that his selling price was the

market value of the goods at the time they were attached. It is claimed by them that the proof shows that after the invoice made by John, and between that time and the levy of the attachments, about \$270 worth of the goods were sold and removed, and that, therefore, the wholesale value of the goods when attached was \$5,176.74. This being so, it is insisted that the damage on this basis is the difference between this sum and \$2,591.57, realized by the receiver. But they insist that the market value of the goods was the selling price at Mouse Creek, which was \$6,570.93, and on this basis the damage is \$3,979.36. Another basis fixed by them is the invoice value at cost, found by the sheriff, \$3,635, with 25 per cent. added, which makes the value of the goods attached the sum of \$4,543.75, and the difference between this sum and the amount realized by the receiver is \$1,962.18; and, at all events, they insist that they should be given this amount as damages. But, in any aspect of the case, they contend that they are entitled to recover the difference between the sum realized by the receiver and the cost invoice value as found and returned by the sheriff, and which invoice the receiver accepted. This difference amounts to \$1,043.43. A vigorous insistence is made by the defendants that the proof amply shows that the receiver employed and put in charge of the goods to sell them for about two months at Mouse Creek, after his appointment, young and inexperienced parties, who roughly managed and handled the goods, and recklessly sold them for unreasonably low prices; and that, when he removed the remaining part of the stock to Athens, he dumped them in the chancery court room in the court house, without any order or system, in consequence of which they could not be sold for their worth. In brief, the insistence on this point is that the receiver carelessly handled and negligently sold the goods for less than could have been realized for them, properly handled and sold.

Now, we find, as a matter of fact, after carefully weighing all the evidence, that the receiver was appointed a few days after the stock of goods were attached; that he employed a young man by the name of Snyder, about 21 years of age, and a Mrs. Matheny, to sell the goods at Mouse Creek; that they sold them for about two months, selling in that time between \$700 and \$800 worth of the goods; that these sales, taken all together, were at a small profit over the actual cost price of the goods; that then the balance of the goods was removed to Athens, McMinn county, by the receiver, and placed in the chancery court room of the court house, in as good and systematic order as was practicable in such a place; that this removal was made just before the circuit court convened there; that the receiver sold out the goods privately and by public auction there, for the best prices he could obtain; and that he was guilty of no neglect or bad faith in his conduct as receiver. We further find that, while a portion



of this stock of goods was reasonably new and in date, a considerable portion of them was old, and not readily saleable in the market. We further find that while the receiver never took an inventory of the goods after his appointment, but went by that made by the sheriff, he nevertheless, when he took charge, and was furnished the invoice of the sheriff, after looking over the stock, said it was invoiced too high. We further find that the receiver did the best he could with the goods after he took charge of them, and, in view of their condition and the times, he realized all that he could from them. Snyder, whom he put in charge at Mouse Creek, and Mrs. Matheny, afterwards employed to assist in selling the goods there, while having no great experience in such business, were reasonably competent, and, from the weight of the proof, we are satisfied, did about as well as any one that could have been selected. We are further of opinion, from this proof in this record, that the receiver got practically as much for the goods as the trustee could have received, in view of their character and the condition of the times. And we construe the most reliable and satisfactory evidence to be found in the record, the invoice made by the sheriff was substantially correct, and, with such a stock of goods on the market to be sold to satisfy creditors, it is, under the proof, a good result to realize 75 per cent. of their invoiced value. The receiver realized within \$148 of this per cent. of the value of the stock as invoiced by the sheriff. The master reported that he had got for the goods all that they could be sold for in view of their character, and the condition of the times, and the circumstances surrounding him, and we are satisfied that his report to this effect is sustained by the evidence. We are further satisfied that, if the goods had been sold by the trustee under the deed of trust for "the benefit of the creditors named in it, he would not have realized but little, if any, more for them than was realized by the receiver.

With these findings of fact, we are prepared to deal with the errors assigned. And, with respect to those assigned by the defendant, it is apparent that they are disposed of by the finding of facts; and, as to them, it is, as may be conceded as a proposition of law, that a party wrongfully suing out and levying an attachment is, with the sureties on his attachment bond, liable for the actual damage caused thereby, and if he resorted to this extraordinary writ wantonly or recklessly, or with malice, and without probable cause, exemplary damages are recoverable. *Smith v. Story*, 4 Humph. 172; *Smith v. Eakin*, 2 Sneed, 461; *Doll v. Cooper*, 9 Lea, 576; *Stringfield v. Hirsch*, 94 Tenn. 425, 29 S. W. 609. There is no claim maintainable under the evidence that these attachments were sued out wantonly, maliciously, or to harass and oppress the defendant. This being so, the case is one where actual damages only are recoverable. Authorities supra; *Benkert*

*v. Elliott*, 11 Lea, 235; *Lobenstein v. Hymson*, 90 Tenn. 606, 18 S. W. 250. The property wrongfully attached in these cases had already been conveyed in trust to secure the payment of debts, and the actual damages sustained, if any under the facts, by the beneficiaries under the trust deed, are the difference between what was realized by the receiver and what could have been realized by the trustee, selling them, without interruption under the terms of the trust. This is manifest, we think, from the situation of the property. The beneficiaries in the trust deed, it being valid, were entitled to the proceeds of the property conveyed in it, properly sold under its terms, and to no more. Wrongfully sold under the invalid attachment bills, by an agency brought into existence by them, if the property was sold for less by the agency, the difference should be made good by the complainants filing the bills, and their sureties. We have already found as a fact that the agent brought in under the bills got as much for the goods as the trustee could have obtained. This disposes of the question of damages so far as the beneficiaries in the trust deed are concerned, and results in overruling the errors assigned in their behalf.

We agree with their learned counsel that damages in this class of cases will, as a general rule, be fixed or based upon the market value of the property wrongfully attached and converted at the time and place of the attachment, and if sold for less, under the wrongful attachment, the difference should be made good. But what is the market value? Obviously, it is not arbitrarily fixed by what the party paid for the property, nor by what he was holding and selling it at in his current business at retail. These things may be considered in arriving at the market value. But, at least, the ultimate test is what the property will bring when properly sold, after giving the public an opportunity to know what the property is, and when and where and the terms of its sale. It is equally clear, we think, that the test is not the invoice value fixed by the owner nor by the sheriff. We held last winter, in Nashville, in a case somewhat analogous, when a surviving partner, who was administrator of his deceased partner, sold a stock of goods after it had been turned over to him by a receiver, who had carefully invoiced it, that he was not, as a matter of law, bound by the value reached by the receiver in his invoice. We further held in the case "that, as a general proposition, goods in the hands of a party for sale are worth what they will bring at sale in open market upon due notice, and, if such sale be honestly made, the party is chargeable with the sum realized at such sale." *Byant v. Harmon* (MS. opinion). The supreme court affirmed our holding. In the case cited, the receiver, just before the stock of goods, by order of court, was turned over to the surviving parties and administrator, took a careful invoice of the stock, and under this in-

voice its value was found to be \$832.80. The surviving partner soon afterwards sold them at public sale, after due notice, and at this sale the goods brought \$325. The contention was that he should be charged and compelled to settle with the heir of his deceased partner upon the basis of the invoice value of the receiver. We held otherwise, and in the opinion used the language above quoted. We have no disposition to establish a rule that will sanction a resort with impunity to attachment by creditors or others seeking by suit to enforce their demands. On the contrary, where they are wrongfully sued out, and the property of the defendant is wrongfully seized, the defendant should be permitted to recover in full measure all the actual damages he sustained, and, if this process is wantonly resorted to, exemplary damages should be awarded. While it was not, perhaps, technically correct to hold that the measure of damages in this case was to be considered in view of the fact that the stock of goods was already conveyed by deed of trust when the attachments were levied, we cannot, nevertheless, avoid considering that they were not in the market for sale in a going retail store, where successive replenishments of the stock could, in an appreciative sense, aid in the sale of parts of the stock at prices which might not be otherwise attainable. The method of apportioning the damages adopted by the learned chancellor is, to use the language of the supreme court, "entirely untenable." *Stringfield v. Hirsch*, 94 Tenn. 425, 29 S. W. 609. We simply refer to this case and its reasoning to support the proposition that, if damages were rightfully found, this part of the decree cannot be sustained.

Having found that no actual damages were caused to John or the beneficiaries in his trust deed by these suits, it is wholly needless to discuss or decide other questions raised in the assignments of error of complainants.

Each party suing and wrongfully taking out an attachment, because of the wrong and tort involved in the issuance of the attachments, is liable to nominal damages, and to no more; and, under the facts, the report of the master, to this effect, should have been affirmed. The result is that the decree of the chancellor is reversed, and the defendants will pay the costs of the appeal, and the costs of the reference below.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, October 30, 1897.

#### MCREYNOLDS v. GRAHAM.

(Court of Chancery Appeals of Tennessee. July 7, 1897.)

##### WILLS—VESTED ESTATE—DEATH OF LEGATEE.

1. Where a will bequeaths to each of three grandchildren a specified sum of money, "to be paid to them when each arrive at the age of 21

years," the bequest is vested, and the time of payment, only, is postponed.

2. Where, after the death of the testator, one of the grandchildren dies before reaching the age of 21 years, her legacy becomes at once payable to her administrator.

Appeal from chancery court, Marion county; Thomas M. McConnell, Chancellor.

Suit by James W. McReynolds, administrator, against John Graham, executor. From the decree, defendant appeals. Affirmed.

W. D. Spears and W. E. Donaldson, for appellant. Shepherd & Frierson, for appellee.

NEIL, J. This bill was filed by the administrator of James Mary McReynolds to collect a legacy. The decision of the case involves a construction of the will of J. H. Graham, the father of the intestate. The first item of the will contains the usual provisions for debts and funeral expenses. The will then proceeds: "Secondly, I will and bequeath to my beloved wife, Elizabeth K. Graham, for and during her natural life, all of my real and personal estate, except fifteen hundred dollars, to be paid to my daughter Martha McReynolds' three children, hereinafter mentioned. Thirdly, after the death of my beloved wife, Elizabeth K. Graham, I will and bequeath to my daughter Martha J. McReynolds, wife of James W. McReynolds, all of the Nick-o-Jack and Shellmound lands, known as the Bank and Webb farms, free from the control of her present husband, or any future husband, should she marry again, for her sole and separate use during her natural life, and at her death to be equally divided between her three children, Hope Graham McReynolds, John Elizabeth McReynolds, and James Mary McReynolds, for their sole and separate use, free from the control of their said husbands, should they marry. I further will and bequeath that each of said children, Hope Graham McReynolds, John Elizabeth McReynolds, and James Mary McReynolds, have five hundred dollars, as before mentioned in this will, to be paid to them when each arrive at the age of twenty-one years; should any necessity arise by which it should become necessary for their education and maintenance, to be paid sooner. Fourthly, I further will and bequeath to my son, John Graham, all of the balance of my real and personal property after the death of my beloved wife, Elizabeth K. Graham, not otherwise disposed of in this will. Lastly, I do hereby nominate and appoint my son, John Graham, my executor to this my last will and testament, and that he shall not be required to give bond and security." The following facts are agreed upon: That J. H. Graham, the defendant's testator, at the time of his death had on hand cash to the amount of \$750, and that this was not sufficient to pay funeral expenses and the medical bills contracted in his last sickness; that he died the owner of personal property, consisting of live stock, grain, etc., worth in all about \$5,-

000, which would be, in value, more than sufficient to pay all the debts of the estate, cost of administration, and the legacies to the McReynolds children mentioned in the will; that the testator died April 13, 1888, in Marion county; that his wife, Elizabeth K. Graham, died May 28, 1888; that on the death of Elizabeth K. Graham all the personal property came to the hands of the defendant, John H. Graham, executor; that James Mary Graham is dead, and that the complainant is her lawful administrator; that she died before she attained the age of 21 years. It is not shown that had she been living when the bill was filed, November 21, 1895, she would then have been 21 years old. On this state of facts, the complainant claims that he is entitled to collect the legacy, as administrator of James Mary McReynolds. On the other hand, the defendant denies this right.

We think that the complainant is entitled to recover. The legacy was clearly vested. The time of payment, merely, was postponed. This would not prevent the vesting of the estate. *Pritch. Wills*, § 409, subsec. 2, and authorities cited. *Nelson v. Blue*, 63 N. C. 659; *Furness v. Fox*, 1 Cush. 134; *Reed v. Buckley*, 5 Watts & S. 517; *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388. And see *Anderson v. Hammond*, 2 Lea, 281, 284, 285, and *Claffin v. Claffin* (Mass.) 20 N. E. 454. In *Furness v. Fox*, *supra*, the rule is thus stated, in a quotation from 3 Woodeson, 512: "If the time of payment, merely, be postponed, and it appears to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance of the gift, as a condition precedent, it is contingent, and not transmissible." In the present case no construction could make clearer than the language of the will itself that there was a distinct gift in presenti to the three children of the testator's daughter, Martha McReynolds. In severalty, each to have \$500, and that the time of payment, merely, was postponed until the majority of each. The subject is first mentioned in the second clause of the will, wherein the testator says that there is to be paid to the three children of his daughter, Mrs. McReynolds, \$1,500. And in the third clause he returns to the subject, and says, "I will that each of said children have \$500," and then adds, "to be paid on arrival at the age of 21 years." If anything were needed to make this language more clearly evincive of the testator's intention that the money should belong to each of these children, it is to be found in the clause which provides that, if necessary for education and maintenance, the money should be paid to them sooner.

It was suggested in argument that, even if the court should hold that the estate was vested, yet this suit was prematurely brought; that it could not properly be brought until such time as James Mary McReynolds would arrive at age, had she not died. This is a

mistake. The cases all hold that where a legacy is vested, and the right of payment postponed until the majority of the legatee, and the legatee dies before reaching majority, the administrator of the deceased legatee takes. See authorities above cited. In none of these cases was the objection raised in terms that we find raised here, yet the courts seem to have assumed that the administrator would take at once. The principle is that in an estate so circumstanced the executor of the testator is a trustee to hold the fund to carry out the purposes of the testator's will. The rule is that a trustee will take and retain that exact quantity of interest, and no more, in the trust property, both as to extent and duration, which is requisite for the proper and efficient execution of the powers and duties conferred upon him, and to effectuate the purposes of the trust. *Jourolmon v. Massengill*, 86 Tenn. 82, syl. 7 (5 S. W. 719); *Davis v. Williams*, 85 Tenn. 648, syl. 4 (4 S. W. 8). In the present case, it appearing that by the death of James Mary McReynolds the purposes of the trust have terminated, it must be held to have ceased, and the legacy to be payable immediately to the administrator of James Mary McReynolds. The trust vested in the executor was to hold the legacy, and, if needed pending minority for education and maintenance, to use it for that purpose, and, if not, then to pay James Mary McReynolds upon her reaching majority. The accomplishment of these purposes of the trust having become impossible by the death of James Mary, the trust is necessarily cut down, to the extent above indicated. Similarly, in *Sanford v. Lackland*, 2 Dill. 6, Fed. Cas. No. 12,312, where the beneficiary, who would have been entitled to a conveyance of trust property at the age of 26, became a bankrupt at the age of 24, it was held that the trustee should convey his interest immediately to his assignee, as "the strict execution of the trust of the will had been thus rendered impossible." See this case, quoted in *Claffin v. Claffin*, *supra*. So, in this state, in the case of *Lynch v. Burts*, 1 Helsk. 600, where the will contained a bequest of freedom to a slave on the death of the testator's wife, the freed woman to be sent to Liberia, or some other suitable place, and, to meet the expense, \$500 was to be set apart, and placed in faithful hands, to inure to the benefit of the slave, but by the emancipation of slaves, brought about by the government, the execution of the trust became impossible according to its strict terms, it was held that the money should be paid to the benefit of the legatee. For the reasons above stated, we think the suit was not premature, and that the chancellor's decree was in all things correct; and it is affirmed, with costs.

BARTON and WILSON, JJ., concur.

Affirmed orally by supreme court, November 17, 1897.

**BANK OF COOKVILLE et al. v. BRIER et al.  
THREAT v. SAME. DIBRILL et al. v.  
SAME. FALLERS et al. v. SAME.**

(Court of Chancery Appeals of Tennessee. June 19, 1897.)

**HOMESTEAD—JOINT CONVEYANCE—WHAT CONSTITUTES.**

Under the constitution, a homestead can be alienated only by the joint deed of husband and wife, and therefore neither a void deed of trust, including land occupied as a homestead, made by the husband for the benefit of certain creditors, nor a void assignment, specially reserving the homestead, made by the husband and wife, will operate to divest either the husband or wife, of their homestead rights.

Appeal from chancery court, Fentress county; T. J. Fisher, Chancellor.

Consolidated causes between the Bank of Cookville and others against H. D. Brier and others. Petition by Isaac Fallers, Sons & Co. and others for the sale of defendants' realty free from their homestead rights therein. From a decree confirming the report of the receiver who made the sale, H. D. Brier appeals. Reversed.

D. C. Young and S. E. Young, for appellant.  
O. C. Conatsed and Ingersoll & Payton, for appellees.

NEIL, J. These cases were before us at the August special term in 1895. The question then under consideration was whether certain conveyances were fraudulent or not. At that term we decreed that a certain deed of trust made by H. D. Brier to one Douglass, for the benefit of Murray, Dibrill & Co., was void, because on its face it authorized the maker, Brier, to remain in possession of the goods, and to replenish the stock, for an unlimited time. It was held that this vitiated the instrument, not only as to the stock of goods therein conveyed, but also as to the real estate now in controversy. We also decided that a general assignment made by H. D. Brier and his wife, Mrs. Hattie Brier, to T. D. Alberson, was void, under the general assignment act of 1881, because of a defective affidavit thereto attached. The debts due the several complainants were ascertained, and a decree was entered, setting aside the deed of trust and the general assignment, and directing the property to be sold for the satisfaction of the debts due to the several complainants; and the cause was remanded to the chancery court of Fentress county for sale of the property and distribution of the proceeds. The case was then appealed by the defendants to the September term, 1895, of the supreme court, and there the decree of this court was in all things affirmed. 32 S. W. 205. When the case reached the chancery court, in obedience to the remand, the chancellor entered a decree directing a sale of the property pursuant to the decree of this court and of the supreme court, and added the following: "This cause came on to be heard upon the application of Isaac Fallers, Sons &

Co., Chas. Brown Grocery Co., and George McAlpin & Co. to have the house and lot attached in this cause sold in bar of the right of homestead and dower of H. D. Brier and his wife, Hattie E. Brier, when it appears that the court of chancery appeals decided that the conveyance by H. D. Brier and wife to J. C. Douglass was fraudulent in law and in fact, which finding of fact is final, which decree of court of chancery appeals was confirmed by the supreme court. The court is pleased to order that the said property be sold free from any homestead or dower rights of defendants H. D. and Hattie E. Brier, and that they are not entitled to any homestead or dower interest therein." This decree was entered on April 23, 1896, and on April 25, 1896, the death of Mrs. Hattie E. Brier was suggested and admitted; and, on the same day, H. D. Brier excepted to so much of the above decree as directed the real estate to be sold in bar of the right of homestead, and prayed an appeal to the next term of the supreme court; and this appeal was refused by the chancellor. Thereupon the property was brought to sale, and was purchased by W. D. Mullinix, at the price of \$1,262, the sale being made by the receiver of the court. The receiver made his report to the chancellor on the 10th day of October, 1896; and it was confirmed on the 19th of October, 1896. On the 20th of October, 1896, H. D. Brier prayed an appeal, which was granted by the chancellor, and he has duly prosecuted the same.

It has already been stated that the trust deed to Douglass was made by H. D. Brier alone, his wife not joining therein. She did join in the general assignment to Alberson, but that instrument did not purport to convey the homestead at all, but was expressly made "subject to the right of homestead." This appears on the face of the instrument. The homestead right was also claimed by Brier and wife in their answers, and it appears that H. D. Brier was the head of a family, being a married man. The chancellor's decree is sought to be sustained on the theory that, inasmuch as the two conveyances were declared fraudulent, therefore H. D. Brier, who signed both of them, had forfeited his homestead rights. We think the chancellor misconceived the true meaning of our cases upon that subject. The earliest case is *Cowan v. Johnson*, a case nowhere reported in our state reports, but its contents are set out with sufficient fullness by Special Judge Ewing in the case of *Nichol v. Davidson Co.*, 8 Lea, at page 395. It is there said: "This was a case arising under conveyances made after the adoption of the constitution and the statute of 1870, in regard to homestead. In that case, husband and wife made a conveyance to the wife's father, and he afterwards reconveyed to the wife. Both of these conveyances were held to be void as to creditors, and homestead was denied the wife. Judge Lea, who gave the opinion in the case, says: 'When the wife executed and

acknowledged the deed, although fraudulently done by her husband, she thereby parted with the right to homestead, and the fact that the land was fraudulently conveyed back to her will not entitle her to homestead." Judge Cooper refers to this case in *Gibbs v. Patten*, 2 Lea, at page 188, and there states it as a case wherein the husband and wife joined in a fraudulent conveyance. He refers to it as the case of *McClung v. Johnson*. Judge Freeman refers to the same case in *Ruohs v. Hooke*, 8 Lea, at page 305, under the title of *Cowan v. Johnson*, and describes it as a case "where the wife joined in a conveyance to a third party, and such third party then conveyed to her, such conveyance having been fraudulent." We are referred to *Gibbs v. Patten*, supra, as a case holding that a fraudulent conveyance made by the husband to the wife will destroy the homestead right. A careful examination of the case will show that what is there stated upon the subject was dictum. The real point in judgment was whether a certain 12-acre tract, confessedly the subject of a fraudulent conveyance, could be subjected to complainant's debt, or whether it was part of the adjoining homestead. The court said that it was not a case for the extension of the doctrine of occupancy by relation in favor of the homestead. That was the ground of the decision. The land which really was occupied as a homestead was not sought to be reached by the bill, nor was it the subject of any conveyances, fraudulent or otherwise. The next case is *Ruohs v. Hooke*, supra. In that case it appeared that the husband had fraudulently conveyed to the wife a tract of land for the purpose of hindering and delaying his creditors. The chancellor denied the right of homestead; and it appears from the opinion that counsel for the complainant creditors relied upon *Cowan v. Johnson*, but the court held that it did not control, for the reason, mainly, that the constitution provided that the homestead could be alienated only by the joint conveyance of the husband and wife, and that the wife, being the donee in the deed, had not joined in it, in the sense of the constitutional requirement. It was also placed on the grounds that the wife did not participate in the fraud, being the mere recipient of the husband's bounty, accepting it without dissent; also, that it was but a fraud in law, the deed being set aside, because it was a gift by the husband to the wife, which he was unable to make by reason of his indebtedness. The chancellor was therefore reversed, and the homestead allowed. The next case we are referred to is *Nichol v. Davidson Co.*, supra. That, however, was a case resting under the act of March 12, 1868, under which the husband could convey the homestead without consent of the wife. It therefore does not apply. There is still one other case,—*Howell v. Thompson*, 95 Tenn. 396, 401, 32 S. W. 309. That was also a case wherein the deed was made by the husband to the wife. The court

said she took the conveyance in good faith, and added: "We can see, therefore, no fraudulent intent on her part in taking a deed to this property which would now operate to estop her to claim homestead out of it." "Indeed," the court adds still further, "if this conveyance was in fact fraudulent, she would be entitled to claim her homestead right in the property conveyed;" citing, with approval, *Ruohs v. Hooke*, supra.

On at least two of the grounds stated in *Ruohs v. Hooke*, we must hold that the homestead was not lost by these conveyances: First, because these conveyances were held void merely for fraud in law, and not fraud in fact; and, secondly, because, as to the Douglass deed, there was no joinder of the husband and wife, and as to the Albersson deed, although the husband and wife joined, yet there was an express reservation of the homestead.

The theory was advanced in the argument that, if the wife were living, she might be able to claim homestead; but inasmuch as the husband was the guilty party of the fraud, and as he was the person now claiming, he must be estopped. The authorities in this state place beyond controversy the proposition that the homestead can be lost neither as to the husband nor wife by a conveyance made by the husband alone. This proposition was first announced in *Kennedy v. Stacey*, 1 Bart. 220. It there appeared that John and Joseph Kennedy conveyed by deed a tract of land, of which they were jointly seised, to the defendant Stacey, to secure their creditors. They were at the time married men and heads of families, residing upon the land. Their wives did not join in the conveyance. The two Kennedys filed their bill, claiming the benefit of the homestead exemption. In an amended bill their wives were brought in and joined as complainants, seeking the same relief. The relief was granted, on the ground that the homestead could not be alienated except by the joint conveyance of the husband and wife. The same doctrine was announced in the case of *Mash v. Russell*, 1 Lea, 543. The syllabus of that case truly expresses the contents of the opinion, and it is as follows: "The deed of husband and wife, without the privy examination of the wife, conveying land then occupied as a homestead, the legal title to which is in the husband, will not carry the homestead right either against the husband or wife, but will vest the grantee with the husband's interest in reversion expectant on the termination of the homestead estate." To the same effect, see *Christian v. Clark*, 10 Lea, 630, 636, and *Boyett v. Riddeck*, cited in 16 Lea, and contents stated on page 471, and *Smith v. Carter*, 16 Lea, at page 530. See also, *Jarman v. Jarman*, 4 Lea, 671, cited with approval in *Collins v. Boyett*, 87 Tenn. 327, 10 S. W. 512, and in *Wilson v. Morris*, 94 Tenn. 547, 560, 561, 29 S. W. 966, all resting on the same principle,—that the homestead

can not be alienated except in the manner laid down in the constitution.

It seems to have been supposed by complainants that the loss of the homestead was visited upon the husband and wife as a sort of penalty for the commission of fraud. It must be admitted that the language used by Judge Cooper in *Gibbs v. Patten*, supra, and by Judge Freeman in *Ruohs v. Hooke*, supra, justifies this theory to some extent. We apprehend, however, that the true theory upon which a loss of homestead should be based in the case of a fraudulent conveyance is that if such a conveyance is joined in by the husband and wife, and duly executed, under the forms laid down for the execution of conveyances by married women, then the very conveyance itself satisfies the language of the constitution, without regard to whether there was fraud, or to the contrary. The crucial principle is that the homestead cannot be lost through a conveyance, unless that conveyance be executed by both the husband and wife while that relation exists. If that principle is satisfied by a joint conveyance, then the homestead passes, regardless of the question of fraud. The real debate over this principle has been in cases where the conveyance was made by the husband and wife to a third person, and that third person reconveyed directly to the wife, and then attack was made by creditors, and the conveyance set aside. It has been supposed by some that the setting aside of the conveyance would restore the homestead to the wife. It seems to us, however, that the better opinion would be that the homestead passed upon the first conveyance, and that a subsequent reconveyance to the wife would not restore the homestead right, inasmuch as the existence of the homestead right depends upon the husband's title; and, further, that the fact of the conveyance being set aside by a creditor for fraud would not alter the situation, for the reason that if, in general terms, it is spoken of as being set aside, yet, in true legal thought, the conveyance remains standing so far as the husband and wife and participating third person or conduit are concerned, and is only set aside in so far as it is necessary to satisfy the creditors' debt. It would then appear that, instead of saying that a conveyance in fraud of creditors waived the homestead, the better statement of the rule would be that a joint conveyance by the husband and wife to a third person satisfies the constitutional requirement, and passes the homestead right, and that that right does not revive upon a successful attack made upon the instrument for fraud by a creditor. But what may be the true legal result upon the subject just discussed in the last paragraph we need not now undertake to determine definitely, because we have no such case before us. Here, as already stated, the husband and wife did not join in the Douglass conveyance, nor did they undertake as to the Alberson deed to make any conveyance of the home-

stead at all. This is sufficient ground upon which to rest our decision, without adverting to the other ground equally apparent in this case, that the two conveyances were set aside merely for legal, not actual, fraud. We think the supreme court intended, in the language in which we have last quoted from the 10 Lea Case, above, to indicate as the true ground that upon which we have placed this decision. The result is that the two deeds above referred to did not destroy the homestead right of either H. D. Brier or his wife, and the chancellor's decree must therefore be reversed, and the sale of the real estate set aside, and the cause remanded to the chancery court for resale of the property, subject to the homestead rights and for further proceedings. The costs of the appeal will be paid by Isaac Faller, Sons & Co., the Charles Brown Grocery Company, and George McAlpin & Co., the creditors upon whose motion the order for the sale of the homestead was made.

WILSON and BARTON, JJ., concur.

Affirmed orally by supreme court, November 13, 1897.

TREADWELL et al. v. PITTS et al. (two cases).

(Supreme Court of Arkansas. Nov. 27, 1897.)

JUDGMENT—RES JUDICATA.

Where an assignee of defendant in an attachment suit is not a party, a holding therein that the evidence does not show that the assignment was fraudulent in fact does not prevent plaintiff from putting in the same evidence on the subsequent trial of the same issue, raised by an interplea filed by the assignee.

Bunn, C. J., dissenting.

Appeals from circuit court, White county; Hance N. Hutton, Judge.

Two actions by Treadwell & Co. against Pitts, Shoffner & Co., in the second of which W. H. Lytle filed an interplea, claiming the attached property as assignee for benefit of creditors of defendants. From the judgment in each case the plaintiffs appealed, and the two cases were heard together. Reversed.

These two cases are heard together; No. 3,245 being a suit in attachment by appellants against the defendants; and No. 3,236 being a trial of an interpleader, really in the same suit, where Lytle, the assignee named in a deed of assignment, claimed, under said deed, the property taken in the attachment. The attachment was tried first, the court sitting as such to hear and determine the issues in the same. The grounds of the attachment were two, although stated in one paragraph, to wit, that the defendants "have sold and conveyed, and otherwise disposed of, their property, with the fraudulent intent to cheat, hinder, and delay their creditors, and are about to sell and dispose of the same with such fraudulent intent," and "that said defendants have fraudulently removed a material part

of their property out of the state, not leaving enough therein to satisfy the claim [claims] of said defendants' creditors." To sustain their contention, the plaintiffs introduced in evidence a certain deed of assignment for the benefit of creditors, executed by defendants to W. H. Lytle, as assignee, on the 24th day of January, 1896, and also the inventory taken by said assignee, and filed as a list of the property conveyed to him, and then sundry witnesses, by whom it was shown, in effect, that some time previous to the making of the assignment, and when the defendants were in a condition of insolvency, they had removed cotton out of the state, to the city of St. Louis, not leaving enough property in the state to satisfy the claims of their creditors, and to show that the attorney's fee provided for was for services other than advice and work in and about the preparation and drawing of the deed of assignment; that certain notes of defendant firm were disposed of without adequate consideration, and in contemplation of, and as part of, the assignment; that a note, the individual property of W. S. Lay, one of the defendants, was withheld from the assignment; and that, about the time the deed of assignment was being prepared, said Lay executed a deed of trust on a large amount of his individual property to secure an indebtedness to his wife,—said deed of trust calling for an excessive indebtedness, if any existed. During the progress of the trial, plaintiffs asked witness (one of the defendants) if he had not told the bookkeeper of his firm that they were worth \$40,000 or \$50,000, which question, being objected to, was ruled out by the court, to which ruling plaintiffs excepted, and saved their exceptions. The court sustained the attachment on the ground that defendants had removed property out of the state, when they were in a condition of insolvency, not leaving enough in the state to satisfy the claims of their creditors; and, subsequently during the same term, on motion of defendants, changed the findings so as to show that not only was the attachment sustained on said ground, but on that only, and that it was not sustained on the other ground named in the affidavit for the order of attachment. Upon this case, No. 3,245, or, rather, upon this first part of the whole case, we have only to say that we find no reversible error in the judgment of the court.

Case No. 3,236 is an intervention or interpleader by W. H. Lytle, who claimed the attached property under the deed of assignment in which he was named as assignee, which was shown to be prior to the lien of the attachment. His original claim, filed before the attachment suit was tried, was demurred to by plaintiffs on the general ground that it did not state facts sufficient to constitute a cause of action; but after the attachment was tried, and before this demurrer was disposed of, interpleader filed an amended interplea, in which the grounds of his claim were enlarged so as to incorporate therein the judgment and

modified judgment of the court in the attachment suit; and to this amended interplea the plaintiffs also interposed a general demurrer, coupled with their answer thereto, and this demurrer was by the court sustained, but without further change in the pleadings or proceedings to conform to the new state of things. Both parties announcing "ready for trial" on the issues made by the interplea and the answer, a trial was accordingly had, resulting in a verdict by the jury in favor of the interpleader. A new trial was asked, and refused by the court, and the appeal taken to this court. To sustain his cause, the interpleader, Lytle, introduced himself as a witness; and as a part of his testimony, over the objection of the plaintiffs, he was permitted to read in evidence the deed of assignment, and the record of the proceedings and judgment in the attachment suit. He also testified as to the execution of his bond as assignee, and the taking of the inventory, during the progress of which the goods were seized under the writ of attachment by the sheriff, at the instance of plaintiff. About all of which there seems to have been no controversy, except as to the admission of the assignment and the record of proceedings in the attachment in evidence. Upon this, interpleader rested, and plaintiffs then offered to adduce in evidence the same testimony that they had introduced in the attachment suit, in so far as the same would tend to show that the assignment was in fact fraudulent,—that is to say, the evidence as to provision for attorney's fees, the evidence as to the notes withheld, and as to the claim of Lay's wife, and the deed of trust given to secure the same; and this was refused by the court on the ground that it was identically—at least, substantially—the same testimony as plaintiffs had adduced in the attachment suit for the purpose of invalidating the assignment, and, as the court had in that suit held the testimony insufficient for that purpose, it would not now be admitted, for substantially the same purpose, by the same party. To the ruling of the court, plaintiffs excepted, and their exceptions were noted of record; and after verdict and judgment for interpleader, and motion for new trial made and overruled, plaintiffs excepted and appealed.

Grant Green, Jr., John T. Hicks, and W. B. Smith, for appellants. J. M. Moore, for appellees.

PER CURIAM. We held in the recent case of *Avera v. Rice*, 42 S. W. 400, that the assignee and interpleader, who was not a party to the attachment suit, was not bound by the judgment therein, so far as the issues made by and upon his interplea were concerned, but that in regard thereto he was entitled to a full hearing, and was privileged to make out his case, notwithstanding any adverse judgment in the attachment suit. A majority of the court are of the opinion that the principles of that case apply to the one now

consideration, and that it matters not that the rehearing of the evidence is now demanded by the plaintiff, while in the former case the demand was by the interpleader,—the principle is the same, under the rule that estoppels must be mutual. The lower court having committed an error in this regard, its judgment in that particular is reversed, and the cause remanded for a new hearing on the interplea.

BUNN, C. J., nonconcurring in the judgment of reversal.

### GALE v. HARP.

(Supreme Court of Arkansas. Nov. 27, 1897.)

BILLS AND NOTES—FAILURE OF CONSIDERATION—STATUTE OF FRAUDS—PLEADING.

1. Where the consideration for a note was a contract by the payee that a third person, then indebted to the payee, would perform a certain contract with the payor, and said third person failed to perform his contract, the consideration of the note failed, and it was a defense.

2. Where the consideration of a note is the parol promise by the payee, who makes the promise to subvert his own purpose, that a third person will perform a certain contract with the payor, the promise is not within the statute of frauds.

3. Where a pleading does not allege whether a contract is in writing, and it is required to be in writing by the statute of frauds, it is presumed to be in writing.

Appeal from circuit court, Baxter county; H. C. Allen, Special Judge.

Action by R. L. Harp against J. Morton Gale. There was an order sustaining a demurrer to answer, and from a judgment for plaintiff defendant appeals. Reversed.

The following is the answer to which the demurrer was sustained: "Comes the defendant, and denies that he owes the plaintiff any sum whatever upon the demand sued on, because, he says, the consideration of said note has failed; that the debt for which said note was given was first contracted by and between this defendant and one Frank Cornell, in which contract this defendant purchased from said Cornell one engine and boiler, saw and sawrig, and gin stand and fixtures; that, by the terms of said contract and purchase, Cornell guaranteed said mill and machinery to be in good running order, and agreed and undertook to furnish defendant his boat to use (free of charge) in transporting said property from its former situation to the farm of the defendant, at the mouth of North Fork, in Baxter county, Arkansas, and put the same in good running order, which contract is herewith filed, and marked 'Exhibit A' [unnecessary to be set forth herein]; that said Cornell failed and neglected to furnish said boat as agreed, and load the same on said boat as agreed, and failed to put said machinery in good running order; that said machinery was not in good running order, as represented by said Cornell, and, though defendant has expended

\$100 thereon, the same is not yet in good running order; that said Frank Cornell falsely and fraudulently represented to defendant that the same was good machinery and in good running order; that by such representations he induced this defendant to make such purchase; that by reason of the failure of said machinery to be as represented, and by reason of the failure of said Cornell to do as agreed in his contract of purchase and sale, this defendant has been put to his expense of \$100 in repairing said machinery, and lost the ginning season of 1894, to his loss, expenditure, and damage in the sum of \$300. Wherefore he says that he has a defense against said demand as against said Frank Cornell, because he has and would be entitled to recoup and counterclaim as against him the said sum of \$300; that said Cornell is wholly insolvent. He further says that, by reason of such fact, the note sued on is without consideration, fraudulent, and void, because, as he further says, that said plaintiff, R. L. Harp, took said note in payment of an antecedent debt due to him from said Cornell, and took the same with full knowledge and notice of the contract of sale and purchase aforesaid, and with full knowledge and notice of the obligations of the said Frank Cornell thereunder, and agreed to and with this defendant, and undertook to guaranty, and did guaranty to him, that said Frank Cornell should and would in all things conform to and execute the conditions of his contract with this defendant in and about said sale. Wherefore, he says, plaintiff ought not to maintain this action. He therefore prays judgment for costs and all legal relief."

Horton & South, for appellant.

HUGHES, J. It is the judgment of the court that the circuit court erred in sustaining the demurrer to the answer of the appellant. The answer pleaded failure of consideration for which the note sued on was executed. The consideration which moved the appellant to execute his note to the appellee was that the appellee promised and agreed with the appellant that Cornell should and would in all things conform to and execute the condition of his contract with the appellee. This Harp wholly failed, according to the answer, to do. The appellant received no consideration whatever from Harp, the appellee, for the execution of the note. The note was executed to appellee for a debt which Cornell owed appellee. The complaint alleges that Cornell was insolvent. If the appellee can make the appellant pay this note, he will collect a demand from his insolvent debtor, and at the same time avoid the performance of his contract and agreement made with the appellee, which was the consideration that induced the appellee to execute the note to him, according to the allegations of the answer which upon demurrer are taken as true.

The promise and agreement of Harp, the



appellee, made to and with Gale, the appellant, were not within the statute of frauds, though they may not have been in writing. It was not a collateral undertaking, according to the decision in *Chapline v. Atkinson*, 45 Ark. 67, which is to the effect that "a parol promise to pay the debt of another is not within the statute of frauds, when it arises from some new and original consideration of benefit or harm, moving between the newly-contracting parties." *Leonard v. Vredenburg*, 8 Johns. 29; *Kurtz v. Adams*, 12 Ark. 174; *Hughes v. Lawson*, 31 Ark. 613. In *Lemmon v. Box*, 20 Tex. 329, it is held that "whenever the main purpose and object of the promisor is, not to insure for another, but to subserve some purpose of his own, his promise is not within the statute of frauds, although it may in form be a promise to pay the debt of another." 1 Brandt, Sur. § 70. The answer does not state whether the promise and agreement by Harp to appellant were in writing or not. This was not necessary, although, if it were a contract required by the statute of frauds to be in writing, it would be necessary to prove that it was in writing. Id. § 90. "The general rule at common law is that a contract not described as made by writing obligatory or instrument under seal will be presumed to have been by parol; but the presumption does not extend to the effect that it was verbal." *Hurlburt v. Manufacturing Co.*, 38 Ark. 598. The contract of the appellant alleged to have been made with appellee is not alleged in the answer to be in parol, and, if it were such as is required by the statute of frauds to be in writing, the presumption is that it is so. *McDermott v. Cable*, 23 Ark. 200. The judgment of the circuit court is reversed, with directions to overrule the demurrer, and the cause is remanded.

Appeal from circuit court, Franklin county; Jephtha H. Evans, Judge.

Action by W. L. Huggins and others against the Little Rock & Ft. Smith Railway Company and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Dodge & Johnson, for appellants. Geo. A. Mansfield, for appellees.

HUGHES, J. This suit was brought under the provisions and according to the procedure provided in the act of April 15, 1891, being an act to establish fencing districts. The entire complaint is as follows: "The plaintiffs, W. L. Huggins, A. Quesenberry, and J. M. Pendergrass, as the fencing board of fencing district No. 1, for cause of action say that an assessment was made, and the taxes extended, as required by law, against the land situated in said fencing district; that said assessment has not been paid by the owners of the real estate situated in said district, and so assessed, described in Exhibit A, filed herewith as a part of this bill. Wherefore plaintiff prays that said delinquent real estate and tracts and parcels of land be severally charged with the amount of taxes, penalty, and costs rightfully chargeable against them, as shown by said Exhibit A; that the same be declared a lien thereon; and that said real estate, or so much thereof as may be necessary, be ordered sold for the payment of said taxes, penalty, and such costs of this action as may be rightfully chargeable against each of said delinquent owners of said real estate; and for all other proper relief." There are several defenses set up in the joint and several answers of the railway company and B. F. Snodgrass, most of which we deem it unnecessary to mention particularly or discuss. Among the defenses urged by the railway company in its answer, it says: "And it further says that the object of the law in creating fencing districts was obviously to protect the crops and farms of persons owning lands and farms within the bounds of such fencing districts, and it was obviously not the intention of the law to assess a tax on railroad tracks, as is attempted to be done in this case, which is manifestly unjust, for the reason that, as shown by Exhibit A to the complaint, 2.80 miles of track or line of this defendant, which embraces only three or four acres of land, is sought to be assessed at \$21,000, which is many times the valuation of any similar number of acres of land in the said so-called 'Fencing District No. 1'; and, besides, the land of this defendant, or its track, could not be benefited by the said fencing district, and it is unjust and unequal to burden it by any such attempted assessment and taxation. And the said B. F. Snodgrass, further answering, says that, there being no valid or legal assessment against its co-defendant, the Little Rock and Fort Smith Railway, on its 'lands' which are embraced within the bounds of the so-called 'Fencing

LITTLE ROCK & F. S. RY. CO. et al. v.  
HUGGINS et al.

(Supreme Court of Arkansas. Nov. 13, 1897.)

FENCING DISTRICT LAW—RAILROADS—DELINQUENT  
TAX SALE—DESCRIPTION OF PROPERTY.

1. The fencing district act does not apply to railroads, it being provided in Sand. & H. Dig. §§ 1183, 1184 (parts of said act), that the word "land," whenever used in the act, shall have the same meaning as the words "real estate" in the act providing for collection of state, county, and city revenues, and that, as soon as the fencing district board shall have formed their plan for the district, and ascertained the cost of fencing, it shall report the same to the county court, which shall assess the cost on the land in the district, assessing each parcel of land according to its value, "as shown by the last county assessment on file in the office of the county clerk"; the assessment of railroads being as entireties by state officers, and not appearing on said county assessment.

2. Description of land in order for sale for delinquent fencing district tax, as "frl. spt. section 12, township 9, range 29, 29.89 acres," and "N. E. frl. spt. frl. section 12, township 9, range 29, 12 acres," is insufficient.

trict No. 1,' the assessment against the lands of him, the said B. F. Snodgrass, is unconstitutional, illegal, and void, since all lands in such district are required to be assessed and taxed, and, since the lands of co-defendant cannot be taxed, because not assessed as the law requires in such cases, so neither can the lands of him, the said B. F. Snodgrass, be taxed. Wherefore these defendants pray to be hence dismissed, with their costs."

Section 1183 of Sandels & Hill's Digest (a part of the fencing district act) provides that "the word 'land' wherever used in this act, shall have the same meaning and signification as are attached to the words 'real property' in the act providing for the collection of state, county and city revenue." Section 1184, Id. (part of the same act), provides that: "As soon as the said board [fencing district board] shall have formed said plan [for the district] and shall have ascertained the cost of fencing, it shall report the same to the county court, which shall at once, by order, assess said cost upon the land in said district, assessing each parcel of land according to its value, as shown by the last county assessment on file in the office of the county clerk." A different and special mode of ascertaining the value of a railroad for purposes of taxation is provided for in the statute. The assessment is made by a board of railroad commissioners, consisting of state officers, and the road is assessed as an entirety, and in fixing its value the board of railroad commissioners may consider the value of the franchise of the road. We think it clear that the act in question was never intended to apply, and cannot be made, by any fair contention, to apply, to railroads.

It appears from Exhibit A to the complaint—the copy of the delinquent tax list for fencing district No. 1 in Franklin county—that the lands of B. F. Snodgrass ordered to be sold to pay the fencing district tax are described in the order as "frl. spt. section 12, township 9, range 29,—29.89 acres," and as "N. E. frl. spt. frl. section 12, township 9, range 29,—12 acres." These descriptions are indefinite and uncertain, and it was error to order a sale upon such descriptions.

It is contended that the act itself is unconstitutional, but, as we can dispose of this case without deciding that question, we think it is proper to do so. As to the duty of courts to decide questions affecting the validity of acts of the general assembly, Judge Cooley says: "Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. 'While courts cannot shun the discussion of constitutional questions, when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*.'"

Thus presented and determined, the decision

carries weight with it to which no extrajudicial disquisition is entitled.' In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable." Cooley, Const. Lim. p. 196; Railway Co. v. Smith, 60 Ark. 240, 29 S. W. 752. The court erred in decreeing that the "main line" of the railway company was liable to assessment and taxation under the act of April 15, 1891, providing for the establishment of fencing districts, and ordering the same sold. The court erred also in condemning the lands of B. F. Snodgrass to be sold to pay the tax assessed thereon by the county upon the description of same as aforesaid. For the errors indicated, the judgment is reversed, and remanded for a new trial.

#### VINSON v. FLYNN.

(Supreme Court of Arkansas. Nov. 27, 1897.)

LANDLORD AND TENANT—ILLEGAL DISPOSSESSION—REMEDIES—DAMAGES—MALICIOUS PROSECUTION—JURISDICTION OF JUSTICE.

1. Evidence of a claim by the tenant to a part of leased premises is not admissible in an action for damages for unlawful dispossession of the tenant by the landlord.

2. Where one is in possession of land without right, and has been turned out by the owner, his only remedy is as for forcible entry and detainer.

3. Where one seeks to recover damages as for trespass on being unlawfully dispossessed of land, the owner can show his title as a defense against the redress sought.

4. In an action for damages by the tenant for unlawful dispossession, it is error to instruct that if the landlord "wantonly and maliciously, in utter disregard of the rights of the" tenant, "forcibly put him out of the possession of the premises," the tenant could recover punitive damages, where the tenant held the demised premises after the expiration of the lease without right, and the evidence showed that the landlord was guilty of no malice in evicting him.

5. An action for malicious prosecution will not lie if the subject-matter of the prosecution was not within the jurisdiction of the court in which the prosecution was instituted and carried on.

6. A justice of the peace has no jurisdiction of the subject-matter of an action brought by the landlord to obtain possession of land occupied by a tenant, and his writs issued therein are void.

7. Where a landlord takes possession of land, as against the tenant, by virtue of a void writ, he stands in the same position as though he had acted without a writ, and is not liable for malicious prosecution.

8. In an action by a tenant against his landlord for damages for dispossession by means of a void writ, it is error to instruct, on the theory of malicious prosecution, as follows: "If you find from the proof \* \* \* that the plaintiff was unlawfully dispossessed, you will find for the plaintiff;" that the writ under which the

landlord acted was void; that malice can be inferred if the defendant acted from improper or indirect motives; that if defendant acted without authority of law, in direct disregard of the rights of plaintiff, in dispossessing him, punitive damages can be assessed; and that injury to feelings, and inconvenience, may be considered in fixing damages.

9. In an action for damages for malicious prosecution, it must be shown that the action complained of was prosecuted without probable cause, before a verdict can be returned against defendant.

10. Where a landlord, in evicting a tenant and removing his goods, commits unnecessary injury to his person or goods, he can recover the damages occasioned thereby.

Hughes, J., dissenting to paragraph 5.

Appeal from circuit court, Woodruff county; Grant Green, Jr., Special Judge.

Action by Dock Flynn against T. C. Vinson. From a judgment for plaintiff, defendant appeals. Reversed.

M. T. Sanders, for appellant. P. R. Andrews and N. W. Norton, for appellee.

BATTLE, J. This action was instituted by Dock Flynn against T. C. Vinson to recover damages. He alleges that he and his family were residing on a place known as the "Upp Place," as tenants of the defendant, and that the defendant unlawfully and maliciously entered and ejected him and his family from the place, and threw his goods and chattels in the road, to his damage in the sum of \$500.

The defendant denied these allegations, and alleged that the term of plaintiff as tenant had expired, and that he had refused, after legal notice and demand, to deliver possession of the place to his landlord, the defendant, and that his family and goods were removed from the place, by the constable of his township, in obedience to legal process, in a prudent and careful manner, without the slightest insult or injury to his family, or damage to his goods.

The facts, as shown by the evidence adduced in a trial before a jury, were substantially as follows: In September, 1892, Vinson rented the Upp place to Flynn for the term of two years. After the termination of the lease, in 1894, Vinson demanded possession of the place, in writing, and Flynn refused to comply with his demand. He (Vinson) thereupon consulted two or more persons as to his right to sue for possession before a justice of the peace. They advised him that he could not do so. Not content with their advice, he applied to a justice of the peace, who, after an examination of the statutes, informed him that he had jurisdiction in such cases. He thereupon instituted an action against Flynn for the place before the justice of the peace, and sued out a writ therein, directed to the constable of the township, and commanding him, if the plaintiff gave security according to law, to deliver possession thereof to Vinson without delay. Vinson gave security as required, and the constable executed the writ in his presence, by turning Flynn and his family, consisting of a wife

and three children (one a babe), out of the house upon the premises, and by removing their goods and chattels off the place. This was in January, 1895. The weather at the time and place was cold, and snow was upon the ground. One witness testified that the goods and chattels were handled roughly by the constable, and were thereby injured, but others testified to the contrary.

Evidence was adduced on the trial, over the objections of the defendant, which tended to show that Flynn acquired, before he was dispossessed, a claim of some kind to a part of the Upp place,—the demised premises.

The court, over the objections of the defendant, instructed the jury as follows:

"(2) If you find from the proof, by a preponderance, that the plaintiff was unlawfully dispossessed, you will find for the plaintiff.

"(3) If you find for the plaintiff, he is entitled to either actual damages, or actual and punitive damages, according to whether you find the unlawful act was or was not done with malice. The damages you assess must not exceed the amount claimed in the complaint, in such an amount as may be sustained by the proof.

"(4) 'Malice,' in the sense in which the word is used in civil actions, is not confined to spite or hatred, but consists of a violation of law to the prejudice of the plaintiff, done willfully, or done with indifference as to whether it is right or wrong, and from being actuated by improper motives.

"(5) A justice of the peace has no jurisdiction to issue writs of possession for real estate, and, if he does issue such writ, it is void and without authority of law.

"(6) The burden is upon the plaintiff to prove malice, but malice may be inferred from circumstances proven; and if you find from the evidence, by a preponderance, that the defendant acted from improper or indirect motives, and without authority of law, malice on the part of the defendant may be inferred.

"(7) 'Punitive damages' means such an amount, as it is called, 'smart money,' or punishment for maliciously violating the legal rights of another; and if you find from the evidence that the defendant wantonly and maliciously, in utter disregard of the rights of the plaintiff, forcibly put him out of possession of the premises, then you may assess his damages at such sum as will be a punishment to him, and deter others from like actions. And in fixing the amount you may consider the vexation and injury to his feelings—his inconvenience—on account of the wrong done the plaintiff."

The plaintiff recovered a verdict and judgment against the defendant for \$150, and the defendant appealed.

At common law no civil action can be maintained against the landlord by the tenant for forcibly taking possession of his land, which constituted the demised premises, after the expiration of the tenancy, unless "

was an excess of force, and then only for the excess. There was no remedy by which he could be compelled to restore the possession forcibly taken. The law in this manner held forth strong temptations to the landlord to retake his land by force from the tenant refusing to deliver the same after the term of his lease had expired. Such actions were calculated to provoke breaches of the peace. To prevent this the statute was enacted which prohibits all persons from taking possession of land, and detaining or holding the same, except where an entry is given by law, and then only in a peaceable manner, and to protect the actual possession, not to determine the rights of property, provides the remedy of forcible entry and detainer. To restore the possession to him, who has been turned out by force, as he held it before, until the right to the possession can be adjudicated, this remedy is designed; its object being, as said by Mr. Justice Eakin, "to prevent any and all persons, with or without title, from assuming to right themselves with strong hand, after the feudal fashion, when peaceable possession cannot be obtained, and to compel them to the more pacific course of suits in court, where the weak and strong stand upon equal terms." *Littell v. Grady*, 38 Ark. 594; *Hall v. Trucks*, Id. 257; *McGuire v. Cook*, 13 Ark. 448; *Anderson v. Mills*, 40 Ark. 192; *Johnson v. West*, 41 Ark. 535; *Logan v. Lee*, 53 Ark. 94, 13 S. W. 422.

But a party who was in possession of land without right, and has been turned out by the owner, has no civil remedies, except those provided by statute. They are designed for the protection of his possession against force. If he abandons them, and seeks to recover damages for a trespass, then he must rely on his right and claim to the property which has been injured. The owner who has dispossessed him is then remitted to his title, and can use it to show that he has not been injured, and is not entitled to redress.

In New York the statutes at one time provided redress for dispossession by force, by an indictment for forcible entry and detainer. In *People v. Leonard*, 11 Johns. 508, the court said: "This was a trial for a forcible entry and detainer. The complainant, on opening his case, proposed to confine his proof to his possession only; but the judge ruled that the complainant must prove in himself an estate in fee, or an estate for years, at least, that the title was in question, and that the complainant must give the like evidence of title as was required in ejectment. Admitting the complainant must give the like evidence of title as is required in ejectment, he offered to show what would have entitled him to recover in ejectment. If the lessor shows himself in the peaceable possession of land, and that he was forcibly dispossessed, it will be sufficient to entitle him to recover possession, and the defendant will not be permitted to set up title to defeat it. He must restore the party to his possession, wrongfully taken

from him, in the first place. But I apprehend there was a mistake in saying the title was in question. In the case of *People v. King*, 2 Caines, 98, on a motion to quash conviction, and for restitution, Kent, C. J. says: 'We cannot decide on the title or right of the parties. The complainant has nothing to do with that. He must give up the possession irregularly obtained, put the defendant in statu quo, and then proceed legally to the question of title.' In the case of *People v. Runkle*, 8 Johns. 363, Spencer, J., says: 'The court cannot, on this indictment, inquire into the title. Right or title to the property is no excuse. The statute was made to prevent persons from doing themselves right by force.' And the court, in giving its opinion, seems to assume that possession is enough for the complainant to show."

In a later case (*Jackson v. Farmer*, 9 Wend. 201), Mr. Justice Nelson, speaking for the court, said: "It was decided by this court in *Hyatt v. Wood*, 4 Johns. 150, and the same principle was again applied in *Ives v. Ives*, 13 Johns. 235, that a person having a legal right of entry on land may enter by force, and though indictable for a breach of the peace at common law, or under the statute for a forcible entry and detainer, he is not liable to a private action for trespass or damages at the suit of a person in possession without right, and who is thus turned out of possession. This position, apparently harsh and tending to the public disturbance and individual conflict, is abundantly supported by authority, and must be considered the law of the land. \* \* \* It was the abuse of this summary power to right one's self by entry, where the right of entry existed, which gave rise to the numerous English statutes against forcible entry and detainer, of which our old act was substantially a copy; and these acts, and the common-law remedy by indictment, are to be found the only protection of the property thus forcibly dispossessed. They punish criminally the force, and in some cases make restitution of the possession. *People v. Leonard*, 11 Johns. 508; *People v. Nelson*, 13 Johns. 340. But, so far as the civil remedy is concerned, there is not but what is afforded by those acts."

The same rule obtains when the statutory remedy for forcible ejection from land is by a civil action of forcible entry and detainer. The principle in both cases being the same. *Kilvet v. Meyer*, 24 Mo. 107; *Fuhr v. Dean*, Mo. 116; 4 Am. Law Rev. 420 et seq., see cases cited.

In the case we have under consideration, the appellee was a tenant of appellant. The term of the lease had expired. The former could not dispute the title of the latter to any part of the demised premises without surrendering possession. Before he could do so, he must surrender the whole, regardless of the title of his landlord. *Miller v. Turney*, Ark. 385; *Clemm v. Wilcox*, 15 Ark. 10; *Bryan v. Winburn*, 43 Ark. 28; *Hershey*

Clark, 27 Ark. 527; Hughes v. Watt, 28 Ark. 153. Yet the lower court instructed the jury that if they found from the evidence that appellant "wantonly and maliciously, in utter disregard of the rights of the" appellee, "forcibly put him out of the possession of the premises," then they might find for the appellee, and "assess his damages at such sum as will be a punishment to" appellant, "and deter others from like actions; and in fixing the amount" they might "consider the vexation and injury to his feelings, and his inconvenience, on account of the wrong done." This was an improper instruction in this action, and it was prejudicial to appellant.

The jury were told by the circuit court that "a justice of the peace has no jurisdiction to issue writs of possession for real estate, and, if he does issue such writ, it is void and without authority of law"; and in this connection they were further instructed that, if they found that the appellant wantonly and maliciously, in utter disregard of his rights, forcibly evicted him, then they might award him exemplary damages. Taking these and all other instructions given, as a whole, we see no theory upon which they could have been based, unless it be there was evidence to show that appellant was guilty of a malicious prosecution. Upon that theory they should not have been given.

Hare and Wallace, in their notes to American Leading Cases, after a review of the cases upon what is necessary to sustain an action for malicious prosecution, say: "The gist of the action above considered is the putting of legal process in force, regularly, for the mere purpose of vexation, annoyance, or injury; and the inconvenience or harm resulting, naturally or directly, from the suit or prosecution, is the legal damage upon which it is founded." *Munns v. Dupont*, 1 Am. Lead. Cas. (5th Ed.) 279, Fed. Cas. No. 9,926. In *Sutton v. Johnstone*, 1 Term R. 511, Lords Mansfield and Loughborough said, "The essential ground of this action is that a legal prosecution was carried on without a probable cause." That being true, the action cannot be maintained on account of a prosecution or suit, the subject-matter of which was without the jurisdiction of the court in which it was instituted and continued. In that case all process issued, orders made, judgments rendered, and proceedings had, would be absolutely void; and the action of the parties would stand as though unattended by any judicial act, process, or proceeding, and completely divested of judicial authority, and the parties would be liable as they would have been had they acted without the authority, real or pretended, of any officer or court. We are aware that some courts have held that an action for a malicious prosecution before a court without jurisdiction of its subject-matter can be maintained, if the essentials are shown, but we think the better opinion is that it cannot be sustained. *Bixby v. Brundige*, 2 Gray, 129; *Whiting v.*

*Johnson*, 6 Gray, 246; *Painter v. Ives*, 4 Neb. 122; *Braveboy v. Cockfield*, 2 McMullan, 270, 273; *Turpin v. Remy*, 3 Blackf. 210, 216; *Marshall v. Betner*, 17 Ala. 832, 836; *Munns v. Dupont*, 1 Am. Lead. Cas. (5th Ed.) 259, Fed. Cas. No. 9,926; 1 Jag. Torts, 605.

*Lemay v. Williams*, 32 Ark. 166, 175, was an action for a malicious prosecution. The malicious prosecution complained of was an action brought by Lemay against Williams before a justice of the peace to recover a judgment on a note, and to foreclose a mortgage executed to secure the note. The court held that the action on the note was within, but the foreclosure of the mortgage was without, the jurisdiction of the justice of the peace. Mr. Justice Walker, in delivering the opinion of the court, said: "If, in the case under consideration, Lemay had based his right of action solely upon his claim of mortgage lien, and not also upon his note for the satisfaction of a debt within the jurisdiction of the justice of the peace, the subject-matter would clearly have been one over which a justice would have no jurisdiction, and trespass, not case, would be the appropriate remedy."

In this case appellant brought an action against appellee, before a justice of the peace, to recover the Upp place, and sued out a writ of possession therein. He attempted to use the writ for a lawful purpose, but the justice of the peace had no jurisdiction of the subject-matter of the action, and the writ was void. He therefore stands in the same position he would have occupied had he taken possession of the land without any writ, and is liable accordingly. The action for a malicious prosecution does not lie against him.

In giving instructions upon the ground that there was evidence to show that appellant was guilty of a malicious prosecution, another error was committed. The instructions failed to inform the jury that, before they should return a verdict against appellant on the ground that he was guilty of a malicious prosecution, they must find that he prosecuted the action before the justice of the peace without probable cause. In this the instructions were fatally defective. *Sexton v. Brock*, 15 Ark. 345; *Lemay v. Williams*, 32 Ark. 166; *Lavender v. Hudgens*, Id. 763; *Chrisman v. Carney*, 33 Ark. 316; *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114.

If the appellant, in evicting appellee and removing his goods from the demised premises, unnecessarily committed any injury to his person or goods, the latter can recover of the former, in this action, the damages occasioned thereby. Unless there be circumstances of aggravation attending the commission of the injuries, he is only entitled to actual damages.

The court erred in admitting the evidence objected to by appellant. Reversed and remanded for a new trial.

HUGHES, J., concurs in the judgment of the court, and also in the opinion, except the

part which holds that the action for malicious prosecution will not lie if the subject-matter of the prosecution or suit was not within the jurisdiction of the court in which the prosecution was instituted and carried on, from which he dissents.

LITTLE ROCK & FT. S. RY. CO. et al. v. OPPENHEIMER et al.

(Supreme Court of Arkansas. Oct. 2, 1897.)

RAILROADS — TRANSPORTATION FACILITIES — DISCRIMINATIONS.

A failure on the part of a railroad company to furnish facilities for forwarding all cotton offered at a terminal point on its line where there was no competition, when it furnished sufficient transportation at competing points, in a year when the shipments of cotton were unexpectedly heavy, is not such a case of unjust discrimination as will subject the company to a penalty at the suit of a shipper, under Act March 24, 1887, providing in section 1, "All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads in this state, and no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state," etc.; and in section 4, "No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad, or any lessee, manager, or employee thereof shall make any preferences in furnishing cars or motive power," etc.; and in section 12 prescribing a penalty for violations, which may be recovered by civil action by the party aggrieved.

Wood and Hughes, JJ., dissenting.

Appeal from circuit court, Conway county; Jeremiah G. Wallace, Judge.

Action by Oppenheimer & Co. against the Little Rock & Ft. Smith Railway Company and others to recover a penalty. From a judgment for plaintiffs, defendants appeal. Reversed.

Dodge & Johnson, for appellants. A. S. McKennon, R. J. White, and Carmichael & Seawell, for appellees.

BATTLE, J. This action was instituted under an act entitled "An act to prevent unjust discrimination \* \* \* and to prevent discrimination between transportation companies and individuals in furnishing cars or motive power," and approved March 24, 1887, for the purpose of collecting a penalty. The plaintiffs recovered a verdict, and a judgment thereon, against the defendants for the sum of \$1,500.

The basis of the action was the failure of appellants to furnish the same facilities for transporting cotton from Altus (the shipping station for Roseville) as were furnished at Van Buren. This, it was insisted, was an undue and unjust discrimination in favor of the shippers at Van Buren against the appellees. The important facts are undisputed, and are substantially as follows: The cotton crop of 1891 was unusually large. In Arkansas it

exceeded anticipation, and was 100,000 bales larger than the preceding crop. The weather favoring, it was rapidly gathered and hurried to the railroads for transportation to market. The railroad companies were not prepared to ship it at many stations as rapidly as it was offered for shipment. At these stations it soon filled their platforms, after which they refused to receive more until room for it was made by the shipment of that already received. At Roseville, where the appellants had established a receiving station for freight to be shipped at Altus over their road, the platforms were covered with it, and appellants were unable to ship it for many days, because they did not have cars sufficient to meet the demands for transportation upon their road. During the months of October, November, and December of that year (1891) appellees hauled to Roseville several hundred bales of cotton to be shipped at Altus over appellants' road, and tendered them to their agent, and he refused to receive them; giving as his reason for so doing that the station platform at Altus was filled, and he had no room to store or care for it. This cotton lay at Roseville several days awaiting transportation. At Van Buren, a town on appellants' road, however, cotton was promptly shipped. The facilities there for shipping were greater than at any other place on the road, except at Little Rock. This was owing to the fact that there are several roads running to that town, called the Kansas & Arkansas Valley Railway, the St. Louis & San Francisco, the Greenwood branch of the St. Louis, Iron Mountain & Southern Railway, and appellants' railway, the two roads first mentioned competing with the last, and to the fact that appellants proportionately furnished more cars at that place than at others.

The reason more cars were used at Van Buren, in proportion to freight shipped, than were furnished by appellants to other stations or depots, was, it is at one of the termini of their road; and another was, there were wholesale merchants at Van Buren, who shipped goods there by the car load, and thereby caused many cars to be unloaded at that town. Being a terminal point, many empty cars necessarily accumulated there. In such cases it was the duty and custom of the agent at the terminals to use as many of the cars as were needed there, and to report the remainder to the transportation department for distribution.

The statutes upon which this action is based are as follows:

"Section 1. All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads in this state, and no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state," etc.

"Sec. 4. No discrimination in charges or facilities for transportation shall be made between transportation companies and individ-

uals, or in favor of either, by abatement, drawback, or otherwise, and no railroad, or any lessee, manager, or employé thereof shall make any preferences in furnishing cars or motive power," etc.

"Sec. 12. That any railroad corporation that shall violate the first, fourth, \* \* \* sections of this act, \* \* \* shall forfeit and pay for every such offense any sum not less than fifty dollars nor exceeding one thousand dollars and costs of suit, to be recovered by civil action by the party aggrieved, in any court having jurisdiction thereof," etc.

The only parties this act declares shall have equal rights to have persons and property transported over railroads in this state are individuals, associations, and corporations. Having declared that they are entitled to these rights, it further declares that "no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers." Against whom is this discrimination prohibited? Manifestly, those the act declares are entitled to equal rights. If it meant that it shall not be made against any party without regard to those named, the first clause would be entirely superfluous. Having declared who are entitled to equal rights, it follows that the refusal to them of the same rights allowed to others would be a discrimination. Hence the act forbids unjust or undue discrimination against them in the transportation of persons or property, and imposes a penalty upon any railroad company who shall be guilty of the forbidden act.

Appellees sued for the penalty on account of a discrimination against them as an association,—as a partnership. Are they entitled to it?

The act makes no changes in the common law as to the rights of the parties named therein to equal facilities for shipping, or as to unjust discrimination. At common law it was the duty of the common carrier to receive and carry all goods offered for transportation upon receiving a reasonable hire, and every one had equal rights to transportation by them. Yet under this rule different facilities, furnished under circumstances essentially different, did not constitute an unjust or undue discrimination, when the difference was in accordance with the difference in circumstances, and the difference was not intended to injure another shipper, or give, or did not tend to give, the favored shipper material advantages over him in their competition in business. The observance of this rule accomplished the design and object of the law in prohibiting discrimination, which was to prevent common carriers from favoring one shipper to the injury of another in the same business, from suppressing or diminishing competition, and from creating monopolies. *Hays v. Pennsylvania Co.*, 12 Fed. 809; *Samuels v. Railroad Co.*, 31 Fed. 57; *Messenger v. Railroad Co.*, 36 N. J. Law, 410; *Phipps v. Railroad Co.*, 50 Am. & Eng. R. Cas. 497;

*Hutch. Carr.* § 302; 1 Wood, R. R. §§ 197, 198; 4 Elliott, R. R. § 1676.

Was there any unjust or undue discrimination by appellants against appellees? Superior facilities for shipping were furnished at Van Buren. If this was a discrimination, it was not against any particular individual or association, nor against the shippers at any particular station, but against the shippers collectively at every station on the railroad, except at Van Buren; that is to say, in favor of one locality against all others. They furnished the same shipping facilities to all persons, associations, and corporations at Van Buren which they refused to all parties at other stations. Hence there was no discrimination against individuals or associations, they being treated alike under the same circumstances.

There was no intention to injure appellees by discrimination. The facilities furnished at Van Buren in the months of October, November, and December of 1891 were no greater than those furnished in previous years. The evidence does not show that a sufficient number of cars were not furnished at all the stations on the road prior to the fall and winter of 1891. Previous to that time Van Buren had enjoyed the same facilities as it did then, by reason of it being one of the terminals of the railroad, and the same distribution of cars was made. The complaint of unjust discrimination grew out of the unusually large cotton crop of 1891. Sufficient transportation was not furnished then, because appellants had not anticipated it.

In the months of October, November, and December of 1891 appellees were merchandising at Paris, in Logan county, and were not injured by reason of advantages gained, through superior facilities for shipping, by those engaged in the same business. If they suffered, their competitors suffered in like manner. All were treated alike, and suffered in the same manner.

It follows there was no unjust or undue discrimination against appellees, and that they are not entitled to a penalty.

Judgment of the circuit court is reversed, and final judgment is rendered here in favor of appellants.

WOOD, J. (dissenting). Necessarily, under the construction given the act by the court, there could be no discrimination between individuals at different stations. So long as all the individuals at any given station are treated alike, there can be no discrimination between these and the individuals at some other station, although at the one station all facilities desired or required are furnished, while at the other they are wholly denied. This, in our opinion, was not the intention of the legislature, and such a construction is not justified by the language of the act. There is nothing in the act limiting the discrimination to individuals of the same station, and, without some such restrictive words in the act

itself, we can find no authority for so limiting it. The legislature evidently intended to prevent any undue or unjust discrimination between "individuals, associations and corporations" anywhere in the state, whether shipping from the same or from different stations. If the construction of the court be correct, any railroad in the state may arbitrarily furnish shipping facilities to one station, and withhold all facilities from another rival station, similarly situated, without being subject to the penalties of the act. (When we speak of place or station, we mean the individuals, associations, or corporations, as the case may be, shipping from said place or station; for the abstract thing called the "station" or "locality" makes no shipments, and has no commercial or financial life, apart from the individuals, etc., residing and doing business there.) It is manifest that the exercise of such absolute power upon the part of railway corporations would be disastrous to the business prosperity of the individuals so discriminated against at any given station. Nor can it be denied that oftentimes the most powerful incentives exist for these corporations to make such discriminations. For instance, they may own little property at one station, and have large possessions at another and rival business point, and it may be to their interest to destroy the town where they have little in order to build up the place where they have much. In what more effectual way could this be done than by denying transportation facilities to the one while furnishing them to the other. Again, at one station on their road there may be competing lines, while at another, and may be its commercial rival, there are none. Now, to meet the competition at the one station, and to do it with the least expense possible, they may take away from the other station, where there is no competition, all, or nearly all, its facilities for transportation, in order to furnish to the station where there is competition. Can it be said that there would be no discrimination in cases of this kind, under the act, or that a discrimination based upon such considerations as these, alone, would not be undue and unjust? We think not. Doubtless, to prevent just such acts of discrimination as these, and all others, between individuals, etc., shipping from different stations, as well as acts of undue and unjust discrimination between individuals, etc., shipping from the same station, the act under consideration was passed. The supreme court of Illinois, in speaking of a case where there had been a discrimination in freights between individuals at different stations, used this pertinent language: "The discrimination, in such a case, is as much a discrimination between individuals as it would be in reference to two persons living in the same locality, and shipping at the same station, unless, as before stated, a satisfactory reason can be given for discrimination between the points of shipment;" and, further: "So, too, in the case before us. The resident

of Bloomington, who sends to Chicago for a car of lumber, is charged by the company at the rate of \$5 per thousand feet for transportation. The resident of Lexington, who orders the same lumber at the same time, is charged \$5.65 per thousand feet for transportation 16 miles less in distance. Is there not here, unless an explanation can be furnished by the company, an unjust discrimination between individuals, quite as much within the prohibition of the principles of the common law as would be an unjust discrimination between individuals of the same town?" And the court holds that the fact of there being a competing line of road at the station where the individual lived in whose favor the discrimination was made would not be a sufficient explanation. *Chicago & A. R. Co. v. People*, 67 Ill. 11. Precisely the same principle would apply whether the acts of discrimination were in the matter of freight charges or facilities of transportation.

The act under consideration is: "All individuals, associations and corporations shall have equal rights to have persons and property transported over railroads in this state, and no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state," etc. There are no terms of limitation as to locality, except "within the state" (and, of course, the legislature had no power to legislate beyond the state). The restrictive words as to the discrimination are that it shall not be "unjust or undue." The use of these terms "unjust or undue" shows that the legislature knew that there would be, necessarily, some discrimination, but that it was only such as was "unjust or undue" that was inhibited. Section 6193, *Sand. & H. Dig.*, makes it the duty of railroads to furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer, or be offered, for transportation at the place of starting and junctions of other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freights, and shall take, transport, and discharge such passengers and property at, from, and to such places on the due payment of tolls, freight, or fare legally authorized therefor. The next section provides "that the railroad shall pay to the party aggrieved all damages sustained by reason of a violation of this act, with costs of suit." See section 6194, *Sand. & H. Dig.* The statute prohibiting unjust discrimination, *supra* furnishes an additional remedy to the statute just quoted, by way of penalty, against those coming within its terms. All these statutes are but declaratory of the common law, which makes it the duty of common carriers to furnish facilities for and to transport all good offered in the ordinary course of business and to prohibit any unjust and undue discrimination in furnishing such facilities of transportation. 4 Elliott, R. R. § 1467, and



authorities cited in note; 1 Wood, R. R. § 195. "It is," says Judge Elliott, "safe to say that the rule is that a railroad carrier, so far as concerns the receipt and transportation of goods, however it may be as to the rates of freight, must, where the conditions and circumstances are identical, treat all shippers alike. It cannot furnish facilities to some shippers, and deny them to other shippers, unless there is a difference in condition or circumstances such as makes the discrimination a just one." 4 Elliott, R. R. § 1468. A common carrier, for such goods as he undertakes to carry, is bound to provide reasonable facilities of transportation to all shippers at every station who, in the regular and expected course of business, offer their goods for transportation. The carrier is not required to provide in advance for any unprecedented and unexpected rush of business, and therefore will be excused for delay in shipping, or even in receiving goods for shipment, until such emergency can, in the regular and usual course of business, be removed. *Id.* § 1470; Hutch. Carr. § 292. The supreme court of Wisconsin voices our opinion of the duty of railroads to distribute cars at different stations as follows: "The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars, under the same circumstances, are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon [the company's] different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. \* \* \* It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance." *Ayers v. Railway Co.*, 71 Wis. 372, 37 N. W. 422. In *Biddle v. Railroad Co.*, 1 Interst. Commerce Coll. R. 594, Walker, C., said: "It is the duty of a common carrier to provide adequate equipment for the business of his line. If in time of special pressure some one must wait the annoyance must be distributed with all possible equality." Again: "A common

carrier is under obligation to serve the public equally and justly. It is unlawful for him to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality." True, this was said under the interstate commerce act expressly naming locality; but, under the construction we give the act before us, it is equally applicable to the case in hand. See, also, Hutch. Carr. § 297; 1 Wood, R. R. § 195.

The statute seeks to enforce equality of treatment to all shippers under like circumstances. As we have seen, not every act of discrimination is unlawful. But there is always a presumption against it. It devolves upon the shipper in the first instance to show the discrimination, and then the burden is upon the railroad to show circumstances that would justify or excuse it; i. e. to show that the discrimination is just. 1 Wood, R. R. § 198; 4 Elliott, R. R. § 1477. The statute does not define what is unjust or undue discrimination. The supreme court of the United States in *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 219, 16 Sup. Ct. 675, says that "such questions are questions, not of law, but of fact." But we agree with Judge Elliott that this can only be so in a loose sense, and that, "in strict accuracy, it is a question in which the elements of law and fact are component parts." 4 Elliott, R. R. § 1679. As was said by the supreme court of Texas: "It is a question of law and fact in the given case, and whether the discrimination be or not unlawful must be ascertained by applying to the facts of the case the principles of the common law," since, as we have shown, our statute is but declaratory of the common law. *Railroad Co. v. Rust*, 9 Am. & Eng. R. Cas. 126. Whether there has been a discrimination undue or unjust in any case depends upon the situation and circumstances of both the shipper and carrier, and is generally a question for the jury, under proper instructions. So far as the shipper is concerned, the relation or situation of one shipper towards the railroad is the same as that of any other shipper having the same class of goods to ship, although they may be at different stations. For example, the merchant at one station having 100 bales of cotton ready, and which has been offered for transportation, is in the same relation or situation to the railroad as a merchant at some other station, who has the same quantity and quality of cotton for shipment. Both are alike desiring and are entitled to prompt transportation and to equal facilities. But the relation of the railroad company to each of these shippers may be very different. For instance, one station may be the end of a division,—a distributing point for cars; may have commission merchants shipping goods by the car load; or at the one station there may be an unprecedented rush of business. These circumstances of the railroad company existing at the one station, and absent at the other,

may enable the railroad to ship promptly for the shipper at the former while denying it to the shipper at the latter. Here would be a discrimination, but no reasonable man could say it would be unjust or undue. But if it should turn out that there was no unexpected rush of business at the one station that did not exist at the other; that both stations shipped about the same quantity of cotton; but that at the station where the favored shipper lived there was a competing line of road, and that the cars which accumulated there (on account of its being a distributing point and on account of large shipments by commission merchants) were held there, and not distributed to the other station pro rata, in order that the railroad might be able at all times to meet the competition, and to control the business of shipping cotton,—if there was testimony to justify a conclusion of this kind, a verdict against the railroad for unjust or undue discrimination could not be disturbed. There was evidence upon which the jury might have reached this conclusion. The foregoing principles of law are applicable to cases of this kind. We have not closely scrutinized the instructions, to see whether they conform to our views of the law as above set forth, since the opinion of the court makes a reversal inevitable in any event. Assuming, however, that the directions to the jury are in accord with the views we have expressed, the judgment of the court should be affirmed.

HUGHES, J., concurs.

#### On Rehearing.

(Nov. 20, 1897.)

RIDDICK, J. We held in a former opinion in this case that a shipper at Altus, a station on appellants' railway, could not recover a penalty against the railway company because it furnished to shippers at Van Buren, another station on its line, facilities superior to those furnished at Altus. We did not hold, nor was it necessary to hold, that the laws of this state do not forbid railroad companies from making unjust discrimination between different localities along their line; but we did hold that, under the facts of this case, appellees were not entitled to a penalty, and that their remedy for the wrongful failure of the company to furnish adequate facilities at Altus was an action for damages. Learned counsel for appellees, in this and other cases in which the same questions are involved, have favored us with able and elaborate printed arguments in support of the motion to rehear, but, after giving such arguments careful consideration, our conclusions announced in the former opinion remain unchanged, and the motion must be overruled. As the question determined is important, and as there is division among the judges of the court, I will endeavor to give some further reasons for our judgment in addition to those stated by Mr. Justice BATTLE in the former

opinion. The facts are fully stated in that opinion, and I will only briefly refer to them again.

The crop of cotton raised along the line of appellants' railway in 1891 was unusually large. The appellant company furnished sufficient cars at Van Buren and Little Rock, where there were competing lines and superior advantages for shipment, to carry all cotton offered, but at Altus and other intermediate points, where there were no competing lines, it failed during the months of November and December of that year to furnish cars sufficient to ship cotton as fast as it was offered, and there was delay in shipping cotton offered by appellees and other shippers at these stations. The contention is that it was an unjust discrimination, within the meaning of our penal statutes, for the company to furnish a sufficient number of cars to carry all cotton offered at Van Buren, when not enough cars were furnished at Altus. Now, we do not deny that if the appellant company wrongfully failed to furnish sufficient cars to carry cotton of appellees offered for shipment it became liable to said shippers for all damages suffered in consequence of the failure to furnish cars. Not only our statute (Sand. & H. Dig. § 6193), but the common law, fully covers a case of that kind, and appellees have already, in another action, recovered a judgment against the appellant company for a large amount to compensate them for all damages suffered by reason of the delay in shipment complained of here, and that judgment has been affirmed by this court. But the mere fact that the company has wrongfully failed to furnish cars to appellees does not necessarily entitle them to a penalty in addition to their damages. To justify the court in awarding them a penalty, they must bring their case within the strict letter of the law affixing the penalty. *Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105; 2 Elliott, R. R. § 710. The statute under which the penalty is claimed in this case provides that "all individuals, associations and corporations shall have equal rights to have persons and property transported over railroads in this state, and no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state." Act 1887, § 1. And again, in another section, it provides that "no discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad, or any lessee, manager, or employé thereof shall make any preferences in furnishing cars or motive power." Id. § 4. The punishment provided for violation of the above provisions is a penalty of not less than \$50, nor more than \$1,000, for each offense, to be recovered by the party aggrieved in a civil action. Now, the rule at common law, as stated by a recent writer, is that a railroad carrier, so far as concerns the receipt and

transportation of goods, must, where the conditions and circumstances are identical, treat all shippers alike, but there is no requirement to furnish the same facilities where conditions and circumstances are essentially different. 4 Elliott, R. R. § 1468. There is nothing in the language of the statute above quoted that expressly says that railway companies shall furnish the same facilities to different localities, or that they shall furnish the same facilities to different individuals, unless they are demanded under similar circumstances. But another clause of the first section of the act above referred to does refer to localities by providing that "persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station." It will be noticed that the portion of the statute which mentions localities has reference to overcharges in the transportation of passengers and freight, and not to discriminations in the matter of facilities. The fact that stations are mentioned in the clause referring to overcharges, and not mentioned in the clause in which discrimination in facilities for transportation is condemned, indicates that the legislature recognized the fact that it was impracticable to regulate the facilities furnished at one town by a comparison with those furnished at another, where the conditions and circumstances might be altogether different. It is doubtless true that a railway company should so distribute its cars as to give adequate transportation facilities to the different stations along its line, and if, by reason of a neglect to properly distribute its cars, it wrongfully fails to furnish shippers at any station adequate transportation facilities, it must respond in damages to the party injured; but we deny that every such shipper is entitled to a penalty in addition to his damages. We do not believe that the legislature intended that this penal statute should apply in such a case, for it would be utterly impossible to distribute the cars of a large railway so as to give each station its exact proportion. But, if the construction contended for is correct, the railroad company would have to furnish, not only a proportional number of cars, but cars of the same kind, drawn by engines of the same speed. A fast through train is a great facility in the transportation of both passengers and freight. The railroads of the state have for years run fast trains, which stop only at certain stations, selected by the company. If the contention of appellees is correct, that the intention of this act was to prohibit and punish discriminations as to facilities in transportation between different localities, it is not easy to see why this is not a discrimination which subjects the company to a penalty in favor of every person who is prevented from riding upon a fast train, or from shipping his fruit or other products upon it, by reason of

its failure to stop at his station. Certainly, under our view of this statute, which is that it forbids and punishes favoritism between passengers or shippers, if the company should permit certain persons to ride upon or ship property upon its fast train, and deny the use of such train to other persons who offered themselves as passengers at the same station, and under the same circumstances, it would become liable to a penalty. If this be true, and if it be also true, as counsel contend, that it makes no difference at what station the passenger offers himself for passage or his property for shipment, he is still, under this statute, entitled to like facilities, then it necessarily follows that the company must stop its fast trains at every station at which a passenger offers, or incur a heavy penalty, whether that station be a great city or a side track in the swamp. Of course, if such trains were compelled to stop at every station, they would cease to be fast trains, and the result would be not only a great inconvenience to the people of the state, but a heavy loss to the railroads of the state; for, under such a restrictive law, the railroads of this state would be utterly unable to compete for the through traffic, and the competing lines of railway which pass around the state would carry such traffic, both freight and passenger.

But cars and trains are not the only facilities within the meaning of this act. A depot, a house for freight, or a waiting room for passengers is a facility for the transportation of passengers and freight, within the meaning of this statute. If a railway company should at one of its stations permit the use of its depot, yard, pen, or other station facility to one shipper, and refuse them to other shippers, under the same conditions and circumstances, I think there could be no doubt that it would become liable for a penalty; for the object of the statute was to prevent favoritism,—in other words, to prevent discrimination in facilities between passengers or shippers when demanded under like conditions and circumstances. Along the railways of this state are depots, both old and new, in different stages of repair, and there are flag stations without a depot or station house of any kind. If the construction contended for is correct, why is this not a discrimination? But under that construction it would be hazardous for a railway company to make any decided improvement in this respect at one of its stations that it did not at once repeat at every other station.

Again, it is necessary for the company to keep at certain stations along its lines a telegraph operator on duty during the night to send dispatches in regard to the movement of its trains. At such stations it is usual to keep the depot open during the night for the convenience of the patrons of the road. Under our construction of this statute, the company must in this respect treat all alike, and cannot allow the use of its depot or station

house to one passenger or shipper after night, and refuse it to others who apply for it under like circumstances. But, under the broad construction contended for here, that this statute was intended to prevent and punish discrimination in facilities between different stations, if the company kept its depot open at night for the reception of freight or passengers at one station it would have to furnish like facilities to passengers and shippers at all other stations, or subject itself to an action for a penalty in favor of each passenger or shipper denied the use of a depot during such hours. The company would thus be compelled to close the depots at all stations to avoid incurring penalties for discrimination. It would, of course, be absurd to suppose that the legislature intended that railway companies should furnish to way stations and small villages facilities the same or equal to those furnished to cities and larger towns, for this would deny to such towns and cities the legitimate advantages due to different circumstances and conditions. But, if we say that the intention was to compel the railroad company to furnish proportional facilities to each station, then it would follow that the legislature intended that the railway company in furnishing such facilities should exercise its judgment as to what were proportional facilities. It would be a difficult matter to determine the dimensions and size of depots, the quality and quantity of train service, and other facilities to be furnished to the different towns and villages of the state, differing, as they do, in size and commercial importance, so as to make their facilities proportional to those furnished other towns and cities of the state. But, under the construction contended for, if the company erred in this matter, however honestly, it would at once become liable, not only for one penalty, but probably for hundreds of them. As it is not usual to inflict penalties for mere errors of judgment, this should incline the court to adopt a different construction from that contended for.

From these and other reasons it can, I think, be seen that the construction contended for by appellees, that the word "locality" should be read in the statute so as to make it a penal offense for a railway company to furnish passengers or shippers at one locality facilities not furnished to all other stations along its line, would necessarily result in great embarrassment to railway companies. It would cast upon the courts for decision many difficult questions as to what were proportional facilities and what were not; for the courts would, in effect, be discharging the duties of a board of railroad commissioners, without any discretion whatever to relieve against the hardships of the statute. The ingenious answer to these objections is, in effect, that the court need not consider such difficulties seriously, for they would be questions for the jury. And that is true. If the construction contended for

by appellees is correct, then, whether the failure to stop a fast train at a certain station, or whether the failure to furnish a depot as good as some other on the line, or to keep it open during the same hours, whether these and other matters were unjust discriminations, would, indeed, be a question for the jury. A passenger desiring to recover the penalty pronounced by the statute (\$50 to \$1,000) would naturally ask himself whether the depot at which he was compelled to wait was as commodious as that at some other station, or whether the train upon which he rode was as superb and elegant in its appointments and as convenient in its time schedules as the fast passenger that stopped only at larger towns. As most people are not disposed to underestimate the importance of their own town or village, it would be easy for him to conclude that the company was unjustly discriminating against himself and his town. As the question might be answered differently by different persons, it can be seen that such a construction would open up a rich field of litigation. If not satisfied with one lawsuit, the passenger could return the next day, and suffer the same inconveniences, and obtain another cause of action. Every man could have his own lawsuit and one for each member of his family.

Now, while the people of this country are not unduly prone to litigation, still the records show that they do not hesitate to appeal to the courts when they believe their rights to be invaded. But the remarkable fact in connection with this statute, if the construction contended for by appellees be correct, is that, although there are similar statutes in other states, learned counsel, as I shall presently attempt to show, have not been able to produce a single reported case of this kind,—a case where, under a statute like this, a plaintiff has demanded a penalty of a railroad company for failing to furnish him the facilities it furnished to shippers at another and different station. I do not say that this shows that the construction they contend for is incorrect, but I do say that when we consider the great diversity in the facilities furnished to different towns and stations, and the frequent complaints made against railways on account of defective train service and facilities,—that considering these things, the fact that, so far as we can ascertain from the Reports, no one has heretofore brought such an action, is conclusive proof that the construction contended for by appellees is not the construction usually placed upon this statute. It shows that the language of the statute does not plainly express what appellees say it means. But this is a penal statute, and cannot be extended by implication. "The rigid rules of the common law with reference to the liability of carriers should not," says Judge Elliott, quoting the language of the supreme court of North Carolina, "be applied in cases involving the violation of a penal statute." 2 Elliott, R. R. §

710. The statute should not, of course, be defeated by a forced or overstrict construction, but the intention of the legislature must be gathered from the words, and they "must be such as to leave no reasonable doubt upon the subject." *U. S. v. Hartwell*, 6 Wall. 385; *Whitehead v. Railroad Co.*, 87 N. C. 255; *Dwyer v. Railroad Co.*, 23 Am. & Eng. R. Cas. 654; *Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105. Following this well-settled rule, the supreme court of Iowa held that a statute of that state against railway discriminations did not include the failure to furnish cars, because, as stated by the court, the statute was penal, and could not be extended by implication. The court pointed out in that case, as we have in this, that the plaintiff had a clear remedy by an action for damages, but that did not include a penalty. *Bond v. Railroad Co.*, 67 Iowa, 712, 25 N. W. 892. And so the supreme court of Texas, declining to apply a penal statute in a case against a railway company not clearly within its meaning, said that it could not award a penalty in any case not expressly denounced by the act. "To do so," said the court, "would be judicial legislation of the most reprehensible character." *Dwyer v. Railroad Co.*, 23 Am. & Eng. R. Cas. 654.

Let us now, for a moment, consider the character of the act of which the appellant company was guilty. On account of a rush of cotton to market, it was unable, during two months, to carry promptly all cotton delivered at stations between Little Rock and Van Buren. Now, admitting that the company by the use of due care and foresight might have foreseen this accumulation of freight, and have guarded against it by providing sufficient cars to carry it, still it must be admitted that there was no intention or desire to injure Altus or any other station. The company, taking the worst view against it possible under the evidence, had but negligently failed to supply itself with sufficient cars to handle the increased business, and when the rush came it endeavored to avoid injury to itself by carrying first the freight offered at points where there were competing lines, and, after that, the freight from the other stations. The wrong was not in furnishing sufficient cars to Van Buren and Little Rock, for this injury required it to do, but in failing to furnish sufficient cars to Altus and other intermediate points. The failure to furnish cars brought the company squarely within the scope of another statute (Sand. & H. Dig. § 6193), under which it has been compelled to respond in damages. The damages suffered by reason of the failure to furnish cars have been paid to appellees. They are not now asking for compensation, but for a penalty, and they must stand upon the strict letter of the law. Now, as was stated by Mr. Justice BATTLE in his opinion, if there was a discrimination against appellees, within the meaning of this statute, there was a discrimination against every shipper who offered cot-

ton or other freight at any station between Van Buren and Little Rock during the months of November and December, 1892. More than that, every separate offer of cotton or other freight, and failure to carry, was under the statute a separate offense. Under such construction, the aggregate amount of the penalties for which the company became liable during those two months would be simply stupendous. When asked to adopt a construction that, in addition to compensatory damages, visits such severe punishment for an act of mere negligence, I recall to mind the words of a distinguished English judge, who, speaking of an action brought against a railway company under the railway and canal traffic act of England, said: Very extensive powers are conferred upon the court by this act,—“powers which may be exercised for the benefit of the public, but which may be also exercised to the wrong and detriment of persons carrying on a great trade; and we ought, therefore, to be very cautious to ascertain that there is reasonable ground for believing that the act has been infringed before we interfere.” *Cresswell, J., in Caterham Ry. Co. v. London, B. & S. C. Ry. Co.*, 1 Ry. & Can. Cas. p. 34. But if it was proper to exercise caution in the application of a remedial statute which inflicted no penalty, and was administered under a board of commissioners with large discretionary powers, how much more necessary is it to do so in construing an unbending penal act, against the punishment of which no tribunal has power to relieve. The construction of the act contended for here is far-reaching. To adopt it would be to change the statute from a simple and easily understood law to a very complex one, difficult either to understand or obey. It would be certain to subject railway companies to heavy penalties in many cases in which they were guilty of no intentional wrong. It is not called for by, the language of the act itself, nor included within the plain meaning of the legislature. We cannot, therefore, adopt it without violating what we conceive to be fundamental rules regarding the construction of penal acts.

I will now briefly notice some of the cases which counsel for appellees have cited in support of their views: First, they refer to certain decisions of the federal courts under the interstate commerce act, and to decisions of the English courts under the railway and canal act of England. It is sufficient to say of these cases that the acts which they construe are neither of them penal, but are remedial acts, and are therefore to be construed liberally, to advance the remedy. The most hasty examination of those acts will show that they are altogether different from the one under consideration. Not only is the language of the acts different, but those acts are enforced under the supervision of a board of commissioners with discretionary powers to relieve special hardships imposed by the letter of the law. No railroad company under

those acts becomes liable for a penalty unless for disobedience of an order of the court after the discrimination has been adjudged and pointed out. The shipper, under those acts, recovers only his actual damages, and the usual relief granted is not even a judgment for damages, but an order that the railway company in future refrain from such discrimination. It is evident, therefore, that a much broader construction can properly be given those statutes than the one we have under consideration. If, in construing a highly penal act, we undertake to follow the decisions under those statutes, we shall inevitably be led into the grossest and most inexcusable errors. This is sufficient to dispose of those cases, but, if it were necessary to go further, it could be shown that the reasoning of those cases. Instead of opposing, tends strongly to support the conclusions at which we have arrived. I will next notice the cases of *Chicago & A. R. Co. v. People*, 67 Ill. 11, and the case of *Ayers v. Railway Co.*, 71 Wis. 372, 37 N. W. 432. I call special attention to these two cases, not only because they are cited by counsel for appellees, but because they are extensively quoted in the dissenting opinion delivered by my two learned associates. The Illinois case, *supra*, was for discrimination in freights. The company made a greater charge for freight from Chicago to Lexington than it did from Chicago to Bloomington, a more distant station on the same line, the freight being of the same kind and being hauled in the same direction. The case came within the words of a statute similar to our own, to the effect that persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction, to a more distant station. The judge who delivered the opinion said something about discrimination between localities, but he was speaking of discrimination in freights. He had no reference to discrimination in facilities, and to suppose that he referred to a case of the kind we have would be altogether misleading. It must also be noticed that, after discussing discriminations to a considerable extent, he concluded by giving judgment in favor of the company, for the reason that the statute upon which the prosecution was based was void. We are unable to understand how that decision can be considered as in conflict with our decision here. The Wisconsin case (*Ayers v. Railway Co.*, 71 Wis. 372, 37 N. W. 432) was an action, not for a penalty, but for damages for wrongfully failing to furnish cars to carry freight. We fully agree with the judgment of the court in that case, but it was unnecessary for counsel to go so far to cite a decision on that point. Only a few months ago this court affirmed a judgment against appellant in favor of appellee for damages for failing to furnish cars in which exactly the same question was in-

involved as that determined by the Wisconsin court. We felt so little doubt about the law of the case that it was disposed of by an oral opinion. Appellees knew of the case, as it was in their favor, and they might just as well have cited it as the case from Wisconsin, although we are not able to see that either case has any bearing upon the question here. In the Wisconsin opinion, as well as that from Illinois, there are expressions which might mislead, if you disregard entirely the facts of the case, and suppose the judge to be discussing the law as applied to the facts of this case; but to get at the meaning of an opinion you must, of course, consider the language of the judge as referring to the facts of the case before him, and not to an altogether different state of facts. The next and last case that I shall notice will be a case from the supreme court of the United States: *Railway Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970. The case arose under a Colorado statute, and was a prosecution for an overcharge in freights. Counsel say that both the statute and case are similar to those before us. There is some similarity in the two statutes, but little between the two cases. The Colorado statute is a much more comprehensive act than our act. It provided, among other things, that railway companies should keep posted schedules of their rates, and that, while such schedules were in force, no rebate or drawback therefrom should be allowed one shipper, unless the same was open and allowed to all persons alike, except in a special case, where the approval of the railroad commissioner was procured in writing. The evidence in the case showed that there were two rival coal companies, one owning a mine at Erie, and the other at Marshall, these places being stations upon lines of the defendant's railway, and each place about the same distance from Denver, to which place the two companies shipped their coal. The railway company posted a schedule of rates, showing that the charges on coal from both Erie and Marshall were one dollar per ton. In other words, the railway company's schedule showed that the rate to Denver on coal was the same from both places, but it made a secret agreement with the Marshall company by which it allowed it a rebate of 40 cents on the ton, and this was done without the written consent of the commissioner. These facts brought the case clearly within the express language of the act, and the company was held guilty. The judge, in speaking in that case of discriminations between localities, had reference to discriminations in charges of the kind forbidden by the act, and not to discrimination as to facilities. I have now noticed the cases upon which counsel for appellees seem to place most reliance, and, in my opinion, none of them furnish authority for holding the company liable for a penalty for a discrimination in facilities between different localities, much less between localities where the conditions and circumstances are

widely different, as we find them here. Van Buren has competing lines of railway. It is the end of a division of appellants' railway. It is a much larger town than Altus, and has not only a much larger retail business, but has several wholesale houses. These and other advantages which Altus does not possess cause empty cars to accumulate at Van Buren, which are used in the shipment of cotton from that point. Conceding that the statute was intended to punish discriminations between different localities, it could not apply to a case such as this, where the conditions and circumstances surrounding the two localities are altogether different; and this is the ground on which, as I understand it, rests the opinion of Mr. Justice BATTLE, ordering a dismissal in this case. But it seems plain to me that the purpose of this act, so far as it forbids discrimination in facilities for transportation, was to require the railroad company to treat all shippers alike who ship from the same place and under the same conditions, and to forbid and punish favoritism on the part of the company under such circumstances. It has, in my opinion, no application to discrimination in facilities when furnished at different localities; for that is covered by another statute, and the common law, which requires railway companies to furnish reasonable and adequate facilities for transportation at every station, and provides an ample remedy for any failure in this respect by means of an action for damages. Sand. & H. Dig. § 6193; 4 Elliott, R. R. § 1479. For these reasons I adhere to the decision made in this case. The motion to rehear is overruled.

BUNN, C. J., and BATTLE, J., concur in the conclusion that the motion to rehear should, under the facts of this case, be overruled.

WOOD, J. (dissenting). The railway and canal traffic act of England, passed in 1854, provides: "Every railway company," etc., "shall, according to their respective powers, afford all reasonable facilities for receiving and forwarding and delivering traffic upon and from the several railways," etc., "belonging to such companies," etc. "And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company," etc., "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 2, c. 31, 17 & 18 Vict. See 27 Am. & Eng. R. Cas., Append. p. 22. State legislation upon this subject has, in all salient features, followed this English statute. 5 Am. & Eng. Enc. Law, 178. Our statute (section 6301, Sand. & H. Dig.), like the English act, in naming the objects protected against discrimination, does not mention "locality." In Vahlberg v. Keaton (Ark.) 11 S.

W. 878, the court, through Judge Hemingway, in speaking of a statute modeled after an English statute, said: "As the American states have adopted the English statute as a model, so the American courts have adopted the construction given it by the English courts." Bank v. Cook, 60 Ark. 288, 30 S. W. 35; McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. 142. In Richardson v. Railway Co., 4 Ry. & Can. Cas. 1, upon a complaint by two firms at Newark that their traffic was unduly prejudiced by the railway company, by not being carried on as favorable terms as to rates and in other respects as Burton traffic, the court said: "It is not contended on the part of the railway company that it is any answer to a complaint of inequality of charge that the traffic favored and the traffic prejudiced are not in the same locality; and assuming that there is a competition of interests, and that circumstances in other respects are not dissimilar, the traffic of two localities, both on the same system of railway, but it may be at a distance from each other (and Newark is 40 miles distant from Burton), is as much within the traffic act of 1854 as the traffic of two or more individuals in the same locality is;" citing and quoting the earlier cases of Ransome v. Railway Co., 1 Ry. & Can. Cas. 63, and Nicholson v. Railway Co., Id. 121. See, also, Town Com'rs of Newry v. Great Northern Ry. Co., 7 Ry. & Can. Cas. 184; Gerard v. Railway, 4 Ry. & Can. Cas. 291. There is nothing in the railway and traffic act as to freight rates, etc., between different localities. Nor was the act of 1873 (36 & 37 Vict. c. 48), providing for commissioners for the better enforcing the railway and traffic act, passed until long after the earlier of the above cases were decided. The case of Richardson v. Railway Co., supra, although decided after the passage of the act of 1873, as we have seen, distinctly approved the construction given the railway and canal traffic act by the earlier cases. It thus appears that the English courts construe the railway and canal traffic act as applying to acts of undue and unreasonable discrimination between shippers of different localities; otherwise they would not have enforced it in such cases. But localities are not mentioned. Our statute is modeled after this act. Therefore, upon the authority of Vahlberg v. Keaton and Bank v. Cook, supra, the same construction should be given the act under consideration as was given the railway and canal traffic act by the English courts. But this is also the construction of the supreme court of the United States. The constitution of Colorado provides: "All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for transportation of freight or passengers within the state." This is the identical language of the statute under consideration. Sand. & H. Dig. § 6301, par. 1. An act of the

legislature of Colorado (Sess. Laws 1885, p. 309, § 7) provided: "No railroad corporation shall charge, demand or receive from any person, company or corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall," etc., "charge, demand or receive from any other person, company or corporation for a like service from the same place, or upon like conditions and under similar circumstances, and all concessions of rates, drawbacks and contracts for special rates shall be open to, and allowed all persons," etc., "alike at the same rate per ton per mile, upon like conditions, and under similar circumstances." An action was instituted by G. & M., coal merchants at Erie, and selling coal at Denver, against the railroad to recover triple damages, under the statute, for unjust discrimination in freights for coal from Erie to Denver, and in favor of the town of Marshall, which was two miles further from Denver than the town of Erie. The rates from the two places to Denver were the same. Mr. Justice Brown, speaking for the court, said: "This act was intended to apply to intrastate traffic the same wholesome rules and regulations which congress two years thereafter applied to commerce between the states, and to cut up by the roots the entire system of rebates and discrimination in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality. It is bound to deal fairly with the public, to extend to them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon absolute equality." *Railway Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970. The Colorado statute was highly penal, the railroad being subject to a forfeiture of "three times the actual damage sustained by the party aggrieved." Yet this was not deemed by the supreme court of the United States as any reason why the statute and the constitutional provision should not be enforced. It will be observed that the Colorado statute quoted above says, "for a like service from the same place,"—just what is decided by the majority opinion is the meaning of our statute. But the supreme court of the United States, construing it in connection with the provision of the Colorado constitution exactly like our statute, enforced it as between individuals of different localities; showing clearly that the provision of the Colorado constitution embraced acts of discrimination between individuals of different localities, and was intended, like our act, to protect the parties named therein against all acts of "undue or unjust discrimination within the state." And, although Erie and Marshall were different stations or localities, shippers there were treated, for the purpose of the Colorado constitution and statute preventing unjust discrimination, as being in like condition and under similar circumstances with reference to the railway company in shipments of coal. The fact of shippers being at different stations or lo-

calities does not necessarily make their condition or circumstances unlike in relation to the railroad company, as we have shown. In the opinion of the court first announced it is said: "Was there any unjust or undue discrimination by appellants against appellee? Superior facilities for shipping were furnished at Van Buren. If this was a discrimination, it was not against any particular individual or association, nor against the shippers at any particular station, but against the shippers collectively at every station on the railroad except Van Buren; that is to say, in favor of one locality against all others. They furnished the same shipping facilities to all persons, associations, and corporations at Van Buren which they refused to all parties at other stations. Hence there was no discrimination against individuals or associations, they being treated alike under the same circumstances. It appears from this, as well as the opinion just delivered, that the court holds that, where shippers are at different stations or localities, there can be no undue or unjust discrimination between them. In other words, where the locality of shippers is not the same, there is such a difference in circumstances as to justify the discrimination in failing to furnish facilities, however great or unreasonable the difference might be. We are not concerned, therefore, about the discussion of the facts of this particular case, as it is conceded that Van Buren and Altus are different stations, which, upon the doctrine announced by the court, must work a reversal and dismissal of this cause. It might be said, however, with reference to the facts, that the station agent at Van Buren, when asked the following question, to wit, 'It mattered not how much they needed them [the cars] down there [at Altus], you were going to keep enough for your people?' replied, 'That was about the size of it.' This would tend to show that the competition of another road at Van Buren was the real cause of the cars being kept there, and not distributed to other points along the road, where there was no competition. At any rate, this, in connection with all the other facts and circumstances, was sufficient to require the submission of the question of undue or unjust discrimination to the jury upon proper instructions." We do not join issue with much that is said in the able opinion just rendered by Judge RID-DICK from his point of view. The opinion we have already delivered shows that. We cannot consent that this statute should not be enforced because another remedy, by way of damages for failing to furnish transportation facilities, is provided for the party aggrieved. The legislature, of course, was familiar with our constitutional provision preventing discrimination. Const. art. 17, § 3. Also with the statute passed in 1868 (section 6193, Sand. & H. Dig.), requiring railroads to furnish sufficient accommodations for the transportation of passengers and property. This act was in obedience to the constitutional provision, and in harmony with the



prior statute, and was intended as an additional or cumulative remedy. It is said in the last opinion that the "appellees have already, in another action, recovered a judgment against the appellant company for a large amount, to compensate them for all damages suffered by reason of the delay in shipment complained of here, and that judgment has been affirmed by this court. But the mere fact that the company has wrongfully failed to furnish cars to appellees does not necessarily entitle them to a penalty in addition to their damages." If our contention, that the statute under consideration was intended as a cumulative remedy, be correct, it is obvious that the above could only be considered as a mere "begging of the question." This question must be decided, and the truth is it was decided in the first instance, without regard to whether or not the appellees had recovered judgment by way of damages for failing to furnish cars in another action; for, when the judges passed upon and decided the present cause, it was unknown to them that another case was pending here on appeal from a judgment for damages for failing to furnish cars. The object of the statute is not to enforce the same facilities, or equality in facilities, but to prohibit unjust or undue inequality. We think these qualifying words "undue or unjust" have either been overlooked, or have not been given the significance which their use in the statute requires. Many of the instances mentioned, as showing the impracticability of giving effect to the statute under the construction we contend for, would be recognized at once by any man of good common sense, whether judge or juror, as not an unjust or undue discrimination. These words "unjust or undue" allow for all differences in the situation and circumstances of shippers and railway companies, whether at the same or different stations. They furnish a wholesome restriction and safe limitation to the passion or caprice of jurors; and, within these bounds, it would not be difficult, much less impracticable, for trial judges, with proper directions, to hold jury verdicts. At any rate, the question of whether there has been an unjust or undue discrimination, like thousands of other mixed questions of fact and law, must be left to the jury, under proper instructions from the trial court. The fact of shippers being at different stations or localities is to be submitted to the jury along with every other fact in the determination of this question. But we insist that this fact being conceded or undisputed does not, of itself, justify the court in declaring, as a matter of law, that, in such a case, there can be no such thing as an undue or unjust discrimination. The statute is plain,—"no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state." No amount of subtle reasoning or lengthy argumentation can either obscure or

make clearer the legislative intent to prohibit acts of undue or unjust discrimination between the parties named "within the state." Under the construction given it by the court, the act is shorn of the very force and power which the legislature doubtless most designed it should have.

HUGHES, J., concurring.

### CUNNINGHAM et al. v. ROUSH.

(Supreme Court of Missouri, Division No. 1.  
Dec. 7, 1897.)

#### APPEAL—NECESSITY OF TRANSCRIPT—TIME OF FILING—MOTION TO AFFIRM JUDGMENT— GROUNDS CONSIDERED.

1. Rev. St. 1889, §§ 2252, 2253, as amended by Acts 1891, p. 69, make all appeals taken 60 days before the first day of the next term of the supreme court returnable to such term, and require a transcript of the record or a certified copy of the judgment to be filed 15 days before the first day of the term. *Held*, that the supreme court, in considering the question of appellant's diligence in perfecting his appeal, will treat the date of filing the bill of exceptions or the expiration of the time allowed therefor as the date of the judgment appealed from.

2. On a motion to affirm a judgment, the court will not consider a ground not stated in the motion.

3. An appeal is good, though no bill of exceptions is filed.

Appeal from circuit court, Linn county; W. W. Rucker, Judge.

Action by J. W. Cunningham and others against Alonzo Roush. Defendant appealed from a judgment for plaintiffs, and the latter move to affirm the judgment. Motion overruled.

A. W. Mullins, for appellant. Balthrop, Stephens & Loomis, for respondents.

PER CURIAM. Respondents move to affirm the judgment, on the ground that neither a transcript of the record nor certified copy of the record entry of judgment was filed 15 days before the first day of the term of court to which the appeal was returnable. The record shows that the judgment was rendered on the 26th day of June, 1896. An appeal was taken on the same day, and defendant was allowed 90 days in which to file a bill of exceptions. Afterwards, on the 23d day of September, 1896, in vacation, the judge of the court extended the time for filing the bill of exceptions to the December term of court. Afterwards, on the 18th day of November, 1896, in vacation, the court again extended the time for filing the bill of exceptions for 60 days from that date. The term of said court was regularly held, and was adjourned on December 26, 1896, to court in course. On the 13th day of January, 1897, and in vacation, the judge of said court extended the time for filing the bill of exceptions for 60 days from that date. The bill was filed March 18, 1897, and the transcript of the record was filed in this court March 20, 1897. All ap-

peals taken 60 days before the first day of the next term of the supreme court are made returnable to that term, and a transcript of the record or certified copy of the judgment, etc., must be filed 15 days before the first day of the term. Rev. St. 1889, §§ 2252, 2253, as amended by Acts 1891, p. 69. Until a bill of exceptions has been filed, it is not possible for an appellant to file a complete transcript of the record in this court; and, as the time in which such bills shall be filed is largely within the discretion of the court or judge in vacation, this court, in considering the question of diligence on the part of appellant in perfecting appeals, has adopted the just practice of treating the date of filing the bill of exceptions or the expiration of the time allowed therefor as the date of the judgment appealed from. *Investment Co. v. Martin*, 125 Mo. 117, 28 S. W. 434. The time allowed appellant for filing his bill of exceptions was extended beyond the first day of the October term, and, according to the rule of practice noted, good cause is shown for the failure to file the transcript 15 days before the first day of that term. The transcript was filed 15 days before the first day of the April term, which is as soon as could reasonably be required.

Counsel for respondents insists, however, that the judge of the circuit court had no right, in vacation, to extend the time for filing the bill of exceptions over a regular term of his court, and that the bill of exceptions filed after such term is without authority of law, and for that reason the judgment should be affirmed. This claim must be overruled for two reasons: First, because there is no such ground for affirming the judgment stated in the motion; second, because the appeal is good though no bill of exceptions was in fact filed. Appellant has the right to have his appeal heard upon the record proper. The motion is therefore overruled.

#### HEMAN et al. v. WADE et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 7, 1897.)

#### APPEAL—JURISDICTION—COURT OF APPEALS AND SUPREME COURT.

1. On appeal from an injunction restraining waste pending ejectment, what the probable loss of the defendants would be by reason of the injunction was not shown. *Held*, that the case was not without the jurisdiction of the court of appeals, on the ground that more than \$2,500 was involved.

2. Where an injunction restraining waste pending an ejectment suit was granted, title to real estate was not involved, so as to give the supreme court jurisdiction of an appeal from the order.

Appeal from St. Louis circuit court; L. B. Vallant, Judge.

Action by August Heman and others against William Wade and others to enjoin waste. From a decree awarding an injunction, defendants appealed to the court of appeals, by which the cause was transferred to the su-

preme court for determination. Transferred to court of appeals.

Alfred Gfeller, for appellants. T. J. Rowe, for respondents.

MACFARLANE, J. At the time this suit was commenced, there was a suit in ejectment pending in the circuit court of the city of St. Louis, in which plaintiffs herein were seeking to recover from defendants herein the possession of certain lots in said city of St. Louis. In the action now before us, plaintiffs undertook, by injunction, to restrain the defendants from the commission of waste on the premises pending the ejectment suit. A temporary injunction was granted, which was made final on the hearing. From the judgment defendants appealed, and the record was sent to the St. Louis court of appeals. That court, having doubt of its jurisdiction, transferred the cause to this court for final hearing and determination. Judge Biggs, of the court of appeals, makes the following statement, which we adopt: "Our jurisdiction is denied on the grounds that more than \$2,500 is involved, and that the title to real estate is involved, within the meaning of the constitutional amendment fixing and limiting the jurisdiction of this court. The plaintiffs claim title to and the right to the immediate possession of the lots by virtue of a deed executed by the Hydraulic Press Brick Company to them, dated April 16, 1894. The deed was the consummation of a previous contract of sale entered into between the Hydraulic Press Brick Company and one Patrick H. Clark. The latter assigned the contract of sale to the plaintiffs. The defendants claim under a lease executed by the brick company. This lease was executed on March 23, 1894, and, by its terms, the lots in question were leased to the defendants for three years from that date, at an annual rental of \$900. The outstanding contract with Clark was mentioned in the lease, and the defendants agreed that if Clark or his assignee should establish his right to the property under the contract, or should consummate the sale, they would surrender the possession. The lease gave the defendants the right, under certain restrictions, to quarry the rock on the premises. After the plaintiffs received their deed, they demanded the possession of the property, and the defendants refused to surrender it. Thereupon the plaintiffs instituted the action of ejectment, and also an action of unlawful detainer, both of which are still pending. The defendants continued to quarry the rock, and, at the time this suit was instituted, had taken out 2,200 cubic yards. The defense to the present proceeding is that, at the time the lease was executed, the contract of sale made with Clark was considered by the Hydraulic Press Brick Company as forfeited, and that it was in fact, by its terms, forfeited prior to that time, and that the extent of the defendants' covenants in the lease was that they

would surrender the possession upon condition only that Clark should establish in the courts his right to have the contract performed, which neither he nor the plaintiffs attempted to do."

In reference to the first jurisdictional question suggested, Judge Bliggs says: "We would not be justified in transferring the case to the supreme court on the ground that more than \$2,500 is involved, for the reason that we have no means of determining how much is really involved, or that the amount will certainly exceed the jurisdictional limit. The plaintiffs claim that the damage already done and that which was threatened was irreparable, and could not be estimated. What the probable loss of the defendants would be by reason of the injunction is not shown." It may be said, further, that no money judgment was rendered for damages against appellants, and they can only be entitled to such a judgment after the final dissolution of the injunction. Defendants are the appellants, and no question of the amount of damages is involved.

Nor do we think the title to real estate is so involved as to give this court jurisdiction of the appeal. It is true, the right of plaintiffs to injunctive relief may depend upon their title to the land and their right to its possession; yet the title is only incidentally or collaterally involved. The suit is merely in aid of the pending ejectment suit, and is not intended to try and determine the title to the land. Neither plaintiffs nor defendants ask to have the title established, nor does the judgment rendered undertake to do more than to prohibit waste, until the title is determined in the ejectment suit. It is sometimes difficult to determine when the title is involved, within the true intent and meaning of the constitution; but the rule is now well settled that the supreme court has no jurisdiction on this ground, unless the result of the litigation may directly, without subsequent proceeding, affect the title to real estate. The determination of a purely personal or pecuniary right, though dependent upon the condition of the title to land, does not involve that title unless it may in some way be affected by the judgment. *Hilton v. City of St. Louis*, 129 Mo. 391, 31 S. W. 771; *May v. Trust Co.* (Mo. Sup.) 40 S. W. 122. It is therefore ordered that the cause be transferred to the St. Louis court of appeals for its determination. All concur.

#### SEIFERER v. CITY OF ST. LOUIS.

(Supreme Court of Missouri. Nov. 30, 1897.)

APPEAL—AGREED FACTS—DOCUMENTARY EVIDENCE—EJECTMENT—DAMAGES.

1. Plaintiff claimed land under a deed executed before defendant city condemned the land, but recorded thereafter. No summons, prior to the condemnation, was served upon the grantee in the deed, as is required under Rev. St. 1889, p. 212, to be made upon the owner; nor was publication made as is required if the owner is un-

known. Plaintiff denied the validity of the condemnation proceedings, and defendant contended that the said deed was never delivered. *Held*, that there was no agreed statement of facts, nor was it a case where the evidence was wholly documentary, and hence the supreme court could not apply the law to the facts, where no declarations of law were given or refused by the trial court.

2. Where the court admitted evidence under an order, "Received subject to objection," and no definite ruling excluding it was afterwards made, the party offering it cannot allege error in rejecting it.

3. Where a city removed plaintiff's fence, and destroyed his garden, he may recover damages therefor, in an action of ejectment, under Rev. St. 1889, § 4638, permitting such plaintiff to "recover damages for all waste and injury."

4. Seventy-five dollars is not excessive damages for destroying plaintiff's garden upon a strip of land 30 feet wide at the end of a city block, and remaining in possession thereof for seven years.

In banc. Appeal from St. Louis circuit court.

Ejectment by Frank Seiferer against the city of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed in division, and transferred to court in banc. Affirmed.

W. C. Marshall, for appellant. H. A. Loevy, for respondent.

GANTT, P. J. This is an action of ejectment, which was returnable to the circuit court of the city of St. Louis. It resulted in a judgment for plaintiff on January 12, 1895. The land in dispute is 30 feet off of a tract containing 93-100 of an acre, in block 3,770 of the city of St. Louis, which the city claims to have condemned for a part of Martin avenue. The answer is a general denial. Chronologically stated, the facts in this case are as follows: (1) In 1876 William A. Mosberger died, owning a tract of land amounting to 93-100 acres, of which the 30-foot strip here in controversy constituted a part. (2) On May 18, 1876, the will of William A. Mosberger was filed for record in the probate court, which will bequeathed all of his property, except one dollar each to his two children, to his wife, Matilda Mosberger, and her heirs, forever. (3) On the 2d of June, 1876, Matilda Mosberger qualified as the executrix under said will. (4) On the 4th of October, 1878, the probate court ordered the real estate to be sold to pay the debts of the estate. (5) On the 8th of March, 1879, Matilda Mosberger, executrix, filed her report of sale, showing that on the fourth Monday in November, pursuant to said order of sale, she sold the third parcel of land described in said order (being 93-100 acres, unimproved, and being land of which the 30-foot strip here in controversy constitutes a part) to Emil Teschemacher, for the sum of \$150, and the probate court approved said sale. (6) On the 8th of March, 1879, Matilda Mosberger, executrix, executed a deed to said land so sold to Emil Teschemacher; but said deed was not put on record until July 9, 1884, and defendant claims there is

no evidence that this deed was ever delivered to him. (7) On January 10, 1883, the city passed Ordinance No. 12,324, establishing Martin avenue from Duncan avenue to the New Manchester road, 30 feet wide, and ordering the city counselor to institute proceedings for this purpose. (8) On the 30th of July, 1883, the city counselor instituted condemnation proceedings in the circuit court for the purpose of establishing Martin avenue; and Matilda Mosberger was made a party defendant, and was personally served by the city marshal. Thereafter, commissioners were appointed by the circuit court, who assessed the value of the 30-foot strip to be taken from the 93-100 acres aforesaid at the sum of \$125, in favor of Matilda Mosberger, or the owner of a lot of ground, situated in city block 2,969, having a front of 175 feet on Clayton road, by a depth of 272 feet 7¼ inches eastwardly. (9) The deed to Emil Teschemacher, dated March 8, 1879, was not recorded until July 9, 1884, when he and his wife joined with Matilda Mosberger in a conveyance of the property to Mena Seiferer, wife of Frank Seiferer. The deed from Matilda Mosberger, executrix, to Teschemacher, was then placed upon record on the 9th of July, 1884, and the deed from Teschemacher and Mosberger to Mena Seiferer was placed on record on the 10th of July, 1884; but defendant insists that there is no evidence that the deed to Teschemacher was ever delivered to him at any time. (10) The final judgment of condemnation was entered in the circuit court on the 13th day of November, 1884. Mr. H. A. Loevy, attorney for plaintiff, testified that he had examined the records of the recorder's office in the city of St. Louis, and had failed to find that the will of William A. Mosberger had been recorded in said office. At the time of the death of William S. Mosberger, said property was vacant and unimproved, and not under fence, and so remained until after Teschemacher and Matilda Mosberger sold it to Mena Seiferer, who, in the spring of 1885, caused the same to be fenced, which was removed in June, 1887, from the 30 feet, after the final judgment of condemnation by the city officers.

1. When this cause was considered by division No. 2 of this court, it was held that there was ample evidence of a documentary nature to show title in plaintiff to the land sued for, and that, unless the condemnation proceedings by the city were valid, the plaintiff's judgment must stand. The defendant, in the circuit court, undertook to establish a valid condemnation, which was controverted at every point by plaintiff. No declarations of law were asked or refused, and, as we were wholly unadvised as to the theory upon which the court disposed of the defense interposed by the city, we held that, inasmuch as no declarations of law were given or refused, there was nothing to review on the principal issue in the case. The learned city counselor having challenged that decision as being out of

line with the recognized practice of this court, it was ordered that the case be transferred to the court in banc, and it has accordingly been reargued. There can be no doubt that it is the uniform practice of this court to apply the law to the facts, when there is an agreed state of facts, or where the evidence is wholly documentary, and its legal effect is simply matter of law. *Waddell v. Williams*, 50 Mo. 216; *Henry v. Bell*, 75 Mo. 194; *State v. Smith* (Mo. Sup.) 41 S. W. 906; and numerous other cases to the same effect. We have no disposition to overrule those decisions. But, notwithstanding the confidence of the learned counsel to the contrary, the facts are not agreed upon in this case, nor are they conceded. On the contrary, the plaintiff challenged the condemnation proceedings at every step, and the validity thereof is not conceded by plaintiff, nor by this court. Among other things, plaintiff insisted that the steps taken to condemn this land for a street were without notice to Emil Teschemacher, who, the evidence clearly demonstrates, was the owner of the land when the proceeding to condemn was commenced. Mrs. Matilda Mosberger alone was made a party defendant to the condemnation proceeding. William A. Mosberger, her husband, was the last record owner; but he died in 1876, long prior to the passage of the ordinance establishing Martin avenue, for which the city attempted to condemn the 30 feet of land in suit. Mosberger left, him surviving, his widow and two children, William Mosberger and Charles Hugo Mosberger. By his will he devised all his estate, except one dollar each to his two sons, to his wife, and made her executrix of his will. She administered, and, under the order of the probate court, sold the lot in suit to Teschemacher; and he, in turn, sold to Mrs. Seiferer, wife of plaintiff. The city only made Mrs. Mosberger, who was neither a record owner nor the actual owner at that time, a defendant, as to this lot. There was evidence from which the circuit court was authorized to find that Teschemacher was the owner of the land when the condemnation suit was begun. If so, and that fact was known to the city or its attorneys conducting this proceeding, it was the duty of the city counselor to set forth in his petition the name of Teschemacher as the owner of this lot, and have him served with summons as directed by section 3, art. 6, of the scheme and charter of St. Louis (Rev. St. 1889, p. 2129). On the other hand, if the owner was unknown the charter provided for an order of publication. Neither of these courses was pursued by the city. Moreover, the charter required that, if the owner was unknown, the petition should contain a correct description of the parcel of land belonging to such unknown owner; and the petition for the condemnation of this land did not set forth the land in suit at all, nor which of the defendants (if either) owned this tract. It may be that the circuit court found, as it well might, that Ma-

tilda Mosberger was divested of her title as sole devisee of her deceased husband in and to the tract in dispute, that Teschemacher was the owner, and that the city must have either made him a defendant by name, or taken an order of publication against an unknown owner of said tract; otherwise the proceeding was void. If it did so hold, we think it was unquestionably right. Mrs. Mosberger, having parted with her title, was not a necessary party to the suit, nor was she a record owner of the tract, and hence naming her as a defendant was without virtue in law. Or the circuit court may have held that the city, being ignorant of the true owner, was bound to describe the land in its petition and order of publication so as to apprise the unknown owner of the proposed condemnation, and, having failed to do so, the proceeding was for that reason void. If so, we think the judgment, for that reason also, was right. But, in the absence of some declaration of law, we do not know what precise theory the court adopted, and the burden is upon the appellant to point out the error. There was evidence to support the judgment, and every presumption is in its favor. There were a number of facts dehors the record which the court, as trier of the facts, was bound to determine, so that this is neither an agreed case, nor a case calling for the construction of an instrument or record only, but, so far as we are advised, the judgment appears to be for the right party. The insistence of the learned counsel for the city, in this court, that there was no evidence that Mrs. Mosberger's deed to Teschemacher was ever delivered, was not raised by instruction in the circuit court; and yet it seems obvious that the circuit court found as a fact that it had been delivered at its date and acknowledgment; and in so doing it indulged a presumption warranted by the decisions of many courts of last resort in the states of the Union. *Dausch v. Crane*, 109 Mo., loc. cit. 333, 334, 19 S. W. 61; *Fontaine v. Institution*, 57 Mo. 558; *Block v. Morrison*, 112 Mo. 343, 20 S. W. 340; 1 Devl. Deeds, § 265; *Dodge v. Hopkins*, 14 Wis. 630; *Osbourn v. Rider*, Cro. Jac. 135; *Fash v. Blake*, 44 Ill. 302; *Henry Co. v. Bradshaw*, 20 Iowa, 355; *McKinney v. Rhoads*, 5 Watts, 343; *Woodman v. Smith*, 37 Me. 25. If the counsel desired to take the opinion of the circuit court as to whether such a presumption obtains in this state, he should have asked a declaration that it did not, and given the circuit court an opportunity to pass upon the question. In view of the condition of the record, we are still of opinion that the judgment must be affirmed, and that we ought not to assume to pass upon the evidence in the absence of declarations of law given or refused upon the questions mooted in this court.

2. In regard to objections by plaintiff to testimony offered by defendant, there is nothing to show that any of these objections were sustained, and consequently no exceptions were saved. We take it that the evidence

must be considered as admitted under the order made, "Received subject to objection." As no definite ruling was afterwards made, excluding any of said evidence, we consider it as admitted.

3. This leaves for our consideration, in the present state of the record, the second and third assignments in the defendant's brief, which are that the court erred in permitting evidence of damage done to the growing crops of plaintiff by the city when it took possession of the property as part of Martin avenue, and that the judgment for damages was excessive. Section 4638, Rev. St. Mo. 1889, expressly permits the successful plaintiff in an action of ejectment under our statutory form to "recover damages for all waste and injury." Such a finding is held to be incidental to the judgment for plaintiff. *Jones v. Manly*, 58 Mo. 559; *Lee v. Bowman*, 55 Mo. 400. It follows that no error was committed in admitting evidence of the damages which accrued by the city tearing down and removing plaintiff's fence and destroying his garden.

4. The court allowed \$75 damages for the loss incurred by the destruction of the fencing and crops, and loss of rents and profits down to the verdict. The plaintiff had been evicted seven years. One dollar per month seems to have been the basis for the court's finding. There is nothing to indicate that the verdict was unreasonable or excessive. In *Rines v. Mansfield*, 96 Mo. 394, 9 S. W. 798, it was said, "Where it is shown in an action of ejectment that the land in controversy is in cultivation, it cannot be said there is no evidence upon which to base a finding as to the value of the monthly rents and profits." Certainly it cannot be said that these damages are more than nominal, under the facts in evidence. Precluded from an investigation of the principal points discussed by the defendant's counsel, because no declarations of law were asked or given, and finding no error in the remaining assignments of error, the judgment must be affirmed.

BARCLAY, C. J., and SHERWOOD, BURGESS, MACFARLANE, ROBINSON, and BRACE, JJ., concur.

#### STATE v. AUSTIN et al.

(Supreme Court of Missouri, Division No. 2.  
Nov. 23, 1897.)

RECOGNIZANCE—RECORD OF FORFEITURE—SCIRE FACIAS TO SURETIES—DEFENSES—LIABILITY OF SURETIES.

1. In scire facias to enforce the forfeiture of a recognizance conditioned for the appearance of the obligor at a certain term, it was not necessary that the record of such forfeiture should recite that the obligor failed to appear "without sufficient cause or excuse," (1) as it was not incumbent on the state to show a negative, the burden of showing his excuse devolving on the obligor as a matter peculiarly within his knowledge; and (2) for the reason that the entry of forfeiture was not a final determination of liability, but a preliminary step to the issuance of

the scire facias to notify the sureties of the default of their principal, and afford them an opportunity to show cause.

2. Where an indictment was adjudged bad on appeal, and the cause remanded, and the prisoner admitted to bail to answer to another indictment, if one should be found, the fact that a new indictment had not been returned did not render such recognizance invalid.

3. The taking and approving of a recognizance by the sheriff, in an amount directed by the court, and filing it with the clerk, was a substantial compliance with Rev. St. 1889, § 4129, requiring the sheriff to take bail in certain cases, and return the same to the clerk.

4. A sheriff held a prisoner under a judgment of the supreme court reversing the cause with direction to commit the prisoner to a certain jail to await the action of the circuit court. The circuit court fixed the bail, which the sheriff accepted. Held valid, under Rev. St. 1889, § 4380, providing that it is sufficient if defendant was legally in custody charged with a criminal offense, and discharged by reason of the giving of a recognizance.

Error to circuit court, Lincoln county; *E. M. Hughes*, Judge.

Scire facias on a forfeited recognizance by the state of Missouri against Josiah Creech, as surety for one Stephen F. Austin, who, having been convicted of grand larceny, appealed, whereupon the judgment was reversed, the cause remanded, and the prisoner ordered committed to await the further order and action of the circuit court. His recognizance was forfeited for nonappearance, and on trial of the issues raised by defendant's answer to said writ of scire facias judgment was rendered for the state, which was affirmed by the St. Louis court of appeals; but, it having been since decided that the supreme court alone has jurisdiction of appeals from judgments of the circuit and criminal courts enforcing recognizances in cases of felony, defendant brings up the record, and reassigns the errors of which he complained in the court of appeals. Affirmed.

Norton, Avery & Young, for plaintiff in error. J. W. Powell and E. C. Crow, Atty. Gen., for the State.

GANTT, P. J. This is a proceeding on scire facias to enforce a forfeiture of a recognizance entered into by Stephen F. Austin as principal and Josiah Creech as surety, April 10, 1893, conditioned that said Austin should be and appear before the circuit court of Lincoln county on the first day of the October term, to be begun and held at Troy, Mo., on the second Monday in October, 1893, and not depart without leave of the court. Austin was first apprehended and taken before Justice Dryden on August 10, 1891, on a charge of stealing a horse from Dodson on August 3, 1891. He was duly committed to jail in default of bail. At the next term he was indicted and tried on the said charge, and the jury disagreed. He was again tried at the spring term, 1892, and convicted, from which he appealed to this court, and in the meantime was sent to the penitentiary. In January, 1893, the judgment was reversed, and

the cause remanded (21 S. W. 31), and the defendant was ordered to be taken from the penitentiary, and delivered to the jail of Lincoln county, "there to be confined to await the further order and action of the Lincoln county circuit court." At the spring or April term, 1893, his bail was fixed by the circuit court at \$300, and the cause continued. On the 10th day of April, 1893, the sheriff took and approved the bond or recognizance which is the basis of this action, with appellant Creech as surety, and filed it with the clerk, and thereupon released the prisoner. At the October term, 1893, and on December 4th the court having been regularly adjourned, the record recites, after entitling the cause: "Now here, on this day, comes the prosecuting attorney for the state, and, the defendant being three times called, comes not in discharge of his recognizance herein, and his surety, Josiah Creech, being three times called to produce the body of said defendant, falls so to do," etc. Thereupon the recognizance was declared forfeited, and afterwards at the same term a scire facias ordered, returnable to next term, and afterwards, on December 8, 1894, the scire facias duly issued, and was served on defendant Creech, December 11, 1894. The answer was filed December 9, 1895, it being the first day of the October adjourned term. It set out the following reasons: (1) Because at the time of the taking of the recognizance the defendant was not legally in the custody of the sheriff, there being no legal indictment pending against him; (2) that he was not under arrest by virtue of a warrant upon an indictment, nor upon a warrant of commitment for failure to find bond with the amount of bail required specified on the warrant, nor for a misdemeanor; (3) that the record of the court fails to show that defendant failed to appear without sufficient cause or excuse; (4) and because the records failed to show that a bond was ever taken by the sheriff, and by him certified, and returned to the clerk; (5) denied that defendant as principal, and Josiah Creech as surety, entered into a recognizance as alleged in the scire facias. The reply was a general denial. The judgment was for the plaintiff, and from the judgment this appeal is taken.

Upon the foregoing evidence, defendant Creech prayed the court to declare the law to be that the finding must be for the said defendant, which the court refused, and the said defendant duly excepted. On an appeal to the St. Louis court of appeals the judgment of the circuit court was affirmed, but, by reason of the fact that this court has since decided that this court alone has appellate jurisdiction from judgments of the circuit or criminal courts enforcing recognizances in cases of felony, the defendant in error has brought this record into this court, and reassigns the errors of which he complained in the court of appeals.

1. It is first contended that the forfeiture

is insufficient, because the entry thereof does not recite that "the defendant failed to appear without sufficient cause or excuse." The obligation of the defendant and his surety bound him to appear at the October term of the court, and not depart without leave of the court. The record shows that at said term his presence was required, and he was three times solemnly called, and came not, and that his surety was also called, and failed to produce his principal; thereupon the forfeiture was taken. If he had cause or excuse to show why the forfeiture should not be entered, it devolved upon him to make it known, and it was not incumbent upon the state to show a negative. The statute has never been construed to require more than to note the calling of the defendant and his sureties, and their default. The burden of explaining his excuse has been justly cast upon him as a matter peculiarly within his knowledge. But a further and complete answer to this contention is that the mere noting of the forfeiture is not the final determination of the liability of the defendant and his sureties. It is merely the preliminary step to the issuance of the *scire facias*. The office and purpose of the *scire facias*, under our practice, is to notify the sureties of the default of their principal, and afford them an opportunity to show cause why execution should not be awarded against them. As pointed out in the very satisfactory opinion of the majority of the court in *State v. Whitecotton*, 63 Mo. App. 8: "The defense that the forfeiture was illegally taken is necessarily still open to the sureties in the latter proceeding, because the statute expressly provides that final judgment should be entered only upon the return of the *scire facias*, and that the court may remit the forfeiture for good cause shown." No such defense was attempted in this cause. *Ellis v. Jones*, 51 Mo. 180. We venture to say that we doubt if the judicial history of this state will show a single entry of a forfeiture in which the record recites that it was taken because the defendant failed to appear "without cause or excuse."

2. Equally without merit is the point that, because this court had adjudged the indictment bad, and remanded the cause, the defendant was illegally restrained of his liberty, and could not be required to enter into a recognizance because a new indictment had not been returned. The very purpose of bail was to require him to answer to another indictment, if one should be found. *State v. Livingston*, 117 Mo. 627, 23 S. W. 766; *State v. Poston*, 63 Mo. 521.

3. The taking and approving the bond in the amount directed by the court, and filing it with the clerk, was a sufficient and substantial compliance with the statute requiring the sheriff to take bail in certain cases, and return the same to the clerk. Rev. St. 1889, § 4129; *State v. Lay*, 128 Mo. 609, 29 S. W. 999. But it is said further that the sheriff did not hold the prisoner under such author-

ity as authorized the sheriff to take the bail. It fully appears that the sheriff held the prisoner under the judgment of this court reversing and remanding the cause, and the specific direction therein to commit the prisoner to the Lincoln jail and the keeper thereof, to await the action of the circuit court. No higher or greater authority is required by the law. The circuit court fixed the bail, and, under these circumstances, the sheriff, being in charge, accepted the bail. This is enough. Section 4380, Rev. St. 1889, provides that it is sufficient if "it be made to appear from the whole record or proceeding that the defendant was legally in custody, charged with a criminal offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance that the sureties undertook that the defendant should appear before a court or magistrate at a term or time specified for trial" (*State v. Morgan*, 124 Mo. 479, 28 S. W. 17); all of which amply appears in this record, and the statute answers all the points made against the judgment. It is a wise and wholesome piece of legislation, and should be enforced in the spirit of its enactment. There was no error in permitting the sheriff to testify he received the prisoner from the marshal of the supreme court, and held under the judgment of this court. The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

#### STATE v. CAMPBELL.

(Supreme Court of Missouri, Division No. 2.  
Dec. 7, 1897.)

#### CRIMINAL LAW—APPEAL—MOTION TO QUASH.

Where no exception is saved to the action of the court sustaining a motion to quash an information, such action cannot be reviewed on appeal.

Appeal from circuit court, Andrew county. Joseph Campbell was charged by information with violating the law relating to peddlers' licenses. From a judgment sustaining a motion to quash the information, and discharging defendant, the state appeals. Affirmed.

The Attorney General and J. T. Wade, for the State. Seneca N. Taylor, Chas. Erd, and S. C. Taylor, for respondent.

GANTT, P. J. The prosecuting attorney of Andrew county filed an information against the defendant for selling Singer sewing machines without first having taken out a license as a peddler. The defendant moved to quash the information in the circuit court, and the motion was sustained, and defendant discharged, and the state appeals. No exception was saved to the action of the circuit court in sustaining the motion to quash the indictment, and hence there is nothing before this court for review. As early in the

judicial history of this state as the decision in *State v. Wall* (1851) 15 Mo. 208, it was ruled by this court that a motion to quash an indictment was no part of the record unless made so by a bill of exceptions, and, in the absence of a bill of exceptions, the clerk could not make it so by copying it into the transcript to this court, and therefore this court refused to consider the judgment of the circuit court thereon. That opinion has been followed without dissent in many cases, and still meets with our approval. *State v. Gee*, 79 Mo. 313; *State v. Thurston*, 83 Mo. 271; *State v. Vincent*, 91 Mo. 662, 4 S. W. 430; *State v. Henderson*, 109 Mo. 292, 19 S. W. 239; *State v. Fraker*, 137 Mo. 258, 38 S. W. 909. The judgment of the circuit court is affirmed.

SHERWOOD and BURGESS, JJ., concur.

#### DAVIS v. DAVIS.

(Court of Appeals of Kentucky. Dec. 14, 1897.)

DIVORCE—CAUSES—IMPRISONMENT FOR LIFE—LIMITATIONS.

1. Where a husband is serving a life sentence in the state penitentiary, the wife should not be denied a divorce for abandonment upon the ground that the living apart "is not voluntary," as the separation is not without fault on his part.

2. Condemnation for felony is one of the grounds of divorce set out in Ky. St. § 2117; and Civ. Code, § 423, subd. 3, provides that a plaintiff must, to obtain a divorce, prove that the cause occurred or existed within five years next before the commencement of the action. *Held*, that "condemnation" does not refer to conviction, merely, but exists as long as the judgment is in force, and the cause is not barred by reason of having existed for more than five years.

Appeal from circuit court, Woodford county.

"Not to be officially reported."

Action for divorce by Allie W. Davis against W. T. Davis. From a judgment for defendant, plaintiff appeals. Reversed.

J. T. Wilson and E. M. Wallace, for appellant. W. H. Julian, for appellee.

HAZELRIGG, J. Appellant and appellee were married in 1881, and lived together until 1884, when appellee was convicted of murder, and sentenced to the penitentiary for life, where he still remains. In January, 1896, appellant instituted this action for divorce, relying on two grounds therefor: (1) Living apart, without any cohabitation, for five years next before the application; (2) condemnation for felony in this state. These grounds are set out in subsections 2 and 3 of section 2117 of the Kentucky Statutes. Appellant also averred that her cause of action accrued and existed within five years next before the commencement of her action. In section 2120 of the Statutes it is provided that the "action for divorce must be brought within five years next after the doing of the act complained of"; but in section 423 of the Civil Code it is provided that a plaintiff,

to obtain a divorce, must allege and prove, in addition to a legal cause of divorce, "(3) that the cause of divorce occurred or existed within five years next before the commencement of the action." The chancellor denied the appellant relief, solely on the ground that the living apart "was not voluntary," and that the condemnation for felony meant conviction for felony; and, as that had not occurred within five years next before this action was instituted, she was not entitled to a divorce on that ground. We think the chancellor was in error as to both grounds. It is true that in *Pile v. Pile*, 94 Ky. 308, 22 S. W. 215, the husband was denied a divorce on the grounds of lunacy and abandonment for five years; but the court said, "Here the wife has a mind diseased, without her fault, and has never abandoned her husband, but is now confined in an asylum for the insane, by his consent and direction." Here the husband is confined in the penitentiary for life, after a conviction for crime; and the separation certainly cannot be said to be without his fault, though it is wholly without the fault of plaintiff. Again, we think the condemnation for felony existed within the five years before suit was brought, although the judgment of conviction was entered more than five years before. Such condemnation must exist at least as long as the judgment is in force. The statute may be thus construed, even if held applicable to this particular ground of divorce. We are inclined to think, however, that it is not applicable. The doing of the act complained of, mentioned in the statute, would seem to have reference to some of the many acts set out in the statute, to be committed by either the husband or wife, entitling the other to a divorce. Here the condemnation was not the act of the husband, but an act by the state. It follows from what we have said that the order of allowance to Edwards, as guardian ad litem, to be paid by the wife, is erroneous. Judgment is reversed for proceedings consistent herewith.

#### ALLEY v. HOPKINS et al.

(Court of Appeals of Kentucky. Dec. 14, 1897.)

APPEAL—CONFLICTING EVIDENCE—CONCLUSIVENESS OF VERDICT.

Where the evidence, though conflicting fairly supports the verdict, the judgment will not be disturbed on appeal.

Appeal from circuit court, Boyd county.

"Not to be officially reported."

Action by John Alley against John C. Hopkins and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Brown & Brown, for appellant. John Hager, for appellees.

HAZELRIGG, J. The facts of this case and the law controlling it, are fully stated in the case of *Alley v. Hopkins*, 98 Ky. 688, 3 S. W. 13. On a return of the case a trial



was had before a jury, the sole question being whether at the time the Hogans, the principals in the debt, paid the annual interest due on the note for the preceding year, there was an agreement on the part of Alley, the payee, that the Hogans should keep the money another year. If there was such an agreement, and it was without the knowledge or consent of the sureties, the court's instruction to the jury was to find for the defendants. This is the law of the case as heretofore determined, and as the proof on the point involved, while conflicting, fairly supports the verdict, we cannot disturb the judgment. For the reasons indicated the judgment is affirmed.

**LOUISVILLE BANKING CO. v. ETHERIDGE MANUF'G CO. et al. RILEY v. MERCHANTS' NAT. BANK et al. BROWN et al. v. RILEY et al.**

(Court of Appeals of Kentucky. Oct. 22, 1897.)

**CORPORATIONS — FRAUDULENT ASSIGNMENTS FOR CREDITORS — ATTACHMENT — COUNSEL FEES — FRAUDULENT MORTGAGE.**

1. A corporation may have a fraudulent intent in the execution of a deed of assignment for the benefit of creditors; the fraudulent acts of its officers and agents being the acts of the corporation.

2. A creditor of an insolvent corporation may, by attachment, acquire a specific lien upon its property, which will entitle him to a preference over other unsecured creditors, as the mere fact that a corporation is insolvent does not require that there shall be a pro rata distribution of its assets among its creditors.

3. A fraudulent assignment by an insolvent corporation for the benefit of its creditors is such a fraudulent disposition of its property as will entitle a creditor to an attachment.

4. Where an order of attachment against a corporation, the only object of which is to garnish funds in the hands of an assignee under a fraudulent assignment executed by the corporation for the benefit of creditors, fails to state the amount of the debt sought to be secured, the amount may, after the execution of the order, be inserted *nunc pro tunc*, so as to give priority over intervening attaching creditors; the garnishee being a party to the action, and the amount of the claim being stated in the petition and affidavit.

5. Although an assignment executed by a corporation for the benefit of creditors is declared fraudulent, the assignee is entitled to compensation for his own services rendered prior to the time suits were instituted by creditors attacking the assignment, and also to an allowance of counsel fees for the services of his attorneys rendered prior to that time.

6. The allowance of separate fees to attorneys employed by the assignee was not the taxation of more than one fee in the case, within the meaning of Gen. St. c. 20, § 32, where one of a firm of attorneys employed by the assignee dies, and another attorney was substituted in his place; there being, as a matter of law and fact, but one attorney or firm of attorneys employed.

7. A mortgage purported to have been executed October 6, 1889, by a corporation, to E., to indemnify him against loss by reason of his suretyship for the corporation. E. was a stockholder, and the father of the president and secretary of the company. At the foot of the mortgage was a stipulation that it was not to be foreclosed, unless absolutely necessary to "protest" said mortgage. The mortgage was never recorded, and was not acknowledged until December 17, 1890, just before an assignment was executed

by the corporation for the benefit of creditors. The mortgage was kept in a drawer of the safe of the corporation, which drawer was under the control of E., and, about the time of the assignment, was delivered by E. to his attorney, who was also attorney for the corporation, and became the attorney for the assignee, with direction to protect his interest. The assignment was held to be fraudulent. Held, that attaching creditors are entitled to priority over the mortgage, and that E. is to be treated as an unsecured creditor.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Consolidated actions by J. H. Riley and others against the Etheridge Manufacturing Company and others to set aside an assignment for the benefit of creditors, and by George Straeffer, Jr., to settle the assigned estate. Judgment setting aside the assignment, and giving priority to certain attaching creditors, and the Louisville Banking Company and others appeal. Certain judgments and orders reversed, and others affirmed.

C. B. Seymour and Chas. Y. Hulsewede, for Straeffer, assignee. T. Hagan and Isaac T. Woodson, for J. H. Riley. John Barret and C. B. Seymour, for Brown, De Turck & Co. Strother & Gordon, for J. M. Robinson & Co. Humphrey & Davie and Callaway & Miller, for Merchants' Nat. Bank. W. O. Harris, for Citizens' Nat. Bank. Barnett, Miller & Barnett, for Louisville Banking Co. Lane & Burnett and C. B. Seymour, for N. N. Etheridge.

GUFFY, J. The Etheridge Manufacturing Company, a corporation, made an assignment December 17, 1890, to George Straeffer, Jr., as alleged, for the benefit of all its creditors. On the 18th of August, 1891, J. H. Riley instituted suit against said corporation and the assignee and the stockholders, individually, seeking to make them liable for his debt sued on, and also set up the fact of the assignment, and asked for a settlement of the same; charging negligence, etc., on the part of the assignee. The allegations setting up the assignment were finally withdrawn by Riley. It was also held that the stockholders were not individually liable for his debt. It also appears that the assignee, at first, by cross action, sought to obtain a settlement of the estate, but finally withdrew same, and on November 6, 1891, instituted suit No. 45,001, for a settlement of the assigned estate. It also appears that J. S. Callaway, the Merchants' National Bank, J. M. Robinson & Co., the Citizens' National Bank, and the Louisville Banking Company each filed separate suits against the said corporation; the assignee being made a party to part, if not to all, of the said suits. The above-named suits, together with that of J. H. Riley and the suit (No. 45,001) by the assignee for a settlement of the estate, were all consolidated and heard together. The creditors attacked the assignment, and sought to have it set aside, for the reason that the same was fraudulent, and made with the intent to hinder, delay, and defraud creditors; and all of said credit-

ors sued out attachments for their several debts, which were executed on the said assignee; and he was also summoned as garnishee. N. N. Etheridge, one of the stockholders of said corporation, asserted a mortgage lien upon the proceeds in the hands of said assignee for the sum of \$6,000, besides interest; his claim being based upon an unrecorded mortgage given upon part of the assigned estate, and dated October 6, 1889. The court, upon final hearing, adjudged the assignment to have been fraudulently made, and set the same aside, and held it for naught. From that judgment, Brown, De Turck & Co., etc., have appealed. On the question of priority of attachments, the court adjudged that J. H. Riley is entitled to the first lien on the attached funds, to the extent of only his costs, not exceeding \$30; that J. S. Callaway is entitled to the second attachment lien for his debt; the Merchants' National Bank, to the third attachment lien; J. M. Robinson, to the fourth attachment lien; Citizens' National Bank, to the fifth attachment lien; and the Louisville Banking Company, to the sixth attachment lien,—to the extent of the amount adjudged each of them. The judgment allowing N. N. Etheridge's claim of \$6,000 was resisted by the attaching creditors, and is also before us for revision.

The testimony in this case fully sustains the judgment of the court in setting aside the assignment, and holding same for naught. We cannot assent to the contention that a corporation cannot have a fraudulent intent. The acts of those authorized to act for a corporation are, in fact and in law, the acts of the corporation, and it must be held to intend that which the acts indicate.

It is, however, the contention of the assignee, as well as of Brown, De Turck & Co., that, the corporation being insolvent, its assets, as a matter of law, must be distributed pro rata among its creditors; and numerous authorities are cited to sustain their contention. It may be true that some courts have so held, and that others have used expressions, in the discussion of cases before them, from which it might be inferred that the courts were so holding. In some of the states, we apprehend, there are statutes which make stockholders or directors trustees for the benefit of the creditors; but we are of the opinion that the weight of authority, as well as the reason of the law, places the property of a corporation upon the same footing as that of an individual, so far as the rights or priorities of creditors are concerned. In *Hollins v. Iron Co.* (decided in 1893) 150 U. S. 371, 14 Sup. Ct. 127, the court, in a well-considered opinion, seems to hold that the property of a corporation, so far as creditors' rights are concerned, is to be distributed or disposed of in the same manner as that of a natural person. We quote as follows from the opinion in *Hollins v. Iron Co.*:

"While it is true that language has been frequently used to the effect that the assets of a

corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pom. Eq. Jur. par. 1046, they 'are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor.' To the same effect are decisions of this court. The case of *Graham v. Railroad Co.*, 102 U. S. 148, was an action by a subsequent creditor to subject certain property, alleged to have been wrongfully conveyed by the corporation debtor, to the satisfaction of his judgment. And the very proposition here presented was then considered, and in respect to it the court, by Mr. Justice Bradley, said (page 160):

"It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor: that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken. We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate interests, but coincident with them.

"When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

"With reference to the suggestion in the last paragraph, it may be observed that the court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is that, when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they, in equity, belong to the creditors and stockholders, rather than to the corporation itself. In other words (and that is the idea which underlies all these expressions in reference to 'trust' in connection with the

property of a corporation), the corporation is an entity distinct from its stockholders as from its creditors. Solvent, it holds its property as an individual holds his,—free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in the condition of a trust, first for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders, as against the corporation, in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder. Again, in the case of *Railway Co. v. Ham*, 114 U. S. 587, 5 Sup. Ct. 1081, it appeared that four railway corporations, owing debts, were consolidated under authority of law, and by the terms of the consolidation agreement the new corporation was to protect the debts of the old. Subsequently the new corporation executed a mortgage on all its property, and in a contest between the mortgagees and the unsecured creditors of one of the constituent companies the court held that the lien of the mortgagees was prior. In respect to this, Mr. Justice Gray (page 594, 114 U. S., and page 1084, 5 Sup. Ct.) thus stated the law: 'It was contended that the property of the Toledo & Wabash Railway Company was a trust fund for all its creditors, and that upon the consolidation the Toledo, Wabash & Western Railway Company took the property of the Toledo & Wabash Railway Company charged with the payment of all its debts. The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor without authority of law, and in fraud of existing creditors, is void as against them.' The case of *Fogg v. Blair*, 133 U. S. 534, 541, 10 Sup. Ct. 338, presented a similar question; and this court, by Mr. Justice Field, observed: 'We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company, before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the

indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence.' In the case of *Hawkins v. Glenn*, 131 U. S. 319, 332, 9 Sup. Ct. 739, which was an action brought by the trustee of a corporation against certain of its stockholders to recover unpaid subscriptions, and in which the defense of the statute of limitations was pleaded, Chief Justice Fuller referred to this matter in these words: 'Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust sub modo, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that, therefore, statutes of limitation do not commence to run, in respect to them, until the retention of the money has become adverse, by a refusal to pay upon due requisition.' These cases negative the idea of any direct trust or lien attaching to the property of a corporation in favor of its creditors, and at the same time are entirely consistent with those cases in which the assets of a corporation are spoken of as a 'trust fund,' using the term in the sense that we have said it was used. The same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is therefore sometimes said, not inaptly, to be held in trust for the partnership creditors, or that they have an equitable lien on such property. Yet all that is meant by such expressions is the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust. A party may deal with a corporation, in respect to its property, in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity, in respect to its property in their hands, and may be called to account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and, if there be any exceptions thereto, they are not presented by any of the facts in this

case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple-contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

In the case of *La Grange Butter-Tub Co. v. National Bank of Commerce* (decided by the supreme court of Missouri in 1894) 28 S. W. 710, the court, in discussing the question under consideration, said: "The mere insolvency of a corporation cannot have the effect of depriving creditors of their legal remedies, but they are at liberty, notwithstanding the insolvency, to sue the corporation in an action at law, and by means of such proceedings establish a specific lien upon the property seized under attachment or execution. Such lien, when perfected, will doubtless entitle creditors acquiring it to a preference over other unsecured creditors. \* \* \* It is true that the court said in that case that: "After the aid of a court of equity being invoked, and assets taken into its hands, the jurisdiction necessarily becomes exclusive; and the court will proceed, in administering the insolvent estate, upon the maxim that 'equality is equity.'" But this expression is not applicable to the case at bar, nor is it necessarily in conflict with the doctrines announced in this case. In the circuit court of appeals for the Sixth circuit, in the case of *Railroad Co. v. Evans* (decided in 1895), the doctrine announced in *Hollins v. Iron Co.* is adhered to in the opinion, delivered by Judge Lurton. 14 C. C. A. 116, 66 Fed. 817.

The court in this case having adjudged the assignment void, it follows that all steps taken under or by virtue of said assignment are likewise null and void; hence this case must be treated as not having been, in fact or in law, placed under the control of a court of equity, and must stand upon the same footing as if the corporation had been guilty of an act which authorized the issuance of the attachments in favor of its creditors; and as held in *Bank v. Payne*, 86 Ky. 446, 8 S. W. 856, the attaching creditor was entitled to a prior lien upon the assets of the corporation. The fraudulent selling or disposing of property, with intent to cheat, hinder, or delay creditors, is by law made a ground of an attachment; and it would be strange indeed if a fraudulent assignment, followed by a suit for the settlement and disposition of the assigned property, could be made to defeat the attachment lien of creditors. The judgment of the court below in giving priority to attaching creditors is affirmed.

Counsel for Riley insists that his attachment for the amount of his debt, as shown by his petition and by his affidavit, should have been held a prior lien to that of the other attaching creditors. It will be seen that the attachment failed to specify the

amount of his debt, but that amount is left blank. After setting up the style of the case, the attachment reads as follows: "To the Sheriff of Jefferson County, Greeting: You are commanded to attach and safely keep the property of the defendant, the Etheridge Manufacturing Co., not exempt from execution, or so much thereof as will satisfy the claim of plaintiff in this action, for —, and thirty dollars for costs thereof, and to summon the garnishee to answer in this action within twenty days from the service hereof, if served in Jefferson county, or thirty days if served elsewhere in the state, in the Jefferson circuit court; and you will make due return of this order within sixty days from the date hereof. Witness: John S. Cain, Clerk of Said Court. This 27th day of April, 1893. John S. Cain, Clerk, by Frank X. Meixel, D. C." Upon the attachment is the following indorsement: "George Straeffer, Assignee of the Etheridge Manufacturing Co., and George Straeffer, Jr., Garnishee: The object of this action is to attach all money, property, choses in action, or other evidence of debt, in your hands, belonging to the Etheridge Manufacturing Co., or in which it has any interest, and to restrain you from paying same to it, or to any one for it, until further orders of this court. T. Hagan, Plaintiff's Attorney. J. H. Riley." The sheriff's return is as follows: "Came to hand April 27, 1893, at 10:40 a. m. Executed April 27, 1893, on George Straeffer, Jr., assignee of the Etheridge Manufacturing Co., a copy of the within order of attachment, and summoned him to answer as garnishee herein. H. A. Belle. S. J. C., by W. B. Thixton." It is also executed on the president of said company. After the issuing of the other attachments, Riley asked leave to amend the order of attachment nunc pro tunc, by having inserted in the order of attachment the amount of his claim, which leave was refused by the court. It is the contention of Riley that inasmuch as Straeffer was a party to the suit, and summoned as garnishee, and his petition and affidavit showed the amount of plaintiff's debt, and the notice indorsed on the attachment notified him to hold the property, etc., until further orders of the court, his lien was complete; and it is contended that, as Straeffer made no defense or objection to the attachment or summons, his (Riley's) attachment lien for the amount of his debt should have been adjudged to him. It seems to us that under the facts in this case the omission to state the amount of plaintiff's claim was merely a clerical error upon the part of the clerk of the court, and for which Riley was in no way blamable; and inasmuch as his petition and affidavit clearly showed the amount of his debt, and the sole object being to garnish the funds in the hands of the so-called assignee, the amendment he asked to be allowed to make was not in any sense prejudicial to the rights of

the other litigants, and the amendment should be allowed, and a prior lien allowed to him on the attached fund or property; and the judgment of the court below, refusing to allow the amendment, and disallowing the lien for the amount of Riley's judgment debt, is reversed.

It is the contention of the Louisville Banking Company that the assignee in this case should not have had any allowance for his services, nor any allowance for counsel fees; and it cites *Scott v. Strauss*, 14 Ky. Law Rep. 892, and *York v. Ferrell*, Id. 207; and it also contends that only one fee can be taxed as costs in the case, and cites *Gen. St. c. 26, § 32*. We do not think the decisions cited are conclusive in this case. They are decisions of the superior court, and the facts in the cases are not stated. It will also be seen that Polk & Hulsewede were first the attorneys for the assignee, and Polk died; and it seems that Seymoor was substituted in the place of Polk; hence, as a matter of law and fact, there was but one attorney or firm of attorneys employed, and the separate fees allowed were doubtless intended as a settlement of the amount due to the former and present associate attorneys. It also appears that the assignee had in fact, without objection from the creditors, entered upon the execution of the so-called trust, and rendered much service, and that his attorneys had presumptively rendered considerable service before the assignment was attacked. It was therefore equitable that he should be paid for his services, and allowed reasonable counsel fees for all services rendered previous to the time suits were instituted assailing the validity of the assignment, if not longer. We are of the opinion that the allowance to Straeffer was proper, and the same is affirmed. Taking the whole case into consideration, we are of the opinion that \$1,500 was sufficient allowance for counsel fees, and the judgment allowing any sum in excess thereof is reversed. The court below will apportion the sum allowed among the attorneys.

It is contended that the petition of the Citizens' National Bank did not authorize the attachment in its behalf; hence it is claimed that it should not have been allowed; but we are of the opinion that the averments in the petition, together with the amendments properly allowed, were sufficient to authorize the judgment of the court sustaining the attachment, and giving it the priority allowed to it.

It is the contention of the Louisville Banking Company and others that the court erred in allowing to N. N. Etheridge his mortgage lien of \$6,000, with interest, amounting in all to the sum of \$6,900. It will be seen that the mortgage purports to have been executed the 6th day of October, 1889, to indemnify N. N. Etheridge against loss by reason of his suretyship to the Louisville Banking Company, for the benefit of the Etheridge

Manufacturing Company, on a note for \$8,100. Said mortgage was never recorded. The proof further shows that on the day of the assignment, and before the assignment was executed, the corporation acknowledged said mortgage before the clerk of the Jefferson county court, but no memorandum of such acknowledgment appears on the copy of the mortgage herein. It is claimed that the \$8,100 note was renewed several times, and that on the 15th day of December, 1890, there was \$6,000 balance due, for which a new note was executed to the Louisville Banking Company for \$6,000, due in three months, signed by N. N. Etheridge and J. J. Etheridge, and indorsed as follows: "Etheridge Manufacturing Company, by Jas. J. Etheridge, Secretary." It seems that N. Etheridge is the same as N. N. Etheridge, named in the mortgage. At the foot of said mortgage the following appears: "October 6, 1889. It is also understood and agreed between parties of the first part and parties of second part that this mortgage is not to be foreclosed unless it is absolutely necessary to protest said mortgage. [Signed] N. Etheridge." The mortgage seems to be witnessed by Henry H. Flaspoebler and James C. Ogeden. The indorsement at the foot of the mortgage seems to be witnessed by Henry Flaspoebler. It will be seen from the record that the said mortgagee was one of the incorporators and a stockholder of the Etheridge Manufacturing Company, and the father of the president and secretary of said company, and at the time of the assignment the three Etheridges owned all the stock of the said company, and that no attempt was made to enforce the collection of said mortgage in question until the 16th of November 1892. The mortgage in question was, as is testified to, kept in a drawer of the safe of the Etheridge Manufacturing Company, which drawer was under the control of the mortgagee, and that about the time of the assignment, or very shortly before, the mortgage was delivered by the mortgagee to his attorney, Polk, with directions, as is claimed, to protect his interest. It also appears that the said Polk was the attorney for the corporation, and became the attorney for the assignee. It is very evident in this case that the reason for the execution of the mortgage, and withholding it from record, was to give greater credit to the corporation, of which the mortgagee was one of the principal stockholders, than it could otherwise obtain, and at the same time to give a preference to the mortgagee over other creditors. It also appears that a part of the debts due other creditors was created after the execution of the mortgage, and some, it seems, before its execution. The addition or condition annexed to the mortgage also indicates very clearly that it was not to be enforced, except in some emergency; and it may well be doubted whether it was intended for any purpose except to prevent ordinary creditors of

corporation from collecting their debts in the event of the failure of said corporation, or in the event of such an assignment as has been made in this case. Taking into consideration all the facts and circumstances proven in this case, it seems to us that N. N. Etheridge should not have been allowed a prior lien upon the assets of the corporation. The judgment allowing said mortgage lien of \$6,900 as a preferred claim, and giving it a prior lien to that of the attaching creditors, should not have been allowed; and the judgment allowing same as a prior lien upon said assets is reversed, and Etheridge is placed upon the footing of creditors having no attachment lien. The other judgments and orders, not herein reversed, are affirmed, except that the attachment taken must be modified so as to conform to this opinion, and the cause remanded for further proceedings consistent with this opinion.

#### HALLON v. CENTER et al.

(Court of Appeals of Kentucky. Oct. 27, 1897.)

**ELECTIONS—CERTIFICATE OF NOMINATION—DUTIES OF CLERK AS TO PLACING NAMES ON BALLOTS.**

1. Ky. St. § 1453, regulating primary elections, provides that the county clerk shall cause to be printed on the respective ballots the names of the candidates nominated by convention or primary election, as certified to him, and that "the certificate of nomination by a convention or primary election shall be in writing, and shall contain the name of each person nominated, his residence and the office for which he is nominated," and that "said certificate shall be signed by the presiding officer and secretary of such convention, or by the chairman and secretary of the county, city or district committee, who shall add to their signatures their respective places of residence and acknowledge the same before an officer duly authorized to administer oaths." *Held* that, where the clerk knows that the persons signing the certificate as chairman and secretary of the county committee are in fact such, it is his duty, in absence of contest or dispute by others, to give full credit to the certificate, although not acknowledged, and to place upon the ballot the name of the person certified, although the certificate does not state the residence of such person, or the residence of the officers signing the certificate, unless the clerk demands other proof of those facts, and it is not furnished; those requirements of the statute being directory, merely, and not mandatory.

2. A nominee who files his certificate of nomination less than 15 days before the election is not entitled to have his name placed on the ballot; the requirement of the statute that it shall be filed at least that long before the election being mandatory.

3. The requirement of the statute that the certificate of nomination shall be filed not more than 60 days before the election is directory, merely, and the nominee loses no right by filing it sooner.

Appeal from circuit court, Clark county.  
"To be officially reported."

Petition by G. T. Center and others against J. B. Hallon, county clerk, for a writ of mandamus. Judgment for plaintiffs, and defendant appeals. Reversed as to some of the appellees, and affirmed as to others.

B. R. Jouett and Beckner & Jouett, for appellant. J. M. Benton, for appellees.

LEWIS, C. J. Appellees, alleging in their petition that at a primary election held September 19, 1896, under authority of the executive committee of the Democratic party of Wolfe county, they were nominated as candidates for various named offices, brought this action in the Clark circuit court, October 22, 1897, for a writ of mandamus requiring appellant, county court clerk, to cause to be printed on the official ballots to be prepared by him and used in said county at the November election, 1897, their respective names, as candidates for said offices, as follows: G. T. Center, for county judge; J. F. Vansant, circuit court clerk; Silas Tutt, county court clerk; A. T. Combs, sheriff; Isaac W. Combs, jailer; G. W. Sally, assessor; John W. Taulbee, superintendent of common schools; J. W. Sample, coroner; John Creech, surveyor; John D. Row, Jr., justice of the peace; Preston Holland, justice of the peace; Peter R. Legg, justice of the peace; J. W. Drake, constable; Sylvester Norman, constable; James W. Rose, constable. On the same day (October 22, 1897) appellant entered his appearance, waiving service of notice; and thereupon, the parties consenting, the case was submitted for trial by Leland Hathaway, special judge. Appellant then filed a general demurrer to the petition, which was overruled; and there being tendered by him no other pleading, judgment was rendered for the writ of mandamus as prayed for by appellees; and an appeal from that judgment having been granted, and the parties uniting in a motion to immediately docket and submit the case, it is now before this court for decision.

The sections of the Kentucky Statutes applicable, and upon construction of which the determination of the questions involved depends, are as follows:

"Sec. 1453. The county clerk of each county shall cause to be printed on the respective ballots the names of the candidates nominated by the convention or primary election of any party that cast two per cent. of the total vote of the state at the last preceding general election as certified to said clerk by the presiding officer and secretary of such convention, or in case of primary election, by the chairman and secretary of any county or district committee. \* \* \* The certificate of nomination by a convention or primary election shall be in writing, and shall contain the name of each person nominated, his residence and the office for which he is nominated, and shall designate a title for the party or principle which such convention or primary election represents together with any simple figure or device by which its list of candidates may be designated on the ballots; said certificate shall be signed by the presiding officer and secretary of such convention, or by the chairman and secretary of the county, city or district committee, who shall add to their signatures

their respective places of residence and acknowledged the same before an officer duly authorized to administer oaths. \* \* \*

"Sec. 1456. \* \* \* Certificates and petitions of nomination herein directed to be filed with the clerk of a county shall be filed not more than sixty and not less than fifteen days before the election."

Each of appellees filed with appellant, as clerk of the county court, a certificate signed by G. C. Hanks, chairman, and attested by J. R. Carroll, secretary, of the Democratic committee of Wolfe county, showing that he had, at a primary election held in the various precincts, been duly elected the Democratic nominee for the particular office therein mentioned, to be voted for at the November election, 1897, except James R. Ross and John Creech, neither of whom filed any. All the certificates were filed during the period prescribed by statute, except one by G. W. Sally and another by J. F. Sample, filed October 19th, less than 15 days, and one filed more than 60 days, before the election. But not one of them contains a statement of the residence of either the nominee, chairman, or secretary; nor were any of the certificates acknowledged, by either the chairman or secretary, before an officer authorized to administer oaths. The question thus arises whether any of the defects or omissions referred to justified appellant in refusing, as he did, to cause the names of appellees to be printed on the ballots as candidates for the respective offices. He was not justified in so refusing if pertinent provisions of the two sections quoted be directory, merely, and not mandatory. It is sometimes difficult to fix the line of demarkation, but the rule by which to determine when a statute is only directory is well stated in Cooley, Const. Lim. p. 92, as follows: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the right of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time nor in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purposes of the statute." And that rule has been uniformly—though not stated in that exact language—recognized and applied by this court. The thing intended to be done by the two sections, in the case of a party convention or primary election, is the printing on the respective ballots of the names of candidates of whose nomination the county court clerk has proper and satisfactory evidence. But the only mode provided for showing the fact is a certificate of the presiding officer and secretary of such convention, or, in case of a primary election, by the chairman and secretary of a county or district committee of the particular party. And that main and essential fact, in our opinion, was not intended by the legislature to be shown in any other way;

otherwise the plan adopted for properly placing before the electors candidates to be voted for would be rendered useless. Such being the case, it would seem to follow, and ordinarily would follow, that the required certificate should be treated as authentic only when the chairman or presiding officer, as the case may be, and secretary, have, according to the provision of the statute, added to their signatures their respective places of residence, and acknowledged the same before an officer duly authorized to administer oaths. And in our opinion such requirement could not be dispensed with in this case if either right of appellees to have their respective names put upon the ballots had been contested by others claiming to have been nominated instead of them, or the clerk had denied, and demanded other proof of, the facts required to be stated in the certificate. But the statement is made in the petition (which, on the trial of the demurrer, is to be taken as true) that the persons who signed the several certificates were, respectively, chairman and secretary of the Democratic committee of Wolfe county; that it was within the actual and personal knowledge of appellant that appellees had been nominated at the primary election, duly held, as candidates for the several offices mentioned in the various certificates filed with him; and, moreover, that he did not refuse to put their names on the ballots because he was unaware of their regular nomination, but upon the sole ground that the certificates did not conform to the formal requirement of the statutes. Therefore, as the two sections relate, not to the vital and ultimate matter of securing the fair and free election of officers by the voters at large, and of ascertaining the correct result thereof, but to the preliminary matter of ascertaining and determining who have been nominated or selected by various political parties as proper candidates,—generally dependent upon persons unlearned of the law,—we think the maxim should apply that what is alleged and admitted, or not denied, should be taken as established. It thus results that, knowing that the two persons assuming to be chairman and secretary of the county committee were in fact such, it was the duty of the clerk, in the absence of contest or dispute by others, to give the same credit to the statements contained in the certificates as they would have been entitled to if the required acknowledgment had been made before the officer authorized to administer oaths. And so, of course, the residence in Wolfe county of appellees, which is only one of the qualifications for such offices prescribed by law, having been alleged and not denied, should be considered established. But the two appellees who did not file any certificates at all were manifestly not entitled to have their names put upon the ballots. Nor, inasmuch as there are obvious and essential reasons for requiring the certificate of each nominee to be filed not less than 15 days before the election, were the two who failed to comply with that pro-

vision, that we regard mandatory, so entitled. The same reason does not, however, apply to that one who filed his certificate more than 60 days before the election, because if it was actually in the possession of the clerk not more than 60, nor less than 15, days before the election, it is not material where it may have been kept or lodged in the meantime. For the reasons given the judgment or order for the mandamus must be reversed as to appellees James R. Ross, John Creech, G. W. Sally, and J. F. Sample, and affirmed as to all the others.

### BLADES v. NEWMAN et al.

(Court of Appeals of Kentucky. Oct. 23, 1897.)

#### ESTOPPEL TO PLEAD USURY.

The maker of a note is estopped to plead usury against one whom he has induced to purchase it by his representation that he had no defense against the note.

Appeal from circuit court, Pendleton county.

"Not to be officially reported."

Action by J. E. Blades against H. N. Newman and others upon a promissory note. Judgment for defendants, and plaintiff appeals. Reversed.

Leslie T. Applegate, for appellant. Felix C. Newman, for appellees.

BURNAM, J. Appellant sued appellee upon a note which he alleges appellee executed on the 18th day of March, 1885, to Garvey & Feltman & Co. for \$5,000, due six months after date, and that on March 23, 1888, the note had been assigned to him for value; that there had been paid, as appeared by indorsement on the note, the interest in full up to that date, and also the further sum of \$1,973.60, leaving due as of that date the sum of \$3,026.40; and, after crediting appellee with a number of payments, asks judgment for the residue. The defendant filed answer and cross petition, in which he alleges that the interest on the note was calculated at the rate of 8 per cent. per annum from the date thereof up to the 23d day of March, 1888 (the date of the assignment to appellant), and that he had paid thereon as interest the sum of \$1,205.05, or \$301.30 more than the amount due at 6 per cent., which sum of \$301.30 was usury; and he asked that he be given this additional credit on the note. Appellant replies that he did not become the owner of the note until the 31st day of March, 1888; that he had not collected anything on the note as interest previous to that date; that he was induced to purchase the note by the solicitations of the defendant, and upon his representations that he owed the face of the note, less the interest (which had been paid up to the 23d of March, 1888) and the credit of \$1,973.60, and that he had no defense against the note, and that it would be an accommodation for him if appellant would buy the note

which he had been sued on, and give him additional time to pay it; that he bought the note relying on these representations of defendant, and that by reason of these statements of defendant he was estopped from pleading any defense to the note that existed at the time of and prior to his purchase thereof. Appellee filed a general demurrer to this paragraph of the reply, which was sustained, and plaintiff excepted, and appealed to this court, asking a reversal.

The question on the appeal is, was the plea of estoppel a good defense? This question has been very often passed on by this court. In the case of *Morrison v. Beckwith*, 4 T. B. Mon. 73, the court says: "It has been so often held that the obligor or payor of a note may bar an equity which he may have against an obligee by inducing the assignee to purchase it, or by first flattering him with the assurance that it will be paid, that it is unnecessary to cite authorities to prove the doctrine." In the case of *Woodriddle v. Cates*, 2 J. J. Marsh. 223, where judgment was resisted on the ground that the note was founded on a gaming consideration, the court say that, if the principal obligor in a note induced an assignee to purchase it, he waives any equity which he may have against the obligee. The court in that case continues: "If Cates had induced Major to purchase the note from Brenham, and had told Major he would pay it, although it was executed upon a gaming consideration, Cates, by doing so, would have precluded him from all equitable defenses against Major." In the case of *Goodloe v. Ross*, 9 Dana, 593, there was an elaborate argument of this whole question upon a petition for rehearing, and the court held that, as between a debtor and the assignee of a note who had paid a valuable consideration therefor upon the assurance of the obligor that he would pay it, the obligor is estopped from setting up any claim for usury which existed in the note before the date of the purchase; that the responsibility of the obligor rested upon his promise to pay the amount so advanced at his instance, and the obligation was the same in good conscience, in law, whether he had or had not notice of usury. In the case of *Smith v. Stone*, 17 B. Mon. 171, it was held that, where an obligor, who is a principal in a note, encourages an assignee to purchase it by assuring him that it is all right, and will be paid at maturity, he cannot avoid its payment to the assignee by relying upon a failure of consideration. In the case of *McBayer v. Collins*, 18 B. Mon. 838, the court say that, if the obligor in a note induces an assignee to take it representing the demand as good, and that it will be paid at maturity, he cannot assert an equity against the assignor to defeat the assignee in the recovery of his debt. This question seems to be so thoroughly settled by these adjudications of this court that it is unnecessary to argue it further. We think the defense a good one, and that the court erred in sustaining the



general demurrer, and for this reason the judgment is reversed, and cause remanded for proceedings consistent herewith.

# OWENSBORO & N. RY. CO. v. BARCLAY'S ADM'R.

(Court of Appeals of Kentucky. Oct. 14, 1897.)

STATUTES—CONCLUSIVENESS OF ENROLLED BILL—EFFECT OF APPEAL FROM ORDER APPOINTING ADMINISTRATOR—CHANGE OF VENUE—ACTIONS FOR CAUSING DEATH—PUNITIVE DAMAGES—JOINDER OF CAUSES OF ACTION FOR DEATH AND SUFFERING.

1. The legislative journals are not admissible to show that a statute was not passed in conformity to the constitutional requirements, the enrolled bill, when properly attested by the presiding officers of the two houses, being conclusive.

2. Under Civ. Code, § 724, regulating appeals from the county to the circuit court, which provides for the issuance of a supersedeas or order to the judge rendering the judgment to stay proceedings thereon, a defendant who questions plaintiff's right to sue as administrator, because of the pendency of an appeal to the circuit court from the order of the county court appointing him, must aver that a supersedeas has been issued.

3. Under the act of April 9, 1880, regulating the change of venue in civil cases, which provided that "the action of the court in refusing or granting such change of venue shall be final and without appeal," an order refusing a change of venue cannot be reviewed even upon appeal from the final judgment in the case.

4. Where the action of the court in refusing a change of venue was not reviewable on appeal under the law in force when the action was taken, it cannot be reviewed, although, by a change in the law before the motion for a new trial was acted on, such rulings are made reviewable.

5. Const. § 241, giving a right of action to the personal representative against any person by whose wrongful act the death of his intestate was caused, does not violate the fourteenth amendment to the constitution of the United States, providing that no state shall make or enforce any act depriving any person of property without due process of law, although the recovery may be for the benefit of persons who have no pecuniary interest in the life of the deceased.

6. In an action arising under Const. § 241, before the enactment of Ky. St. § 6, punitive damages may be recovered for the death of a person where the evidence authorizes such recovery.

Appeal from circuit court, Logan county.

"To be officially reported."

Action by Hugh Barclay's administrator against the Owensboro & Nashville Railway Company for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

W. F. Browder and H. W. Bruce, for appellant. John S. Rhea, Craddock & Sanditz, and Edward W. Hines, for appellee.

DE RELLE, J. Hugh Barclay, Jr., was a fireman on the railroad of appellant, and had been so employed for some time previous to June 5, 1892. On that day a change of schedule went into effect, at 7 o'clock p. m. By the old time card the regular train for Owensboro left Russellville at 7:25 a. m. By the new time card the starting time was

made 20 minutes later. Barclay was acting as fireman on an excursion train from Owensboro to Bowling Green, by way of Russellville. The engineer and conductor of the excursion train, under whose orders Barclay was acting, misunderstood the time card, and, supposing it to have gone into effect at 7 a. m. of that day, instead of 7 p. m., failed to stop at the proper station to permit the regular train for Owensboro to pass, which failure resulted in a collision between the two trains, near South Carrollton. Barclay was frightfully mangled and scalded in the collision, and died about two hours afterwards. Appellee qualified as Barclay's administrator, brought suit for damages against appellant, and recovered a verdict and judgment for \$15,000, to reverse which this appeal is prosecuted.

The first question raised, in logical order, is the right of appellee to bring the suit, the point being made that the bank, which was by law authorized to act as administrator, was appointed by a special judge elected in pursuance of the provisions of the act of May 11, 1892, and that that act "was not adopted pursuant to the provisions of the constitution of Kentucky, and that it is for that reason, among other reasons, unconstitutional, null, and void." It was made to appear from the journals of the house and senate that the act, upon its passage in the house, received the votes of two-fifths of the members elected, a majority of the members voting, and the vote being taken by yeas and nays, and entered in the journal, in accordance with section 46 of the constitution. It was amended in the senate by the insertion of a provision that the pay of the special judge should not be taken out of the regular judge's salary, but out of the county levy, and was passed by that body in accordance with section 46. Upon the question of the house concurring in the senate amendment, the journal does not show that the vote was taken by yeas and nays, nor does it appear by what majority the amendment was concurred in, nor was the vote entered in the journal; but it was enrolled as amended, signed by the speaker, and signed and approved by the governor. Without stopping to pass upon the sufficiency of the pleading in which this objection is made, under the rule laid down in *Norman v. Board of Managers* (Ky.) 20 S. W. 901, it is sufficient to say that in *Lafferty v. Huffman* (Ky.) 85 S. W. 123, in a well-considered opinion by Judge Hazelrigg, it was held that "the enrolled bill, when attested by the presiding officers as the law requires, must be accepted by the courts as the very bill adopted by the legislature, and that its mode of enactment was in conformity to all constitutional requirements. When so authenticated, it imports absolute verity, and is unimpeachable by the journals."

A further objection urged to the right of appellee to prosecute the action is the aver-

ment in the answer that the father of Hugh Barclay, Jr., had, previous to the order appointing appellee administrator, applied to the county court to be appointed; that the same order which appointed appellee denied the father's application, and he thereupon took an appeal from the order, executed a supersedeas bond, and took all other necessary steps to bring up the judgment and proceeding of the county court to the circuit court for review and reversal; and that said appeal was then pending in the circuit court. This pleading, however, does not state that a supersedeas was ever issued. Unless a supersedeas was issued, there was no stay of proceedings upon the judgment appealed from. Under the act of May 5, 1880, the circuit court has appellate jurisdiction of all orders or judgments of the county court granting, revoking, or refusing letters of administration. Carroll's Code, p. 379. By the act of May 15, 1886, the time and manner of taking such appeals are governed (Carroll's Code, p. 380) by the provisions of the Civil Code of Practice regulating appeals from said courts. Section 724 provides the manner of taking the appeal, and provides for the issuance of a supersedeas or order to the judge rendering the judgment to stay proceedings thereon. We regard the issuance of the supersedeas as a necessary averment.

It is urged as a reversible error that the trial court denied an application for a change of venue. It is unnecessary for us to consider whether the trial court erred in deciding that appellant could obtain a fair and impartial trial in Logan county. The statute then in force (which was the act of April 9, 1880, amending Gen. St. c. 12) provides: "The action of the court in refusing or granting such change of venue shall be final and without appeal." It is insisted, however, that this provision is a mere declaration that no appeal could be taken from an order granting or refusing a change of venue, but that an erroneous decision of the question is, nevertheless, a reversible error after final judgment. But such an order would clearly not have been a final order from which an appeal might be taken, had there been no such declaration in the statute; and the language used, "shall be final and without appeal," clearly indicates the legislative intent to be that such order should not afford ground for reversal. Moreover, by an act which went into effect five days after the order complained of, the legislature dropped from the statute the language above quoted, and provided that the court "shall exercise a sound discretion in deciding the question," indicating the legislative construction to be in accordance with the view here given. And the superior court, in *Howard v. Dietrich* (11 Ky. Law Rep. 235), considering this statute which was then in force, held that the refusal of the court to grant a change of venue in a civil case cannot be reviewed on appeal. It is earnestly urged,

however, that the motion for a new trial which was made after the new statute went into effect, at a subsequent term, gave the trial court an opportunity to correct the error which it is claimed was made in denying the change of venue. We should be slow, however, to conclude that the legislature, by the passage of the new act, intended to make a previous act of a court reversible error, which was not so when the action was taken.

It is further claimed that section 241 of the present constitution, under which it is conceded the action was brought, is in violation of the provisions of the fourteenth amendment to the constitution of the United States, providing that "no state shall make or enforce any act which shall abridge the privileges or immunities of any citizen of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law"; that, if this section of the Kentucky constitution is construed as giving the right of recovery for death caused by negligence or wrongful act to any person who had not a legal, pecuniary interest in the life of the deceased, it is in conflict with the federal constitution, as depriving the person by whose negligence the death was caused of his property by arbitrary fiat of the constitutional convention; that in this case, the deceased, being a young man of 19, unmarried, and childless, no person had any legal claim upon him, or any pecuniary interest in his life, except his father, and that only for the period to elapse before he attained his majority; and it is claimed that a construction of section 241 which allows any relative having no legal, pecuniary claim upon the deceased to recover damages for his death is a taking of private property from one person for the private use and benefit of another person, which cannot be done by constitutional provision, general law, or special enactment. But it has never been held, so far as we are informed, in any of the states, that a person must have a legal claim upon another for support in order to sustain a pecuniary loss by reason of the latter's death. Under Lord Campbell's act, the original legislation under which damages were recoverable for death caused by negligence, it was provided that the action should be for the benefit of the wife, husband, parent, child, grandparent, stepparent, grandchild, and stepchild. None of those enumerated in the Campbell act had a legal claim for support upon the decedent, except the widow, child, or parent of an infant. In the case of *Railroad Co. v. Barron*, 5 Wall. 90, which was a case brought by the administrator of a person who left neither wife nor child, the supreme court said: "It has been suggested frequently in cases under these acts, for they are found in several of the states, and the suggestion is very much urged in this case, that the widow and the next of kin are not entitled to recover any damages unless it is shown that they had a legal claim on the deceased, if he had survived, for support. \* \* \* The

only relation, mentioned in the statute, to the deceased essential to the maintenance of the action, is that of widow or next of kin. To say they must have a legal claim on him for support would be an interpolation in the statute changing the fair import of its terms, and hence not warranted. This construction, we believe, has been rejected by every court before which the question has been made.

\* \* \* If the person injured had survived and recovered, he would have added so much to his personal estate which the law on his death, if intestate, would have passed to his wife and next of kin. In case of his death by the injury, the equivalent is given by a suit in the name of his personal representative." And in *Bush v. Railroad Co.*, C. & J. 48, it was said that "damages for the death must be given in reference solely to pecuniary loss, which, however, may be evidenced by proof of a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of life." Moreover, this court seems to have frequently held that suits under section 1, c. 57, Gen. St., might be maintained by the personal representative, regardless of whether there was a widow, child, or other person having a legal claim upon the decedent for support. *Givens v. Railway Co.* (Ky.) 12 S. W. 257; *Railroad Co. v. Morris* (Ky.) 20 S. W. 539.

The question of whether section 241 of the constitution, before the enactment of section 6 of the Kentucky Statutes, authorized the recovery of any other than compensatory damages, was fully considered and decided in the affirmative in *Railroad Co. v. Kelly's Adm'r* (Ky.) 38 S. W. 852. But the petition averred, not only the death of appellee's intestate by the gross negligence of appellant, but alleged specifically the physical and mental suffering of the intestate during the period between the accident and the death. Motions to require appellee to paragraph its petition, and to elect which cause of action it would prosecute, were overruled by the trial court. The instructions, moreover, authorized the jury to find, not only damages for the physical and mental suffering of the intestate, but for the destruction of the intestate's power to earn money. A most ingenious argument has been made by counsel for appellee, to the effect that there was no misjoinder of causes of action, but that there was only one act of negligence, and that the cases upon this subject go only to the extent of requiring the plaintiff to recover in one action all that he is entitled to recover for that act. But whatever may be the logic of the question, and whatever might be our opinion were the question now submitted to us for the first time, we regard this question as so authoritatively and distinctly settled in this state that the maxim of stare decisis should be applied. At common law a cause of action existed for damages for the physical and mental suffering of the intestate between the time of his injury and his death; and by

section 1 of chapter 10 of the General Statutes this cause of action survived to the personal representative. By the constitution (section 241), as well as by statutes in force prior to its adoption, a cause of action is given to the personal representative for the damage to the estate of the decedent caused by his death. In *Hansford v. Payne*, 11 Bush, 382, the death was caused by negligence in filling a physician's prescription with croton oil, instead of linseed oil; and suit was brought alleging the suffering and agony, and also the death, resulting from the negligence. It was held in that case that the order dismissing the petition on the face of the pleadings was error, as a cause of action was stated; but the court said: "We do not anticipate that this ruling will (as appellees' counsel fears) enable parties to sue under the third section of the act of 1854, for the death, and also under the provisions of chapter 10, for the damages accruing anterior to the time of dissolution. A recovery of punitive damages for the destruction of the life will certainly bar any other action for the injury or any of its consequences; and, if a party elects to sue and enforce the right of action that survives to him, he will not be allowed afterwards to avail himself of the benefits of the punitive statute, and also to recover under its provisions." In *Conner's Adm'r v. Paul*, 12 Bush, 144, the personal representative of Conner instituted one action for the recovery of damages for the mental and physical suffering of his intestate between the times of the injury and death, and also instituted another action for damages sustained by his death caused by the same act. A motion was made to require him to elect which of the two he would prosecute. The motion was sustained by the circuit court, and its judgment affirmed by this court. Said the court, through Judge Pryor: "The party entitled to bring the action, either under the common law or under the statute, must make his election; and, while the right of recovery under our statutes for willful negligence may increase the measure of the recovery, such an action is a bar to a cause of action that survived at the common law upon the same facts." In *Hackett v. Railroad Co.*, 96 Ky. 236, 24 S. W. 871, this court held: "Now, this court has decided and settled the question that, where certain acts cause death, they cannot be divided so as to make two actions,—one to recover for the suffering caused, and the other to recover for death. The party must elect." In that case an amended petition averring the suffering which took place between the injury and the death was held to be a separate count, and the plaintiff was required to elect which cause of action he would prosecute. And in the most recent case upon this subject (*Railroad Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236), the wife having been killed by the negligence of the railroad company, the per-

sonal representative, who was the husband, recovered a judgment for damages for her death, and instituted another action in his individual capacity for damages for the loss of her society from the date the injury was inflicted until her death. In that case, after a careful review of the authorities, the court, through Judge Paynter, said: "It was not the intention of the legislature to multiply cases. The husband must accept the benefits which the statute secures to him, in lieu of those he possessed at common law." Without further elaboration or argument, we conclude the rule to be established that in such causes the party complaining is restricted to the common-law cause of action, or the statutory cause, and must elect which one he will pursue. This being our view, it is unnecessary to consider the errors alleged in the instructions given, which will certainly not be given upon a retrial. For the reasons given, the judgment is reversed, and the cause remanded, with directions to award the appellant a new trial, and for further proceedings consistent with this opinion.

#### HETTERMAN et al. v. POWERS et al.

(Court of Appeals of Kentucky. Oct. 27, 1897.)

##### TRADE-MARKS AND TRADE-NAMES—LABELS OF LABORERS' UNIONS.

The members of a voluntary union of cigar makers are entitled to the protection of the courts in the exclusive use of a label to designate the exclusive product of their labor, though they are not engaged in business, in the ordinary sense, but are employed for wages, and do not own the property to which the label is attached; and the label is not objectionable, as denouncing other cigars than union-made ones, because it states that the cigars to which it is attached were made by "an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship."

Appeal from circuit court, Jefferson county.  
"To be officially reported."

Action by Powers and others against Hetterman Bros. and others to restrain defendants from using a certain cigar label. Judgment for plaintiffs, and defendants appeal. Affirmed.

Humphrey & Davie, for appellants. Augustus E. Willson, for appellees.

HAZELRIGG, J. The appellants were manufacturers and dealers in cigars in Louisville, Ky., and, without right or claim of right, used on boxes of cigars manufactured and sold by them the blue label of the Cigar Makers' International Union of America, a fac simile of which is as follows: "Sept., 1880. Issued by Authority of Cigar Makers' International Union of America. Union-Made Cigars. This certifies that the cigars contained in this box have been made by a first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship. Therefore we rec-

ommend these cigars to all smokers throughout the world. All infringements upon this label will be punished according to law. A. Strasser, President C. M. I. U. of America." Thereupon appellees Powers, Kieffer, and Wopprice, suing for themselves and all their associate and fellow members in the Cigar Makers' International Union and the Cigar Makers Protective Union, No. 32, and joining these two organizations, also, as plaintiffs, brought this action to prevent this alleged wrongful use of the label. The International Union, embracing, according to the petition, some — members, and the local union, some — members, are voluntary, unincorporated labor organizations, composed solely of practical cigar makers. They are workmen, who do not own the products of their labor, being exclusively wage workers. The purpose of these unions, as said in the petition, is, generally, to maintain a high standard of workmanship, and secure fair wages to cigar makers; to elevate the material, moral, and intellectual welfare of the membership; and, by legitimate, organized effort, to secure laws prohibiting labor by children under 14 years of age, the abolition of the "truck" system, the tenement house cigar manufacture, and the manufacture of cigars by prison convict labor. Other praiseworthy objects are set out, which need not be detailed. It is further averred that, for the purpose of designating the cigars made by members of the unions, the label in controversy was adopted and extensively used as a trade-mark, or certificate of identification, and, when posted on the outside of cigar boxes containing cigars made by members of the unions, it is a guaranty that the cigars are made by first-class workmen, members of the cigar makers' union, etc.; that because the members receive fair wages, and were thus able to furnish good workmanship, the cigars so labeled commanded a higher price than did similarly looking cigars not so labeled; that the label was therefore a source of great profit and benefit to the appellees, and other members of the unions. The appellants, for defense, do not deny the use of the label as charged in the petition, but it is insisted by them that this label does not possess any of the elements of a trade-mark; that the appellees are engaged in no trade, having nothing to sell, and therefore nothing to protect by a trade-mark; that none of them are engaged in the business of selling cigars; that they are "simply workmen employed by other people making cigars. —first by one person, and then another,—and those persons sell the cigars"; that the plaintiffs, therefore, "have not shown any property right in the label, as a trade-mark, or otherwise"; moreover, that the membership is an ever-changing one, constantly varying in numbers, composed of a few thousands to-day, and many thousands to-morrow,—“a shifting crowd”; that the plaintiffs, therefore, are not qualified to sue, and have, in fact, no legal rights that can be made the subject of a suit.

Moreover, it is urged that the plaintiffs do not come into court with clean hands; that they are members of an organization lately engaged in boycotting the defendants, and attempting to ruin their business; that the label itself cannot be approved, either in law or morals, as it denounces other cigars than union-made ones as inferior and unwholesome, and the product of filthy tenement houses, or made by coolies and convicts.

And, first, we may admit that the label is not used as a "trade-mark," in the ordinary sense of that word. It is not a brand put on the goods of the owner, to separate or distinguish them from the goods of others. But we cannot agree, on that account, that it does not represent a valuable right, which may be the subject of legal protection. Why may not those engaged in skillful employments so designate the result of their labor as to entitle them to the fruits of their skill, when it is admittedly a source of pecuniary profit to them? And this though they may not own the property itself. They are not, it is true, "in business" for themselves, in the ordinary sense; but they have property rights, nevertheless. They may not select a label, and be protected in its use apart from its connection with some commodity; but they not only select it in this instance, but they apply it to property, and it does not at all matter that the tangible property is that of another. In order to get the benefit of the superior reputation of cigars made by them, the appellees select and apply this label, as a distinguishing brand or mark; and it would be strange if this thing of value,—this certificate of good workmanship, which makes the goods made by them sell, and thus increases the demand for their work,—should be entitled to no protection, because those making the selection and application are not business men engaged in selling cigars of their own. The man who is employed for wages is as much a business man as his employer, in that larger sense in which the word "business" has come to be used by statesmen and legislators. In a number of the states, laws have been enacted giving protection to the men engaged in the business of working for wages; and their right of organizing and selecting appropriate symbols to designate the results of their handiwork is recognized, and ordained to be the subject of lawful protection, by the court. Thus, in this state, in April, 1890, a law was enacted by the general assembly providing that "every union or association of working men or women adopting a label, mark, name, brand or device intended to designate the product of the labor of the members of such union, shall file duplicate copies of such label in the office of the secretary of state, who shall then give them a certificate of the filing thereof," and that "every such union may by suit in any of the courts of the state, proceed to enjoin the manufacture, use, display," etc., "of counterfeits or imitations of such labels," etc.,

"on goods bearing the same, and that the court having jurisdiction of the parties shall grant an injunction restraining such wrongful manufacture, use," etc., "of such label," etc. This suit was filed before the adoption of this statute, but it indicates the policy of the law, and the growth or expansion, and perhaps the creation, of legal remedies hardly known to ancient trade-mark law. The learned chancellor below, in an exhaustive opinion, reviewing all the authorities, among other things, said (and we can say it no more clearly) that: "The known reputation of a particular kind of skilled labor, employed in the development of a particular product or class of products, determines, to a large degree, the value or price of such products when put on the markets. To stamp or label a commodity as the product of a particular kind or class of skilled labor, determines the demand for, and the price of, such product or commodity. The marketable price of a commodity influences the scale of wages paid for its manufacture. The higher the price, the higher the wages paid. Hence it is indisputable that the employé, whose skilled labor in the production of a particular commodity creates a demand for the same that secures for him higher, remunerative wages, has as definite a property right to the exclusive use of a particular label, sign, symbol, brand, or device, adopted by him to distinguish and characterize said commodity as the product of his skilled labor, as the merchant or owner has to the exclusive use of his adopted trade-mark on his goods."

The question has engaged the attention of a number of the courts of this country, but the conclusions reached have not been uniform. In *Weener v. Brayton* (Mass.; 1890) 25 N. E. 46, it was held that an injunction against the wrongful use of the label of the International Cigar Makers' Union should not be granted because of special injury to plaintiffs, who were officers and members of the union, but were not manufacturers of or dealers in the cigars on which such label is used; and to the same effect are the cases of *Union v. Conhaim*, 40 Minn. 243, 41 N. W. 943; *McVey v. Brendel*, 144 Pa. St. 235, 22 Atl. 912; *Schneider v. Williams*, 44 N. J. Eq. 391, 14 Atl. 812. However, a number of the courts have held otherwise. In the case of *Strasser v. Moonells*, 55 N. Y. Super. Ct. 197, affirmed in court of appeals in 1888 (15 N. E. 730), it was argued, as it is here, that the members of the union were not the owners or manufacturers of cigars, but merely laborers, and that, therefore, the label did not come within the settled definition of a "trade-mark." The court said: "It is needless to discuss this phase of the case, for the right to the exclusive use of this label may be sustained, although it failed to be a 'trade-mark,' in the precise definition of the term as heretofore used; for whether we call the property right which I believe plaintiffs have in the label a 'trade-mark,' or by another

name, is a matter of slight import. It is a right entitled to the protection of a court of equity, on the same principle as that upon which the courts have based the right to protect trade-marks and good will. It has been accepted as the rule that the court proceeds upon the ground that a person has a valuable interest in the good will of his trade or business, and that, having appropriated to himself a particular label or sign or trade-mark, indicating, to those who wish to give him their patronage, that the article is manufactured or sold by him, \* \* \* he is entitled to protection against any other person who attempts to pirate on the good will of his friends or customers \* \* \* by sailing under his flag without his authority or his consent." In *Cohn v. People*, 149 Ill. 486, 37 N. E. 60, the court upheld the constitutionality of the trades union act in that state; and as the court, independently of the statute, disposed of one of the contentions of counsel in the case, which is also relied on here, we quote, in part, its argument: "It is next objected that the label, an imitation and counterfeit of which is alleged to have been unlawfully used by plaintiff in error, could not have been rightfully adopted either as a label, trade-mark, or form of advertisement. It is said that it transgresses the rules of morality and public policy. We are referred to the rule in respect to trade-marks, that, 'to be a lawful trade-mark, the emblem must avoid transgressing the rules of morality and public policy.' *Browne, Trade-Marks*, § 602. \* \* \* By reference to the label, heretofore set out, it will be seen that it is a certificate, signed by the president of the Cigar Makers' International Union of America, certifying that the cigars contained in the box upon which it was placed were 'made by a first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship.' And it concludes: 'Therefore we recommend these cigars to all smokers throughout the world.' The purpose, as derived from the label itself, is to send the cigars out to the public with the assurance that they are made by a first-class workman, who belongs to an order opposed to the inferior workmanship designated. It will be observed that the label attacks no other manufacturer of cigars. It says, simply, in effect, 'These cigars are not the product of an inferior, rat-shop, coolie, prison, or filthy tenement house workmanship.' Can it be said that one may not, without condemning or aspersing the product of other manufacturers, commend the article he has for sale? If he may do so himself, may he not procure the certificate of others as to the quality of the article he puts upon the market?" See, also, *State v. Hagen*, 6 Ind. App. 169, 33 N. E. 223; *Carson v. Ury*, 39 Fed. 777.

Further, we agree with the learned chancellor that there is no competent evidence

that the appellees, or any of them, have been engaged in boycotting the appellants, and thus deprived themselves of the right to enforce their legal remedies in a court of equity. Whatever may be said of the letters and circulars looking to this end, and exhibited in the proof, it is not shown by any competent proof that the appellees instigated, or had ought to do with, the attempted boycott. And, moreover, this boycott, which seems to have occurred 1886, did not in any way grow out of the wrongful use of the label in controversy. On the whole case, therefore, we are of opinion that the law may be justly invoked by organized labor to protect from piracy and intrusion the fruits of its skill and handiwork, and that brain and muscle may be the subjects of trade-law rules, as well as tangible property. The judgment is affirmed.

#### TILLER et al. v. BURKE et al.

(Court of Appeals of Kentucky. Oct. 28, 1897.)  
OFFICERS—SUBJECTION OF FEES TO CLAIMS OF CREDITORS.

Although deputy assessors, by contract with their principal, are to have a lien on, and to be paid out of, the salary and fees allowed to the principal by the state for services rendered by him and his deputies, they are not entitled to judgment requiring the auditor and treasurer of the state to pay to them the amount of their salaries, instead of to the principal, though their claims may otherwise be lost, as the fees and compensation due to officers cannot be subjected to claims of creditors.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Action by Theodore F. Tiller and others against R. F. Burke and others. Judgment dismissing petition on demurrer, and plaintiffs appeal. Affirmed.

Thomas F. Hargis, for appellants. Phelps & Thum, for appellees.

GUFFY, J. The question presented for decision in this case is as to the sufficiency of the petition. The petition reads as follows: "The plaintiffs state that they were respectively appointed, prior to the performance of the services hereinafter named, and before the year 1894, to the office of deputy assessor of Jefferson county, and that each of them entered upon the discharge of his duty as deputy assessor of Jefferson county, for the defendant Richard T. Burke, assessor of said county, and performed his duty faithfully and honestly, and according to law. They allege that the defendant Richard T. Burke, as assessor aforesaid, appointed them to said office of deputy, and each of them to a deputyship under him, as aforesaid, and agreed to pay them for their services to be rendered as such deputies the following sums, respectively: To the plaintiff Theodore F. Tiller, one thousand dollars (\$1,000) per annum; to the plaintiff A. J. Sturgeon, seven hundred dollars (\$700) per annum; to the plaintiff S. O. Newman, six hundred dollars (\$600) per annum; to the plaintiff John

J. Greany, five hundred dollars (\$500) per annum; to the plaintiff Samuel Phillips, four hundred dollars (\$400) per annum; to the plaintiff H. F. Gaar, three hundred dollars (\$300) per annum; to the plaintiff Charles Curran, three hundred dollars (\$300) per annum; and to the plaintiff Edgar L. Kling, four hundred dollars (\$400) per annum,—to be paid out of the salary and sums allowed, or that might be allowed, by the state of Kentucky and Jefferson county to said defendant Richard T. Burke, as assessor, for the services of himself and his said deputies in performing the duties required of them as such in said offices.” Similar allegations are made as to the other plaintiffs, showing the amount due to them. It is further alleged as follows: “The plaintiffs allege that said payments respectively named above were made to them out of the salary and fees allowed to said Burke by the state of Kentucky for services rendered by him and his said deputies. They further allege that the state of Kentucky is indebted to the defendant Burke for twenty per cent. of the salary and fees due him and his said deputies from said commonwealth of Kentucky for their said services rendered as aforesaid in the year 1894, amounting to more than three thousand dollars (\$3,000), no part of which has as yet been paid by said commonwealth of Kentucky, or its auditor, the defendant L. C. Norman, or its treasurer, the defendant Henry S. Hale. The plaintiffs allege that they were to be paid their respective salaries out of said sum and twenty per cent. withheld and due from the commonwealth of Kentucky, and it became due therefrom. They allege they were to look to, and have a lien upon and a right in, said sum or sums which said defendant Richard T. Burke should be allowed for his salary and services aforesaid by the commonwealth of Kentucky, and said defendant so agreed with plaintiffs, and they are therefore, and by reason of their public services as deputies aforesaid, and by reason of having earned the respective amounts of said salary and fees, entitled to and hold a lien upon said twenty per cent. and said three thousand dollars and more still due from the commonwealth of Kentucky for the express purpose of paying them their said salaries, and the respective parts thereof still due and owing as aforesaid. The plaintiffs allege that the defendant Burke also agreed and bound himself personally to pay said salaries to the plaintiffs in the event the sums to be paid him as assessor for the services of himself and deputies by the commonwealth of Kentucky should fall short, or be insufficient for that purpose, or in any manner diverted therefrom, either by his own act or through his procurement, which he agreed with plaintiffs not to do or permit to be done. The plaintiffs allege that the defendant L. C. Norman is auditor of the commonwealth of Kentucky, and as such is bound to issue his warrant upon the treasurer and treasury of the

commonwealth of Kentucky for said twenty per cent. of said salaries and fees. Plaintiffs allege that the defendant Henry S. Hale is treasurer of the commonwealth of Kentucky, and as such is bound to receive, accept, and pay said warrant for said twenty per cent.; but the plaintiffs allege that the said warrant has never been drawn and presented to said treasurer. They allege that said auditor will soon draw said warrant in behalf of said Burke, and said treasurer will soon pay the same, unless ordered and adjudged not to do so by this court. They allege that, in the event said warrant is so drawn and paid, they will not receive any part thereof, but that same will be diverted by said Burke from the payment of the balance of their said salaries, respectively, and they will lose the same, and be deprived of their compensation as deputies and officials aforesaid for the work so done by them. The plaintiffs allege that the defendant Bank of Louisville is setting up and asserting some claim or demand against said twenty per cent. and said sum of more than three thousand dollars still due from the commonwealth of Kentucky for the services of the defendant Burke, as assessor, and the plaintiffs, as his deputies, above stated, and that said claim or demand of said bank is illegal and contrary to public policy and void; but they allege that said illegal claim and demand of said bank places a cloud upon their right and lien upon said fund and twenty per cent. still due by the commonwealth of Kentucky, and causes the said auditor and treasurer to refuse to pay any part of said sum to the plaintiffs, or to said defendant Burke for the plaintiffs, and said Burke also refuses to pay or permit them to be paid any part of said fund and twenty per cent. on account of the said illegal claim and demand of said bank. The plaintiffs allege that they have and hold a prior and superior lien, by contract, and in equity and law, upon said undrawn and unpaid twenty per cent., and said sum of more than three thousand dollars, due from said commonwealth, to the extent of their unpaid balances for services rendered by them as above set forth. The plaintiffs state that they have instituted this suit for the purpose, among other things stated, of giving said defendant L. C. Norman, as auditor, and said Henry S. Hale, as treasurer, notice of this pending litigation and claim of plaintiffs and lien which they are entitled to have enforced in this action. The plaintiffs allege that should said auditor draw said warrant, or said treasurer pay the same, their said acts would tend to render ineffectual the judgment they seek in this action. They are informed and believe that the defendant Richard T. Burke is insolvent, and on said information and belief they so allege. Wherefore the plaintiffs pray judgment for the respective sums yet due and owing to them respectively as above stated, and for interest on each of said sums from the date of their services against the defendant Rich-

ard T. Burke. They also pray that the said claim and demand of the defendant the Bank of Louisville be held not to be legal, or any lien upon said twenty per cent. and sum amounting to more than three thousand dollars yet due from the commonwealth of Kentucky to said Richard T. Burke; and they also pray that the defendant L. C. Norman, as auditor, and Henry S. Hale, as treasurer, of the commonwealth of Kentucky, be enjoined by the final judgment in this action from the issuance of said warrant, or the payment thereof to said defendant Burke or said bank, should such injunction become necessary to the protection of the rights of the plaintiffs; and they also pray judgment that said treasurer and auditor shall pay said sum still due and owing to the defendant Richard T. Burke as assessor for the work and official services done by him and his said deputies into this court, and that said sum so paid to this court be adjudged to the plaintiffs in a sufficient amount to pay their said respective claims, interest thereon, and the costs of this action. The plaintiffs pray judgment for all special and general relief in equity, and for their costs." A general demurrer of the defendants Hale and Norman to the petition was sustained by the court, as was also that of appellee R. T. Burke; and, plaintiffs declining to amend, the petition was dismissed, and from that judgment appellants prosecute this appeal.

The law provides that the auditor shall draw his warrant in favor of the assessor for the sum due him for his services, which shall be paid by the treasurer, but the object of the petition in this case seems to be to obtain a judgment which would require the officers of the state, instead of paying to the assessor as provided by law, to pay sundry sums to the plaintiffs herein. It must be obvious that such a requirement would greatly complicate and confuse the accounts of the auditor and treasurer, and impose upon them labor and duties not provided for by statute. The general doctrine is that the fees and compensation due to officers cannot be attached or subjected to claims of creditors of such officers. It seems to us that the claims set up by appellants are but debts due from the appellee Burke, and they must look to him for payment, and be remanded to such remedies for the collection thereof as is provided by law. *Hewitt v. Craig*, 86 Ky. 23, 5 S. W. 280; *Com. v. Cook*, 8 Bush, 220; *Tracy v. Hornbuckle*, Id. 336; *Divine v. Harvie*, 7 T. B. Mon. 440. Judgment affirmed.

On Rehearing.

(Nov. 13, 1897.)

PER CURIAM. It appears that the petition in this case shows a right to a personal judgment against appellee, Burke; but the attention of the court was not called to that fact, the argument having been devoted exclusively to the other proposition involved in the

case. The petition for rehearing, as to Burke, must be sustained; and the judgment, as to Burke, is reversed, with directions to overrule the general demurrer of Burke, and the cause remanded, as to him, for proceedings consistent with this opinion. The petition for rehearing, as to the other parties and questions involved, is overruled.

#### MILWARD v. SHIELDS.

(Court of Appeals of Kentucky. Oct. 26, 1897.)

MORTGAGEES—PRIORITY OF CLAIM FOR FUNERAL EXPENSES.

A claim for the funeral expenses of a dead mortgagor is not entitled to priority over the mortgage lien, either at common law or under Ky. St. § 3868, which provides that: "If the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent, and the cost and charges of the administration of his estate, and the amount of the estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court of record to, and remaining in the hands of, a decedent, shall be paid in full before any pro rata distribution shall be made."

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action by W. R. Milward against Annie E. Shields. Judgment for plaintiff. Defendant appeals. Affirmed.

Falconer & Falconer, for appellant. C. T. Hanson, for appellee.

DU RELLE, J. The sole question for decision in this case is whether the lien of the mortgagee of real estate is superior to the claim of an undertaker for funeral expenses of the dead mortgagor. So far as we are informed, the question has never been decided by this court, and we have not been referred to any authority on the question, except the case of *Best v. Spooner*, 4 Ky. Law Rep. 602, in which the superior court divided, the majority holding that a claim for funeral expenses was superior to the lien of an attachment levied before decedent's death. The reasoning of the majority in that case is difficult to follow, if we concede to the decedent the power to dispose of his property, and give due regard to the obligation of contracts. It is not sought to assert a priority in favor of funeral expenses under the statute (Ky. St. § 3868), which provides that: "If the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent, and the cost and charges of the administration of his estate, and the amount of the estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court of record to, and remaining in the hands of, a decedent, shall be paid in full before any pro rata distribution shall be made. \* \* \* Under the statute, funeral expenses and claims against the decedent in a fiduciary capacity are put upon the same footing, and no one has yet claimed that money due to a ward from the estate of a decedent has priority over an antecedent



mortgage lien. The statute appears to us to apply entirely to assets for distribution in the hands of the personal representative, and was so conceded in the opinion of Judge Richards in the superior court; and, while the proceeds of realty—the personal estate being insufficient—are assets for the payment of debts, and subject to the rule of distribution laid down in the statute quoted (*Muldoon v. Crawford*, 14 Bush, 125), the proceeds of realty covered by prior lien are not assets in the hands of the personal representative for distribution. The statute, moreover, gives priority to funeral expenses over those debts only which come in for a pro rata distribution, and no pro rata distribution can be made to a mortgage creditor except upon the residue of his debt after he has exhausted the mortgaged property. As well said by Judge Reid in the dissenting opinion in the case referred to: "The statute has no reference to, nor any effect upon, bona fide liens secured to creditors of the decedent under the general law, such as liens by mortgage, or liens acquired—like attachment liens—by operation of law, but regulates priorities in reference only to unsecured liabilities, gives certain liabilities and expenses priority, and then puts all other debts and liabilities on equal footing. It leaves valid liens acquired on the decedent's estate where the rules of the general law leave them. Such liens have no validity by virtue of the statute in question, but exist independent of it. They overrule burial expenses, claims due the estate of a dead person, or of a ward, or of a person of unsound mind committed by a court of record to and remaining in the hands of a decedent, and the costs and charges of administration, except so far as the latter may necessarily be incurred in ascertaining the lien, and pursuing it to judgment, with a view to determine whether any assets, personal or real, may be left, after the incumbrance is satisfied, for distribution under the terms of the statute. Every lien may be considered exposed to this peril, but no more. If burial expenses are allowed to overreach a valid lien, acquired in good faith before the death of the decedent, so may what he owes as fiduciary to the estate of a dead person, of a ward, or of a lunatic, and the lien might be totally destroyed, if such claims had priority; and, no matter how acquired in the lifetime of the decedent, they might be as worthless as the paper by which they are evidenced. The burial expenses and the other statutory priorities are placed on the same footing, and are of the same dignity, and are superior only to the general unsecured liabilities of the decedent. They cannot prevail against and consume liens created voluntarily by the decedent before he dies, or by the equally binding operation of law, but stand secure in their inherent force, by virtue of the general law governing them." But in this case, as in the case in 4 Ky. Law Rep. 602, it has been sought to justify the claim of pri-

ority for funeral expenses under the common law. The authorities quoted in support of the majority opinion do not sustain the doctrine there laid down. Each of the authorities quoted is in reference to the powers and duties of executors or administrators in the distribution of the assets among the general creditors. *Ram, Assets*, 258; *King v. Wade*, 5 Price, 621; *Lomax, Ex'rs*, 1, 283; 2 Bl. Comm. 508; *Patterson v. Patterson*, 59 N. Y. 585; *Trueman v. Tilden*, 6 N. H. 202; *Parker v. Lewis*, 18 N. C. 21; *Hancock v. Podmore*, 1 Barn. & Adol. 260. In the case of *Parker v. Lewis*, 13 N. C. (2 Dev.) 21 (not 3 Dev., as cited), it was held that funeral expenses "form a charge upon the assets, independently of any promise by the executor or administrator, upon the ascertainment of the fact that they are of that description, and proper for the estate and degree of the deceased." In that case the question was not one of lien, but simply of priority in administration between the funeral expenses and a judgment debt in favor of the administrator. In *Trueman v. Tilden*, 6 N. H. 202, it was stated that "funeral expenses are a charge upon the estate of a deceased person," the word "estate" being used to mean "assets," its technical meaning when employed in reference to a personal representative. The sole question in that case was whether the administrator, by charging the amount of the funeral expenses in his administration account, had made himself personally liable. The citation from *Sir Edward Coke* (to be found in 3 Inst. 202) goes to the point only that proper funeral expenses are to be allowed of the goods of the deceased, before any debt or duty whatsoever. No case has been referred to, or authority cited,—and we are confident none can be found,—in which it was held, or the doctrine was laid down, that a claim for funeral expenses, which is not a debt against the estate at all, but more properly a credit to the personal representative, is superior to the lien of a mortgage, whereby the decedent devoted so much as might be necessary of certain specified property to the payment of the mortgage debt. The decedent, up to the date of his death, had absolute control of his property. He could dispose of it by deed or mortgage, and, in the latter case, though he did not part with the legal title, he did part with the equity. To the extent that it was necessary, his estate in the property mortgaged was appropriated to the payment of the mortgage. Nor does the argument drawn ex necessitate appear to be meritorious. It is true that when a man dies he must be buried, but it is equally true that while he lives he must be fed and clothed, and when sick he should receive medical attention. It is pro bono publico that these things should be done. And, if a man have assets, these things should be paid for out of such assets; but, if not, the state provides poor houses, hospitals, and pauper burial. There is no reason why a

claim for one of these things more than another should be permitted to override the contract rights of a mortgagee. Wherefore the judgment of the lower court is affirmed.

### GRAY v. WILSON et al.

(Court of Appeals of Kentucky. Oct. 28, 1897.)

JUDGMENT—DISMISSAL PROCURED BY FRAUD—DEEDS—MENTAL INCAPACITY OF GRANTOR.

1. A petition alleging that an agreement for the dismissal of a former action was procured by the misrepresentations of the ancestor of defendants, and that plaintiff, who now sues by next friend, did not have capacity to make such an agreement, and asking that the dismissal be set aside and the former action reinstated, and the two cases consolidated, states a good cause of action, and must be regarded as seeking the relief sought in the original action.

2. Where the plaintiff died after judgment dismissing the action, and before any appeal had been taken, her representatives had two years in which to prosecute an appeal; the provisions of the Code as to revivor having no application.

3. The grantor in a conveyance, who was not capable of understanding its nature, and who received no consideration therefor, is entitled to have it set aside, as against the heirs of a subsequent grantee who paid nothing for the land.

Appeal from circuit court, Bourbon county.

"Not to be officially reported."

Action by Verlinda Cray, by next friend, against Benjamin F. Wilson and others, to set aside a judgment and deed. Judgment for defendants, and plaintiff appeals. Reversed.

McMillan & Talbott, for appellants. J. Q. Ward and Emmett M. Dickson, for appellees.

GUFFY, J. The petition in this case reads as follows: "The plaintiff says that on the 10th day of March, 1891, the plaintiff, Verlinda Cray, filed in this court an action in equity under the style of 'Verlinda Cray, Plaintiff, against John R. Cray, etc., Defendants,' and that on the — day of —, 1891, a judgment was entered in said case dismissing the same, settled. Plaintiff refers to and makes said case a part hereof. Julia Letton, as next friend of said Verlinda Cray, says that said Verlinda Cray at the time of the rendering of said judgment was of unsound mind, and still is; and said Julia Letton further says that she is a resident of this state, and is free from disability. Plaintiff comes and prays the court to set aside said judgment and to redocket the said action, and, for grounds for said motion, says that said judgment was obtained by fraud practiced by the successful party, the said John R. Cray, and that the plaintiff was, by reason of unsoundness of mind, unfitted for the transaction of business, or taking care of her financial interests, and was incompetent to enter into the agreement for a judgment of dismissal of said action. Plaintiff says that said fraud consisted of undue marital influence exercised by the said John R. Cray, and in the representation by the said Cray that he had sufficient property to take care of the said Ver-

linda Cray in case of his dying first, and that he would provide for her in case of his death, and would furnish her with all the necessities and comforts in that event. Plaintiff says that said John R. Cray has died since the rendering of said judgment; that he died intestate, leaving as his only heirs the defendant Mary E. Wilson, who is his only child. Plaintiff says that said John R. Cray made no provision for the support of his widow, the plaintiff; that she had received from his estate only a dower interest in her own land, the 98 A., 3 R., 6 P., referred to in the aforesaid action, and a dower interest in a tract of land in Nicholas county, and her distributable share of his personal estate. Further says that said share only amounted to \$107 in money, and about that much in personal property, and also says that she has since sold to the defendants the said dower interest in the Nicholas county land for \$100. Plaintiff further says that said John R. Cray died on the 3d day of October, 1892, and that on the 11th day of said month (that is, on the 8th day after Cray's death) the defendant Mary E. Wilson and her husband, Benjamin F. Wilson, induced the plaintiff, Verlinda Cray, to unite with them in a petition to the Bourbon county court for an allotment of dower to said Verlinda in the said tract of 98 A., 3 R., 6 P., of land; that thereupon said court appointed commissioners to allot dower to plaintiff, and said commissioners did allot to her, as dower, 28 A., 3 R., 21 P., of her said land, and the balance was allotted to the defendant Mary E. Wilson, and is now held by her and her husband, B. F. Wilson. Plaintiff says that the defendants required the plaintiff to build one-half of the division fence between that part of her land allotted to her and the part allotted to the defendant, and thereby expend a large part of the money received from the estate of said John R. Cray. The plaintiff was at the time of agreeing to the allotment of dower, and at the time of the allotting of said dower, incapable of attending to her affairs, and not competent to enter into said agreement. Plaintiff is now in her 75th year, nearly deaf, memory greatly impaired, and is wholly incapable of caring for herself, and has only the rent from the little land left her as income on which to subsist during her old age; that the said rent is only about \$150 per year, and taxes and insurance and repairs to come out of that. Wherefore plaintiff prays that the court will set aside and hold for naught the judgment entered in the said case of Verlinda Cray, Plaintiff, against John R. Cray, etc., Defendants, and will redocket the same, and consolidate it with this action; and prays for all general and equitable relief."

Defendants' demurrer to the petition was properly overruled, but their motion to strike out certain words was erroneously sustained, after which defendants answered, and the answer may be treated as a traverse of all the material averments of the petition. Upon

final hearing the court rendered judgment refusing the relief prayed for, and from that judgment this appeal is prosecuted.

It will be seen that the petition makes the former suit therein referred to a part of this suit, and this action may be fairly considered as an attempt to obtain the relief sought in the original action. It is the contention of appellees that this appeal ought to be dismissed because there was no revivor of the action within 12 months after the death of Verlinda Cray, who, it appears, died after the rendition of the judgment complained of; and they cite sections 509 and 510 of the Code of Practice. The sections referred to do not control or govern the revivor of actions or appeals to the court of appeals in a case like this. Section 767 of the Code of Practice provides that the provisions of title 11 shall, so far as applicable, regulate cases in the court of appeals. It will be seen in this case that no appeal had in fact been taken to the court of appeals by Verlinda Cray or her next friend until after the death of said Verlinda; hence there was no suit or action pending at the time of her death; and by statute she or her representative had the right to prosecute an appeal to this court within two years after the rendition of the judgment complained of, and it seems to us that the proper steps were taken in this case to obtain and prosecute the appeal. The principle announced in *Hopkins v. Hopkins*, Adm'r, 91 Ky. 310, 15 S. W. 854, seems to sustain the appellant in this case in her contention that the appeal and revivor, if it may be so called, was properly taken. The motion of appellees to dismiss the appeal must be, and is, overruled.

It will be seen from the evidence in this case that Verlinda Cray was the owner of a tract of land in her own right, which was conveyed to the brother of her husband, for which she received no consideration, and then immediately conveyed by him to the husband, and is now claimed by the heir at law of said husband. It further appears from the testimony that Verlinda Cray was a widow, and her late husband, John R. Cray, was a widower, at the time of their marriage; that Verlinda never had any children, but was the owner of the tract of land in question, and owned some other property, at the time of her marriage. It is also shown that she was not capable of transacting business at the time of the said conveyance to the brother of her husband, and, it seems, made the conveyance under an entire misapprehension of its effect at the time. It therefore follows that as she was not capable of understanding the nature of the conveyance, and incapable of making a rational disposition of her property, and having received no consideration at all for the conveyance, and the present claimants of the land having paid nothing therefor, the conveyance ought to be set aside. The judgment appealed from is therefore reversed, and the cause remand-

ed, with directions to set aside the agreement in the original suit, and cancel the deed from the said Verlinda to M. A. Cray, and the deed from M. A. Cray to John R. Cray, and adjudge the land to the real representatives or heirs at law of the said Verlinda Cray, and for proceedings consistent with this opinion.

(Dec. 17, 1897.)

PER CURIAM. So much of the opinion heretofore rendered in this case as directs the cancellation of the deed from Verlinda Cray to M. A. Cray, and the deed from M. A. Cray to John R. Cray, and adjudging the land to the real representatives or heirs at law of said Verlinda Cray, is withdrawn; but the residue of the opinion shall remain in full force, and the cause is remanded, with directions to the court below to set aside the agreement and judgment rendered pursuant thereto, and hold the same for naught; and the parties may litigate the questions involved in the original suit. In other words, all questions affecting the validity of the deed from Verlinda Cray to M. A. Cray and the deed from M. A. Cray to John R. Cray may be further litigated, and the parties may, if they so desire, amend their pleadings, and take such additional proof in support of or adverse to said deeds as they may desire.

#### TUDOR v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 28, 1897.)

HOMICIDE—INDICTMENT—AIDERS AND ABETTORS—KILLING IN DEFENSE OF ANOTHER—INSTRUCTIONS—ARGUMENT OF COUNSEL.

1. An indictment for murder against several defendants jointly, charging that they murdered the deceased by one of them shooting him, the others being then and there present, aiding and abetting, but that which one "did the actual shooting and killing, or which aided and abetted, was unknown to the jury," is good.

2. Where the accused intervened in a fight between two others, and killed one of them, threats made by the deceased against the other combatant, of which the accused had no knowledge, were not admissible in his behalf, he having no intimation as to which began the fight, or as to which was about to commit a felony.

3. The accused, having intervened in a fight between two others, and killed one of them, cannot justify his action by evidence that the man who was killed had brought on the difficulty, when that fact was unknown to him at the time of the killing.

4. An instruction directing the jury to find defendant guilty of manslaughter only, and not of murder, if they believed beyond a reasonable doubt that he killed S. in sudden heat and passion, or that in sudden heat and passion he aided, abetted, or encouraged some one who did so kill S., was not erroneous, there being no evidence authorizing a qualification as to defendant's right to an acquittal on the ground of self-defense.

5. If defendant aided and abetted in the killing, he was a principal in the second degree, and not an accessory.

6. The error, if any, in omitting from an instruction the requirement that a jury should believe beyond a reasonable doubt that the person who did the actual killing did so in sudden heat and passion, in order to reduce the offense of

defendant in aiding and abetting such killing from murder to manslaughter, was harmless, as it required the jury to find the existence of sudden heat and passion in defendant alone, in order to so reduce the offense.

7. The mere fact that the jury, while in charge of the sheriff, taking exercise, went to the store where the killing occurred, for the purpose of procuring some tobacco, did not constitute the receiving of evidence out of court.

8. The statement of the commonwealth's attorney to the jury that no living witness stated to them that the life of the person in whose defense defendant claimed to have acted was in danger was not such an obvious allusion to defendant's failure to testify as to render the action of the court in overruling an objection to the statement substantial error.

Appeal from circuit court, Garrard county.  
"Not to be officially reported."

James Tudor was convicted of manslaughter under an indictment for murder, and appeals. Affirmed.

R. C. Warren and Lewis L. Walker, for appellant. W. S. Taylor, Atty. Gen., for the Commonwealth.

**DU RELLE, J.** The appellant was indicted jointly with Jack Turner and S. D. Turner for the murder of Marion Sebastian, the indictment charging that the defendants murdered him by either the said Jack Turner, or S. D. Turner, or James Tudor, with pistols, shooting him, the others being then and there present, aiding and abetting, but that which one of the defendants did the actual shooting and killing, or which aided and abetted, was unknown to the jury. The demurrer to the indictment was properly overruled, a similar allegation in an indictment having been held good by this court in the case of Jackson v. Com., 38 S. W. 422. Appellant had a separate trial, was found guilty, and his punishment fixed at confinement for 21 years.

It appears that appellant, Jack Turner, and Marion Sebastian had married three sisters of S. D. Turner, who had married a daughter of one Nave, who had married a sister of Sebastian. S. D. Turner had had trouble with Nave, claiming that the latter, who was his father-in-law, had persuaded his wife to leave him, and Sebastian, the deceased, had taken sides with Nave. The killing took place at a store in a corner of a public square, and there was the usual conflict of testimony as to who commenced the difficulty, and who fired the first shot. It sufficiently appears, however, that the Turners and Sebastian were fighting when appellant appeared. There was evidence tending to show that he fired at Sebastian, and ran away from the fight. Upon the trial he offered to prove by S. D. Turner and other witnesses that threats had been made by the deceased at various times against S. D. Turner, none of which had been communicated to appellant. The trial court excluded the testimony as to the threats, and, we think, properly. It is true that, in cases where the plea of self-defense is relied on, there is conflict of testimony as to who

the difficulty, it has been held that un-

communicated threats were admissible in evidence as tending to indicate which person commenced the fight. *Hart v. Com.*, 85 Ky. 77, 2 S. W. 673; *Young v. Com.* (Oct. 9, 1897) 42 S. W. 1141. But we do not think such testimony admissible in a case like this, where a third person took part in a fight between two others, without having, so far as this record discloses, any information or ground of belief as to which of the two combatants was committing, or likely to commit, a felony. There is no evidence to show that appellant had any information as to which of the men began the fight. All he knew, or could know, therefore, was that one of them was likely to commit a felony; and evidence tending to show that Sebastian, as matter of fact, began the conflict, would not tend in any degree to show that appellant believed, or had reasonable ground to believe, that it was necessary to kill Sebastian in order to prevent the commission of a felony. Upon the plea of self-defense on behalf of Turner, such testimony might be admissible as tending to prove that Sebastian had first attacked him; but there is no pretense that this appellant acted in self-defense, or that any threats were uttered as against him.

The fifth instruction is objected to by appellant. It is as follows: "Although you may believe from the evidence beyond a reasonable doubt that the defendant, Tudor, shot and killed Sebastian, or that he was present, and aided or abetted or encouraged any one who did shoot and kill him, yet if you further believe from the evidence that at the time he did so a fight was going on between S. D. Turner and Sebastian, and that Tudor had reasonable grounds to believe, and did believe, that Turner was in immediate danger of suffering a loss of his life or great bodily harm at the hands of Sebastian, and did further believe, in the exercise of a reasonable judgment, that the danger to Turner could be averted only by his shooting Sebastian, then you will acquit Tudor: provided, you further believe from the evidence that Sebastian brought on the fight between himself and Turner by first drawing a pistol in a hostile manner on Turner, or by first presenting a pistol in a hostile manner at Turner, or by first shooting at Turner. If, however, you believe from the evidence beyond a reasonable doubt that Turner started the fight by first drawing his pistol on Sebastian in hostile manner, or by first presenting it at Sebastian in hostile manner, or by first shooting at Sebastian, then you cannot acquit Tudor upon the ground that he interfered to save Turner from danger of harm or death." For the reasons stated for the inadmissibility of the evidence of threats by Sebastian against Turner, this instruction might properly have been withheld, as there was no evidence in the record upon which to base it; but it certainly did not prejudice the appellant. It would be, in our opinion, new doctrine to

hold that a man may intervene in a conflict between two others, kill one of them, and justify his action by evidence that the man who was killed had brought on the difficulty, when that fact was utterly unknown to him at the time of the killing.

The instruction as to manslaughter was also objected to, as not properly qualified. By that instruction the jury were told, in substance, to find defendant guilty of voluntary manslaughter if they believed beyond a reasonable doubt that he killed Sebastian in sudden heat and passion, or that in sudden heat and passion he aided, abetted, or encouraged some one who did so kill Sebastian. It is claimed, under the authority of *Hinkle v. Com.*, 11 S. W. 773, that the latter part of this instruction should have contained a qualification requiring the jury to believe beyond a reasonable doubt that the person who did the shooting did so in sudden heat and passion, and not in his necessary self-defense, and a further qualification as to the appellant that his aiding and abetting of the person who did the shooting was not in his necessary self-defense, or in the defense of another. As we have seen, there was no evidence to justify an instruction as to self-defense on the part of appellant. This was not, like the *Hinkle Case*, an indictment for conspiracy. If the appellant aided and abetted in the killing, he was a principal in the second degree, and not an accessory. *Bish. Cr. Law*, § 603. Nor could the omission of a requirement that the jury should believe beyond a reasonable doubt that the person who did the actual killing did so in sudden heat and passion operate to the prejudice of appellant, even if it had been proper to insert it. On the contrary, it must have operated to his advantage, as it required the jury, and properly, to find the existence of sudden heat and passion in the appellant alone, in order to reduce the offense from murder to manslaughter.

A further objection is based upon the fact that, while the jury were in charge of the sheriff, taking exercise, they were permitted to go to a store fronting on the public square, in front of which the killing occurred; and it is urged that there was an invasion of appellant's constitutional rights, in that the jury received evidence out of court by the view thus obtained of the place of the killing, not had in accordance with section 236 of the Criminal Code. Nothing was pointed out to the jury when they went to Powell's store, where they went for the purpose of procuring some tobacco, nor was any remark made in regard to the position of the combatants, or about any feature of the case; and we do not regard this visit as prejudicial error any more than the passing or repassing of the jury to and from the court house would have been if the killing had taken place at the court-house door.

It is also urged as error that, against appellant's objection, the court permitted the

attorney for the commonwealth in argument to state to the jury that no living witness stated to them that appellant believed D. Turner's life was in danger, and that it could be averted in no other way than by shooting at Sebastian, the claim being that this was an indirect allusion to the fact that defendant did not testify, as he was the only witness who could have stated that he believed Turner's life was in danger. We are unable to concede that this was substantial error. It may be that it was intended as an allusion to the fact that appellant did not testify, but we cannot see that it was sufficiently obvious to direct the jury's attention to the fact, if it had not been for the objections of the defendant. For the reasons stated, the judgment is affirmed.

### COX v. ARMSTRONG et al.

(Court of Appeals of Kentucky. Oct. 26, 1897.)

JUDGMENT—RIGHT TO VACATE.

A default judgment upon a forged note will not be set aside upon the ground that defendant was dissuaded by her attorney from making defense upon the representation that she would be defeated, and, moreover, that the judgment could be satisfied out of a judgment in her favor against plaintiff, the collection of which has since been enjoined by plaintiff.

Appeal from circuit court, Kenton county.  
"Not to be officially reported."

Action by Amanda Cox against L. A. Armstrong and others to set aside a judgment. Judgment for defendants, and plaintiff appeals. Affirmed.

C. F. M. Striger and J. W. Menzies, for appellant. D. A. Glenn, for assignee of Armstrong.

GUFFY, J. The only question presented in this case is the sufficiency of the petition, which is as follows: The plaintiff, Amanda Cox, states that in May, 1886, the defendant Armstrong brought against her in this court an action (No. 259) on a note for \$200 of June 2, 1886, payable four months after date at the Covington City National Bank. It was not discounted, and a judgment by default thereon was rendered against her for \$201.50, which includes cost of protest, with interest from October 5, 1886. At the time said action was begun she had an execution for \$900 in the hands of the sheriff of this county against said Armstrong, which he has enjoined, and on his injunction case he obtained a judgment against her for costs,—\$11.80. The said Armstrong had executions issued on said judgments, and had them levied on an 18-acre tract of land in this county, belonging to her, and he claims to have purchased the land under said executions, and he has a motion in this court for the possession of said land, but he may not care for his motion. He has put the defendant Northcutt in possession of the land, and the plaintiff avers that when she was first notified of said action No. 259 she went to a lawyer, and he informed her

that the action was on a note. She had never heard of the note, and did not know that such a paper existed, or had ever existed. She never signed it, nor in any manner authorized its execution. She never did owe L. A. Armstrong one cent. The note is a forgery. This fact she declared to said lawyer, and desired him to defend for her against said note. He dissuaded her, urging that Armstrong was a man of high standing, and that she was a friendless woman, without means; he was riding on the top of the wave, and the decision on the note would depend upon his testimony against her testimony, and she would be defeated; and, moreover, her said claim for \$900 was for damages, and said note could easily be satisfied out of it. Armstrong's wife is her sister, and she believes that in October, 1893, she is the only person who knew Armstrong as he really was. Since said executions were issued, said Armstrong has become a confessed forger, and has no standing for respectability with any one, or in any direction. He has made an assignment to the defendant Baker. (2) The said Northcutt has cultivated this year a part of said land, and the use and occupation thereof is worth \$48, and he has used valuable timber which he found standing on the lands, worth \$50. She has received nothing for said use of the land, nor for said timber. Wherefore she prays judgment that the proceedings on said executions be held for naught, and set aside, and that said judgment in action No. 250 be set aside, and that said Northcutt be required to surrender said land to her, and that she recover of him and said Armstrong \$108 for said use of said land and for said timber, and she prays for all proper relief and her costs, etc. The court below sustained a demurrer to the petition, and plaintiff failing to amend, the same was dismissed.

It appears from the petition that the appellant was well aware of the suit and nature of the claim asserted against her, the judgment upon which she now seeks to have set aside. There is no adequate reason given why she failed to make defense. The petition fails to show that the possession of the other appellees of the land in question was without right, or that she is entitled to compensation for the use or rent of same, or for the timber taken therefrom by appellee. Judgment affirmed.

#### FOLEY'S EX'R v. GATLIFF et al.

(Court of Appeals of Kentucky. Oct. 26, 1897.)

##### JUDGMENT—ENTRY OF "AGREED" JUDGMENT WITHOUT AUTHORITY.

Where it appears that judgments purporting to have been entered by agreement were entered without authority, the judgments, and all proceedings thereunder, will be set aside.

Appeal from circuit court, Whitley county. "Not to be officially reported."

Action by J. C. Foley's executor against Joseph Gatliff and others to set aside certain

judgments. Judgment dismissing petition upon demurrer, and plaintiff appeals. Reversed.

John T. Hays, for appellant. R. D. Hill, for appellees.

GUFFY, J. The only question involved in this case is as to the sufficiency of the petition. If the allegations of the petition, are true, and they must be treated as true for the purpose of demurrer, the so-called agreed judgments were entered without authority, and should be set aside, and a new trial awarded; and the same may be said as to the proceedings had and taken under the aforesaid orders, and under the orders and judgments set up and assailed by the plaintiffs herein. The judgment appealed from is reversed, and the cause remanded, with directions to overrule the demurrer, and for proceedings consistent with this opinion.

#### COPE v. DEATON et al.

(Court of Appeals of Kentucky. Nov. 13, 1897.)

##### EVIDENCE OF EXECUTION OF RECEIPT—CONTINUANCE.

1. The mere fact that witnesses had seen receipts purporting to have been executed by plaintiff is not evidence of their execution, unless the witnesses were acquainted with plaintiff's handwriting.

2. Defendant was not entitled to a continuance for the absence of witnesses, when the affidavit failed to show that the witnesses resided within 20 miles of the county seat, so as to give the right to compel their personal attendance, especially as a default judgment had been permitted to be rendered and to remain in force six or seven days; and plaintiff, to avoid a continuance, having been compelled to consent that the affidavit might be read as a deposition, is entitled to a reversal.

Appeal from circuit court, Breathitt county. "Not to be officially reported."

Action by J. S. Cope against Thomas Deaton and others to recover amount alleged to be due on a settlement. Verdict and judgment for defendants, and plaintiff appeals. Reversed.

J. J. C. Bach and G. W. Fleenor, for appellant. S. H. Patrick & Sons, for appellees.

GUFFY, J. The appellant instituted this action against the appellees to recover \$543.30, alleged to have been due on a settlement made July 10, 1893. A judgment by default was at first rendered, but afterwards, on motion of appellees, the same was set aside, and appellees filed answer and counterclaim, in which it was alleged, in substance, that appellees had paid sundry sums of money and taken receipts therefor from plaintiff which should have been credited upon the obligation sued on. After issue joined, appellees moved the court for a continuance, and filed affidavit in support thereof, which motion was sustained by the court; but upon appellant's consent that the affidavit might be read as a deposition, subject to exceptions for competency, a trial was had resulting in

a verdict allowing to appellees a credit of \$400, and judgment for the residue of the claim, and, appellant's motion for a new trial having been overruled, he has appealed to this court.

One of appellant's contentions is that the court erred in granting a continuance, for the reason the affidavit failed to show that the witnesses resided within 20 miles of the county seat. It is also contended that the affidavit should not have been read or considered, because the statements were not competent, for the reason the witnesses did not profess to know that appellant had in fact executed the receipts referred to in the affidavit. We need not now pass upon the competency of the affidavit, but it may be proper to say that the mere fact that the parties had seen the receipts purporting to have been executed by appellant is not evidence of their execution, unless the witnesses were acquainted with the handwriting of appellant. But it seems to us that, under the facts and circumstances, the affidavit should have shown that appellees had the right to require the personal attendance of the witnesses in court, and, as it failed to so show, it was error to grant a continuance on account of the absence of witnesses, and especially is this true in view of the fact that a default judgment had been permitted to be rendered and remain in force for six or seven days. For the reasons indicated the judgment is reversed, and the cause remanded for a new trial upon principles consistent with this opinion.

#### CARLISLE v. HOWES et al.

(Court of Appeals of Kentucky. Nov. 12, 1897.)

##### JUDGMENT—RES JUDICATA—DISMISSAL.

1. A judgment dismissing an action to recover the value of timber taken from land of which plaintiff was not in possession, in which defendants denied plaintiff's title, and asserted title in themselves under a sheriff's deed, is a bar to a subsequent action by plaintiff to set aside the sheriff's deed, and recover the land, though plaintiff has perfected his title since the former judgment; it being necessary for plaintiff to show title in order to recover in the former action.

2. The dismissal of an action is conclusive unless the pleadings and judgment show that the case was not heard and determined on its merits.

Appeal from circuit court, Johnson county.

"Not to be officially reported."

Action by John G. Carlisle against E. F. Howes and others to set aside a sheriff's deed and to recover land. Judgment for defendants, and plaintiff appeals. Affirmed.

G. W. Castle, for appellant. Jas. Goble, for appellees.

PAYNTER, J. The appellant, Carlisle, by this action, sought to have a deed set aside which the sheriff of Johnson county had made to Daniels and Preston, and to recover from them the possession of the land described in the deed. Several defenses were pleaded, but only one of them seems to be meritorious,

which is that a court having jurisdiction of the parties and the subject of litigation in a former action, involving the same question, had rendered a judgment on the merits of the action which bars the appellant's right to recover in this action. In 1892 the appellant filed an action in the Johnson circuit court, in which he alleges that he was the owner of the same land in dispute in this action; that the appellees had cut and removed a considerable quantity of the timber from the land, and of a certain value, for which he sought a judgment; that they were continuing to cut the timber, and he asked and obtained an injunction to restrain them from doing so. In the answer in that case the appellees denied that Carlisle was the owner of the land, or that they had wrongfully cut and removed the timber. In addition, it was alleged that they were the owners of the land, and pleaded that they acquired title to it by virtue of a sale of the property for taxes, and a deed which the sheriff had made in pursuance of such sale. They did not deny simply that they had not been guilty of the trespass, but denied that Carlisle was the owner of the property, and affirmatively declared they were the owners of it. On the trial of that case the court dismissed the petition. It is true, in that case the plaintiff did not seek to recover the possession of the land, or to have vacated the sheriff's deed which had been made to the appellees. But he did claim that he was the owner of the land, and had the right to recover the value of the timber, and restrain the commission of further acts of trespass. The right to recover for cutting and removing the timber depended upon Carlisle's ability to show that he was the owner of the land. He was not in the actual possession of it. It does not appear from the judgment of the court in that case what reasons influenced the court to dismiss the bill. The record shows the title was involved, and the bill was dismissed upon the hearing of the case. In order that a judgment will constitute a bar to a subsequent action involving the same issue, it must appear that the case was tried upon its merits. It is contended by the counsel for the appellant that the court did not decide the case upon its merits, because on the trial of the case it was shown that Carlisle had not at that time perfected his title to the land. Counsel then proceeds to argue, as Carlisle did not then have the legal title to the land, but had since perfected his title to it in the United States district court, he is entitled to maintain this action. Had he sought in the first action to recover for the timber cut and removed, and the answer had simply denied the trespass, without putting in issue the title to the land, then the judgment would not have been a bar to recover in this action. *Walker v. Leslie*, 90 Ky. 642, 14 S. W. 682. If Carlisle instituted his action before he had acquired title to the land,—hence before he had a right to recover,—and proceeded to have his case tried on its merits, he is barred by the

judgment. Had he discovered, before the case was tried, that he could not succeed, owing to a defect in his title, which, with time he could have cured, he should have dismissed his case without prejudice. It is said in *Freeman on Judgments* (section 260): "To create such a judgment, it is by no means essential that the controversy between the plaintiff and defendant be determined 'on the merits,' in the moral or abstract sense of those words. It is sufficient that the status of the action was such that the parties might have had their lawsuit disposed of according to their respective rights, if they had presented all their evidence, and the court had properly understood the facts, and correctly applied the law. But, if either party failed to present all his proofs, or improperly managed his case, or afterwards discovered additional evidence in his behalf, or if the court find contrary to the evidence, or misapplies the law, in all these cases the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled their controversy in accordance with the principles of abstract justice." The order fails to show the appeal was dismissed without prejudice. It is essential that this should have been shown by the order so as to have prevented the judgment from operating as a bar to this action. It is said by *Black on Judgments* (section 722): "It will not be presumed from the mere fact that a bill was dismissed that the merits were not reached. On the contrary, according to the great majority of decisions, it must appear in specific terms on the record that the dismissal was 'without prejudice,' or else the decree will operate as a bar to a subsequent suit." Section 270, *Freem. Judgm.*, is to the same effect. The dismissal of the bill is conclusive unless the pleadings and judgment show that the case was not heard and determined on its merits. If dismissed on the motion of the plaintiff, the rule might be otherwise. The doctrine laid down by *Freeman* and *Black* is sustained by *Curtis v. Trustees of Bardstown*, 6 J. J. Marsh. 538; *Daniel v. Morrison*, 6 Dana, 187. The only question in this case is as to whether the title was involved in the former case. The conclusion must be that it was, because the defendants did not only deny that they were not guilty of cutting and removing the timber, but pleaded that they were the owners of the land. Unless he could show title to the property, he was not entitled in this action to recover the possession of it. His right to vacate the deed necessarily depends upon the question as to whether he is the owner of the land. In the first case, as we have said, it was essential that *Carlisle* should show that he was the owner of the land before he could recover, as he was not in actual possession of it. The court dismissed his petition, which was equivalent to saying that he was not the owner of the land. As the title to the land was involved in the former case, and as the court, in effect, decided that he was not

the owner of the land, and as the question of title to the same land is involved in this case, we are of the opinion that the judgment in the former case bars his right to recover in this case. The judgment is affirmed.

#### FELTMAN et al. v. CHINN.

(Court of Appeals of Kentucky. Oct. 26, 1897.)

##### ANIMALS—AGISTOR'S LIEN.

It was error, as against an attaching creditor, to adjudge the existence of an agistor's lien upon stock which was under full control of the owner.

Appeal from circuit court, Mason county.  
"Not to be officially reported."

Action by George F. Chinn against James Davis to enforce an agistor's lien, consolidated with an action by appellants against James Davis in which an attachment was levied upon the same property. Judgment giving George F. Chinn priority, and H. Feltman & Co. appeal. Reversed.

L. W. Robertson and A. M. J. Cochran, for appellants.

GUFFY, J. The appellants instituted this action in the Mason circuit court against James Davis to recover an amount of \$7,000, besides interest, and obtained an attachment against the property of said Davis, which was levied upon certain crops and certain stock, consisting of horses and mules. Annie E. Davis claimed some of the property levied on, which it seems, by final agreement, was surrendered to her. The appellee, Chinn, seems to have instituted suit in equity to enforce an agistor's lien upon some of the stock levied on, which suit was consolidated with the suit of appellants against Davis. Chinn also claimed to be the owner of part of the crops levied on, and also a portion of the stock, and claimed the lien aforesaid for feeding and pasturing certain other stock. A jury trial was had, and it seems the jury found for Chinn as to the property claimed by him, and also found in his favor on his alleged claim for feeding and caring for the stock as claimed by him. Thereupon the court adjudged to Chinn the hayrake, old buggy, an undivided one-half interest in the crop of tobacco raised by Nathan Smith, the crop of tobacco in the barn near the house, and the corn in the crib, and 40 shocks in the field, old bay horse 20 years old, bay mare 7 years old, white mare 16 years old, iron-gray mule 19 years old, and bay horse mule 12 years old,—all of which was attached in the action. The court further adjudged that Chinn recover of Davis \$500, with interest, and that he has a lien on the 10 horses belonging to defendant Davis for the sum of \$500 for the pasturing and keeping of same, which lien is prior and superior to the lien and attachment of H. Feltman & Co. herein. Said 10 horses have been sold by order pending this action, and, as appears from the report of sale, sold for \$380.50 on



July 27, 1895. The interest on the bond amounted to \$8.68. It is now ordered and adjudged that J. C. Jefferson, commissioner, pay said sale bond of \$389.18, proceeds of the sale, to the defendant Chinn. It is also adjudged that Chinn recover of plaintiffs Feltman & Co. all his costs in this action and the equitable action consolidated therewith. Appellants afterwards filed grounds of new trial in substance as follows: The verdict is not sustained by sufficient evidence. Is clearly and palpable against the weight of evidence. The court admitted incompetent evidence, and refused to admit competent evidence. The court ruled that the defendant had the burden of proof, and gave him the closing speech. The court erred in giving to the jury, in behalf of defendant, instructions 1, 2, and 3. It seems that the verdict of the jury is not sustained by sufficient evidence. It clearly appears that James Davis had full control of the leased premises, as well as the stock upon which appellee asserted an agistor's lien, and that he in fact controlled and managed the entire business. It does not, however, appear that the court below submitted the question of the lien of appellee on the stock in contest to the jury, nor could that question have been properly submitted to a jury. It may be that there was some evidence conducing to show that appellee was the owner of the stock and other property claimed by him; hence we are not disposed to set aside the verdict of the jury as to such property claimed by appellee as his individual property. But it is manifest that appellee had no lien upon the property upon which he asserted a lien, and the judgment in that respect is reversed, and the cause remanded, with directions to adjudge to appellants the \$389.50, the price for which said property upon which the lien was asserted sold, with interest from the 27th day of July, 1895; and also to render judgment in favor of appellants against appellee for their costs expended incident to the contest as to said lien; and for proceedings consistent with this opinion.

### KENTUCKY CENT. RY. CO. v. CARR.

(Court of Appeals of Kentucky. Nov. 12, 1897.)

**MASTER AND SERVANT—RAILROADS—DEFECTIVE MACHINERY—WILLFUL NEGLIGENCE.**

1. Where plaintiff alleges that the defect in machinery by reason of which he was injured was unknown to "defendant," and could not have been discovered by him, but could have been discovered by defendant's agents, it is manifest that the pleader's meaning was that the defect was unknown to "plaintiff," and the petition is good.

2. Plaintiff testified that, in coupling a car, his hand was caught between the "deadwoods," and crushed; and one of defendant's witnesses testified that he saw the flesh and blood on the deadwoods where the hand was crushed. A witness for plaintiff testifies that the car had been standing on the switch for some days, and that he examined it, and discovered that the springs in the drawbars were broken, and that the bolts which held it were loose. Held, that

the court properly refused to direct a verdict for defendant.

3. Defendant cannot complain that the court allowed plaintiff to prove that, under the rules of the company, it was the duty of the inspector at terminal points, and of agents at intermediate points, where the cars are left, to inspect them, as the law imposes the duty on the company to have proper inspection of its cars made, regardless of the rules of the company.

4. While there is no degree of negligence known as "willful" when injury has been inflicted not resulting in death, it is immaterial that the petition alleges "willful and gross" negligence, the court having instructed the jury as to gross negligence alone.

Appeal from circuit court, Harrison county.

"Not to be officially reported."

Action by John M. Carr against the Kentucky Central Railway Company to recover damages for personal injuries. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

J. Irvine Blanton, for appellant. Swinford & Evans, for appellee.

**PAYNTER, J.** The appellee was a brakeman on a freight train of the appellant in 1891, and, while attempting to couple cars, his hand was crushed to such an extent as rendered amputation necessary. He alleges that the injury was the result of the willful and gross negligence of the company and its employes. It is averred in the petition that the cars were standing on the main track at Cynthiana, which were to be attached to the train; that the engineer "kicked" some freight cars back, that they might be coupled to the cars thus standing on the main track; that they were kicked back with unusual and unnecessary force; that the coupling machinery was defective; that the cars came together with such force as to drive the drawbars back under the cars, thus bringing the cars so close together as to catch the body of the appellee between them, and his hand between the "deadwoods."

It is contended that the petition is defective, because it fails to allege that the defective condition of the machinery was unknown to the appellee. It is true, the petition alleges that it was unknown to the defendant, but language follows immediately which shows the allegation had reference to the plaintiff. The language used is as follows: "The coupling of the said car that he was ordered to couple as stated aforesaid was out of repair and in an unsafe condition to couple or manage in coupling, and, in fact, unfit for as well as unsafe for use, which condition was unknown to 'defendant,' and could not have been discovered by him by the exercise of reasonable diligence, but could have been ascertained by the defendant's said agents, employes, and servants, by the exercise of reasonable diligence and care or prudence." When this language is considered, it is manifest that the plaintiff meant the defective condition of the machinery was unknown to him, instead of meaning it was unknown to the defendant.

The pleading was not defective, as contended by counsel for appellant.

The testimony offered by the plaintiff conduces to show very strongly that he was injured in the manner alleged. In his testimony he describes particularly the circumstances under which he was injured, and shows that his hand was caught between the "deadwoods," and crushed. If we correctly understand the testimony as to the construction of the cars, it was utterly impossible for his hand to have been caught between the deadwoods, except that the drawbars gave way. There seems to be no doubt that his hand was injured by being thus caught by the deadwoods, because the plaintiff is not contradicted upon that question, but one of the employes of the appellant, who was introduced as a witness by it, testified that he saw the flesh and blood on the deadwoods where the hand was crushed. A witness introduced by the plaintiff testifies that the car had been standing on the switch for some days; and he examined it, and discovered that the springs in the drawbars were broken, and the bolts which held it were loose. Under such proof as this, it is perfectly clear that the court should not have instructed the jury, as counsel contends it should have done, to find for the defendant. If the testimony offered by the appellee be true, it was certainly gross negligence upon the part of the appellant to have required the appellee to couple the car the coupling machinery of which was so defective. By ordinary care, the company could have detected the defective condition of the machinery.

It is contended that the court did not properly instruct the jury on the question as to whether the plaintiff knew, or could have by reasonable care known, of the defective condition of the machinery. The plaintiff testified that he did not know of its defective condition; neither did the defendant attempt to show that the plaintiff knew of the defect in the machinery, or could have known it by reasonable care. The whole theory of the defense was pitched upon the idea that the machinery was not defective. Neither by pleading, proof, nor argument has the appellant sought to show that the machinery was defective. While the instructions are not artistically drawn, still we think they sufficiently submitted the issue to the jury.

It is contended that the court erred in allowing the plaintiff to prove that, under the rules of the company, it was the duty of the inspector at terminal points, and of agents at intermediate points, where the cars are left, to inspect them. Regardless of the rules of the company, the law imposes the duty upon the company to have proper inspection made of its cars. And we are not of the opinion that it was not proper to allow the plaintiff to give the testimony in question. It is true, as counsel contends, that there is no degree of negligence known as "willful" when injury has been inflicted not resulting in death. Had

the court required the plaintiff to have shown willful neglect to have entitled him to recover, it would not have been prejudicial to the appellant, but would have been to the appellee, as "willful" is a higher degree of negligence than "gross." However, the court eliminated the word "willful" from the case, by requiring the jury to believe that the company had been guilty of gross negligence before the jury could find for the plaintiff. The jury was the judge of the facts, and we do not think their verdict should be disturbed. The judgment is affirmed.

#### HALL'S ADM'R et al. v. MUTUAL LIFE INS. CO.

(Court of Appeals of Kentucky. Nov. 13, 1897.)

##### MORTGAGES—MENTAL CAPACITY OF MORTGAGOR.

The mere fact that the mortgagor has not a high order of intellect, or that he has entered into imprudent and disastrous ventures, is not sufficient to establish his incapacity to contract; the burden being on his representatives, resisting the enforcement of the mortgage, to show his incapacity.

Appeal from circuit court, Bourbon county. "Not to be officially reported."

Action by the Mutual Life Insurance Company against William B. Hall's administrator and another to enforce a mortgage. Judgment for plaintiff, and defendants appeal. Affirmed.

Breckinridge & Shelby, C. P. Chenault, and W. S. Pryor, for appellants. Strother & Gordon, for appellee.

GUFFY, J. William B. Hall on the 5th of February, 1885, executed to the appellee his note for \$3,500, due five years after date, with interest at the rate of 7 per cent. per annum, payable semiannually, and executed his several promissory notes or coupons for the payment of the interest as aforesaid, and, together with his wife, Ann Belle Hall, executed a mortgage to appellee on a certain tract of land in Bourbon county to secure the payment of said note. It is further alleged that the said Hall, by his promissory note of May 10, 1888, promised and agreed to pay appellee the sum of \$4,000, five years thereafter, with interest at the rate of 7 per cent. per annum, payable semiannually, and executed his 10 promissory notes or coupons, payable semiannually, for the interest aforesaid, and, to secure the payment of said debt, mortgaged to appellee the same tract of land. In 1890 appellee instituted suit in the Bourbon circuit court against said Hall, seeking to obtain a judgment for said debts, and for a sale of the land to pay the same. In 1890 George Hall, as next friend of William B. Hall, filed his petition, as next friend, alleging that William B. Hall was of unsound mind at the time of the execution of said obligations, and unable to understand the nature and effect of same, and asked to be permitted to make defense, which motion the

court overruled. After the entry of some other motions, not necessary to notice, William B. Hall, at the January term, 1892, filed his answer, in which he alleged, in substance, that he was of unsound mind, or incapable of making or understanding any contract, and incapable of rational volition, or to understand any business transaction, or nature or force or effect of any writing or obligation, at the time of the execution of said notes, but at the time of filing this answer he had been restored to his right mind. This answer was controverted by reply, after which Hall died, and the action was revived against his administrator and real personal representative. They made the same defense, and also alleged that none of the money was obtained for, or used by, said Hall. Upon final trial the court below adjudged that the said Hall was mentally capable of contracting at the time of the making of said contracts, and rendered judgment in favor of appellee for the sums claimed, with legal interest, and adjudged a sale of the land to pay same, which land, it appears, has been sold; and from that judgment the appellants prosecute this appeal.

A considerable amount of testimony was introduced by defendants, and also by plaintiff. There is proof introduced on behalf of appellants conducing to show that, from about the spring of 1883 until shortly before the death of W. B. Hall, he was of unsound mind, or at least mentally incapable of understanding or transacting any business, and they gave many instances of his conduct, clearly indicating total destruction of mental capacity; and from that testimony we are constrained to believe that at times he was mentally incapable of understanding the nature and obligation of a contract. But it is in proof by the officers who took the acknowledgment of the mortgages that he was then rational, and capable of understanding the nature and effect of the transaction. It is also worthy of note that his wife united with him in the first mortgage (she died before the execution of the second), and that other parties of the family were present at the time the mortgage was executed,—at least, occupied the same dwelling with him. It is also in proof that in 1890 his brother presented an affidavit to the county attorney of Bourbon county, with the view of instituting proceedings to have the said W. B. Hall adjudged incapable of attending to his business and taking care of his property, and that the county judge and county attorney sent two doctors out to W. B. Hall's, to examine and report as to his mental capacity, and they reported him as fully competent to manage his affairs. They testified in this action as to their visit and conversation, and of their belief that he was fully competent, and his mind not at all impaired, at the time of their visit. Some other parties testify to seeing him when, in their judgment, he was perfectly competent to understand and transact any business. There is also some proof tending to show that part of the

money so borrowed of appellee was used to pay debts due from said Hall; and during the time it is alleged that he was incompetent, or of unsound mind, he incurred other obligations, and suits were filed against him, and no plea or defense set up as to his imbecility. There is some claim or intimation that his son-in-law, S. W. Yager, induced him to execute said mortgage, and that he (Yager) got all the money. But, as before said, it appears that at least several hundred dollars of the money went to pay Hall's debts, and some other portions of it were paid on debts of Yager, for which Hall was security. It is also in evidence in this case that Yager married the only daughter of Hall, which daughter was his only child, and that by his will of 1882, after some bequests to his wife and daughter, he devised all his property to the children of his said daughter, Mrs. Yager. It is not, therefore, unreasonable that he should have furnished his son-in-law, Yager, some aid and assistance, who seems to have been somewhat of a trader, although not remarkably fortunate. There is no evidence conducing to show that appellee had any notice that W. B. Hall was to any extent incapacitated, mentally, from properly attending to business and taking care of his property. It is a well-settled rule of law that, if a party is capable of understanding the nature and effect of a contract which he enters into, the same must be held valid and binding, although the obligor might not have a high or commanding intellect. The mere fact that a party enters into imprudent and disastrous contracts or ventures does not establish incapacity to contract. The presumption of law is that all men are sane, and capable of entering into valid and binding contracts; and the burden being upon defendants to establish the mental incapacity of W. B. Hall, in order to avoid the contract, unless they have done so the judgment of the court below must be sustained. We deem it unnecessary to recite at length even the substance of the evidence of all the witnesses who testified in the case. Suffice it to say that in our opinion the evidence fully justifies the judgment of the court below. Judgment affirmed.

#### GREENE v. ANDERSON et al.

(Court of Appeals of Kentucky. Nov. 12, 1897.)

APPEAL—PRINCIPAL AND SURETY—EXISTENCE OF RELATION—CONTRIBUTION.

1. The verdict of a jury will not be disturbed on appeal as against the evidence, unless palpably and flagrantly wrong.

2. A., T., and J. agreed with each other to borrow \$2,500 each from bank on their joint note, with which to buy certain stock. Before the note was executed, J. stated that his son, H., wanted \$1,000, and asked that the note be increased to that extent, which was done, H. signing the note. The money was used in buying stock as agreed, H. receiving 10 shares, and each of the other obligors 25 shares. H. signed several renewals of the note, but did not sign t<sup>h</sup>

last renewal; J., without the knowledge of the other obligors, having taken up the preceding renewal without securing the signature of H. to the new note. H. testifies that he signed the note as surety at the instance of J., who owed him \$1,000, and that the stock was a gift from J. *Held* that, if there was such an agreement between J. and H., the other obligors, having no notice of it, are not bound by it, and the finding of a jury that H. was a principal, and must contribute, will not be disturbed.

3. One of several obligors, who has discharged the joint obligation by the execution of his note, is entitled to contribution from his co-obligors as if he had paid money.

4. Several solvent obligors in a note are required, as between themselves, to contribute to the payment of the portion of an insolvent obligor only in proportion to the amounts received by them, respectively, from the original loan.

5. The excess in a judgment, attributable to an erroneous instruction, having been remitted, the judgment will not be reversed for the error in the instruction.

Appeal from circuit court, Montgomery county.

"To be officially reported."

Action by M. W. Anderson and W. T. Tyler against H. K. Greene for contribution. Verdict and judgment for plaintiffs, and defendant appeals. Affirmed.

O'Rear & Bigstaff and H. R. Prewitt, for appellant. Tyler & Apperson, for appellees.

**BURNAM, J.** In January, 1890, M. W. Anderson, W. T. Tyler, James Greene, and H. K. Greene executed their joint obligation to the Mt. Sterling National Bank for the sum of \$8,726.66, and the proceeds thereof, viz. the sum of \$8,500, was divided and received by the obligors as follows: M. W. Anderson, \$2,500; W. T. Tyler, \$2,500; James Greene, \$2,500; and H. K. Greene, \$1,000. This note was renewed to the bank by all the obligors for the original amount, the interest being paid at the date of the renewal, certainly as many as three times. In the execution of these renewals the obligors did not go together, and all sign the note at the same time, but it was the custom for each of them to call at the bank, as convenient, and, when the note was signed by all of them, the last signer would take up the preceding obligation. Upon the renewal of this note on the 14th day of June, 1892, James Greene (who was the father of H. K. Greene) was the last signer, and he took up the preceding renewal without the knowledge or consent of the plaintiffs that the signature of H. K. Greene had not been attached to the new obligation, and H. K. Greene thereafter failed and refused to sign any subsequent renewal of the note. On January 11, 1894, the plaintiffs, Tyler and Anderson, were compelled to, and did, take up and satisfy the whole of the debt, with accrued interest, amounting, as of that date, to the sum of \$9,127.86, and they instituted this suit against appellant, H. K. Greene, to recover the \$1,000 received by him from the proceeds of the original note, and also his proportion of the part which was due by James Greene, his father; the latter having

become insolvent. Defendant, H. K. Greene, resisted judgment, because, he says, he was only a surety upon the original obligation, and was not interested as a principal in borrowing the money; and that, by the acceptance of the renewal note by the bank without his name being attached thereto, he had been discharged from all liability thereon. Upon the trial of the case the court instructed the jury, first: "That if they believed from the evidence that the defendant, H. K. Greene, was one of the principals in the original note executed to the bank by him, James Greene, and the plaintiffs, or any renewal thereof, and they further believe from the evidence that the plaintiffs, Anderson and Tyler, prior to the institution of this action, took up or paid off the whole of said debt, the jury should find for the plaintiffs such sums or proportion of the amount so paid or taken up by them as they believe from the evidence H. K. Greene was originally bound or liable for as between the obligors on said debt on his own behalf, and any interest that may have accrued thereon. They should also find for the plaintiffs one-third of such sum, and accrued interest thereon, as they may believe from the evidence plaintiffs have paid or taken up for which James Greene was originally bound or liable." And by the third instruction they were told that, if they believed from the evidence that H. K. Greene was only a surety on the note, they should find for the defendant, Greene, to which defendant excepted. The trial resulted in a verdict and judgment for plaintiffs for the sum of \$1,968.74, with interest from the 11th day of January, 1894, this sum being the \$1,000, with accrued interest, which appellant, H. K. Greene, had himself received from the proceeds of the original note; and for one-third of the \$2,500, and accrued interest thereon, which James Greene had received from the proceeds of the original note. At a subsequent day of the term, plaintiffs remitted and released \$447.44 of the principal of their judgment, admitting that appellant was liable only to the extent of one-sixth of the amount for which James Greene, the insolvent obligor, was liable, instead of one-third. The court thereupon overruled the motion of the defendant for a new trial, and he prosecutes this appeal, and seeks a reversal of the judgment against him—First, upon the ground that the verdict is palpably against the weight of the evidence; second, because, it is insisted, that appellees are not entitled to recover any sum from appellant, for the reason that at the institution of this action they had not actually paid the joint debt, but had only taken it up by the execution of a new note to the bank; and, third, because of the admission of incompetent testimony against him upon the trial of the case.

With regard to the first ground, this court has, in repeated opinions, announced as a rule that the verdict of a jury upon a question of fact will not be reversed because of a

mere preponderance of evidence in favor of appellant, but that it must be palpably and flagrantly wrong before it will be disturbed; and, after a careful reading of the bill of exceptions in this case, we do not feel authorized to say that the verdict is against the preponderance of the proof. The testimony concludes to show that the plaintiffs, Anderson and Tyler, and James Greene agreed with each other to borrow \$2,500 each upon their joint obligation from the Mt. Sterling National Bank, the money to be used in the purchase of stock in the Security Land & Investment Company; that at the date of the original agreement appellant was not present; that when they went to get the money on a subsequent day defendant James Greene (the father of H. K. Greene) stated to the plaintiffs that his son, H. K. Greene, wanted \$1,000, and asked that the note be sufficiently increased as to include that amount, and that "Harvey would sign it," which was accordingly done; that the note was signed by the plaintiffs and the defendant James Greene, and subsequently by Harvey Greene; that the proceeds of this note, viz. \$8,500, were divided, of which plaintiffs got \$2,500 each, James Greene \$2,500, and Harvey Greene \$1,000; that all this money was placed to the credit of Greene & Co., and was by the secretary of that company checked out to pay subscriptions of the plaintiffs and defendant to the capital stock of the Security Land & Investment Company of Mt. Sterling, Ky., appellant, H. K. Greene, receiving a certificate for 10 shares of the capital stock, M. W. Anderson 25 shares, James Greene 25 shares, and W. T. Tyler 25 shares; that this stock was accepted by the appellant, and that he signed several of the renewal notes. Appellant testifies that he signed his name as security at the instance of his father, James Greene, who was indebted to him in the sum of \$1,000 or \$1,500, and who used his portion of the money to pay for the 10 shares of the capital stock subscribed for by him in the land and investment company, and made him a present of it. There is no pretense that either of the plaintiffs ever asked him to sign the note as surety, and the testimony of the cashier of the bank shows that he did not require any security on the note, and that he did not attach any special importance to the name of H. K. Greene. And even if, as contended, there was an agreement between appellant and his father that he was to sign this note only as security, we do not think that plaintiffs would be bound by it, as there is no evidence that they ever had any information regarding this agreement; and the conduct of appellant in accepting and appropriating his proportion of the money derived from the proceeds of the note was certainly an important fact, which tends to support the conclusion arrived at by the jury that he was a principal in the original transaction, and not a surety; and the verdict of the jury will not be disturbed on this ground.

Counsel for appellant argues plausibly that there can be no recovery by appellees, because they have not actually paid in money the joint obligation, but that they have only taken it up by executing a new note, which he insists is not a payment; and that the right to contribution depends, not on the fact of exoneration merely, but also upon the additional fact that the exonerating security has parted with something of value. This identical question has been frequently passed upon by the courts of last resort in many other states of the Union as well as this court, and, so far as we have been able to ascertain, their conclusions have been uniformly against the contention of counsel. Such was the ruling of this court in the cases of *Gray v. Gray*, 2 J. J. Marsh. 21; *Stone v. Porter*, 4 Dana, 207; *Robertson v. Maxcey*, 6 Dana, 101; *Atkinson v. Stewart*, 2 B. Mon. 348; and *Stubbins v. Mitchell*, 82 Ky. 538,—the court saying in the last-named case: "It should now be considered settled, and, in our opinion, correctly settled, that, as between co-sureties, a discharge of their obligation by the acceptance in lieu of it by the creditor of the note of one of them must be deemed a payment in money, in the meaning of the statute." And by section 4667 of the Kentucky Statutes co-obligors and co-contractors, as between each other, are given the full benefit of all the remedies of a surety who pays the whole or any part of a debt or liability for which he is bound jointly with other co-sureties, in case of the insolvency of one of the co-sureties. We therefore conclude that, as the bank has accepted the obligation of appellees in full satisfaction of the demand due by all the obligors, it is equivalent to, and will be considered as, a payment in cash.

It does not appear to us that appellant has been prejudiced by the testimony of appellee Tyler. He was a principal on the debt to the bank, and, as the question as to whether appellant signed the note as principal or surety is one of fact as well as of law, it would seem that Tyler was competent to testify on this point, if any one was. Nor do we think any error prejudicial to the substantial rights of the defendant accrued from the admission of the statement of his father at the time the note was originally signed by plaintiffs and himself that "Harvey wanted a thousand dollars," as appellant subsequently ratified this statement by signing the note and accepting the money. But we think there can be no question that so much of the first instruction as directed the jury to "find for plaintiffs one-third of such sum, and accrued interest thereon, as they may believe from the evidence plaintiffs have paid or taken up, for which James Greene was originally bound or liable as between the obligors on said debt," is erroneous, and prejudicial to appellant; because, if the parties, as found by the jury, were all principals on the note to the bank, they were only principals to the extent of the money severally received by them. The ben-

edit resulting to the obligors from borrowing the money was in proportion to the sums they severally received out of the amount borrowed, and therefore the loss occasioned by the insolvency of either obligor should be borne by the solvent partners in the same proportion—excluding the insolvent ones—as they received the benefit. See 1 Poth. Obl. p. 174; *Kincaid v. Hocker*, 7 J. J. Marsh. 333; *Breckinridge v. Taylor*, 5 Dana, 110. Of the original sum borrowed, plaintiffs and James Greene each received  $\frac{2}{17}$  of the whole amount, and appellant received  $\frac{3}{17}$ . The loss to the solvent obligors on the note by reason of the insolvency of James Greene is, therefore, the amount for which he was liable, or  $\frac{2}{17}$  of the original sum borrowed, and which is to be made up and paid by those receiving the remaining  $\frac{12}{17}$  of the original loan, which amounts in figures to \$6,000. Of this \$6,000 appellees received \$2,500 each, or \$5,000, and the appellant \$1,000, or one-sixth of the whole amount; and he should, therefore, be required to contribute only one-sixth of the loss sustained by reason of the insolvency above mentioned. Appellees, recognizing this error, remitted \$447.42, and they seek to enforce their judgment for only \$1,521.32, which is exactly the amount of the \$1,000 originally borrowed by appellant, with the accrued interest from the date of payment by appellee, and one-sixth of the amount for which James Greene was liable. We are of the opinion that no error was committed on the trial to appellant's prejudice, except as indicated, and, as that has been corrected by the remission of so much of the judgment as was erroneous, the judgment is affirmed.

HAZELRIGG, J., not sitting.

#### WILLIAMS et al. v. WILLIAMS et al.

(Court of Appeals of Kentucky. Nov. 11, 1897.)

##### SECRET TRUSTS—RIGHTS OF CREDITORS.

A secret trust will not be enforced, as against creditors of the person sought to be charged with the trust, where the debts were created while the title was in the debtor, and without notice of the equity, and no claim was asserted until after the creditors had acquired liens, and obtained judgment for a sale of the land to satisfy the liens.

Appeal from circuit court, Franklin county.  
"Not to be officially reported."

Action by the Deposit Bank of Frankfort and others against H. R. Williams and others to enforce liens on land. Judgment for plaintiffs, and Isaac Williams and others, whose petition to be made parties was rejected, appeal. Affirmed.

John L. Scott & Son, for appellants. John W. Rodman, for appellees.

WHITE, J. In August, 1894, the Deposit Bank of Frankfort instituted its action in the Franklin circuit court against appellee H. R.

Williams and others, his sureties on certain notes given and discounted to said bank, and in said action sought to enforce and foreclose a mortgage lien given by said H. R. Williams to secure his sureties on said notes, on certain property,—among other pieces, this, viz.: "A certain tract of land in Franklin county, Ky., on Cedar Run creek, about a half mile from its mouth, containing 154 acres, more or less, particularly described in Mortgage Book No. 6, page 389, Franklin county clerk's office, and being the same land purchased by H. R. Williams, August 22, 1892, at commissioners' sale in case of Mary E. Currans, Trustee, versus Isaac Williams, in Franklin court of common pleas." This mortgage was executed by said H. R. Williams, and acknowledged and recorded, and bears date, August 28, 1893. Upon this petition of the Deposit Bank, as well as on the cross petitions of the other defendants, there was, September 24, 1894, a judgment rendered for the several amounts therein claimed, and also a judgment directing a sale of the real estate described in the mortgage, including that above, to satisfy said debts; but this record does not show that the above-described land was sold under said decree, but that other property was sold, sufficient to pay off and satisfy that judgment. In August, 1895, the Farmers' Bank of Kentucky brought two actions against said H. R. Williams, and Lucy Julian also brought an action against said H. R. Williams, and in each of these actions other parties were made defendants, and in these actions the foreclosure of mortgages were sought. Between August, 1894, and August, 1895, the dates of the filing of the suit by the Deposit Bank and the filings by the Farmers' Bank and Lucy Julian, numerous creditors of said H. R. Williams had secured judgments and executions against said H. R. Williams; and said executions were levied by the sheriff on several pieces of real estate of said H. R. Williams in Franklin county, including the 154 acres on Cedar Run creek. The levies of these executions were in the months of March and April, 1895, and were for various sums. All of these execution creditors were made parties in one or the other of these actions, or, after consolidation, made themselves parties by petition. At the January term, 1896, the Franklin circuit court rendered a judgment in the consolidated cases, adjudging a sale of all the property included in the mortgage, or in the levies of the executions,—the tract of land of 154 acres, above described, included. In neither of these cases, up to the date of the judgment, viz. January 17, 1896, had appellant Isaac Williams ever been a party, nor had he appeared; but on January 22, 1896, after the judgment of sale in the consolidated cases had been rendered, the appellants produced to the Franklin circuit court, and offered to file, his petition, claiming the 154 acres of land herein described; and, upon objection being made, the court refused to permit said

petition of appellants to be filed, from which order, after duly excepting, this appeal is prosecuted. The petition which the appellants offered, and the court refused to permit them to file, states, in substance, as follows: That appellants are husband and wife, and live on and own the said 154 acres of land (describing same), and have so owned and occupied same for 25 years last past, and have claimed and held the same adverse to all the world for that length of time. However, they state that some years ago, in order to accommodate H. R. Williams, appellee herein, these appellants did execute a mortgage to Mary E. Currans, trustee, to secure a debt of said H. R. Williams, but that in the mortgage it appeared to be the debt of these appellants; that, in an action to foreclose said mortgage, said land was sold, under a judgment of the Franklin circuit court, by its commissioner, on August 22, 1892; and that the same was bid in by H. R. Williams, and the sale confirmed to him, and the deed made in accordance therewith. But the appellants allege that at the date of the sale to, and purchase by, said H. R. Williams, under the decree, viz. August 22, 1892, there was a verbal agreement and understanding between appellant Isaac Williams and said H. R. Williams that said H. R. Williams should buy the land in, and pay off the mortgage debt, and hold the land for this appellant, Isaac Williams, and that during all these years appellants had lived on, used, owned, and claimed, said land, adversely to all the world, as well as for many years previous. And in said petition they asked the court to permit their petition to be filed, in order that their right to said land might be litigated, and, finally, that they should be adjudged the rightful and true owners of said land, and their title quieted, and, in the alternative, if that could not be done, then to have laid off to them a homestead of \$1,000 worth out of same. It is alleged that the mortgage debt due Mary E. Currans, trustee, has long since been satisfied in full by said H. R. Williams. This petition was sworn to by appellant Isaac Williams, but on presentation the court refused to permit same to be filed.

The court's action in thus refusing appellants permission to file said petition, claiming this land, is the sole question presented by this appeal. This petition, on its face, shows that appellants permitted H. R. Williams to hold the title to this land of record from August 22, 1892, without anything showing that appellants had any claim to same. After this date said G. R. Williams executed a mortgage on said land to secure some of his creditors, and, upon failing to pay the same, there was a decree rendered to sell said land, although it was not sold. The debts for which an execution lien was created on this land were all created by said H. R. Williams while the title to this land, as shown by the record, was perfect in him by commissioner's deed under a decree against appellant; and

appellant's only reason why this land should not be subject to these execution debts is a private agreement made by H. R. Williams and himself, that said H. R. Williams should hold this land in trust for him, made August 22, 1892. As between appellant and said H. R. Williams alone, this secret trust might have been enforced, but as appellant has permitted it to remain secret till creditors of said H. R. Williams have acquired rights, by extending credit, no doubt, on the faith of this property being owned by said H. R. Williams, and have put their debts into judgment, and acquired liens by levy and judgment of sale by the circuit court, the appellant has lost his rights to have the land, or to have the secret trust executed, at least till these creditors are paid; and as the petition, on its face, and the facts as alleged, show clearly that appellants were not entitled to any relief, the action of the circuit court in refusing to file their petition was not error. Judgment affirmed.

#### FORD et al. v. HARRIS et al.

(Court of Appeals of Kentucky. Nov. 11, 1897.)

#### **GUARANTY—ACCEPTANCE—NOTICE TO GUARANTORS.**

1. Under a guaranty of the payment of any bill that O. may purchase, "within ninety days from date of purchase, to the extent of two hundred dollars," stating that "this guaranty is intended to cover a running account, and is to be binding upon us until we notify you to the contrary, in writing," notice of the acceptance of the guaranty, or that goods have been sold on the faith of it, is necessary to charge the guarantors; but formal notice in writing is not necessary. It being sufficient that the guarantors have knowledge within a reasonable time that goods have been sold on the faith of the guaranty.

2. The defect in the petition, in failing to allege notice of acceptance of the guaranty, is cured, demurrer being waived and the issue as to notice made in subsequent pleadings.

3. The guarantors are liable, to the extent of the guaranty, for a balance on account, though payments have been made by the principal debtor in excess of the amount of the guaranty.

Appeal from circuit court, Floyd county.

"To be officially reported."

Action by Ford, Eaton & Co. against James P. Harris & Co. on a guaranty. Judgment for defendants, and plaintiffs appeal. Reversed.

F. A. Hopkins, for appellants. James Goble, for appellees.

LEWIS, C. J. In the fall of 1887, appellees executed to appellants, doing business as wholesale merchants in Cincinnati, Ohio, under the firm name of Ford, Eaton & Co., this writing: "Prestonsburg, Kentucky, 1887. Ford, Eaton & Co.: We hereby guaranty the payment of any bill that J. M. Osborn may purchase from you, within ninety days from date of purchase, to the extent of two hundred dollars. This guaranty is intended to cover a running account, and is to be binding upon us until we notify you to the contrary, in writing. James P. Harris. Abra-

ham Wiseman." November 27, 1887, Osborn delivered the guaranty to, and thereupon purchased on credit from, said firm, merchandise amounting to \$217.61, which was shipped to the town of Goodloe, Ky., where he then commenced business as a retail merchant, and continued until September 17, 1889. During that period he had a running account with the firm, purchasing goods aggregating \$2,047.47, though it was, by payments made from time to time, reduced to \$342.24. But having failed, when he quit the business, to discharge that balance, appellants in due time sued and recovered against Osborn judgment therefor, upon which an execution was issued, and returned wholly unsatisfied. Now, this is an action by them to recover of appellees, on their guaranty, \$200 and interest, which they defend upon two main grounds: First, that no notice was given them of acceptance by appellants of the guaranty, and sale of the goods to Osborn upon faith of it; second, that sale of goods, and receipt of payment therefor, in excess of the amount guaranteed by appellants, discharged appellees of all liability.

In *Lowe v. Beckwith*, 14 B. Mon. 184, where recovery was sought upon a guaranty similar to this, it was held that "notice to the guarantor of its acceptance, and an intention to act under it in pursuance of its terms, is necessary, because it is in the nature of a proposition, which the party addressed may accept or reject at his option, and, until acceptance, does not constitute a contract between the parties"; and such is the well-settled rule of this court. Accordingly, in order to render appellees liable on the guaranty in question, notice must have been given or brought to them in a reasonable time after sale of goods to Osborn, or after opening of the running account with him, that appellants had accepted, and given credit to him on faith of, that guaranty. Consequently, as the petition in this case did not contain a distinct averment of such notice, there was really no cause of action stated in it. But inasmuch as a general demurrer to the petition was waived, and an issue as to the required notice was made in subsequent pleadings, the question is now properly before us for determination. As held in *Kincheloe v. Holmes*, 7 B. Mon. 5, "The object or end of the requisition of notice is that the guarantor may know that he is bound, and to whom, in order that he may be enabled to take such measures for his own safety as circumstances may require." The present guaranty is not indefinite in respect to the person authorized to give credit to Osborn, nor the extent of such credit, but only as to the continuance of the guaranty, which appellees might have terminated at their pleasure. Therefore, when appellants opened the running account with, and sold the first bill of goods to, Osborn, upon faith of the guaranty, as the evidence satisfactorily shows they did, a contract founded upon suf-

ficient consideration existed, subject, however, to be enforced only upon condition of notice of the fact to appellees in a reasonable time thereafter. It does not appear that appellants gave formal notice, in writing, of their acceptance, which was indicated by the sale of goods to Osborn. Nor has it been yet distinctly held by this court to be indispensable that such notice should be in writing, or that any be given, if the guarantors otherwise acquire, and have, in a reasonable time, actual knowledge of the fact. Certainly, as intimated in *Kincheloe v. Holmes*, the same strictness is not required as in giving notice of a protest, or as to any particular matter, when the character of notice, and manner of serving it, are regulated by statute. It seems to us that if the guarantors in this case had been present when the goods were sold, and in that way acquired knowledge that the guaranty was accepted, the purpose of notice would have been fully accomplished, and their liability fixed, without any further formal notice in writing. If so, then there is no reason for permitting them to avoid liability, if it be clearly and fully shown that they otherwise acquired and had knowledge of the fact in a reasonable time. That they did know the guaranty had been accepted, and the goods sold on faith of it, the evidence in this case puts beyond question. Osborn was not only insolvent, but under full age, when he applied to the salesman of appellants, in Prestonsburg, to sell him goods on credit, and by him told that he could not get the goods without a written guaranty, the form of which was given to him, to get signed by responsible parties. It was returned, signed by appellees; and soon afterwards the goods were purchased, and Osborn commenced business as retail merchant at Goodloe, in a store house leased from appellee Harris. We are convinced that both Harris and Wiseman, who was a kinsman of Osborn, well knew that the goods had been sold upon faith of the guaranty, and it would be simply aiding deception, to permit them to escape liability upon the sole ground of want of written notice of what they already knew. By the terms of the guaranty, appellees made themselves liable unconditionally for as much as \$200 worth of goods sold; and that liability was not lessened, or at all affected, by sales and payments in excess of that amount. In our opinion, as the record stands, appellants are entitled to recover the amount sued for, and interest. The judgment is therefore reversed, and the case remanded for a new trial consistent with this opinion.

VAN METER et al. v. PARKER et al.  
(Court of Appeals of Kentucky. Nov. 13, 1897.)  
APPEAL—APPEALABLE ORDERS—LIABILITY ON  
SUPERSEDEAS BOND.

1. An order directing an assignee for creditors to rent out land for one year pending an appeal



by the assignor, with supersedeas, from a judgment confirming a sale of the land procured by the assignee, is appealable.

2. From a judgment confirming a sale of land obtained by an assignee for creditors, the assignor prosecuted an appeal with supersedeas, resulting in a reversal of the judgment. Pending the appeal, the court, upon application of the assignee for advice, entered an order directing him to rent out the land for one year; and from that order the assignor prosecuted an appeal with supersedeas, the supersedeas bond being in the usual form, and the appeal was dismissed for want of prosecution. *Held*, that the sureties in the bond are liable for the rental value of the land for the period fixed by the order.

3. Under Ky. St. § 2299, providing that rent shall bear interest from the time it is due, judgment against the sureties for interest from the expiration of the year was proper.

Appeal from circuit court, Fayette county.  
"Not to be officially reported."

Action by Watts Parker, trustee, and another, against Frances H. Van Meter and others, on a supersedeas bond. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bromston & Allen, for appellants. Breckinridge & Shelby, for appellees.

WHITE, J. This action was brought by the appellees, Watts Parker, trustee of Isaac C. Van Meter, and A. H. Shropshire, former trustee, against the appellants, Frances H. Van Meter, Jesse and L. M. Van Meter, upon a supersedeas bond executed by appellants, as sureties of Isaac C. Van Meter, wherein said Isaac C. Van Meter sought to supersede a judgment or order of the Fayette circuit court directing appellee Shropshire, as trustee of said Isaac C. Van Meter, to take charge of and rent out the farm formerly owned by said Isaac C. Van Meter, and which had been conveyed by deed of trust to said Shropshire for the benefit of the creditors of said Isaac C. Van Meter. It appears from this record that, after the deed of trust was executed, the trustee Shropshire filed a suit in equity, seeking a settlement of the trust, and, to that end, asked the court to decree a sale of the real estate of said Van Meter, assignor. This reality consisted, among other things, of a farm of 462 acres, near Lexington, and was worth in the neighborhood of \$30,000. In that action, all parties necessary were brought in, and by common consent, or, rather, without issue being made, this farm was decreed to be sold. The court's commissioner sold said land as a whole to one James, at the price of \$64.05 per acre,—\$29,666.67. Upon the filing of the report of this sale by the commissioner, the assignor, Isaac C. Van Meter, filed exceptions to the report of sale, and objected to its confirmation. The circuit court overruled his exceptions, and confirmed the sale to James; and, from the judgment of confirmation, the said assignor, Isaac C. Van Meter, appealed to this court, executing a supersedeas bond, thereby preventing the purchaser, James, from obtaining possession of the land under the writ of possession awarded him upon the confirmation. This judgment of confirmation was rendered December 19, 1887, and was su-

perseded January 14, 1888. This appeal on the judgment of confirmation was prosecuted to this court, and the said judgment and order confirming the sale to James was reversed, March 30, 1889. 88 Ky. 448, 11 S. W. 80, 289. After the execution of the supersedeas bond, on January 14, 1888, the appellee Shropshire, on February 18, 1888, asked the court for direction as to what he must do in respect to the land pending the appeal; and the court entered an order, over the objection of said assignor, Isaac C. Van Meter, directing said assignee Shropshire to take charge of said farm, and rent same for one year from March 1, 1888; and to this order the said Isaac C. Van Meter excepted, and prayed an appeal to this court, which the circuit court granted; and thereupon said Isaac C. Van Meter, with these appellants as sureties, executed the supersedeas bond sued in this case. This supersedeas bond is in the usual form, and covenants to pay A. H. Shropshire, trustee of I. C. Van Meter, Robert James, and the creditors of the said I. C. Van Meter, all damages, etc. This bond bears date February 28, 1888. Upon the execution of this bond, there was issued by the clerk a supersedeas in proper form, commanding said Shropshire, trustee, James, and the creditors of said I. C. Van Meter, to stay proceedings on said judgment and order directing said Shropshire to rent the farm. On March 21, 1888, the appellee Shropshire, as trustee, totally ignoring the supersedeas bond, executed February 28, 1888, and the supersedeas issued thereon, brought a suit in equity in the Fayette circuit court, in which he sought an injunction against said Isaac C. Van Meter and another, preventing said parties from taking charge of and using said farm or renting same out to others; the said Shropshire claiming in said action that, as assignee under the deed of trust, he should have possession of said farm, and that he considered it his duty to rent same out pending the appeal from the order confirming the sale to James. Upon proper affidavit and bond, the clerk granted and issued a temporary injunction according to the prayer of the petition. On notice by said Van Meter, and trial, the court dissolved the temporary injunction granted by the clerk, and denied the relief asked for. The court, in deciding this injunction suit, gave as a reason for so doing that, if the judgment confirming the sale to James be affirmed by the court of appeals, then said James would be entitled to the rent, and was protected by a supersedeas bond; but, if it was reversed, that no liability on that bond could be enforced; and, recognizing this contingency, the court had appointed Shropshire to take charge of the farm, and rent same out, and that order had been superseded, and that thus the rent was secured. In May, 1890, on the motion of appellee Parker, he having in the meantime succeeded Shropshire as trustee, the appeal of said Isaac C. Van Meter from the rental order was dismissed, the same

never having been prosecuted, and thereupon the said Parker, trustee, brought this action on the bond.

The defenses offered by these appellants in this action on the supersedeas bond are that the rental order superseded was void, the circuit court having no authority or power over the land after it had confirmed the sale to James, and awarded him a writ of possession; that, if the circuit court had power and authority to make the rental order, the same is not a final order or judgment, and is not an appealable order, and that the clerk of the circuit court had no authority to accept a supersedeas bond, and that, although he did in fact accept a bond and issue a supersedeas thereon, all this being without warrant or authority of law, nothing was superseded, and that the whole effort to supersede said order was absolutely void, and bound nobody; that, in any event, the said Isaac C. Van Meter did not have the possession of the whole of said farm, and could in no event be made liable for rents on any part held by the trustee, and finally denied any liability for rent in the sum claimed, or in any other sum. The affirmative allegations of the answer were, by consent, controverted of record, and the case was tried before a jury. At the conclusion of the testimony for plaintiffs, the defendants (appellants here) asked the court for a peremptory instruction to find for defendants, which it declined to give. This motion was renewed by defendants at the conclusion of all the evidence, but was again refused by the court. The court then gave to the jury an instruction as follows: "The jury will find for the plaintiff the reasonable rental value from March 1, 1888, to March 1, 1889, of the land directed to be rented under the order of February 18, 1888, in the administration suit of Shropshire, assignee, against Van Meter and others." To the giving of this instruction proper exceptions were reserved. The jury returned a verdict as follows: "We, the jury, find that the amount upon which rental be estimated is 349 acres, and the rental value for the year be fixed at \$5.50 per acre, making total amount \$1,919.50, for which sum we find for plaintiff." Upon this verdict the court, on that date, May 18, 1894, rendered judgment for said sum, \$1,919.50, with interest from that date and costs. On the 19th day of May, appellants filed reasons and motion for new trial. Afterwards, on June 23, 1894, on the motion of appellees, and over the objection of appellants, the court set aside the judgment of the 18th day of May, and on that day rendered judgment on the verdict for the amount of \$1,919.50, with interest from March 1, 1889, and on that day overruled appellants' motion for new trial, and from this judgment appellants have prosecuted this appeal.

There is no question made on this appeal as to the fact necessarily found by the jury,—that Van Meter had charge of the farm from March 1, 1888, to March 1, 1889, and refused to permit James, the purchaser, or Shropshire,

the trustee, to have possession and rent same, although Shropshire had theretofore had possession and had rented same before; nor that the reasonable rental value of said farm so used for said time was as found by the jury, \$1,919.50; but the only question presented is as to the liability of these appellants as sureties on the supersedeas bond. We are of the opinion that the order of the circuit court made February 18, 1888, directing Shropshire, trustee, to rent out the farm for one year pending the litigation, was such a judgment and order as permitted an appeal to this court therefrom; and that said Isaac C. Van Meter having been granted an appeal, and having executed the supersedeas bond, said appeal granted having been dismissed, the sureties on said supersedeas bond are liable for the reasonable rental value of said farm for the period by said order fixed, during which said trustee was directed to rent same, viz. from March, 1888, to March, 1889. It therefore follows that the instruction given to the jury was not error. Appellants complain also of the action of the court in setting aside the judgment, and in rendering judgment for the same sum, with interest from March 1, 1889. We are of opinion this was not error. The rent of the farm was due March 1, 1889, the last day of the year. By section 2290, Ky. St., it is provided that rent shall bear interest from the time it is due. Finding no error, the judgment of the circuit court is affirmed, with damages.

#### TURNER-LOOKER CO. et al. v. GARVEY et al. (two cases).

(Court of Appeals of Kentucky. Nov. 6, 1897.)

#### FRAUDULENT CONVEYANCES—DEED TO WIFE IN FRAUD OF CREDITORS—EXEMPTIONS.

1. Where the husband buys land, and has it conveyed to his wife, intending to pay for it with the proceeds of his own labor or of other property, with intent to defraud his creditors, crops raised by him thereon are subject to execution for his debts.

2. A debtor cannot claim as exempt, in lieu of breadstuffs for his family and of provender for his stock, property levied on under execution, where he has property remaining sufficient to satisfy the deficiency in breadstuffs and provender.

Appeals from circuit court, Owen county.

"Not to be officially reported."

Separate actions by Mrs. Georgia Garvey and S. S. Garvey against the Turner-Looker Company and others on an indemnifying bond. Judgment for plaintiffs, and defendants appeal. Reversed.

E. E. Settle, for appellants. Lindsay & Botts, for appellees.

PAYNTER, J. The appellant the Turner-Looker Company had sold under execution a certain quantity of tobacco, which was issued against S. S. Garvey. Before the sheriff would make the sale, he required the plaintiff in the execution to give an indemnifying bond. Mrs. Georgia Garvey is the wife of S. S. Garvey. She claims that she was

the owner of three-fourths of the tobacco sold, and brought this action on the indemnifying bond to recover damages. The appellee S. S. Garvey brought an action on the indemnifying bond, by which he seeks to recover damages for the sale of one-fourth of the tobacco, upon the ground that he was a housekeeper with a family, and entitled to the property as exempt in lieu of bread-stuffs for his family and provender for his stock. Mrs. Garvey claimed that she was the owner of three-fourths of the tobacco, because she owned the land upon which it was raised. The appellants filed an answer, in the third paragraph of which it was substantially alleged that the land upon which the tobacco was raised belonged to S. S. Garvey; that, at the time it was purchased, S. S. Garvey and Georgia Garvey were husband and wife, and were at the date of sale under execution; that, at the time the land was purchased, the husband was insolvent, and unable to pay his debts, among which was the debt of the appellants; that, at the time the land was purchased, no money was paid; that the consideration of the purchase was \$5,674.65, for which Garvey executed his notes, payable in 12, 24, and 36 months, with personal security; that, for the fraudulent purpose of cheating and defrauding of his creditors, and of covering up his property, and placing the same beyond their reach, S. S. Garvey had the land conveyed to his wife, who consented to hold the legal title thereon, for the purpose of aiding her husband to carry out his fraudulent purpose of cheating his creditors; and that, if any of the purchase money had been paid, it was done by the husband. To this paragraph of the answer, the court sustained a demurrer.

The question, then, arises: If the allegations made are true, can Mrs. Garvey maintain her action? We do not deny that a married woman has the right to purchase real estate, and pay for it, and thus acquire a title to it. She could pay for it with her own means, or with the proceeds that might arise from the proper use of the property. Assuming the allegation of the answer to be true, she did not so acquire or attempt to acquire title to the property. If the averments of the answer be true, it is not her property, but that of her husband. If a husband buys property, and has it conveyed to his wife, with the intention of paying for it with the proceeds of his own labor, or of that and the proceeds of the property, with a view of defrauding his creditors, it must be treated, in a proceeding to subject it to the payment of his debts, as his property. If Garvey bought this property with the intention of paying for it by his labor and skill and the proceeds of the property, and had it conveyed to his wife, it was, in contemplation of the law, fraudulent. If, after the support of his family, he applied the proceeds of his labor and of the land to the payment of the purchase money, certainly the purchase money would be paid by Gar-

vey. The views we have expressed are fully sustained. *Lyons v. Lancaster* (Ky.) 14 S. W. 405. The same facts were substantially alleged in the answer filed in the action of S. S. Garvey against the appellants.

It is further pleaded that there was more than sufficient tobacco raised on the farm when the levy was made out, which was not sold under the execution, to supply Garvey's deficiency in bread stuffs and provender. If it should appear on the trial of the issue tendered in the answer that Garvey, and not his wife, was the owner of the farm, then, he having sufficient property remaining to supply the deficiency indicated, he was not entitled to recover for that which was sold. In other words, it was not exempt property. The court should have overruled the demurrer to the paragraph of the answer mentioned, and transferred the case to equity. The judgments are reversed for new trials, and for proceedings consistent with this opinion. On Response to Petition for Extension of Opinion.

(Dec. 2, 1897.)

We are of the opinion that on a return of these cases the lower court should make an order consolidating them.

#### CHESAPEAKE & O. RY. CO. v. GROSS.

(Court of Appeals of Kentucky. Nov. 12, 1897.)

#### RAILROADS—INJURY TO ABUTTING PROPERTY—MEASURE OF DAMAGES.

1. Where a railroad, under the supervision of the city engineer, has constructed a third track in an alley in which it had two tracks, the measure of compensation to abutting owner is the actual diminution in the market value for any reasonable use which resulted from the construction and operation of the additional track; and his right of recovery extends only to real damages, resulting from the interference with his light and air, his access to his property, and the drainage of his lot, and from smoke, dust, and cinders; the damages resulting from the noise and jarring caused by trains not being included.

2. The plaintiff may recover, not only for the direct injury to his property up to the commencement of the action, but also for permanent injuries resulting from the continued operation of trains over the additional track.

3. It was error in instructing the jury as to the permanent damages recoverable on account of the continued operation of the road not to qualify the word "operation" by the words "skillful and prudent."

4. It was error to admit evidence as to how much it would cost to fill up the lot in order to properly drain it, and as to how much it would cost to raise the house, as such evidence assumed that these changes were necessary to drain the lot, whereas it is shown that the lot can be drained at small expense by a proper system of ditching.

5. A proper instruction as to the measure of damages does not cure an error in admitting evidence assuming a different measure of damages to be the true one.

Appeal from circuit court, Boyd county.

"Not to be officially reported."

Action by George Gross against Chesapeake & Ohio Railway Company to recover damages for injury to plaintiff's property. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

Wadsworth & Cochran, for appellant.  
James Andrew Scott, for appellee.

**BURNAM, J.** Appellee sought in this action to recover damages from appellant for injury to a house and lot owned by him in the city of Ashland (which lot runs back to an alley known as "Railroad Alley"), growing out of the construction of a third railway track in the alley, and the running of trains over same. The trial resulted in a verdict for appellee for \$525, and from that judgment this appeal is prosecuted.

The facts in the case, as developed by the proof, are about these: In May, 1890, the common council of the city of Ashland adopted an ordinance granting to the Elizabethtown, Lexington & Big Sandy Railroad Company perpetual and exclusive right to lay a sufficient number of tracks for the transaction of its business through and along Railroad alley, between Bath avenue and Carter avenue, and crossing the various street crossings, and to run cars thereon propelled by steam, not exceeding 10 miles an hour, in consideration that the railroad company would run its road by way of Ashland, instead of by way of Chadwick Creek. Pursuant to this agreement, the railroad company did build its road, and in 1892 constructed two railway tracks through this alley, which it continued to use to the year 1892, when that corporation leased its roadbed to the appellant herein, who, finding it necessary in the transaction of its business to lay a third track through Railway alley, proceeded to do so. The proof shows that this alley is 50 feet wide; that the first track was laid directly in the center thereof, and the second track on the north side of the alley, the distance between the first and third tracks being 13 feet from the centers of same. On the south side of the alley, a deep open sewer had been constructed by the city, which, from the proof, appears to have been about four feet deep and six or seven feet wide, which was used for drainage purposes by the lots and dwelling houses abutting on the alley to carry off the refuse therefrom. In the construction of the third track, which was done by consent of, and under the supervision of, the engineer of the city of Ashland, it became necessary to fill up this ditch, and level the alley, but, in order to preserve the sewer, a 2-foot pipe was, by consent of the city, laid in the place where the old open sewer had been, and 6-inch T pipes, running at an angle of about 45 degrees, were carried out to the surface of the lots whose rear abutted on the alley, at a distance of 100 feet apart. After the alley was graded, and the sewer pipe put in, the railroad company put down its ties, rails, and ballast. The effect of the filling was to raise the grade of the alley along the property line of appellee about two feet higher at the rear end than the surface of his lot. The chief grounds of complaint in this action are that the grading of

the alley and the building of the third track obstructed the drainage of the water from appellee's lot, interfered with his ingress and egress therefrom, and that, by reason of the proximity of the additional track to his residence, smoke, cinders, etc., were thrown directly upon his property. The proof shows that, after putting in the additional track, there was left a space between the ends of the ties of the third track and the property line of appellee of about 7 feet 9 inches, which left a clear space of about 6½ feet between the property line of appellee and trains passing along. The testimony of appellee himself shows that for a period of 14 years before the institution of this suit he had been unable to obtain access to the rear end of his lot from the alley in question by wagons, on account of the deep open sewer referred to, and that he had only used the space in the rear of his lot for walking purposes, having a door through which he could get in and out; but that at one time he had had a bridge across the open sewer, by which he could, by hauling across both the old tracks from the north side of the alley, get access to the property, but that this bridge had been taken away many years before this action began. It is evident from the proof that his ingress and egress from the rear end of his lot has not been materially prejudiced by the filling up of the old sewer and the grading of the alley. While it is true that this filling raised the embankment along the line of his lot about two feet, this embankment is a much less serious obstruction than the ditch which was filled up. The chief injury resulting to appellee's property appears to come from obstruction to his drainage, and from the operation of trains over the new track (the center of which is some 13 feet closer to his property line than the old ones), from which smoke, soot, and cinders are thrown upon his lot and into his house to such an extent (as it is claimed by him) as to vitiate the atmosphere, and render the property less valuable.

The measure of damages recoverable for the occupation of this alley by the third track of the railroad is only such damages as flow directly and proximately from the construction and operation thereof,—such as are actual and real damages, capable of being pointed out, described, and appreciated; and the measure of compensation to the owner is the actual diminution in the market value of his premises for any use to which they may reasonably be put, which resulted from the construction and prudent and skillful operation of this additional track along the alley. And the right of recovery extends only to the interference with, or the impairment of, the owner's easement of light, air, access to his property from the alley, and the drainage of his lot, and damages resulting from smoke, dust, and cinders being thrown directly upon the property itself; and, in short, to any act which causes a special damage to the par-

ticular piece of property sought to be recovered for. This excludes consideration of the damages which result from the noise of trains, jarring, etc. See *Combs v. Railroad*, 10 Bush, 392; *Bridge Co. v. Foote*, 9 Bush, 264; 1 Wood, R. R. pp. 796, 1028, 1029.

In this action appellee sought to recover compensation not only for the direct injury done his property up to the commencement of the suit, but was also allowed to recover for injuries that were permanent and enduring in their character, resulting from the continued operation of trains over the third track; and, while this is not objectionable, and may be permitted in one action, it was error not to have qualified the word "operation," in the second instruction, by the words "skillful and prudent," as without such qualifying words the jury were permitted to speculate as to the possibilities of indirect and remote prospective damages which might accrue. For instance, without these qualifying words, the jury could have argued: "Although it is the duty of this railroad company to have every modern spark arrester upon its engines, yet the possibilities are that this duty may be neglected, and sparks may escape, and fall upon the property, and destroy it. And this is an element which we will consider." See Wood, R. R. § 229, and authorities there cited. The chief element of damage complained of is the obstruction to the drainage of appellee's lot, resulting from raising the grade of the alley and filling the open ditch, and on this point a number of witnesses for appellee were asked and permitted to prove, over the objections of appellant—First, how much the lot of appellee would have to be filled up to properly drain it; and, second, how much the house would have to be raised on its foundation on account of such additional filling of the lot, and the cost of making these additions. These questions assumed as a fact that these changes in the lot and house are rendered necessary, and are the only means of accomplishing the proper drainage of the lot. There is no competent evidence in the record to show that this course is necessary in order to drain it; and the effect of this testimony was misleading and prejudicial to appellant, as it tended to exaggerate in the minds of the jury the injury complained of. The testimony of the appellee himself shows that he has known the water to stand upon the lot "only a few hours at a stretch, when it disappears by seepage." The true criterion of damage on account of interference with the drainage of this lot by the grading of the alley and the filling up of the old sewer is the reasonable cost of providing for such drainage under the existing circumstances; and, while the instruction given to the jury on this question properly states the law, it does not cure the error of having allowed evidence of this character to go to the jury. There seems to be no reason to doubt, from the testimony of the engineers, that by a proper system of

ditching, which can be done at a comparatively small expense, all the water falling on this lot could be conducted to the mouth of the T pipes which were put in by appellant, at the time the open sewer was filled up, for that express purpose, and the lot properly drained. The damages allowed appear to be excessive, and, we think, are traceable to the errors pointed out. For the reasons given, the judgment is reversed, and cause remanded for proceedings consistent herewith.

#### WICKS et al. v. McCONNELL.

(Court of Appeals of Kentucky. Nov. 13, 1897.)

#### UNRECORDED MORTGAGES—PRIORITY OF ATTACHMENT.

The lien acquired by the levy of an attachment has priority over an unrecorded mortgage which was in existence, but of which the attaching creditor had no notice, at the time his debt was created.

Appeal from circuit court, Breathitt county.  
"To be officially reported."

Consolidated actions by Wicks Bros. and others against Valley & Son, involving a contest as to priority of liens. Judgment in favor of James McConnell, and Wicks Bros. appeal, and Stidham files cross appeal. Affirmed.

E. W. Hines, J. M. Benton, and J. B. Marcum, for appellants. J. J. C. Bach, for appellee.

DU RELLE, J. In August, 1893, appellants, Wicks Bros., sold to Valley & Son some \$1,400 worth of machinery, and the latter firm executed an instrument such as, in the case of *Baldwin v. Crow*, 86 Ky. 680, 7 S. W. 148, and other cases, has been held to have the effect of a mortgage back to the vendor to secure the unpaid purchase money. This instrument was not recorded. For the purpose of paying the freight on the machinery, and putting it in running order, Valley & Son obtained a loan from appellee, McConnell, of some \$475, representing, as claimed by him, that they were the absolute owners of the property, and that the title thereto was unincumbered. He further claims that he examined the records in the county clerk's office in search of liens against the property, and failed to find any evidence of the existence of any lien; that Valley & Son at the time offered to give him a mortgage, which he thought it unnecessary to take, as they were abundantly solvent, if they were the owners of the property. His debt not being paid at maturity, and Valley & Son in the meantime having become indebted to other parties, he instituted an attachment suit, and had his attachment levied upon the property in question. McConnell's attachment, and an attachment sued out by Stidham, who is a cross appellant here, were the first levied of several attachments issued about the same time. It appears that while these suits were pending Wicks Bros. insti-

tuted a suit to enforce their lien for the unpaid purchase money, to which suit McConnell and Stidham were made parties on their petition, and their attachment suits, as well as the suits of other attaching creditors, were consolidated with it. Before the filing of the suit by Wicks Bros., Valley & Son, during the pendency of the attachment suits, executed a mortgage to Stidham, to secure his and McConnell's claims. The attachments were subsequently sustained, and McConnell's claim adjudged to be prior in lien to that of appellants. Stidham's claim, having been created prior to the purchase of the property by Valley & Son, was adjudged inferior. Section 496, Ky. St., being the same as section 10, c. 24, Gen. St., which provides: "No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law and lodged for record,"—has been frequently construed by this court; and, as said by Judge Lindsay in *Low v. Blinco*, 10 Bush, 334, the decisions thereon are singularly inconsistent with each other. Without reviewing those cases,—which has been done in the case last referred to, and in *Baldwin v. Crow*, 86 Ky. 680, 7 S. W. 147,—it may be said that in the case last named, which is the latest authoritative utterance of this court upon the subject, a distinction was clearly recognized between the position of an execution or attachment creditor without notice of an unrecorded mortgage lien, whose debt was created antecedent to the creation of the lien, and the position of one whose debt was created subsequently. Said Judge Lewis in that case: "If the inquiry whether, by that section, creditors generally were intended to be affected by notice of such conveyances and transfer of property to debtors in the same way and to the same extent as purchasers, was an original one, there would, looking alone to the language used, be some difficulty in reaching a satisfactory conclusion. But there is no reason whatever that a creditor, whose debt has been created prior to the conveyance, as was that of appellee, Crow, and who has not been defrauded or injured thereby, should occupy a better attitude than a purchaser with notice." It may be said that in that opinion is to be found the first intimation of such a distinction; but, on the other hand, the distinction is there clearly indicated, and is, in our judgment, right and equitable. The holder of an antecedent debt is in no wise defrauded by not being permitted to subject to the payment of his debt property subsequently acquired by his debtor, which is subject to a lien. Moreover, in none of the cases to which we have been referred, in which the holder of a pocket lien has been held to have a claim superior to an execution or attachment creditor, does it appear that the latter's debt was created subsequent to the creation of the lien. And while

we desire to adhere strictly to the decision and reasoning of the court in the *Baldwin Case*, supra, we are not inclined to push the doctrine further than we are required by the language of that opinion in support of secret liens as against creditors whose debts were created, or may reasonably be supposed to have been created, upon the faith of the property being, so far as they could by any possibility discover, unincumbered. If this be not the construction, then the language of the statute, "or against creditors," is entirely nugatory. There must be some class of creditors to which this language applies. The law gives to the execution or attachment creditor a lien. The law also provides that a mortgage shall not affect him, except from its recording; and equity and good conscience do not require the court to disregard the will of the legislature, and inflict upon creditors whose equity is superior to that of the mortgagee the evils which the statute was designed to restrain. In *Manufacturing Co. v. Hart* (Ky.) 1 S. W. 416,—a case which was distinctly held not overruled by the *Baldwin Case*,—it was said: "Appellant had made its vendee the ostensible owner, had received more than half the purchase money, and when the cars have been transferred to an adjoining state, and placed upon the track of the railroad company, the appellant, with this evidence of the lien in its pocket only, is now insisting that no title ever passed to its vendee, or that it has a prior equity against the claims of creditors. To so hold would be to disregard the plain provisions of the statute enacted to prevent fraud and protect the rights of creditors and purchasers, and, as said by this court in the case of *Greer v. Church*, 13 Bush, 430, the title in such cases will be treated as being where the nature of the transaction requires it should be." Time and again it has been held by this and other courts on grounds of public policy that secret liens were not to be favored. As said by Judge Pryor in *Schmidt v. Carter's Adm'r*, 95 Ky. 5, 23 S. W. 365: "Courts of equity cannot be too careful in guarding the rights of bona fide purchasers and creditors against hidden liens, or such as exist only in the contemplation of the parties, and it should be made to appear from the terms of the instrument itself that a lien has in fact been created." And again, on page 6, 95 Ky., and page 368, 23 S. W.: "Hidden liens, or such as usually arise when the debtor's property is about to pass from him, even if containing all the requisites of a mortgage, are looked upon with suspicion, and courts of equity should be reluctant to ignore the claims of bona fide creditors, unless such liens are clearly established." This doctrine we believe to be a salutary one. On the one hand, the unrecorded lien is upheld as against creditors who cannot be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit are protect-

ed as against the secret lien in the rights which they secure by their diligence in the levy of their execution or attachment. As indicated by Judge Lewis in the Baldwin Case, before referred to, if the inquiry were an original one, we might reach a different conclusion as to the meaning of the statute in regard to creditors generally; but as to antecedent creditors the question has undoubtedly been considered as well settled. For the reasons indicated, the judgment is affirmed on the original and cross appeals.

### BRIGHT v. STONE, Auditor.

(Court of Appeals of Kentucky. Nov. 12, 1897.)

OFFICERS—INCREASE OF COMPENSATION DURING TERM.

Under Ky. Const. § 161, providing that "the compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office," circuit court clerks in office at the time of the enactment of Ky. St. § 1722, are not entitled to the benefit of that statute, which allows to circuit court clerks compensation for services in felony cases, for which they had not theretofore been allowed any compensation.

Appeal from circuit court, Franklin county.  
"Not to be officially reported."

Action by H. R. Bright against S. H. Stone, auditor, for a writ of mandamus. Judgment for defendant, and plaintiff appeals. Affirmed.

A. T. Wood and C. C. Turner, for appellant. W. S. Taylor, for appellee.

LEWIS, C. J. Appellant, who was at the November election, 1892, elected and duly qualified as clerk of Montgomery circuit court, brought this action for a writ of mandamus requiring appellee, the auditor of public accounts, to draw a warrant on the state treasurer for the amount of his account for fees allowed under an act approved February, 1894, and now being section 1722, Ky. St., as follows: "That the clerks of the various circuit courts of this commonwealth, other than as hereinafter provided, shall be entitled to, allowed and paid by this commonwealth, a fee of five dollars for services rendered or performed by them, respectively, for the commonwealth in all felony cases or prosecutions by indictment for felony in their respective courts, except in such prosecutions in which the defendant may, under a felony indictment, be convicted only of a misdemeanor. \* \* \* In all cases of conviction for a felony the fee of five dollars herein allowed shall be taxed against the defendant as costs in favor of the commonwealth." As that statute was passed after appellant's term of office commenced, the decisive question arises whether the fees or compensation sued for come within the provision of section 161 of the constitution, as follows: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during

his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed." Prior to the statute in question the compensation of clerks of the circuit and county courts of the commonwealth had been paid, not out of the state treasury, but by fees authorized to be fixed and taxed in specified sums for designated services; and thus was the aggregate compensation of each ascertained, and authorized to be collected and appropriated. But no fees had, before that statute, ever been allowed for services rendered by circuit court clerks for the commonwealth in felony cases. It is therefore plain that, however just it may be to pay for services of that nature out of the state treasury, circuit court clerks in office when the statute was passed are not entitled to the benefit of its provisions, because, in the explicit language and meaning of section 161, the compensation of such officers was thereby changed. Judgment affirmed.

### ASHLAND COAL, IRON & RAILWAY CO. v. WALLACE'S ADM'R.

(Court of Appeals of Kentucky. Nov. 18, 1897.)

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—FAILURE OF MINER TO PROP ROOF.

Ky. St. § 2732, which provides that "any person employed in any mine governed by this statute, who intentionally or willfully neglects or refuses to securely prop the roof of any working-place under his control, or neglects or refuses to obey any order given by any superintendent of the mine in relation to the security of that part of the bank where he is at work," shall be liable to a fine, was specially intended to apply to miners actually engaged in taking out coal, and thereby removing the natural props of the roof, and has no application to one specially employed as tracklayer in the entry of a mine.

Appeal from circuit court, Boyd county.

"To be officially reported."

Petition for rehearing. Overruled.

For opinion on original hearing, see 42 S. W. 744.

John F. Hager and Store & Sudduth, for appellant. James Andrew Scott, Rufus S. Dinkle, and Proctor K. Malin, for appellee.

PER CURIAM. Appellant asks a rehearing in this case, chiefly because, in the former opinion herein, we failed to consider or construe section 2732 of the Kentucky Statutes, which provides: "Any person employed in any mine governed by this statute, who intentionally or willfully neglects or refuses to securely prop the roof of any working-place under his control, or neglects or refuses to obey any order given by any superintendent of the mine in relation to the security of that part of the bank where he is at work, and whoever knowingly and willfully does any act endangering the lives or the health of the persons employed in a mine, or the security of the mines or the machinery, shall be liable to a fine of not less than ten dollars

nor more than fifty dollars, to be recovered in the county in which the mine is situate." It is insisted by counsel that, as the entries and roadways of the mine were the working places of Grant Wallace, the same duty and responsibility were imposed by law upon him to see after and prop the roof of the entries as devolves upon a miner, who is actually engaged in taking out coal which is the support of the roof of the mine, to see after the security of the roof of his working place; that the positive duty rested upon Wallace, not only to test the condition of the roof of the entry, that he might report it to the mine boss, but that it was a misdemeanor on his part to begin or continue the work without first making this test to ascertain whether it was secure or not, and, if in his judgment it was not, then to refrain from work until it could be made so by props; and that his failure to do this is contributory negligence on his part, and concludes his right to maintain this suit; and, in support of this contention, we are referred to the cases of *Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725, *Coal Co. v. Muir*, 20 Colo. 320, 38 Pac. 378, and *Syndicate v. Murphy* (Ky.) 38 S. W. 700.

The first part of the section of the statute referred to makes it a misdemeanor for any person employed in a mine to intentionally or willfully neglect or refuse to securely prop the roof of a working place under his control. There is not a particle of evidence in this case to show that the entries of this mine (which were its roadways, used by all the employes thereof) were in any sense under the control of the deceased. He used these entries in the performance of his duties as tracklayer, as did all the rest of the employes of the mine; and while it is true that, in the discharge of his duties as tracklayer, his work was largely confined to the entries, there is no evidence that tends to show that he had any more control of them than any other employé in the mine.

The next part of the section provides that any person employed in a mine who neglects or refuses to obey an order given by the superintendent of the mine in relation to the security of that part of the bank where he is at work shall be liable to a fine, etc. There is no testimony here which tends to establish the state of case contemplated by this provision of the statute, and there is no evidence which conduces to show that it was the special duty of Grant Wallace to see after the security of the roof of these roadways, or that he neglected or refused to obey any order in relation to the security thereof. We are not unmindful of the testimony of the various bank bosses, Schugh, Hughes, Herron, Morris, and Bates, who state that, as a matter of custom, it is the duty of the tracklayer to examine the roof wherever he goes, and, if he sees loose slate, to report it to the bank boss or gin hands, and to assist in taking it down. There can be no doubt that it is the

duty of every employé in a mine to use care to avoid accidents, and, when he knows of the dangerous condition of any part of the mines, to report it to the superintendent or the bank boss; but there is nothing in the testimony in this case which conduces to show that any higher duty rested upon Grant Wallace in this respect than upon any of the other general employes of the mine.

In our opinion, the statute was specially intended to refer to those persons actually engaged as miners in taking out coal, and thereby removing the natural props of the roof, and that it has no application to persons who are specially employed, as was the plaintiff in this case, to perform duties which had no connection in any way with the weakening or removal of these natural supports. And this construction, we think, is borne out by the facts and decisions in the cases referred to in Ohio and Colorado. The facts in the case of *Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725, show that the plaintiff was a practical coal miner; that he and his brother were working in the room at the time of the accident; that these two men had opened the room, and had done all the work therein since it had been opened, and had sole charge and control over it; that it was the special duty of the plaintiff and his brother to post the room, and the manner in which they posted it for their own safety and for other purposes, and the manner in which the coal was mined, were matters which were controlled entirely by the plaintiff and his brother; that they went to work when they pleased, and consulted their own convenience as to when they should stop work; that the furnishing and preparation of the room itself was a part of the work which these miners were employed to perform; and that the time during which they worked, the manner in which they prepared the place to work, as well as the manner in which they mined the coal in their room, were left entirely to their own judgment. The Ohio statute makes it the special duty of the coal-mine owner to keep a supply of timber constantly on hand, and deliver same to the working places of the miners, and a failure to do so is negligence on his part, and, if an injury is proximately caused thereby, an action will lie for damages, and also makes it the special duty of the miner to securely prop the roof of such working place, and if he fails to do so, and thereby sustains an injury, he is made guilty of such negligence as to prevent recovery therefor. The facts in the Colorado case referred to show that the plaintiff was a practical miner, and by his employment was engaged in taking out coal; that he had worked in and had control of the working place where he was injured for several weeks before the injury; that he knew the rock which fell on him was a bad rock, and that it ought to be propped, and yet, with the full knowledge of the dangerous condition of the roof, he continued to



work within a few feet of the rock until it fell; the court holding in that case that as he had neglected a known duty, and in consequence of such negligence was injured, this was contributory negligence, and would bar his action for damages at common law. In the case of *Syndicate v. Murphy* (Ky.) 33 S. W. 700, the facts were that appellee was injured by the falling of slate from the roof of an entry which he had been employed to open, and where he had dug away the coal from under the very roof which afterwards fell on him, and that, after discovering the dangerous condition of the roof, he continued to work therein; the court holding in that case that he was not entitled to recover damages for injuries received under such circumstances.

In all the cases referred to, the plaintiffs were engaged in actually taking coal out,—in actually withdrawing the support from the roof of the mine; and in all of them they necessarily had absolute control and management of the places in which they were working, and were bound, from the nature of their employment, to look out for the security of the roof. They bear no analogy to the facts of this case. Here the mine had been opened for many years before plaintiff was employed as tracklayer, and his duty was simply to lay tracks along the entries. In the case of *Mining Co. v. Ingraham*, 17 C. C. A. 71, 70 Fed. 223 (a case that is in many respects analogous to this), Judge Caldwell said: "Whatever may be the duty of coal miners with reference to timbering the slopes and roofs of rooms from which they remove coal, the rule is well settled that, after a mine is once opened and timbered, it is the duty of the owner or operator to use reasonable care and diligence to see that the timbers are properly set and kept in proper condition and repair; and for this purpose it is his duty to provide a competent mining boss or foreman, to make timely inspection of the timbers, walls, and roof of the mines, to the end that the miners may not be injured by defects or dangers which a competent mining boss or foreman would have discovered or removed. This is a positive duty which the master owes the servant. Neglect to perform this duty is negligence on the part of the master, and he cannot escape responsibility for such negligence by alleging that he devolved the duty on a fellow servant of the injured employé. It is an absolute duty which a master owes his servant to exercise reasonable care and diligence to provide the servant a reasonably safe place in which to work, having regard to the kind of work and the conditions under which it must necessarily be performed; and when the master, instead of performing this duty in person, delegates it to an officer or servant, then such officer or servant stands in the place of the master, and any servant injured by such negligence may recover from the master for such injury, regardless of the

relation the injured servant sustained to the officer or servant whose negligence resulted in inflicting the injury."

The working place of the plaintiff in this case was a roadway which had been opened and used by all the employes of the mine for many years, and he had the right to presume that, when directed to lay the track in the entry, the master had performed his duty, and to proceed with his work relying upon this presumption, unless a reasonably prudent and intelligent man, in the performance of his work as a tracklayer, would have learned facts from which he would have apprehended danger to himself. The petition for rehearing is overruled.

### MOODY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 11, 1897.)

#### CONTINUANCE—HOMICIDE—HARMLESS ERROR.

1. The fact that defendant had not procured attorneys until the morning of the trial did not entitle him to a continuance, no reason being shown for his failure to do so sooner.

2. The absence of documentary evidence or of witnesses does not entitle defendant to a continuance where no diligence is shown in procuring the evidence or witnesses.

3. Where defendant is convicted of manslaughter under an indictment for murder, the error, if any, in an instruction defining "malice aforethought," is harmless.

4. An instruction authorizing an acquittal if defendant believed he had no other safe means, "short of flight," to avert the danger, is not objectionable, as requiring the jury to believe that the accused should have resorted to flight, as it could not have been so understood.

Appeal from circuit court, Madison county.  
"Not to be officially reported."

Pleas. Moody was convicted of manslaughter, and appeals. Affirmed.

John Chenault and W. B. Smith, for appellant. William Cromwell and W. S. Taylor, Atty. Gen., for the Commonwealth.

DURLE, J. The appellant, having been convicted of manslaughter, urges as error, first, that he was refused a continuance at the term at which the indictment was returned against him. He was indicted upon the 7th of April, after an examining trial. His case was set for the 20th. He was admitted to bail, and remained at liberty until the trial. In his affidavit for a continuance, he alleged that he had not procured attorneys until the morning of the trial; but no reason for his failure to do so is assigned, nor is the affidavit of any attorney filed in support of the motion. It appears from the affidavit subsequently filed in support of the motion for a new trial that one of the attorneys who represented him upon the final trial appeared on his behalf upon the examining trial. No sufficient diligence in procuring attorneys or preparing his defense is shown, nor is any reason given why a diagram of the place at which the killing occurred could not have been procured, and, as matter of fact, it

seems to have been sufficiently explained to the jury by the witnesses.

A further ground for continuance alleged in the affidavit was the absence of his son in Texas, it being averred that his son, if present, would make statements material to the defense, and that his presence could not be procured at the trial term. Although no proper diligence in securing his attendance was alleged, and no reason for the failure to exercise diligence, a part of the affidavit setting out certain statements the son would make was admitted as a deposition. We are of the opinion the court did not err in refusing a continuance.

No serious question is made as to the evidence admitted upon the trial. It appears sufficiently that Powell, the deceased, came to appellant's store, remained there some time, went away, and returned. Appellant, upon Powell's starting away for the second time, attempted to persuade him to remain, upon the ground, as he states, that Powell was drinking. It appears that Powell and appellant made mutual protestations of friendship, in the course of which appellant stated that he had known Powell's mother when a girl, and always said she was the prettiest Harrison he ever saw. This remark was objected to by Powell, and a conflict resulted, in the course of which Powell was mortally wounded. Before his death, Powell made a dying statement, in which he said that there was no provocation for appellant's shooting him, and he did not know what he shot him for. Upon evidence tending in general to support this statement of fact, the court instructed the jury. Objection is made to the first instruction, upon the authority of *Cockrill v. Com.*, 95 Ky. 22, 23 S. W. 658; but we fail to see anything in the instruction in conflict with the reasoning or conclusion in that case. Objection is also made to instruction No. 2, which is, in our judgment, a correct definition of malice aforethought, but, if incorrect, could not have prejudiced appellant, as the conviction was for manslaughter only. *Galloway v. Com.*, 7 Ky. Law Rep. 166; *Wing v. Com.*, Id. 227. But the principal objection is made to instruction No. 3, and this is based upon *Cockrill v. Com.*, above referred to, and *Bledsoe v. Com.* (Ky.) 7 S. W. 884, in each of which cases it was held that, under the circumstances of that case, the accused was not required to resort to flight in order to avoid the danger which he believed to be imminent. The objection to this instruction seems to be based upon the statement contained in it that if appellant believed, in the exercise of a reasonable judgment, he had no other safe means, "short of flight," to avert the danger of death or great bodily harm then pending, or reasonably believed by him to be pending (if he did so believe), except to shoot the deceased, the jury should find him not guilty. The words "short of flight" are particularly objected to, as tending to lead the jury to the conclusion

that he was required to fly; but, in our judgment, assuming the jury to be men of average sense, the words could have had no such effect. We think the law applicable to the circumstances of the case was correctly given, and see no valid reason why the verdict of the jury should be disturbed. For the reasons given, the judgment is affirmed.

#### DUCKER v. NELSON et al.

(Court of Appeals of Kentucky. Nov. 11, 1897.)

ATTORNEY AND CLIENT—VALUE OF SERVICES—INSTRUCTIONS.

In an action to recover for services rendered by plaintiffs, as attorneys, in assisting defendant, as attorney, in the prosecution of an action, the petition alleging a contract for one-half the amount received by defendant, an agreement to pay the reasonable value of the services being admitted by the answer, defendant cannot complain of an instruction directing the jury to find for plaintiffs "what they believe, from all the evidence, to be the reasonable value of the services described in the proof," not exceeding the amount claimed by plaintiffs, and not less than that admitted by defendant.

Appeal from circuit court, Campbell county. "Not to be officially reported."

Action by Nelson & Desha against John S. Ducker to recover for legal services. Judgment for plaintiffs, and John S. Ducker's executrix, Lizzie Ducker, appeals. Affirmed.

Wright & Anderson, for appellant. George Washington, for appellees.

GUFFY, J. The substance of plaintiffs' claim is that John S. Ducker was an attorney, and instituted suit in favor of Wallinford, against the Louisville & Nashville Railroad Company, to recover damages for personal injuries inflicted upon said Wallinford; and that said Ducker employed the plaintiffs (now appellees) to assist him in the prosecution of said suit; and that they and said Ducker were to have a sum equal to one-half of whatever sum might be recovered in said action, one-half of which was to be paid the appellees; and that one-half of the sum so recovered was \$3,492, which was paid to and retained by said Ducker; and that he refused to pay the appellees any sum, except \$100; and they pray judgment for \$1,746. Sundry motions and demurrers were filed and acted on by the court, and several amended petitions were filed and passed upon. The answer of Ducker may be treated as a denial of plaintiffs' employment and the contract as claimed by them, except he admitted that he had employed and retained the plaintiffs on the trial thereof in the circuit court of Campbell county, and did agree to pay them the reasonable value of the services they should render therein, and they did co-operate with him and render services, which he specified, and alleged that their services were worth no more than \$100, which he claimed he had always been ready to pay. After the filing of the answer, Ducker departed this life, and the suit was revived against the appellant.

A trial resulted in a verdict and judgment in favor of appellees for \$1,000, and, appellant's motion for a new trial having been overruled, she prosecutes this appeal.

The substance of the grounds relied on for a new trial are: (1) The court erred in refusing to render judgment for defendant notwithstanding the verdict of the jury. (2) The court erred in refusing to instruct the jury to find for the defendant. (3) The court erred in refusing to withdraw from the jury all the testimony heard by it. (4) The court permitted sundry witnesses to testify as to the value of the services based upon the idea that the employment of plaintiffs by defendant, Ducker, had been contingent upon success in the case, and upon the assumption that the employment was for services in conducting and assisting in the case through all the courts in which it was taken. (5) The verdict of the jury is excessive, and against the law of the case. (6) The instruction given by the court is not the law of the case, and was misleading to the jury in its language, and the jury was misled thereby.

It seems to us that no error was committed to the prejudice of the substantial rights of appellant in the admission of testimony, or in refusing to exclude the testimony introduced, nor to render judgment notwithstanding the verdict. It is also clear that the verdict of the jury is sustained by sufficient evidence, and is not against the law of the case. Nor do we think that the court erred in giving or refusing instructions. The instruction given is as follows: "The jury will find for plaintiffs what they believe, from all the evidence, to be the reasonable value of the services described in the proof rendered by them in assisting John S. Ducker in conducting and prosecuting the suit of Eugene Wallinford vs. Louisville & Nashville Railroad Company, not exceeding \$1,737.59, amount claimed by the plaintiffs, and not less than \$100, amount admitted by the defendant." It seems to us that the foregoing instruction correctly presents the law applicable to the case. Judgment affirmed, with damages.

#### SHORT v. MOORE et al.

(Court of Appeals of Kentucky. Nov. 11, 1897.)

##### BUILDING CONTRACT—DAMAGES FOR DEFECTS.

Where the principal defect in a church building consisted in the spreading of the walls, which has to a large degree been remedied by some iron rods, at the expense of a few dollars, so that the building is safe, and in use by the congregation, the measure of damages recoverable by the building committee against the contractor is the difference between the value of the building in its present condition and the contract price, and not the cost of taking out all the work and material not done according to the contract, and having it done over.

Appeal from circuit court, Boone county.

"Not to be officially reported."

Action by Charles W. Short against James F. Sanders on a note. George Moore and others, summoned as garnishees, answered, deny-

ing any indebtedness to defendant, and pleading a counterclaim for damages against defendant. Verdict and judgment for plaintiff against the garnishees for only a part of his claim, and he appeals. Reversed.

C. C. Cram and J. G. Tomlin, for appellant. Gaunt & Downs and R. B. Brown, for appellees.

WHITE, J. This action was originally begun in the Boone circuit court by appellant, Short, against James F. Sanders, on a note, in which there was an attachment sued out, and appellees Moore and others, as the building committee of the South Fork Christian Church, were summoned as garnishees to answer the amount, if any, of their indebtedness to said Sanders. At the August term, 1894,—the appearance term,—there was filed a paper purporting to be the answer of appellees as garnishees, stating that they would, on the completion of the building, owe the said Sanders \$1,300, less certain payments of about \$660, leaving about \$640 due Sanders; and the court thereupon made an order directing appellees to pay \$500 into court to be applied to the payment of appellant's debt. Subsequent to this, the appellees, by affidavits, denied the filing of the said answer as garnishees by their authority, or of either of them, or that it was a fact that they would owe Sanders anything, and the court, upon their motion, and over the objection of appellant, struck said answer from the files, and permitted these appellees to file an answer denying the indebtedness to said Sanders in any sum, and pleading a counterclaim for damages in the construction of said building, and made said answer and counterclaim a cross petition over against said Sanders. On this answer and counterclaim for damages the appellant, Short, and Sanders made issue, by pleading the contract of building said church, and denying any breach or damages in the building. The issue thus formed was tried before a jury, which resulted in a verdict and judgment for appellant for \$60.85, and from that judgment this appeal is prosecuted.

Appellant filed reasons for new trial, and one of the grounds contained therein is that the verdict and judgment are contrary to the evidence. From a careful reading of the evidence, we are of opinion that the verdict is not sustained by the evidence, and that the damages allowed appellees on their counterclaim was excessive. The proof shows that the building is in use by the church congregation, and the only defects shown that are serious are that the walls had spread some two to three inches on each side, and had cracked the plastering in the corners, but that this damage had been remedied by an expenditure of \$7.50 for some iron rods, though the walls had not been straightened. The proof tends strongly to show that a roof as called for in the contract and specifications cannot be built without the walls spreading some.

It is shown that the material used in the building was of a good quality, and was hauled by appellees and used without objection from them.

On the trial the court gave to the jury instructions Nos. 1, 2, and 3, but in the conclusion we reach we deem it necessary to notice No. 3 only, which is as follows: "The court instructs the jury that, although they may believe from the evidence herein that defendant Sanders agreed to build the South Fork Christian Church according to the contract and specifications filed in this suit, and that he did not build said house according to said contract and specifications, yet they must allow him for building said house the value of the material put into same, and the value of the labor to build same, to be credited by the sum of \$548, and by any other amount defendants may have paid to Sanders or to any person for labor and material which was necessary to complete said house according to the contract, not exceeding \$294.15; and they will also find for defendants Grimsley and others against defendant Sanders any amount in the way of damages which they have sustained, if any, by the failure of defendant Sanders to build said house according to the contract and specifications; and the measure of damages is the cost of taking out all the work and material which was not done according to the contract, if any, and having it done over, according to the contract and specifications, not exceeding \$1,000, and they will strike the balance, and find for the party, as herein directed, in whose favor the balance is."

Appellant objected and excepted to the giving of this instruction No. 3, and the ruling of the court below in this behalf is questioned on this appeal. We are of opinion that in giving this instruction the court erred, as the measure of damages there fixed by the court is the cost to remove all defective work and rebuild same. This is not the true rule, as the building is in use, and can be used with safety, and the principal defect shown was in the walls spreading, and that, in a large degree, had been remedied by the iron rods, at a cost of only \$7.50; at least the use of the rods had prevented any further damage, and had rendered the building safe. It cannot be said that the contractor, Sanders, could be charged with the expense necessary to tear out such of the building as might be necessary to straighten these walls. In the opinion of some of the witnesses, this could not be done without taking off the roof, and probably other work, which might, and probably would, cost as much as the entire building cost as contracted by Sanders. Yet by the instruction given the jury were told that they should estimate the damages by this rule. In our opinion, the correct rule of damages on the counterclaim is embraced in instruction B, asked for appellant, and refused by the court. Said instruction is as follows: "The court instructs the jury that, al-

though they may believe from the evidence that the work was defective, yet they must find for the plaintiff the value of the building in its present condition, credited as provided in instruction A, less the difference in value of the building in its present condition and the contract price, to wit, \$1,300."

There are other errors suggested, but, as they are not likely to occur on another trial, they will not be noticed. For the errors indicated, the judgment of the lower court is reversed, and cause remanded, with directions to award a new trial, and for proceedings consistent herewith.

**STEPHENS et al. v. DICKINSON et al.  
SAME v. ROBINSON et al. SAME  
v. JOANBROCK et al.**

(Court of Appeals of Kentucky. Nov. 11, 1897.)

**APPEAL—WEIGHT GIVEN CHANCELLOR'S JUDGMENT—ASSIGNMENTS FOR CREDITORS—FRAUD—PREFERENCES.**

1. The rule that a judgment will not be reversed as against the evidence unless palpably and flagrantly so does not apply to equity cases; but the court in such cases will weigh the testimony for itself, merely giving weight to the judgment as a circumstance in the case.

2. The failure of debtors, before making an assignment for creditors, to keep a cashbook, is not evidence of fraudulent intent.

3. The fact that a firm, before making an assignment for creditors, turned over to one of the partners certain judgments and accounts in payment of a loan made by him to the firm, and marked the accounts on the books as settled, while it may have constituted a preference subject to attack as such under the statute, does not show fraud in the assignment; the preferred partner having had the advice of an attorney that the transaction was valid, but finally turning over most, if not all, of the accounts to the assignee.

4. An assignment having been openly made, and everything then undisposed of turned over to the assignee, acts of the debtors prior to the assignment, constituting grounds for an attachment, do not authorize the court to set aside the assignment.

**Appeal from circuit court, Lincoln county.  
"Not to be officially reported."**

Actions by W. S. Dickinson & Co. and others, with attachments against G. W. Stephens & Co. and others, to set aside a deed of assignment for the benefit of creditors. Judgment for plaintiffs, and defendants appeal. Reversed.

R. C. Warren, for appellants. W. G. Welch, for appellees.

GUFFY, J. It appears that W. S. Knox and G. W. Stephens, on the 30th day of August, 1892, entered into the following contract: "This is to certify that I, W. S. Knox, and Geo. W. Stephens, have formed a partnership to do business under the firm name of Stephens & Knox, at Rowland, in Lincoln county, Ky., whereby I, W. S. Knox, am to have  $\frac{1}{3}$  interest in the business; and, in consideration of this  $\frac{1}{3}$  interest, G. W. Stephens is first to have all his and his family's expenses paid for two years,—that is, neces-

sary expenses, paid out of the proceeds of the business.—before he (G. W. Stephens) becomes accountable to me for my  $\frac{1}{2}$  interest in the proceeds of the business. After two years in the business of merchandising, G. W. Stephens, which party is to manage the business, is to become responsible to W. S. Knox for  $\frac{1}{2}$  of the business entirely. W. S. Knox. G. W. Stephens." It appears from the evidence in this record that said Stephens & Knox purchased a stock of goods from one Hamilton, and entered into the mercantile business at Rowland, Ky., at which place was the terminus of a railroad; and it is claimed that, until that point ceased to be the terminus of the railroad, they had a good business, but afterwards their trade fell off, and they contemplated removing to Lebanon, Ky.; at least one of them so contemplated. On the 24th of July, 1893, they made an assignment of the firm property to appellant Higgins, for the benefit of all their creditors. Not long afterwards, appellees instituted suit in the Lincoln circuit court, and obtained attachments against the property of said Stephens & Knox, and sought to have the assignment set aside, upon the ground that it was made to cheat, hinder, and delay creditors. The suits were resisted by these appellants, but, upon final hearing, the court set aside the assignment, and sustained the attachments, and ordered Higgins, who had been made receiver to sell the property attached, to pay the same out of the proceeds of the attached property; and, to reverse these judgments, appellants prosecute this appeal.

Appellees' counsel contends that the judgment of the chancellor will not be reversed unless palpably and flagrantly against the evidence. Such is not the rule of this court. While it is proper to consider the judgment of the chancellor as entitled to some weight as a fact or circumstance in the case, yet this court, in equity cases, will weigh and judge of the sufficiency of the testimony for itself, and decide according to the evidence.

The contention of appellees is that, for some time prior to the assignment, appellants were selling goods at any price they could for cash. They also complain that appellants kept no cashbook, and turned over no cash to the assignee, and that they concealed from the assignee certain judgments in their favor, which they collected after the assignment, and that they marked, in number at least 16, of accounts on the ledger, against good parties, as settled, before turning it over to the assignee, and afterwards undertook to collect them from the parties, but, when detected, one of the firm attempted to erase the entries on the ledger. We do not think the evidence sustains any reckless selling or attempt to sell at a sacrifice, sufficient to authorize the judgments complained of, or, indeed, shows any disposition to defraud creditors. Nor was the failure to keep a cashbook any evidence of fraudulent

intent, and the proof conduces to show that appellants had no considerable amount of cash to turn over, if, indeed, they had any. It is satisfactorily shown that Stephens had advanced several hundred dollars of his own money for the benefit of the firm, and that the judgments and accounts turned over to him were in accordance with previous agreements between the partners, and, that being true, marking them on the books "Settled" or "Paid" might have been done without any intent to defraud creditors. It also appears that Stephens had consulted a lawyer as to his right to hold and collect the accounts in question, and had been informed that he could do so, but finally turned over most, if not all, of the accounts to the assignee, and that most, if not all, were turned over before service of attachment, and before appellants knew that attachments would be issued. The payment of the firm debt to Stephens, or the attempted payment in accounts, as well as what money was paid him by the firm, might properly be considered an attempt to prefer Stephens to other creditors, and might, by proper proceedings, have been held to operate as an assignment for the benefit of all their creditors; but no such proceedings were instituted. The failure of plaintiffs to make money, and their failure to be able to pay all their debts, is reasonably well accounted for by the testimony; and their assets turned over to the assignee were not so remarkably insufficient as to furnish evidence of fraudulent intent.

It seems clear to us that, if the appellants had been guilty of any act or conduct justifying the attachments, such conduct had occurred before the execution of the assignment. It seems that the assignment was openly made, and everything then undisposed of turned over to the assignee. The proof conduces to show that the horse killed by the railroad, and paid for to Stephens, was in fact his horse, and that he had the legal title to the money garnished and paid over to him by the police judge. It is eminently proper and just that the property of insolvent debtors, who are unable to longer remain in business, should be distributed pro rata among all their creditors, and, unless assignments are in fact fraudulent, they should be sustained. For the reasons indicated, the several judgments appealed from are reversed, and the cause remanded, with directions to dismiss the attachments, and to adjudge the assignment valid, and for proceedings consistent herewith.

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LOGAN et al. v. CATRON et al.

(Court of Appeals of Kentucky. Nov. 12, 1897.)

PARTITION—PARTIES—UNRECORDED DEED.

1. In a suit in the circuit court for division of lands alleged to belong to plaintiff and another, made a defendant, other defendants, alleged to be in possession, will be permitted to file answers and set up ownership.

2. Plaintiffs are not entitled to recover land which they claim under a deed which they made no effort to record for 25 years; the land having in the meantime been sold under execution against the grantor, and purchased by defendants, who recovered possession in ejectment, and have held it for many years.

Appeal from circuit court, Knox county.

"Not to be officially reported."

Action by Marshall Logan and others against J. H. Catron and others for a division of lands. Judgment dismissing petition, and defendants appeal. Affirmed.

John F. Hays, for appellants. Jas. D. Black and Tinsley & Faulkner, for appellees.

HAZELRIGG, J. In this suit, for a division of lands alleged to belong to plaintiffs and another, who is made a defendant, other defendants, who are alleged to be in possession, and retaining the lands without paying rent therefor, will be permitted to file answers and set up their ownership thereto, as otherwise they would be estopped from doing so afterwards. It is otherwise in suits in county courts for division of lands, for the obvious reason that title cannot be involved in such actions. *McIntire v. McIntire*, 82 Ky. 503.

Both the alleged joint owners and the defendants in possession claim under Robert Logan, and, in supporting their title, the former relied on a deed purporting to have been executed in March, 1869, by Robert Logan to their ancestor, Woodson Logan; but this deed is not shown by any competent proof to have been lodged for record, and there was no attempt to record it until 1894, nor did the alleged grantee ever take possession. In the meantime the land was sold under execution against Robert Logan, and the appellees, or their representatives, having bought it, recovered possession thereof in an action in ejectment, and have had possession for a number of years. The court properly dismissed the plaintiffs' petition. Judgment is affirmed.

#### BROWN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 12, 1897.)

##### RAPE—EVIDENCE—INSTRUCTIONS.

1. The defendant may show specific acts of a lewd or lascivious character on the part of the prosecutrix shortly before the alleged offense.

2. An instruction authorizing a conviction if defendant had carnal knowledge of the prosecutrix, "against her will or consent, or by force, or by putting her in fear," is objectionable, as authorizing a conviction though no force, actual or constructive, was used.

3. It is error to group in the instructions certain circumstances, as that the prosecutrix did or did not make complaint at the earliest opportunity, or made no outcry at the time, and dictate the force to be given them as showing guilt or innocence, or as corroborating the prosecutrix.

Appeal from circuit court, Daviess county.

"To be officially reported."

Clint Brown was convicted of rape, and appeals. Reversed.

Sweeney, Ellis & Sweeney, for appellant. W. S. Taylor, for appellee.

HAZELRIGG, J. On the defendant's trial for rape, his defense being that carnal knowledge of the prosecutrix was had by him with her consent, it was error for the court to refuse to permit him to prove by third parties, and by the prosecuting witness on cross-examination, if he could, acts of a lewd or lascivious character on her part occurring shortly before the alleged rape, such as that other young men had taken undue liberties with her person, by putting their hands under her clothes and feeling her person, to which she submitted without objection. In all the courts it is held admissible to show the reputation of the prosecutrix for general chastity by general evidence, but in some of the states it is held incompetent to prove particular acts of unchastity. We think, however, the contrary rule is more in accord with reason. If the prosecutrix in fact permitted such undue liberties, to the extent indicated, the jury may gather some light on the question of whether she the more likely consented to the intercourse. It may be, and is, far from conclusive; but it is, at least, somewhat relevant to the inquiry. The cases of *Benstine v. State*, 2 Lea, 169, *Woods v. People*, 55 N. Y. 515, *State v. Johnson*, 28 Vt. 512, and *State v. Murray*, 63 N. C. 31, seem to be directly in point.

Again, under the first instruction, the jury was authorized to convict the defendant if he had carnal knowledge of the prosecutrix "against her will or consent, or by force, or by putting her in fear." Rape is the unlawful carnal knowledge of a female by force, and without her consent. 4 Bl. Comm. 210; 2 Archb. Cr. Prac. 152; 1 Russ. Crimes (9th Ed.) 904, 912. It is the ravishing of a woman against her will, and without her consent. 1 East, P. C. c. 4, § 4. Force, actual or constructive, is a necessary ingredient in the crime, except in cases not now involved; and a conviction in this case should not have been permitted unless the act was committed forcibly, and against the will of the prosecutrix. The instruction hardly comes up to this requirement. If the prosecutrix passively submitted, though without actually consenting, to the intercourse, a conviction was authorized, under the instruction. Yet if she so submitted, without resisting to the last,—because there is no reason shown why she could not have done so,—the defendant is not guilty of rape, although he may not have obtained formal consent.

Again, by the fifth instruction the jury were told that if the prosecutrix failed to make complaint at the earliest opportunity, unless she explained this satisfactorily, or if she failed to repel defendant with all the resistance within her power, or if she made no outcry at the time, then these circumstances should be taken into consideration, with the other evidence, "as tending to show that no rape was committed." This instruction

should not have been given. It was not the province of the court to select or group certain facts, and attempt to dictate to the jury the force to be given them. And the same vice appears in the third instruction, where the jury were told that, if the prosecutrix "complained of the alleged rape at the earliest opportunity, this fact should be taken into account as a circumstance tending to corroborate the testimony of the said witness." The testimony of the witnesses Gabbert and Adcock was properly rejected, and that of Mrs. Roby was properly admitted. For the reasons given the judgment is reversed, with directions to award the defendant a new trial, and for proceedings consistent with this opinion.

**METZ'S ADM'R v. LOUISVILLE & N. RY.**  
(Court of Appeals of Kentucky. Nov. 12, 1897.)

**EXCEPTIONS, BILL OF—TIME FOR FILING.**

1. Under Ky. St. § 1016, allowing a party, in a court having continuous sessions, 60 days after the judgment becomes final in which to file his bill, he may ignore an order obtained by him giving him until an earlier day, and rely on the statute.

2. If, instead of relying on this right, he relies on a bill signed by a special judge, who did not preside at the trial, when he had opportunity to present it to the trial judge, the bill will not be considered, though signed by the trial judge some 10 months thereafter.

Appeal from circuit court, Jefferson county.  
"To be officially reported."

Action by Ernest Metz's administrator against the Louisville & Nashville Railway. Judgment for defendant on a verdict, pursuant to a peremptory instruction, and plaintiff appeals. Affirmed.

Gardner & Moxley, for appellant. Lytleton Cooke, for appellee.

**HAZELRIGG, J.** When a party obtains time within which to file his bill of exceptions to a subsequent day not 60 days from the time when the judgment becomes final, he may ignore the time limit, and rely on his statutory right of presenting his bill within the 60 days provided by law. Ky. St. § 1016; *Connally v. Adams* (decided Oct. 27, 1897) 42 S. W. 1133. If, instead of relying on this right, he relies on a bill signed by a special judge, who did not preside at the trial, when ample opportunity was afforded him to present it to the trial judge, the bill will not be considered by this court, even though he gets it signed by the proper judge some 10 months afterwards. He is at fault in presenting the bill to the special rather than to the trial judge; and it is not as if he had done all he could do, and the delay was caused by the court. In the cases of *Nance v. Railway Co.* (Ky.) 17 S. W. 570, and *Meaux v. Meaux*, 81 Ky. 477, relied on by appellant, the parties presented their bill within the proper time and to the proper judge for signature, and the delay was caused wholly by the judge failing

to act. But outside of this question, upon the facts presented, we are of opinion that the peremptory instruction was properly given by the trial judge. The judgment is affirmed.

**ROSS v. REES.**

(Court of Appeals of Kentucky. Nov. 10, 1897.)

**APPLICATION OF PAYMENTS—INTEREST.**

1. Defendant denying any other indebtedness than the note sued on, and plaintiff's evidence as to an alleged additional indebtedness not being explicit and satisfactory, while defendant's statements are clear, and his recollection good, plaintiff has failed to show any other indebtedness, and an admitted payment should be credited on the note.

2. Where a note bore interest payable "annually," a payment made October 19, 1889, of the interest to become due December 29, 1889, should be credited as of the date of maturity of the interest.

3. As the note provided that the maker might pay it all, or any part of it, at any time, payments made February 27, 1890, and August 12, 1890, when no interest was due until December 29, 1890, should be credited on the principal as of the dates on which they were made, interest being computed to the first payment, and thereafter on the several balances of principal, the sum of the amounts of interest thus ascertained being the interest due December 29, 1890.

Appeal from circuit court, Harrison county.  
"Not to be officially reported."

Action by Richard Rees against J. J. Ross on a promissory note. Judgment for plaintiff, and defendant appeals. Reversed.

Ward & Lafferty, for appellant. W. S. Cason, for appellee.

**PAYNTER, J.** The court has had some difficulty in reaching a conclusion as to the item of \$39.50, for which the appellant claims he is entitled to a credit on the note on which this action is brought. The testimony is somewhat conflicting as to this item. Ross claims that he owed Rees the note in suit, upon which certain payments had been made, and that he did not owe him anything else. He testifies that on January 1, 1891, he delivered Rees McCauley's check for \$40, which amount, less 50 cents, was to go as a credit on the note. Rees admitted that he received the check, and paid Ross the 50 cents, but claims that Ross paid him the amount for sheep or cattle, or both; he did not remember which. He claims that this stock was sold Ross within a week before the McCauley check was given. Rees is unable to state the price of the stock, whether it was all sheep, or all cattle. A son of Rees testifies that the father sold Ross some cattle in December, 1890. He thinks they were steers, but does not say the price for which they were sold, nor when or how the price was paid. On the other hand, Ross testifies that he never bought a hoof of stock from Rees since the note was executed, December 29, 1888; that he never did buy but one lot of sheep from Rees, and that was on the 9th of April, 1888. The lot consisted of 15 head

for which he paid \$4.50 per head, cash. Ross, with much detail, gives a description of all the cattle on his farm in December, 1890, and tells from whom he bought them; and he offers other evidence which tends to corroborate him. Ross says, instead of buying cattle from the Reeses, father and son, who were partners, he, on the 3d of February, 1891, sold the Reeses three head of cattle. He proves by Toadvine, who kept the scales near where the parties lived, by exhibiting the scale books, that on the 3d of February, 1891, three head of cattle were weighed on the scales from Ross to the son, Hyson Rees. Rees fails to make any explanation of this transaction. Ross is particular in giving the transactions with reference to the sheep and cattle. The Reeses claim that on January 1st, at 3 o'clock in the evening, Ross paid the interest on the note to that date, and made the indorsement on the note to that effect, while Ross testifies that he was not present at Rees' house on that day, but went to town to get the McCauley check cashed, so as to pay Rees the interest on the note. He proved by his brother that he was in town on the day named, and could not have been at Rees' house at the time stated. As Rees admits that he received the \$39.50, and his evidence is not explicit and satisfactory on the question of Ross' alleged indebtedness for cattle and sheep, and, as Ross' statements seem to be clear, and his recollection good, as to the transaction in sheep and cattle, we are of the opinion that Rees has failed to show an indebtedness due by Ross other than a note in suit. Therefore the court should have given Ross credit for \$39.50 of date January 1, 1891, instead of simply crediting interest paid to that date. The note upon which the several payments were made was for \$900, payable two years after date, with interest from date, payable annually. There is a provision in the note that the payor might pay it all, or any part of it, at any time. The note was dated December 29, 1888. On October 19, 1889, Ross paid \$54, the interest due December 29, 1889. As this was clearly a payment of the interest, although before it had matured, it should have been credited as of date of maturity of interest, to wit, December 29, 1889. On February 27, 1890, Ross paid \$200 on the note, and on August 12, 1890, he paid \$200. At these times no interest was due, although the interest for 1890 was maturing. As the interest was payable annually, the interest would not be due until December 29, 1890. The statute provides that the partial payment on a debt bearing interest shall be applied to the extinguishment of the interest then due. As the interest was not due under the terms of the contract, and as the party had the right to pay any part of the note at any time, the sums so paid must be so credited on the principal of the debt; in other words, these payments should not be applied to the payment of interest. In computing the interest, it should

be done to the date of the first payment, that payment deducted from the principal, the interest then computed on the principal thus remaining to the next payment, then deduct that payment from the principal, and then compute interest on the remaining principal to December 29, 1890. The sum of the amounts of interest thus ascertained would be the interest due on December 29, 1890. This should be done upon the idea that the interest was not due when the payments were made, and the party had the right to make the partial payments on the principal. This rule should not be observed as to the credit of \$300 of date June 11, 1891, because the note had matured, and the interest was due continually until the debt was paid. To follow the rule we have enumerated as to the manner of entering credits, the payment of \$39.50 somewhat overpays the interest which was due January 1, 1891. Ross claimed to Rees that the interest should not be compounded, and we presume he meant that he should have full credit on the principal for the payments made. This method of calculation, which we say should be pursued, sustains Ross' contention that he made the payment of \$39.50 on the interest. The judgment is reversed for proceedings consistent with this opinion.

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**LOUISVILLE & N. R. CO. v. HUNDLEY.**  
(Court of Appeals of Kentucky. Nov. 9, 1897.)  
RAILROADS—DAMAGES FOR FAILURE TO CONSTRUCT CROSSING.

A verdict for plaintiff against defendant railroad company for defendant's failure to construct a crossing at the place stipulated in plaintiff's deed of the right of way through his farm will not be disturbed, being sustained by the evidence, and there being no error in the instructions.

Appeal from circuit court, Lincoln county.  
"Not to be officially reported."

Action by J. S. Hundley against the Louisville & Nashville Railroad Company to recover damages for defendant's failure to construct a crossing. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Alcorn, for appellant. W. G. Welch, for appellee.

GUFFY, J. It appears from this record that Henry C. Helm, the remote vendor of appellee, Hundley, by deed of date November —, 1865, conveyed to the appellant a right of way for the Knoxville Branch Railroad through his farm in Lincoln county. The right of way covered about seven acres of ground, and the consideration paid was \$1,800. In the conveyance is the following stipulation: "It is further understood that, should the party of the second part cause a fill to be made at the place where the trestlework is now being constructed, then said second party are to make a good crossing at grade or under grade, as may best seem fit to them." It further appears from this rec-



ord that a few years ago appellant elected to remove the trestle, and make a fill at the place where the trestle had been erected, leaving at that place no crossing or passway for appellee. Thereupon appellee instituted this action, seeking to recover \$2,000 damages. It is claimed by appellant, among other things, that it did construct a crossing by means of which appellee could have ingress and egress to and from his residence. Appellee's contention is that it was not at the point at which, by the terms of the deed, appellant was required to erect the crossing. A jury trial resulted in a verdict and judgment in appellee's favor for \$1,500, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

Owing to the crowded state of the docket of this court, we deem it inexpedient to notice or to discuss at length the various contentions of appellant and of appellee. We have carefully considered the testimony and the instructions of the court, and we fail to discover any error in either to the prejudice of the substantial rights of the appellant. The evidence is sufficient to sustain the verdict of the jury, and the instructions of the court, as given, correctly present the law applicable to this case. Judgment affirmed, with damages.

#### LOWE v. WEBSTER.

(Court of Appeals of Kentucky. Nov. 9, 1897.)

JURY—IMPLIED CONTRACT TO PAY FOR SERVICES.

1. A litigant, for the purpose of exercising his right of peremptory challenge, should be permitted to ask a juror whether he occupies the relation of client to the opposing attorneys, but the refusal to permit the juror to answer the question is not reversible error, in the absence of anything tending to show that appellant was prejudiced thereby.

2. In an action to recover the value of services rendered by plaintiff in nursing and caring for his deceased stepfather, it was error to give an instruction hinging the right of recovery on the fact that plaintiff intended to charge for the services without any reference to the intention of the decedent to pay for same, or to whether decedent had information of plaintiff's intention to charge therefor.

Appeal from circuit court, Carroll county.  
"Not to be officially reported."

Action by J. C. Webster against John Lowe, administrator of James Lowe, on an implied contract for services. Judgment for plaintiff, and defendant appeals. Reversed.

Harvey Myers and M. C. Lykins, for appellant. Winslow & Winslow and Gaunt & Downs, for appellee.

WHITE, J. The appellant, John Lowe, administrator of James Lowe, appeals from a judgment of the Carroll circuit court for \$1,000 in favor of appellee, J. C. Webster. The cause of action, as stated in the petition, is that the estate of James Lowe was indebted to the plaintiff, J. C. Webster, at the time of his death, in the sum of \$1,000, for waiting on, nursing, and taking care of the said

James Lowe, deceased, from the 2d day of January, 1891, to March 23, 1894. To this petition the defendant (appellant) filed answer, in which he denied that at the time of decedent's death, or at any other time, he was indebted in any sum whatever for waiting on and nursing the deceased, and denied that plaintiff rendered the services charged for. This answer was filed on the 19th day of September, 1895, and on the 24th of September a jury was impaneled, and part of the evidence heard, when defendant filed, by leave, a general demurrer to the petition. This demurrer was not disposed of by the court, so far as appears in the record. The petition appears to state a cause of action, and, if not, the demurrer being filed after answer, and a trial having begun, it was too late to then raise a question by demurrer to the petition.

The facts, as proven on the trial, are that the deceased, James Lowe, at the time of his death, which occurred in March, 1894, was about 83 years old; that in the year 1891 he was stricken with paralysis, and at that time he resided at his own house, some 2½ squares from the residence of appellee, and continued to so reside until January, 1892; that no one lived with him; that the deceased was very feeble; that appellee and his wife frequently visited and waited on him, and carried his meals to him, and many times appellee and wife remained with deceased over night, to wait on him, and attend to his wants; that this service of appellee and his wife continued until January, 1892, when appellee had deceased removed to his own home, where he remained till his death, in March, 1894. The proof shows that during the whole time the deceased remained at the home of appellee deceased, owing to his enfeebled condition, required considerable attention, and much of the time constant attention, although the proof shows that much of the time he was able to walk out on the streets, but, owing to the nature of his complaint, he was unable at times to control the action of his bowels and kidneys, and required washing and dressing, which he was unable to do himself, and by these reasons made the attendance on him the more offensive than the attention on ordinary patients; that the deceased retained his senses, and had the ability to transact business, up to the time of his last illness, which commenced about the 1st of March, 1894, when he became an utter wreck, and had no mind, and remained so to his death, March 24, 1894. The appellee is the stepson of the deceased, and resided with him until appellee's marriage, in the year 1882, and while he so resided with deceased he paid board. The affection existing between appellee and the deceased was like unto that of father and son, they being very kind to each other. The amount found by the jury is fully sustained by the evidence.

The first error assigned by appellant was

the refusal by the court to permit the appellant's counsel, on the formation of the jury, to ask the jurors, or either of them, whether or not they, or either of them, occupied the relation of client to plaintiff's attorneys. This question, when propounded to the jurors when being tested by defendant's attorney, was objected to by plaintiff's attorney, and the court sustained the objection, and defendant excepted; the defendant's counsel stating at the time that several of the jurors, whose names were unknown to defendant or his counsel, were clients of appellant's counsel. In testing a juror, many questions are permitted to be asked to enable the party to determine whether, in their judgment, the jurors are in a condition to go upon the jury, and give the party a fair and impartial trial, the object being in all jury trials to obtain a fair and impartial trial; and the litigant has, we think, the right to make the inquiry of the juror as to his relationship to the parties litigant, or the attorneys engaged in the case. The answer of the juror to the question in the affirmative would not disqualify him to sit as a juror in the case, but would enable the party to exercise his right to excuse a juror from service. A juror is frequently excused by a party on account of friendship for the party litigant, and on account of his being a neighbor to the party litigant; and we see no reason why a party may not make the inquiry as to the relationship of client and attorney, for the purpose of exercising his right to excuse from the jury a certain number of persons as the law permits. He ought to have the right to ascertain the residence, feelings, and business relationship to the party or his attorney engaged in the case of the persons called as jurors, so that, if possible, the party may arrive at an intelligent opinion as to whether the juror would give him a fair and impartial trial of the case. There is nothing in this record showing or tending to show that appellant was prejudiced by the refusal of the court to permit the juror to answer the question; nor is it claimed that appellant would have excused the jurors, if answered in the affirmative; nor do we think that the action of the court would be a reversible error, unless there was something to show that by reason of the relationship of client and attorney the verdict of the jury was influenced thereby.

On the trial the court gave to the jury two instructions, as follows: (1) "The court instructs the jury that, if they believe from the evidence herein that the plaintiff, his family or servants, rendered the services claimed and sued for herein, and that plaintiff, at the time the services were rendered, intended to charge for same, they will find for plaintiff the value of the services so rendered, not to exceed \$1,000; and, if there was no special contract as to the price to be paid for same, then the jury, in estimating the value of the said services, should take into account the nature and quality of services rendered, and

the degree of care and attention bestowed on deceased by plaintiff, his family or servants, so far as is shown by the proof, not to exceed \$1,000." (2) "The court instructs the jury that, although they may believe from the evidence herein that the plaintiff, his family or servants, rendered the services to and for decedent sued for herein, yet, if they further believe from the evidence that said services were rendered on account of any relations which may have existed between plaintiff and decedent, and without any intention on the part of plaintiff to charge for same at the time the services were rendered, they will find for defendant." To the giving of both these instructions the appellant objected, and excepted, and the correctness of same are questioned on this appeal. From these instructions it seems that the lower court hinged the right of recovery on the fact that plaintiff (appellee) intended at the time to charge for such services, without any reference to the intention of the decedent to pay for same, or even that decedent had any information of this intention to charge him by appellee. That appellee did not intend to charge for the services when rendered would be a fact against his right to recovery. But his intention to charge would not of itself give him the right to recover. Such intention to charge must have been communicated to the decedent, and an acceptance of the services afterwards, or some contract, either expressed or implied, shown to exist, before the appellee had a right to recover for such services. We think the jury should have been told that, if they believed from the evidence that the services were rendered under a contract, either expressed or implied, or with the intention on the part of the appellee to charge, and an intention on the part of the decedent to pay, for such services, then they should find for plaintiff the reasonable value of such services, not exceeding \$1,000.

Appellant asked and the court refused to give instruction B, as follows: "If the jury believe from the evidence that plaintiff invited and received decedent, James Lowe, into his residence, and treated him as a member of his family, and did not intend to make charge for the alleged services, in the proof described, and did not make charge or claim for such services before decedent's death, and believe from the evidence that decedent was mentally capable of contracting, but did not contract, to pay for said alleged services, they shall find for defendant, except as to such services as were rendered during the last illness of decedent, and for such services they shall find for plaintiff the reasonable value." In our opinion, this instruction embraced the law of this case, and should have been given. For the errors in giving the instructions, and in refusing to give instruction B asked for by appellant, the judgment is reversed, and cause remanded for further proceedings consistent herewith.

**PERDUM v. RAMSEY et al.**

(Court of Appeals of Kentucky. Nov. 9, 1897.)

**ATTACHMENT—SUFFICIENCY OF EVIDENCE.**

A judgment dismissing an attachment, and adjudging that the supposed interest of defendant in a certain company, upon which the attachment was levied, did not exist, will not be disturbed on appeal, the evidence fully sustaining the judgment.

Appeal from circuit court, Barren county.  
"Not to be officially reported."

Action by Louis Perdum against W. H. Ramsey and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Jones, for appellant. A. W. Scott, J. D. Wilson, Thos. H. Hines, and W. G. Chapman, for appellees.

GUFFY, J. It appears from this record that appellant was the security for appellee Ramsey, to the Glasgow Bank, for \$500, and, to indemnify him, he had a mortgage on certain property. He at first instituted this suit to obtain indemnity as such security, but finally paid off the debt, and sought judgment against Ramsey therefor. He also claimed that Ramsey had an interest in the Adams Oil Company, and sued out an attachment against same, seeking to subject Ramsey's interest therein to the payment of his claim. Ramsey answered, and pleaded a counterclaim, amounting to about the sum sued for, and also denied that he had any interest in the Adams Oil Company. The oil company also denied that Ramsey had any interest whatever in said company. The court rendered judgment against Ramsey for the amount of the debt claimed, and judgment enforcing the lien upon the mortgaged property, but dismissed the attachment, and adjudged that Ramsey had no interest in the said Adams Oil Company; and from the latter part of the judgment so dismissing the attachment, and so adjudging as to the interest of Ramsey in the oil company, appellant prosecutes an appeal to this court. The evidence fully sustains the judgment of the court below, and the judgment appealed from is affirmed.

**LOUIS et al. v. TEBBS.**

(Court of Appeals of Kentucky. Nov. 9, 1897.)

**VENDOR AND PURCHASER—REVERSIBLE ERROR.**

In an action by the vendee to recover damages for breach of contract for the sale of land and certain personal property, a judgment for defendant on a counterclaim will not be disturbed, there being no substantial error in regard to the admission or rejection of evidence, or as to the giving or refusing of instructions.

Appeal from circuit court, Harrison county.  
"Not to be officially reported."

Action by Joseph Louis and others against F. J. Tebbs. Judgment for defendant, and plaintiffs appeal. Affirmed.

Swinford & Evans, for appellants. Blanton & Berry, for appellee.

GUFFY, J. The appellants seem to have purchased from appellee a tract of land, and about 80 head of sheep, and some loose lumber, etc., at the sum of \$9,500. The contract was entered into in September, 1892, and it seems that appellants were to execute and deposit with some third party a good note for \$1,500, to indemnify appellee against loss upon failure of appellants to comply with the contract. It further appears that a payment of \$2,500, or \$1,500 in cash and \$1,000 in a negotiable note, was to be made the 1st of January, 1893. It further appears that the appellants were to have the privilege of seeding certain portions of the farm, which they did by sowing some wheat and some rye, and also placed upon the farm 24 barrels of corn. It seems that for some cause the contract was not executed, and appellants brought suit seeking to recover \$2,500 damages for the alleged failure of appellee to comply with his contract. A trial resulted in a judgment in favor of appellants for something over \$90. Appellee had filed an answer and counterclaim for \$1,500, and from the aforesaid judgment appellee prosecuted an appeal to the superior court, where the judgment was reversed on account of error of the lower court in refusing to allow appellee to file a certain pleading. Upon return of the case a trial resulted in a verdict and judgment in favor of appellee for \$100, and from that judgment this appeal is prosecuted.

The crowded state of the docket of this court renders it impracticable to notice and to discuss at length the contentions of the parties to this appeal. Suffice it to say that we have carefully read and considered the evidence, and the contentions of the parties, and fail to see that any errors were committed in regard to the admission or rejection of evidence, or as to the giving or refusing of instructions prejudicial to the substantial rights of the appellants. The judgment appealed from is therefore affirmed.

**GREER et al v. BENTLY.**

(Court of Appeals of Kentucky. Nov. 10, 1897.)

**BILLS AND NOTES—CONDITIONAL ACCEPTANCE—RIGHTS OF ACCOMMODATION ACCEPTORS.**

1. The indorsee of a bill of exchange who has taken it with notice of an agreement, omitted by mistake from the bill and acceptance, that the acceptors were not to pay until the maker shall collect a certain county claim, cannot recover of the acceptors where the maker has used due diligence to collect the claim, and proceedings are pending therefor, though the acceptors may be finally liable, though the claim is not collected.

2. The plaintiff having, as attorney for the maker of the bill sued on, made a compromise and settlement with the payees, and, upon payment of the sum agreed, taken an indorsement of the bill to himself, he can recover of the accommodation acceptors only the amount paid by him for the bill.

Appeal from circuit court, Knott county.  
"Not to be officially reported."

Action by W. P. Bently against J. P. Greer and others on a bill of exchange. Judgment

for plaintiff, and defendants appeal. Reversed.

Jas. Goble, for appellants. John L. Scott & Son, for appellee.

PAYNTER, J. On December 14, 1893, P. H. Greer drew a draft for \$253.85, in favor of Grinsted & Tinsly, on appellants J. P. Greer and John L. Grigsby, which they accepted in the following language, to wit: "We accept and agree to pay the within draft at its maturity." This draft was indorsed by Grinsted & Tinsly to the appellee, W. P. Bently, who brought suit on it against the acceptors. It is averred in the first paragraph of the answer that Greer and Grigsby were accommodation acceptors for P. H. Greer of the bill of exchange; that it was agreed and understood by all the parties thereto that the acceptors of the bill were not to pay it until P. H. Greer should receive or collect the money which was due him from Knott county for building a courthouse; that the draftsman, in preparing the bill and writing the acceptance on the back of it, by mistake, failed to incorporate in the acceptance that part of the contract; that Knott county had not paid P. H. Greer the sum due him for building the courthouse; that he has been using diligence to collect the same; that the proceedings were pending in court for that purpose; that the event had not yet happened which fixed their liability; that the plaintiff took the bill with full knowledge and notice of the terms upon which it was accepted. For these reasons it is claimed that the debt had not matured. In the second paragraph of the answer it was alleged that P. H. Greer was indebted to several persons in considerable sums; that, after the maturity of the bill, P. H. Greer made propositions to his creditors for a compromise, and settled with them at 40 or 50 cents on the dollar; that the plaintiff, as an attorney, represented some of the creditors; that Greer requested the plaintiff to make for him a compromise and settlement with some of the creditors, which the plaintiff agreed to do; that he made such compromise and settlement with Grinsted & Tinsly of the debt in suit; that he paid 40 or 50 cents on the dollar for it, and had the bill indorsed to himself. They deny the right to recover anything only the sum so paid. The court sustained a general demurrer to the answer.

Assuming the averments of the answer to be true, the question arises whether the answer constitutes a defense to the action. A partial or total failure of consideration, or even fraud between the antecedent parties, will be no defense to the title of a bona fide holder of a bill of exchange, for a valuable consideration, at or before the time it becomes due, without notice of any infirmity in the bill. *Kelly v. Smith*, 1 Metc. (Ky.) 316. It is alleged that the plaintiff in the action knew of the agreement between the

parties to the bill, and that, by mistake, it was omitted from the bill and acceptance. The defense pleaded would have been good had Grinsted & Tinsly brought this action on the bill of exchange. The plaintiff having notice of the infirmity in the bill, the defense is available in the action. It is true that the time is uncertain as to when the acceptors are bound to pay the bill; yet, if the parties choose to enter into such a contract, they are bound by it. This case is unlike *Brannin v. Henderson*, 12 B. Mon. 62. The acceptance in that case was as follows: "I will see the within paid eventually." No precise time or certain event or precise condition was stated in the acceptance upon which he would pay. The court held that he was required to pay within a reasonable time. In this case the payment was to be made on the happening of a certain event; i. e. when Knott county should pay P. H. Greer. But we do not want it understood that we are of the opinion that, in the event Knott county should not pay P. H. Greer, there could be no recovery on the bill. As the appellants were accommodation acceptors, they are certainly entitled to the benefit of any agreement which the appellant made for P. H. Greer, in the compromise and settlement of the debt in suit. If he bought the debt, and took the assignment of it at the request of P. H. Greer, and for him, all he is entitled to recover is the sum which he spent in the purchase of the bill. He is entitled to be reimbursed that sum. The judgment is reversed for a new trial, and for proceedings consistent with this opinion.

#### PORTER v. SPARKS.

(Court of Appeals of Kentucky. Nov. 9, 1897.)

LANDLORD AND TENANT—ATTACHMENT FOR RENT.

Under Ky. St. § 2302, a landlord may have an attachment for rent when there are reasonable grounds for belief, and he does in fact believe, that, unless an attachment issue, he will lose his rent; and the finding of the lower court upon conflicting evidence of the existence of such grounds for the attachment will not be disturbed.

Appeal from circuit court, Bourbon county. "Not to be officially reported."

Proceeding by attachment by L. W. Sparks against J. W. Porter to recover land. Judgment for plaintiff, and defendant appeals. Affirmed.

Ward & Dickson, for appellant. Geo. C. Lockhart and W. H. Holt, for appellee.

WHITE, J. On November 28, 1894, the appellee, L. W. Sparks, filed his affidavit before the judge of the quarterly court of Bourbon county, stating that the appellant, J. W. Porter, was indebted to said Sparks in the sum of \$1,000, due March 1, 1895, for rent of land, and "that there are reasonable grounds for belief, and affiant believes, unless an attachment be issued, affiant will lose his said rent

of \$1,000, which remains and is wholly unpaid." Upon this affidavit the judge issued an attachment which was levied on certain property of appellant, Porter, and said Porter, after appraisement, executed a forthcoming bond, and the levy was released. These papers were filed in the circuit court of Bourbon county as provided, and in that court appellant filed his affidavit, and controverted the grounds of attachment, and the issue thus made was tried by the court, who adjudged that there were grounds for the attachment, and sustained same, and rendered judgment for the said debt, and entered rule against appellant and his surety on the forthcoming bond, to show cause why the property shall not be forthcoming, or they shall not be required to pay into court the amount of \$1,000, etc. From this judgment this appeal is prosecuted.

The statute upon which this proceeding was had is section 2302, Ky. St., as follows: "When any person, who shall be liable to pay rent, whether the same be due or not, and whether the same be payable in money or other thing, if the rent be due within one year thereafter, the person to whom the rent is owing, or his agent or attorney, may file an affidavit before a justice of the peace, police judge, or judge of the quarterly court of the county in which the tenement lies, stating that there are reasonable grounds for belief, and that he believes, unless an attachment be issued, he will lose his rent; whereupon, such officer shall issue an attachment for the rent, against the personal property of the person liable for same, to any county the person suing out the same may desire," etc. From this statute it appears that a landlord may have an attachment for rent when there are reasonable grounds for belief, and he does in fact believe, that, unless an attachment issue, he will lose his rent. In this case the issue was directly made as to the existence of reasonable grounds for belief that, unless an attachment issue, the appellee would lose his debt. From a careful reading of the evidence, of which there was much, and directly conflicting, but without here quoting in detail, we concur in the judgment of the circuit court in adjudging that there were reasonable grounds for belief in the appellee, and that he did believe, that, unless an attachment issue, he would lose his rent. Therefore the judgment of the circuit court is affirmed, with damages.

#### RAY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 10, 1897.)

##### HOMICIDE—THREATS—INSTRUCTIONS—HARMLESS ERROR.

1. It is not proper to give an instruction calling special attention to evidence of threats by deceased against accused.

2. It is not error to instruct the jury that defendant had the right to use such force as seemed to him to be necessary for his own defense, "and no more."

3. The error in permitting the commonwealth's attorney to make misleading statements in his argument to the jury is harmless if it is apparent that no other verdict could have been rendered.

Appeal from circuit court, Monroe county.  
"Not to be officially reported."

Nick Ray was convicted of murder, and appeals. Affirmed.

J. W. Compton and S. M. Payton, for appellant. Sherman Spear, Boles & Duff, and W. S. Taylor, for the Commonwealth.

BURNAM, J. Appellant was indicted at the June term, 1896, of the Metcalfe circuit court, for the murder of A. W. Scott. On his motion he was given a change of venue in the case to the Monroe circuit court, and was put upon trial at the June term, 1897, of that court, this being the second term after the change of venue, and was by the jury found guilty of murder, and given a life sentence in the penitentiary, and to reverse that judgment he prosecutes this appeal.

The chief ground relied on for reversal is that the court erred to his prejudice in instruction No. 4, which is in these words: "If you shall believe from the evidence before you that at the time the defendant shot and wounded the deceased, Albert Scott, if he did so, he had reasonable grounds to believe, and did believe, that he was in immediate danger or apparent danger of loss of life or receiving great bodily harm at the hands of said Scott, then he had the right to use such force as appeared to him to be necessary for his own defense; and, if he used such force under such circumstances, and no more, you shall find him not guilty." It is insisted by counsel that it was the duty of the court to have told the jury in this instruction that in determining the guilt or innocence of defendant they should consider any threats which had been made by the deceased against the life of the accused previous to the homicide, and relies for this contention on the case of *Oder v. Com.*, 80 Ky. 35. The opinion in that case does not support this contention; on the contrary, it is expressly stated therein that, when a person has been merely threatened "by even the most lawless character, it furnishes no legal excuse for taking his life." The facts in this case are not at all analogous to those recited in the *Oder Case*. In this case the facts are these: A suit was pending in the Metcalfe circuit court between appellant and deceased with regard to the location of a fence along an alley in the town of Edmonton, and on the Saturday morning immediately preceding the beginning of the circuit court deceased was taking depositions in the office of his brother, M. Scott, to be read in his behalf in the trial of that cause, at which time appellant and his counsel were present. It appears from the evidence in the case that there was lying on the table in the office a pistol and a razor, the latter shut up in its case; that the pistol belonged to the marshal of the town, and had been left

in the office a day or two before by him; and that the razor belonged to a party who was in the habit of shaving there. Appellant became incensed at the sight of these weapons, and, according to his own testimony, left the office, and went downstairs, armed himself with a pistol, and came back, although nothing offensive had transpired at that time. When the parties in the office had finished the work of taking depositions, Basil Richardson and Theophilus and Wade Ferrill, at the request of deceased, went to measure the ground which was in contest in the civil suit, with a view of testifying, and while they were so employed the accused came up to where they were, inquired what they were doing, and, upon being informed, began immediately to indulge in threatening, abusive, and violent language towards deceased, and, pointing to a hole in the ground where a post had been set, said, "Here's the place where the damn son of a bitch put his fence!" Just at this time the deceased, Scott, came up, with Kinnaird and Shannon, to the same spot. At the time the accused made the above remark, he did not see the deceased, but, as he raised up, he saw him, and immediately said, "Here's the damn son of a bitch now." The deceased replied, "There is no use for any of that here now," and turned as if he would go away, and, as deceased did this, accused drew his pistol, rushed upon him, saying, "I will give you some of it now," and when within six or seven feet of him fired on him. Deceased and the accused then clinched each other and fell to the ground, when accused succeeded in disengaging himself from the deceased, raised up, and fired on him three times; some of the witnesses testifying that immediately before the firing of the second shot deceased appealed to the accused not to kill him. After the shooting was over, the accused picked up a hat from the ground, and, upon discovering that it belonged to the deceased, threw it at him with an oath, telling him to "take that." The proof shows that the deceased was entirely unarmed, and that he made no attempt to attack the accused in any way. While it is true that some witnesses testified as to threats on the part of the deceased towards accused, there was no assault, no waylaying, and no attempt to injure him proven or attempted to be proven. Under these circumstances we think it would have been error on the part of the court to have specially called the attention of the jury in the instruction to the threats testified to by defendant's witnesses, as all this testimony was before the jury as evidence and he got the full benefit of it; and this was the view taken by this court in the case of *Brady v. Com.*, 11 Bush, 286, where it said: "The decided inclination of the courts is to confine the instructions as closely as possible to the essential facts necessary to make out the charge or defense, and leave the evidence offered to establish these facts to the jury without com-

ment. If it be once admitted that the court may and ought to caution the jury to scrutinize closely one class of evidence, it would be difficult to give a satisfactory reason why such caution should not be given as to every other species. It is most conducive to the due administration of justice, and most consonant with the right of trial by jury, to confine the instructions of the court as closely as possible to those facts which must be found by the jury in order to enable them to say that the prosecution or defense has been made out by proof, and to leave the counsel to argue before them all matters which are merely collateral or incidental." Counsel also insists that the instruction should not have been qualified by the words, "under such circumstances, and no more." We cannot concur in this contention. Accused had the right to use only such force as appeared to him to be necessary to protect himself from immediate danger of loss of life or great bodily harm. When he went beyond this point, he was no longer acting his necessary self-defense.

Another ground relied on for reversal is that the commonwealth's attorney in his closing speech to the jury stated that deceased had been shot in the back. It is contended by counsel for the state that this statement of the commonwealth's attorney was authorized by the testimony of Dr. Pedigo as to the location of the wounds upon the body of the deceased, but, if it be conceded that the commonwealth's attorney was wrong as to the testimony of Dr. Pedigo on this point, it has been repeatedly held by this court that if the trial, in other respects, was fairly conducted, and it is apparent that no other verdict could have been rendered without misconduct on the part of the jury, the verdict should not be set aside on such a ground (see *O'Brien v. Com.*, 80 Ky. 361, 12 S. W. 471; *Rankin v. Com.*, 82 Ky. 424; and *Hourigan v. Com.*, 94 Ky. 526, 23 S. W. 355); and, in our opinion, no other verdict could have been arrived at by the jury from the testimony in this case. The defendant has had a fair and impartial trial, exceptionally free from errors. The instructions, as given to the jury, were as favorable to the defendant as the law authorized, and we think they correctly stated the law. For the reasons indicated, the judgment is affirmed.

#### HAGINS et al. v. COMBS et al.

(Court of Appeals of Kentucky. Nov. 10, 1897.)

##### SALES—PASSING OF TITLE.

Where logs for which the buyer agrees to pay "the most that the seller can get for them, delivered at J. when measured," are marked with the buyer's brand, the title passes, nothing remaining to be done by the seller except to deliver the logs, which he is to be regarded as undertaking to do as agent of the buyer.

Appeal from circuit court, Breathitt county.  
"To be officially reported."

Action by B. M. & D. F. Hagins against William M. Combs and others. Judgment for defendants, on verdict returned in obedience to a peremptory instruction, and plaintiffs appeal. Reversed.

G. W. Flenor, J. B. Marcum, and W. W. Vaughan, for appellants. J. J. O. Bach and W. W. McGuire, for appellees.

HAZELRIGG, J. Appellants and appellees claimed to be the owners of certain saw logs in Breathitt county, Ky., by purchase from the same original owner. Appellants insist that they were the first purchasers, and the sole question in this case is whether the title passed to appellants under the state of facts presented in this record. The only material evidence bearing upon the issue is given by the appellant D. F. Hagins, and is as follows: "I am one of the plaintiffs in this action. I bought the logs claimed by the plaintiffs in this action, from H. D. Back, for myself and B. M. Hagins. Had two trades with Back. Sold him some goods and a log wagon, and he gave me his note. The note recites that he was to pay same in logs delivered at Jackson. Said note reads as follows: '\$140. Jackson, Ky., Dec. 18th, 1893. One day after date, I promise to pay to the order of B. M. and F. Hagins one hundred and forty dollars, with interest at 8% until paid; value received. The above amount to be paid in logs at market price in the spring of 1894, delivered at Jackson. H. D. Back.' Some time after this Loge Terrell sued out an attachment against Back; and I went to Back, and proposed to buy the logs. This was in February, 1894. He agreed to sell same to me, and we made the trade. The logs at that time was at the mouth of Roark's Branch of Quicksand, about three miles above Jackson, and down Quicksand, below the mouth of said branch, at Back's house. I took possession of the logs, and branded them with a large 'C.' I branded all the logs Back had at the mouth of said branch, and I gave him the branding hammer, and he took it down to where the other logs were, and had them branded. Under our trade, and by the terms of same, the logs were delivered into my possession, and were to become our property, and he [Back] was to run them to Jackson for me. We did not measure the logs, as it was raining, nor did we agree upon the price except in this way: I was to pay him for the logs the most that he could get offered in money for them delivered at Jackson when measured."

It is a well-settled principle of law that where there is a contract for the sale of personal property in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the property for the purpose of ascertaining the price, the property or title does not pass until such act or thing is done. But it is otherwise where nothing remains to be done by the seller, and it appears that the parties intended

that the title to the property should pass immediately; and this is true though it is subsequently to be weighed or measured in order to ascertain the total amount of the price. We are of opinion that the title passed immediately upon the branding of the logs, and that this was the intention of the parties, and that the sale was then and there completed. It is insisted by appellees that the sale was not complete, for the reason that, by the terms of the contract, the seller (original owner) was to deliver the logs at Jackson, Ky., a point some distance from the place of sale, and this was a condition precedent. While it is true the seller was to deliver the logs at Jackson, yet we are of opinion that it was the intention of the parties that such delivery was to be made by the seller as the agent of the buyer. Discussing this question in the case of *Terry v. Wheeler*, 25 N. Y. 520, that court said: "Where the sale appears to be absolute and the identity of the thing fixed, \* \* \* we can see no reason for the inference that the property remains in the seller merely because he agrees to transport it to a given place; \* \* \* and, in carrying it, the seller acts as bailee of the buyer." "Symbolical delivery of a large number of logs landed on a stream, preparatory to driving, is sufficient delivery, even as against subsequent purchasers, where \* \* \* the vendee's mark is put upon the logs as they are thus landed, although the vendor is bound by the contract of sale to deliver the logs at a specified place, which is many miles below the landing." *Mill Co. v. Brown*, 90 Am. Dec. 752. The court erred in giving peremptory instructions for the appellees, and the judgment is reversed for proceedings consistent herewith.

#### BURKE v. SHANNON.

(Court of Appeals of Kentucky. Nov. 10, 1897.)  
PLEADING—STRIKING OUT AVERMENTS—SALES—  
PASSING OF TITLE.

1. In an action to recover the price of personal property, it is proper to strike from the answer averments setting up the contract as defendant understood it; such averments being but a denial, in another form, of the allegations of the petition already denied.

2. Upon an issue as to whether the title to hay, for the price of which plaintiff sued, had passed at the time the hay was burned,—defendant claiming that he agreed with plaintiff that after he had baled and weighed certain hay, bought from M., he would bale and weigh all the hay plaintiff could then spare,—testimony of M. to the effect that plaintiff asked him to agree to let defendant bale and weigh plaintiff's hay before defendant baled and weighed his hay was irrelevant.

3. The title to the property passes, and its loss by fire is the loss of the buyer, when it is left with the seller until the performance of subsequent acts by the buyer, such as weighing or measuring.

Appeal from circuit court, Boyle county.

"Not to be officially reported."

Action by James Shannon against J. W. Burke to recover the price of personal property sold by plaintiff to defendant. Verdict

and judgment for plaintiff, and defendant appeals. Affirmed.

Robert J. Breckinridge, for appellant. Robert Harding and J. W. Rawlings, for appellee.

**HAZELRIGG, J.** This action was instituted in the Boyle circuit court by James Shannon, plaintiff, against J. W. Burke, defendant, to enforce the payment of the purchase price of a lot of hay sold by plaintiff to defendant. The petition alleges that in 1893 the plaintiff sold to defendant eight stacks of hay, to be paid for January 1, 1894, at the price of 42½ cents per 100 pounds; "the weight of which hay the defendant was to ascertain, and which hay was left on plaintiff's farm, and left there by defendant, for the purpose, aforesaid, of ascertaining the weight of same, but defendant never weighed said hay." The plaintiff further states in his petition the weight of the hay, and prays judgment for \$238. The defendant filed an answer denying each allegation of the petition, and further pleaded as a defense that in 1893 he bought of Brisco & McFerran a certain lot of hay, to be baled and weighed by him (defendant), and that he agreed with plaintiff that, after he had baled and weighed the hay of Brisco & McFerran, he would bale and weigh all the hay plaintiff could at that time spare, and that he would pay 42½ cents per 100 pounds for all the hay he received from plaintiff, but, before defendant had baled and weighed the Brisco & McFerran hay, plaintiff's hay was destroyed by fire; and defendant never received any hay from plaintiff, and did not, therefore, owe him anything therefor. Upon motion of plaintiff, that part of the answer setting up the contract as defendant understood it was stricken out, and we think properly so. It was simply a further denial by defendant, in another form, of the statements of plaintiff's petition; and proof of such contract could have been, and was, heard under the issue made by the allegations of the petition, and a plain denial thereof by the answer. Upon trial of the issues made, a jury found a verdict for the plaintiff.

It is insisted that the judgment should be reversed because the court instructed the jury not to consider the statement made by the witness McFerran to the effect that plaintiff came to witness, and asked him to agree to let defendant bale and weigh plaintiff's hay before defendant baled and weighed the hay of witness. We think this testimony irrelevant and immaterial, and that it was properly refused by the court.

The defendant further complains of the instruction given by the court which told the jury that if they believed from the evidence that plaintiff and defendant made an agreement, by the terms of which defendant was to take all the hay then on plaintiff's meadow, at the price of 42½ cents per 100 pounds, that the hay should remain on plaintiff's land until defendant weighed the same, and that it was

to so remain that defendant might ascertain the weight thereof, and nothing further was to be done, then the title to the hay passed to defendant, and they should find for plaintiff, though the hay was burned before it was baled or weighed, and that unless they believed that this, and no other, was the contract between the parties, they should find for the defendant. We think the instruction clearly embodies the law of this case. Where one purchases personal property of another, and the buyer leaves it with the seller until the performance of subsequent acts by the buyer, such as weighing, measuring, or otherwise ascertaining the quantity, it is left at the risk of the buyer, unless there is an express contract to the contrary; the title having passed immediately upon the trade being closed. This, however, is not so when there are conditions precedent to be performed by the seller. Mr. Benjamin, in his late work on Principles of Sales (page 73), in laying down the rule that when the seller is bound to weigh, measure, test, or do some other act or thing in reference to the property, for the purpose of ascertaining the price, the property does not pass until such act or thing be done, says: "It is otherwise when nothing remains to be done by the seller, and it appears that the parties intended that the property in the goods should pass immediately, as where all of a certain lot of hay in a rick or barn is sold at an agreed price per ton, the same to be baled and weighed by the buyer;" citing in support of the illustration the case of *Kohl v. Lindley*, 39 Ill. 195-199; *Phillips v. Moor*, 71 Me. 78-81. The pleadings and proof in this action do not indicate that there were any conditions precedent to be performed by plaintiff, as contended. The hay was to be baled, weighed, and paid for by defendant; and the jury so found, under proper instructions. The judgment is affirmed.

#### HAGINS v. WHITAKER et al.

(Court of Appeals of Kentucky. Nov. 6, 1897.)

##### BOUNDARIES—PAROL EVIDENCE.

Parol evidence is admissible to show the line actually run and marked by a surveyor, though it deviates from the course called for.

Appeal from circuit court, Breathitt county.  
"Not to be officially reported."

Action by D. B. Hagins against W. J. Whitaker and others for trespass on land. Judgment for defendants on a verdict returned in obedience to a peremptory instruction, and plaintiff appeals. Reversed.

J. J. C. Bach, for appellant.

**BURNAM, J.** This suit was instituted by appellant against appellee for trespass on his land, and for damages for cutting, carrying away, and conversion by appellee of certain timber. Appellee set up claim to the same land, and the question involved is the proper location of one of the boundary lines of the patent of the land claimed by ap-



pellant, which also involves appellee's title. The evidence shows that Daniel Hagins, the father of appellant, owned a farm lying on both sides of Quicksand creek, in Breathitt county, and that this farm extended to the top of the ridge on each side of the creek; that there is a branch known as the "Dumbbettle Branch" that rises on the south side of the ridge on the south side of Quicksand creek, and opposite Hagins' farm; that in 1866 Hagins obtained a patent for 100 acres of land on the head of this branch, the effect of which was to extend his farm over the top of the ridge. The beginning corner of his patent is a gap between Dumbbettle branch and Quicksand creek; thence north, 50 degrees east, 22 poles, to a pine; thence north, 45 degrees west, 107 poles, to a white oak and service. The evidence shows that there is a marked line from this pine along the top of the ridge to the white oak and service called for in the patent; that this is a curved line, running around the head of the branch, and bordering on the line of the Hagins farm, while the line called for in the patent is a straight line from the pine to the white oak and service, leaving out of the patent boundary the head of the branch. Many years after the date of appellant's patent, appellee obtained a patent for that portion of the land lying between the straight line as called for in the patent and the marked line along the top of the ridge, and bordering on appellant's farm, being a narrow strip separating the land covered by appellant's patent of 1866 from the residue of his tract, which it was evidently the intention of appellant to patent. Appellant, after proving trespass, offered to prove by one of the chain carriers, and another person who was present, that when the survey upon which the Hagins patent was issued was made the surveyor marked a line along the top of the ridge bordering on the Hagins home farm; that Daniel Hagins directed how the line should be made, and marked it as it ran, and that the marked line along the top of the ridge spoken of by appellant in his testimony was the line actually made by the surveyor; that they had run the line from the pine to the white oak and service, and that a straight line between them was not the line made by the surveyor at the time the survey was made. This testimony was excepted to by appellee, and the court below sustained the exception, and refused to allow appellant to show the location of the line marked by the surveyor by parol evidence, and instructed the jury to find for appellee. From the judgment rendered on that finding this appeal is prosecuted, and reversal asked.

In passing upon this question in the case of Lyon v. Ross, 1 Bibb, 467, the court said: "In surveys, where a line has not in fact been run, or, if run, no objects existed on the direction of the line to give it locality, or those that existed, being of a perishable nature, have become extinct, to ascertain the

line in question, the course called for of necessity must be adopted as the only practicable mode; but, when ascertained, and marked by natural or artificial objects, it would seem most reasonable that it should remain to be considered as the proper boundary of the survey, notwithstanding it might afterwards be found to deviate somewhat from a rectilinear direction. To substitute the rectilinear line instead of the line actually run and located by natural or artificial objects, as the test of right between parties, would be subjecting men to the inconvenience of being governed by a rule which was invisible and intangible, and capable of being known but by a few; instead of being governed by a rule which is an object of sense, and equally capable of being known to all." In the case of Cowan v. Fauntleroy, 2 Bibb, 261, the court says: "It is contended that, where the patent describes the line, as in the present case, by its course only, without reference to natural or artificial objects, that it would be contradicting the record by parol proof to admit evidence to establish a marked line deviating from the course called for. This would be true if, where a line is described by its course only, a mathematical line in the cause, either according to the true meridian or the magnetic variation, was intended; but it is apprehended that this is a misconception of the true meaning of such a description of boundary. Such a line was never run in any survey, and it is impossible to be ascertained with perfect precision and certainty by any human means. It seems more rational to presume the description of a line by its course to be applicable to the line as actually run and marked by the surveyor than to one which never was run exists only in idea, and is impracticable to be ascertained with certainty. \* \* \* No rule of evidence will be violated in the admission of proof to show the line as actually run and marked by the surveyor, though it should deviate in some measure from a direct mathematical line. The propriety of admitting such evidence is amply supported upon the score of precedent." This rule has often been approved by this court, and we are therefore of the opinion that the court below erred in rejecting the parol evidence in regard to the marked line at the date of the survey. That the entry of land which has already been surveyed and patented to another is void has been repeatedly adjudged by this court. For the reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

#### McCAULEY v. GALLOWAY.

(Court of Appeals of Kentucky. Nov. 19, 1897.)  
LOSS OF DEED—SUIT TO COMPEL GRANTOR TO EXECUTE ANOTHER DEED—COSTS.

1. Though it may be that plaintiff, having by his own fault lost a deed from defendant to his

grantor before it was recorded, could not compel defendant to execute another deed, it was proper to direct a commissioner to convey on her part.

2. Though plaintiff had, by his own fault, lost a deed from defendant, yet, defendant having resisted the suit to obtain another conveyance, it was proper to render judgment against her for the costs accumulated by reason of her defense; and, though the judgment was erroneous in including other costs, yet, the excess being small, there can be no reversal on that account.

Appeal from circuit court, Muhlenberg county.

"Not to be officially reported."

Action by William Galloway against Annie B. McCauley to obtain a conveyance. Judgment for plaintiff, and defendant appeals. Affirmed.

Johnson & Wickliff, and S. P. Love, for appellant. W. H. Yost and R. Y. Thomas, Jr., for appellee.

GUFFY, J. This action was instituted by William Galloway for the purpose of obtaining conveyance of a certain lot or parcel of ground at Central City, Ky., claimed by plaintiff to have been purchased from Jerry Kirtley. The material allegations of the petition as amended claimed that appellee purchased the lot from Kirtley, and obtained a deed duly acknowledged therefor, which was by accident burned up and destroyed before being recorded; and also that the same land had been conveyed by the appellant, Annie McCauley, to the said Jerry Kirtley, by deed duly signed and acknowledged, but which had never been placed on record, and was then lost, or at least not in appellee's possession. The heirs of Kirtley (he being dead) were made parties to the suit, as was appellant. Some defense was made upon the part of Kirtley's heirs, and appellant, by answer, admitted the sale and conveyance to Kirtley of a part of the lot claimed, to wit, 40x65 feet, but denied any sale or conveyance of the residue. After issue joined, and proof taken, the court rendered a judgment in favor of appellee for a conveyance of the land claimed, subject to the life estate of Jerry Kirtley's widow, and rendered judgment against the defendant for the costs expended, and from that judgment this appeal is prosecuted.

We do not concur in appellant's contention that this was a suit simply to quiet title, but was manifestly a suit to obtain a conveyance; and, while it may be true that Annie McCauley could not have been compelled to make any conveyance to the lot sold to him, the appellee having, by his own fault, lost or misplaced the deed, yet it was proper for the court in such a case to direct the commissioner to convey on her part, to the end that a clear legal title to the lot should be made.

It is also insisted by appellant that the judgment for costs is erroneous against her. It will be seen, however, that appellant

denied the relief sought by appellee, and that denial was the cause of the accumulation of a large portion of the costs, and we are not disposed to reverse the judgment on account of the judgment for costs, which, if at all erroneous, is erroneous to a very small extent. The Kirtleys have not appealed, hence we need not discuss the propriety of the judgment as to them. It seems to us that the sale and conveyance of the entire lot in contest by appellant to Kirtley and by Kirtley to appellee was clearly proven, and, besides, the appellant in this case did testify on her own behalf; hence the testimony on behalf of appellee is entirely uncontradicted by any opposing testimony. For the reasons indicated, the judgment is affirmed.

#### BRASHEARS v. HOLCOMB et al.

(Court of Appeals of Kentucky. Nov. 19, 1897.)

#### APPEAL—CERTIFICATE TO TRANSCRIPT—FINAL ORDER.

1. The certificate of the clerk, to a transcript, that the foregoing is a "copy, in substance, of the record" in a certain case, is not a compliance with Civ. Code, § 737, subsec. 12.

2. An order directing a specific attachment to issue upon execution of a bond is not such a final order as is appealable.

Appeal from circuit court, Letcher county.

"Not to be officially reported."

Action by Susanna Holcomb and others against Robert O. Brashears. Order for a specific attachment, and defendant appeals. Dismissed.

R. O. Brashears, in pro. per. John L. Scott, for appellees.

WHITE, J. This record is very imperfect, and the certificate of the clerk thereto reads: " \* \* \* do hereby certify that the foregoing is a copy, in substance, of the record," etc. This is not a compliance with subsection 12 of section 737 of Civil Code. This appeal is prosecuted from an order of the Letcher circuit court directing a specific attachment to issue for two mules, the property of appellant, upon the execution of a bond to secure appellant if the attachment was wrongfully sued out. There is no judgment disposing of this attachment. The order appealed from is not such a final order as will authorize an appeal to this court. Wherefore, this court having no jurisdiction of the appeal, and there being no judgment rendered by the Letcher circuit court, this appeal is dismissed.

#### JOHNSON'S ADM'X v. HALDEMAN et al.

(Court of Appeals of Kentucky. Nov. 6, 1897.)

#### LIBEL AND SLANDER—SURVIVAL OF ACTION.

An action for libel is an action for slander, within the meaning of Ky. St. § 10, and does not, therefore, survive the death of the plaintiff.

Appeal from circuit court, Laurel county.

"To be officially reported."

**Action by Andrew Johnson against W. W. Haldeman and others for libel.** Judgment dismissing the action upon death of plaintiff, and plaintiff's administratrix appeals. Affirmed.

R. D. Hill, for appellant. F. Hagan, for appellees.

**BURNAM, J.** The only question in this case is whether an action for libel survives the death of the plaintiff. Appellees were sued by Andrew Johnson for publishing an alleged libel against him. Before trial, he died, and his administratrix moved the court to revive the action in her name. This the court refused to do; holding that the action was embraced by the provisions of section 10 of the Kentucky Statutes, under the word "slander." By that section, actions for slander do not survive. As libel is not named in that section, the question is, does the word "slander" embrace libel? The word "slander" is the general and original word for all kinds of defamation. One can be defamed by words spoken, words written, or by signs or pictures, and, when so defamed, it is called slander; and the word "slander," in the statute, we think, was intended to embrace all these varieties of defamation. There is nothing in the statute which shows that the word was intended to be limited in its meaning to oral slander. Webster defines "slander" as defamation generally, whether oral or written, but goes on to say that in modern usage it has been limited to defamation by words spoken. *Bac. Abr.* says: "Slander is the publishing of words, in writing or by speaking, by reason of which the person to whom they relate becomes liable to suffer some corporal punishment." *Esp. N. P.* 496, says in regard to the action of slander: "Slander is the defaming a man in his reputation, by speaking or writing words from whence any injury in character or property arises, or may arise, to him of whom the words are used, and may be committed—First, by words; second, by writing (which is called 'libel'); third, by picture, or representation of that sort." *Folkard Starkey* says: "The term 'slander' was formerly used to embrace written as well as oral defamation." 2 *Kent, Comm.* p. 16, draws the distinction between spoken and written slander; treating the word "slander" as comprehensive enough to embrace both oral and written defamation. It has never been the policy of the law to keep alive actions of this character after the death of the plaintiff. For the reasons indicated, the judgment of the lower court is affirmed.

#### COLLINS et al. v. THOMPSON et al.

(Court of Appeals of Kentucky. Nov. 13, 1897.)

#### CONSTRUCTION OF WILL—DEFEASIBLE FEE.

Under a devise by a testator to his three nieces, "and, in case either of them die without issue of their bodies, the portion of such one dying to be equally divided between the sur-

vivors," each of the nieces takes the fee in her share, subject to be defeated in the event of her death without issue at any time, and not merely in the event of her death without issue during the lifetime of the testator; the rule applying to a devise over in the event of the death of a remainder-man having no application.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

**Action by the Fidelity Trust & Safety-Vault Company, trustee, against Ella Thompson and others, for the construction of a will.** Judgment construing will, and Hilton Collins and others appeal. Reversed.

Simrall, Bodley & Doolan and B. F. Washer, for appellants. Randolph H. Blaine, for appellees.

**GUFFY, J.** The Fidelity Trust & Safety-Vault Company, trustee of Mrs. Ella Thompson, instituted suit in the Jefferson circuit court, chancery division, against Mrs. Ella Thompson, etc. One of the objects of this suit was to obtain the construction of the will of Isabella Barnes. Ella Thompson answered, and, for answer and cross petition, claimed that she was the owner in fee of the property devised to her by the will of said Isabella Barnes. Anna Giltner and Hilton Collins filed demurrers to the petition, which demurrers were overruled by the court; and, Collins and Giltner failing to plead further, the court adjudged, in substance, that appellee Thompson held the property in question in fee. The clause of the will under consideration, and the construction of which was sought by the suit, is as follows: "That, after the payment of my just debts, I give and bequeath all my property, of whatsoever description, to the following children of my sister Grace Alice Collins, to wit, Ann Isabella Giltner, Ella Collins, and Hilton Collins, to be equally divided between them; and, in case either of them die without issue of their bodies, the portion of such one dying to be equally divided between the survivors. That, the portions given to my said nieces, I direct to be held as their sole and separate estate, free from the control of husbands they may now or hereafter have; and for that purpose I appoint my brother Edwin V. Thomas trustee for Ella Collins, and Henry Giltner trustee for his wife, Ann I. Giltner." It is the contention of appellee Thompson that the contingency was made certain upon the death of the testator, appellee then being alive. It is the contention of appellants that appellee took only a defeasible fee, and that, in the event she should die without issue of her body, the property so devised to her would revert to the other devisees. These contentions have been ably and extensively argued by counsel on each side, and many authorities cited, but we deem it unnecessary, to notice and comment at length upon the various authorities referred to. It seems to us that the decision in the case of *Crozier v. Cundall* (Ky.) 35 S. W. 546, is conclusive of this case.

The opinion in the case *supra* discusses the various decisions supposed to bear upon the construction of wills vesting in the devisee less than the fee, or vesting a defeasible fee. We quote as follows from said opinion: "The clauses of the will of the testator which are involved in this controversy are the fifteenth, the twenty-second, and the twenty-fifth. By the fifteenth clause he devised to his said daughters, Almyra and Patsey, a tract of about sixty acres of land in Garrard county, and a tract of about forty acres in Lincoln county; and both of said tracts were devised 'to them and their heirs, forever.' Having, by the fourteenth clause of his will, directed his executors to sell certain other lands belonging to him, by the twenty-second clause he required his executors to collect all debts and demands due him from any source whatever, and to pay all his just debts and expenses incident to the final settlement of his estate, and all bequests made by him in his will. The following provision was then made, viz.: 'All my estate remaining after such settlement, I will and bequeath to my daughters Almyra Baker and Patsey Baker, to them and their heirs, forever, with the understanding that they are to pay out of such remaining fund' certain sums to certain of his grandchildren. The twenty-fifth clause is in the following words: 'In the event that either one of my daughters Patsey or Almyra should die without bodily issue, then such portion of my estate as is devised to them shall revert back to, and be equally divided between, the rest of my children and the children of those who are dead; and, if Kate Baker Denton or Harriet Baker Hopper die without issue, then that portion of my estate devised to them, or such one as shall die without bodily issue, shall be vested in my daughters Patsey and Almyra, to their use and benefit, as above.'" It further appears from said opinion that said Almyra and Patsey each made a will bequeathing to each other all of their estate, real and personal, and also making their two nieces, in the event of the death of either, the ultimate beneficiaries. Each of said wills was admitted to probate in Garrard county. It further appears that Almyra Baker conveyed to Kate B. Cundall and Hallie B. McKee the 60 and 40 acre tracts of land once owned by Capt. Abner Baker, and by him willed to Almyra and Patsey Baker, to have and to hold same forever. "The two wills of Patsey and Almyra Baker, and the deed of the latter, above referred to, were attacked in the petition, in which, it seems, all the surviving descendants of Abner Baker joined, either originally or by amendment, except the appellees, Mrs. Cundall and Mrs. McKee, and two others. They are set up and relied upon, however, in the answer of Mrs. Cundall and Mrs. McKee and their husbands in support of the title they claim to the two tracts of land, and the residue of the estate devised in the will of Abner Baker to his said daughters. The

questions at issue were raised by general demurrer of the plaintiffs to the answer of Mrs. Cundall and Mrs. McKee and their husbands, which was overruled, and by general demurrer of the latter to the reply of the plaintiffs to their answer, which was sustained; and in passing upon these demurrers the lower court held that the lands in controversy passed under the will of Abner Baker, in fee simple, to Almyra and Patsey Baker, and that by the wills of the latter and the deed of Almyra the said lands passed to appellees Kate B. Cundall and Hallie B. McKee in fee simple. A judgment was accordingly entered dismissing the petition; and that judgment, on proper exceptions, is before us for review. There is no doubt that the words in the fifteenth clause of the will of Abner Baker, by which the lands in controversy were devised to his daughters, Patsey and Almyra Baker, 'to them and their heirs, forever,' were sufficient to vest them with the absolute right and title to the lands at the death of Abner Baker, unless the title was made subject to be defeated by the twenty-fifth clause of his will, by which it was provided that, in the event of the death of either of his said daughters 'without bodily issue,' the portion of the estate devised to them should revert back to, and be equally divided between, the rest of his children, and the children of those who are dead. The same question has been passed upon by this court in many cases involving the construction of similar testamentary provisions. In the case of *Thackston v. Watson*, 84 Ky. 206, 1 S. W. 398, the rule applicable in construing such provision is stated as follows: 'The settled and well-understood construction in reference to such devises seems to be that where an estate is given or devised with remainder over, but, in the event the remainder-man should die without a child or children, then to a third person, the words "dying without children or issue" are restricted or limited to the death of the remainder-man before the termination of the particular estate; and it is equally as well settled that if an estate is devised to one in fee, but if he die without issue, or without leaving a child or children, then to another, the first devisee takes a defeasible fee, which is subject to be defeated in the event of his death at any period without issue.'" The opinion then proceeds to discuss a large number of decisions, most of which are referred to by counsel, and clearly holds that the said Patsey and Almyra take only a defeasible fee, and that, as they died without issue, the property devised to them reverts to the other children or heirs, as prescribed by the testator, and reversed the judgment of the lower court, and remanded the cause for proceedings consistent with this opinion. It will be seen that the provisions of the will discussed and decided in the opinion *supra* are in all respects similar to the one in the case at bar, and, if there is any difference, the expressions in the will of Abner Baker tend more strong-

ly to vest Patsey and Almyra with a fee, than the provisions in the will at bar. It results, therefore, that the court erred in sustaining the demurrer to appellees' petition, and the judgment is reversed, and the cause remanded, with directions to overrule the demurrer, and for judgment holding that the devisees named in the will in question took only a defeasible fee, and for proceedings consistent herewith.

### SCHUFF v. GERMANIA SAFETY-VAULT & TRUST CO. (three cases).

(Court of Appeals of Kentucky. Nov. 17, 1897.)

#### BILLS AND NOTES—CONSIDERATION—RELEASE OF ACCOMMODATION MAKER—COMPOSITION WITH CREDITORS.

1. A note executed by S. for the balance of a note upon which he was surety is without consideration if the creditor agreed to accept a composition by the principal with his creditors in discharge of both its secured and unsecured debts against him, and received its pro rata under the composition settlement.

2. If the surety in a note was induced by the creditor to release a mortgage which he held as indemnity, by the assurance that the note would enter into a composition made by the principal, and be discharged in accordance therewith, the surety is not liable on a note executed by him for the balance after deducting the amount paid under the composition agreement.

3. The accommodation maker of a note, the nature of whose liability is known to the indorsee, is released by an extension of the time of payment without his consent.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Consolidated actions by Germania Safety-Vault & Trust Company, as assignee of Masonic Savings Bank, against William Schuff and Jacob Krieger, upon certain promissory notes. Judgment for plaintiff, and William Schuff appeals. Modified.

M. A., D. A. & J. G. Sachs, Lane & Burnett, and Wm. Krieger, for appellant. Helm & Bruce, for appellee.

WHITE, J. These three consolidated cases were brought in the Jefferson circuit court by the appellee, the Germania Safety-Vault & Trust Company, as assignee of the Masonic Savings Bank, against appellant, William Schuff, and Jacob Krieger, and were there numbered, respectively, 32,869, 33,651, and 34,678, and in this opinion will be so distinguished. Action No. 32,869 was brought on two notes, dated November 22, 1888, for \$1,235.25 each, given by appellant, William Schuff, to Jacob Krieger, and payable in one and two years after date, with interest; and in this petition it is alleged that these notes were, in due course of business, sold and assigned to the said Masonic Savings Bank, and before maturity, and were therefore placed on the footing of a foreign bill of exchange, and that at maturity payment was regularly and duly demanded, which was refused, and the said notes duly protested, etc. To this action, appellant, Schuff, filed

separate answer, wherein he alleged that the notes sued on were without consideration, either legal or valuable, but were signed by him to said Jacob Krieger as an accommodation maker, and for the purpose of discount, and that there was no other consideration therefor; that of this fact the Masonic Savings Bank was aware,—had actual notice; and that the same, with others, were made to be discounted by said Jacob Krieger at the Masonic Savings Bank; and the answer denies that the same was ever discounted by said bank at all, or that said bank was the owner of same, for value or at all, and that, as said notes were without consideration in toto, the same were void, not having passed into the hands of an innocent purchaser or any purchaser for value. In a second paragraph of the answer, appellant, Schuff, pleads that, if said notes were discounted by the Masonic Savings Bank that it did so with full knowledge of the fact that he was but the accommodation maker of same, and well knowing the fact that he signed same with the express understanding and agreement that in no event was he (Schuff) ever to pay same to any person. In a third paragraph, appellant, Schuff, pleads that if the said note due November 22, 1889, was in fact ever assigned to the Masonic Savings Bank for value or at all, on the day of its maturity the said bank, for a good and valuable consideration, contracted with said Jacob Krieger, and without the knowledge or consent of this appellant, to extend the maturity for the payment of the principal of said note until the 22d day of May, 1890, six months, and pleads and relies on this contract of extension as a bar to a recovery on said note first due; i. e. due November 22, 1889. In a fourth paragraph of the answer, appellant pleads that the two notes sued on are the first two of a series of four, executed the same day, and for the same amount, and for the same purposes, to wit, he says that prior to May 8, 1888, the said Jacob Krieger had, by deed of mortgage duly signed, acknowledged, and recorded, conveyed to this appellant divers and various lots of land in the city of Louisville, for the purpose of indemnifying this appellant for all loss or damage resulting or that might result by reason of certain obligations due the Masonic Savings Bank, wherein this appellant, Schuff, was surety for a large sum; that in May, 1888, the said Jacob Krieger failed, and afterwards, in October, the said Jacob Krieger made a composition agreement with his creditors, by which it was agreed that he would pay 25 cents on the dollar in cash, and the further sum of 5 cents on the dollar to be paid thereafter; that this agreement of composition was effected and agreed to by the said Masonic Savings Bank, who were creditors of said Krieger in a large sum, exceeding \$30,000; and that by said composition the said Masonic Savings Bank agreed to, and did, release, acquit, and discharge said

Jacob Krieger from all his indebtedness to said bank on and prior to said 8th day of May, 1888; and that, in order that said composition agreement might be effected at the instance and request of the said Masonic Savings Bank, and upon its undertaking to release him from all liability as surety of said Jacob Krieger on the obligation to the said bank, this appellant released his mortgage lien on the notes and land held by appellant, which he held as indemnity. Appellant pleads that, in making said composition agreement, the said Masonic Savings Bank and said Jacob Krieger, without the knowledge or consent of appellant, had and made a secret agreement between them that while said bank was to receive its pro rata under the composition settlement, and was to apparently agree to same, in fact the said sum was not to be a payment and satisfaction in full to said bank; and that, as a part of that secret agreement between the bank and Jacob Krieger, the said Jacob Krieger was to procure this appellant to make the four notes, two of which are sued on, as accommodation notes, under the agreement between Krieger and appellant as above, and that said Krieger should indorse and assign the said four notes to the said bank as an additional payment on his indebtedness; this to be in addition to the amount pro rata paid to all the creditors under the compromise settlement. Appellant pleads that, at the time he signed the four notes, it was agreed and understood that it was for the purpose, if discounted at all, to enable the said Jacob Krieger to raise money to continue and carry on the business of a tannery as before he had done; and he pleads that said four notes were given to the Masonic Savings Bank as a payment on said old indebtedness, which was settled by the composition agreement, and are in toto without consideration, and void. The defendant Krieger also filed separate answer, wherein he pleads and denies that said notes were ever discounted by the Masonic Savings Bank before or after their maturity, or at all, and also pleads the contract of extension pleaded by appellant, Schuff, on the one note.

By a reply filed, the appellee denied serially all the allegations of the answer of Krieger, and filed written motion to strike from the answer of appellant, Schuff, certain matter, as to the protest of said notes, and also as to the knowledge of the bank as to the purposes for which said notes were executed, which was sustained. Appellee also filed demurrer to the fourth paragraph of the answer of appellant, Schuff, which was overruled; and then appellee filed reply to the answer of appellant, Schuff, specially denying every material allegation therein contained, and further pleading that, after the assignment of Jacob Krieger was made, certain creditors of said Krieger brought suit in equity in the Louisville chancery court, wherein the mortgage to appellant was attacked, as an act done and

device resorted to in contemplation of insolvency, and with intent to prefer appellant, Schuff, and wherein it was sought to put appellant, Schuff, on an equal footing with the other creditors, as provided by what is known as the "Statute of 1856"; that it was under this state of facts that the compromise agreement was made; that the Masonic Savings Bank did, so far as its unsecured debt was concerned, agree to the compromise agreement, but denied the alleged secret agreement by which the bank was to be paid anything else than the 25 cents, or that any other sum was paid, or that these notes were assigned in payment of any sum on said compromise agreement except for the remaining balance on the secured debt due the bank, on which appellant, Schuff, was surety, after the payment on that debt of the pro rata at 25 cents allowed to Schuff in the compromise agreement; and that, as to the balance, these four notes were in fact renewals of the old debt, divided into four payments. By a rejoinder, all these allegations were denied, and, upon the issues thus made, a trial was had before a jury, which resulted in a verdict for defendant. Upon motion and grounds for new trial being made, the court set aside that verdict and judgment, and granted a new trial. Thereafter case No. 33,651, which was for the third of the series of notes, was filed, in which the pleadings and issues were the same as above; and also case No. 34,678, which was for the fourth and last of the series, was filed, and the same pleadings and defenses and issues made; and by an order of court all three cases were heard and tried together, which was done before a jury upon much proof, which resulted in a verdict for the appellee for the four notes, and judgment was rendered accordingly, and from that judgment this appeal is prosecuted.

On the trial of the consolidated cases, the court gave the following instructions to the jury, four in number: No. 1: "The court instructs the jury that they should find for the plaintiff, as against the defendant Jacob Krieger (the tanner), in the sum of \$1,235.25, with interest from November 22, 1889; and in the sum of \$1,235.25, with interest from the 22d day of November, 1890; and in the sum of \$1,235.25, with interest from the 22d day of November, 1891; and in the further sum of \$1,235.25, with interest from the 22d day of November, 1892,—unless they shall believe from the evidence that the Masonic Savings Bank, by its president, Jacob Krieger (the banker), agreed that it would accept the terms of the composition made by defendant Jacob Krieger (the tanner) with his creditors, in discharge of both the unsecured and the secured debts held by it against the said Jacob Krieger (the tanner)." No. 2: "But if they shall believe from the evidence that the Masonic Savings Bank, by its president, did agree to accept the terms of composition entered into between the defendant Krieger and his creditors in discharge of both the unsecured and secured debts held

by it against him, then the law is for the defendants, and so they should find." No. 3: "If the jury believe from the evidence that the defendant Krieger had executed a mortgage to the defendant Schuff to indemnify him against loss by reason of his being surety for the said defendant on paper held by the Masonic Savings Bank against the said defendant Krieger, and that Schuff was induced to release the said mortgage by the assurance of the said bank, by its president, that the said debts upon which he was surety would enter into the composition made by the defendant Krieger with his creditors, and be discharged in accordance with the terms of said composition, then the law is for the defendant Schuff, and they should so find." No. 4: "The court instructs the jury that, if they believe from the evidence that the composition or compromise of the debts of Jacob Krieger did not include the secured debts due the Masonic Savings Bank, then the alleged composition does not constitute any defense to this action for either defendant Krieger or defendant Schuff, unless they further believe from the evidence that Schuff was induced to release his mortgage on the assurance that the debt upon which he was surety should enter into the composition, as indicated in instruction number three." To the giving of each of these instructions, appellant reserved proper exceptions. The appellant, Schuff, asked the court to give instructions to the jury, 12 in number, all of which were refused; and, in our view of the case, it will only be necessary to notice No. 1, which is as follows: "If the jury believe from the evidence that at the maturity of the note sued on, dated November 22, 1888, and due in one year after date, the Masonic Savings Bank and the defendant Jacob Krieger, without the knowledge of the defendant William Schuff, agreed that same should be extended six months from its maturity, and that the defendant Jacob Krieger should pay interest at the rate of six per cent. per annum to the Masonic Savings Bank thereon, for the time of such extension, then the law is for the defendant William Schuff as to such note, and the jury must so find." The appellant's reasons for new trial are the alleged errors of the court in giving instructions, in refusing instructions, in admitting testimony, in excluding testimony, and that the verdict is contrary to the law and evidence, and is not sustained by the evidence.

The evidence is very voluminous and somewhat conflicting, but, in our opinion, is sufficient to sustain the verdict of the jury. The weight of evidence seems to sustain appellee's contention that the Masonic Savings Bank did not go into the composition with the other creditors of Krieger as to its secured debt, but only as to the unsecured debt. As to the question of the release of the mortgage by appellant, Schuff, and the representations made to him, and the causes of this release by him, there is direct conflict of evidence. The verdict of the jury cannot be said to be flagrantly

against the evidence in this particular, and this court has repeatedly held the verdict cannot be set aside unless it appears to be flagrantly against the evidence.

In our opinion, instructions Nos. 1, 2, 3, and 4, given by the court, clearly and concisely state the law applicable hereto, and the giving of same was not error. The instructions asked by defendant, and refused by the court, were, in our opinion, except as to instruction 1, copied above, all properly refused by the court. Such as were applicable were, in effect, given to the jury by the court, and any further instruction would have tended to confuse the jury.

We are of opinion that instruction 1, asked for by defendant, should have been given. The evidence on this particular question shows that the appellant, Schuff, was only an accommodation maker of this note, and that this fact was known to the Masonic Savings Bank; for, if their testimony is to be believed, this was a renewal of a balance of the secured debt that it refused to put into the composition; and that said note was extended by said bank without the consent or knowledge of appellant, Schuff, is almost equally clear. The indorsement on the back of the note could only have been made by some officer of the bank, and that it was a mistake in dating to read May 22, 1889, is clear. The indorsements reading: "Paid June 1, 1889, \$37.05, for six months' interest to May 22nd, 1889. Paid Dec. 6, 1889, \$37.05, for six months' interest to Nov. 22nd, 1889. Note extended six months, due May 22nd, 1889,"—could not be true, as the note on its face was due November 22, 1889, and to extend the note six months must necessarily put it May 22, 1890. If this extension was given to Krieger without the consent of Schuff, which we think the evidence shows was the fact, then the liability of Schuff ceased, as by this act of extension he was released. Wherefore we are of opinion that the judgment of the circuit court as to the three notes due, respectively, November 22, 1890, 1891, and 1892, for \$1,235.25 each, and bearing interest by the judgment from their maturity, be affirmed, with damages, and that the judgment of the circuit court for the note due November 22, 1889, for \$1,235.25, and bearing interest from said date, November 22, 1889, should be reversed, and cause remanded, with directions to set aside the said judgment as to appellant, Schuff, and to grant him a new trial, and for further proceedings.

SPURLOCK et al. v. NOE et al.

(Court of Appeals of Kentucky. Nov. 19, 1897.)

INSANE PERSONS—VACATING JUDGMENT.

The land of N. was sold in a proceeding by creditors, and the sale confirmed, in the year 1882. N. was then transacting his own business without objections from his family, but in 1884 was adjudged to be a lunatic, and a committee was appointed. In 1889 he died, and his heirs then brought suit to set aside the sale.

It does not appear whether the inquest of lunacy showed, as it should have done, the date of the first attack. The evidence shows that, while N.'s mind was impaired at the time of the judgment against him, he had sufficient mind to understand the effect of legal proceedings. *Held*, that the judgment should not be set aside.

Appeal from circuit court, Harlan county.

"Not to be officially reported."

Action by Daniel Noe and others against Sanford Spurlock and others to set aside a judgment and sale of land thereunder. Judgment for plaintiffs, and defendant Spurlock appeals. Reversed.

Howard & Clay, for appellant. J. Smith Hays, N. B. Hays, and S. B. Dishman, for appellees.

GUFFY, J. It appears from the allegations in the petition in this action that Elizabeth Noe, W. T. Hall, and Robert Napier claimed debts against Nathan Noe, and procured a sale of a large and valuable tract of land in Harlan county, being the place where the said Noe lived in his lifetime, giving a description of the land. It is further alleged that the land was sold, and that defendant Sanford Spurlock (now appellant) became the purchaser at the price of \$780. It is further charged that at the time of said sale and judgment Nathan Noe was a lunatic, and incapable of attending to any kind of business, and did not owe the debts for which said land was sold; and that said land is worth \$3,000; and that said Spurlock has had the sole use and occupation of said land, and the rents thereof, for — years. It is also alleged that nearly all of the plaintiffs at the time of said sale were infants, and that their father was destitute of mind, and that he made no defense against said debts, or the sale of the land, and did not know that such a suit was going on, and that immediately after the sale Nathan Noe was adjudged to be a lunatic, and carried to the lunatic asylum, where he remained two or three years, was pronounced incurable, and sent back to Harlan county, and died. Several amended petitions were filed, and on motion some portions thereof were stricken out. The real issue finally presented was that Nathan Noe was of unsound mind at the time of the rendition of the judgment, and that he did not owe the debts sued for, and was a lunatic at the time of the confirmation of sale and conveyance of the land to Spurlock. All the material averments of the petition were denied by Spurlock. It appears from the pleadings, and there is some testimony conducing to show, that John D. Noe, son of Nathan Noe, purchased the land at the commissioner's sale at the price named. It is further contended by plaintiffs that the purchase was made by an agreement with appellant, Spurlock, to the effect that he (Spurlock) was to have the land; all of which, however, is denied by Spurlock. The value of the land is estimated by witnesses all the way from \$1,000 to \$4,000. There is no proof conducing to show that the debts on which the judg-

ment was rendered were not just and due. A considerable amount of testimony was introduced in the case. It further appears that Nathan Noe left 13 children, 10 of whom united in the petition for a recovery of the land, or rather for a setting aside of the judgment and sale, and praying that the land be adjudged to them. It appears also that Spurlock, having heard of some dispute about the land, obtained a deed from three of the children of said Nathan Noe, for which, he said, he paid \$10 apiece to two of them. Appellant's contention is that John D. Noe bought the land without any arrangement with him, and that he afterwards purchased the same from John D. Noe, and by appropriate orders of the Harlan circuit court same was conveyed to him by the commissioner of the court. There is some evidence conducing to show that the sale was made in 1881, and the deed made to Spurlock in 1882, and that afterwards Nathan Noe was, by the county court of Harlan, adjudged to be a lunatic, and sent to the lunatic asylum; and that in 1884 he was returned as incurable and harmless, and one of his sons was appointed as committee, and took charge of him, and drew \$75 per year for his support, until the time of his death, which period is not well established, but some records introduced tend to show that he probably died in 1889. The court, upon final hearing, adjudged in favor of the plaintiffs to the extent of 10-12 of the land conveyed to Spurlock, holding, to effect, that he was entitled to his purchase money, with interest, and pay for valuable improvements to the extent they increased the vendible value of the land, and to be held accountable for reasonable rents, and referred same to the master commissioner to take proof and report as to these items, and from that judgment Spurlock has appealed.

We deem it unnecessary to determine as to the question of the statute of limitation pleaded and relied upon by appellant, or to determine as to whether the proper parties were all before the court. It will be seen from the record that the judgment was rendered in 1881, and sale confirmed in 1882, before the inquest as to the sanity of Noe, and that at least from 1884 one of his sons was his committee, having him in charge, and drawing \$75 per annum from the state for his support, on the assumption that he was a pauper lunatic. There is proof conducing to show that at and before the rendition of the judgment and sale of the land Nathan Noe was in bad health, afflicted with the palsy, and that he was of unsound mind, and, in the judgment of sundry witnesses, not capable of transacting business. It further appears that he was going at large, and attended, without restraint, to his own affairs, up to and after the confirmation of the sale, and that no steps were taken to place his affairs in the hands of a committee, or have him adjudged a lunatic, until after the confirmation of the sale. The testimony of appellant is that he regarded



him as capable of attending to his business, and was not aware of his lunacy, and that he (appellant) had nothing to do with the judgment or sale of the land until after the same was purchased by said Noe. The decisive question in this case is whether or not Nathan Noe was of such unsound mind at the time of the rendition of the judgment and the sale of the land as to render the same void or voidable. The presumption of law is that all men are sane, and capable of understanding the nature and effect of contracts, and all suits and proceedings in court, and, although a party may be in bad health, and his mind, to some extent, impaired, yet, if he has sufficient mind to understand and comprehend the nature and effect of contracts, or comprehend and understand the effect and result of legal proceedings, the same are binding upon such persons. In this case the judgment and sale complained of were rendered at a time when Nathan Noe was going at large, and attending to his own business, without restraint or objection from his friends, or from his numerous family of children. It is true that he was found a lunatic after confirmation of the sale, and by statute the verdict of the jury should have shown the date of his first attack; but, if such was shown by the proceedings, the plaintiffs have failed to exhibit the record in that case. It also appears that one of his sons was appointed his committee in 1884, and, although said Nathan Noe was reported as having no property, no steps were taken by said committee, or any one else, to set aside the judgment or sale complained of. Public policy requires that the judgments and orders of courts should not be lightly vacated or set aside upon the assumption that the parties against whom the same were rendered were lunatics at the time of such rendition; and, taking all the facts and circumstances proven in this case into consideration, it seems to us that the evidence is not sufficient to establish such unsoundness of mind upon the part of Nathan Noe as to authorize the sale, confirmation, and deed to be set aside or vacated. For the reason indicated, the judgment of the court below is reversed, and the cause remanded, with directions to dismiss the petition of appellees, and for proceedings consistent herewith.

#### ROBERTS v. HINKLE.

(Court of Appeals of Kentucky. Nov. 19, 1897.)

#### ENFORCEMENT OF FOREIGN JUDGMENT—LIMITATION.

To an action on a judgment of a justice's court in another state the plea of limitation to the claim on which the judgment is based is not available.

Appeal from circuit court, Carlisle county.

"Not to be officially reported."

Action by Jessie Hinkle against J. F. Roberts on a judgment. Judgment for plaintiff, and defendant appeals. Affirmed.

John W. Ray, for appellant. Walter G. Chapman, Warming Order Atty., for appellee.

GUFFY, J. It is substantially alleged in the petition in this action that the defendant (now appellant), J. F. Roberts, was indebted to plaintiff in a large sum; and that on the 8th of February, 1893, she instituted suit in Esquire A. Comings' court, justice of the peace in and for the county of Alexandria, and state of Illinois, in her favor and against defendant, Roberts, and caused process to issue thereon, which was duly executed on said Roberts; and that on the 25th of February, 1893, said court rendered judgment in her favor for the sum of \$118.15, with interest from date of said judgment, and \$3.70 costs, upon which execution was duly issued, and returned "No personal property found to satisfy same." It is also alleged that said court had jurisdiction of the amount claimed, and also of the defendant, Roberts. The answer denied the indebtedness, and also denied the jurisdiction of the justice who rendered the judgment, and also pleaded the statute of limitation against said claim. After the issues were fully made up, and proof taken, judgment was rendered in favor of the appellee for the sum claimed, and from that judgment this appeal is prosecuted.

It seems to us that the finding of facts by the judge, to whom the case was submitted without the intervention of a jury, and his conclusions of law, are correct. The jurisdiction of the court is clearly sustained by the proof, and, the action being based upon a judgment, the statute of limitation pleaded was not available. The answer being a mere denial, no reply was necessary. The pleadings and proof fully sustain the judgment appealed from. Judgment affirmed.

WHITE, J., not sitting.

#### BUTREY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 19, 1897.)

#### HOMICIDE—APPEAL—SUFFICIENCY OF EVIDENCE.

A verdict finding defendant guilty of manslaughter will not be disturbed on the evidence, though there was evidence tending to show that deceased was the assailant in the fight; there being some evidence to support the finding.

Appeal from circuit court, Clay county.

"Not to be officially reported."

Mitchell Butrey was convicted of manslaughter, and appeals. Affirmed.

Lytle & Jeffries, for appellant. W. S. Taylor, Atty. Gen., for the Commonwealth.

DU RELLE, J. The appellant was convicted of manslaughter, and his punishment fixed at eight years' confinement in the penitentiary. The evidence upon the trial tended to show that appellant had threatened the life of the deceased, and had sought the meeting at which the killing took place. It also tended to show that the deceased was the as-

mailant in the fight, though there was no evidence to show that he had a weapon. His ante mortem statement, however, was to the effect that the appellant had begun the difficulty. But there was undoubtedly evidence to support the finding of the jury, and no error has been pointed out in the instructions, which seem to us to state the law applicable to the facts disclosed by the record. The judgment is therefore affirmed.

#### JOHNSTON et al. v. ROGERS.

(Court of Appeals of Kentucky. Nov. 18, 1897.)  
ACTION BY FOREIGN RECEIVER—WHEN MAINTAINED—ATTORNEY'S FEES.

1. A foreign receiver may sue in Kentucky, if resident creditors are not adversely affected thereby.

2. In a suit by a foreign receiver to sell land in satisfaction of a mortgage to a foreign corporation, a judgment for attorney's fees, as provided in the mortgage, is unauthorized.

Appeal from circuit court, Laurel county.

"Not to be officially reported."

Action by C. H. Rogers, receiver, against J. T. Johnston and others, to sell land in satisfaction of a mortgage. From a judgment in favor of plaintiff, defendants appeal. Reversed.

W. H. Holt, for appellants. R. D. Hill and Hill & Brock, for appellee.

HAZELRIGG, J. Appellee is the receiver of a Tennessee building and loan association,—appointed such in a Tennessee court,—and sought, by suit in this state, to sell certain real estate in satisfaction of a mortgage to the association. There is no controversy as to the amount of the debt for which judgment was rendered, but it is contended that the receiver cannot bring suit in this state; and it is insisted, further, that the judgment for an attorney's fee of \$150 is unauthorized. It has often been said that a receiver has no extraterritorial power, and cannot sue outside of the jurisdiction of the court which appointed him. *Booth v. Clark*, 17 How. 322. But in *Beach on Modern Equity Practice* (volume 2, § 747) the author says, "But it is a well-established exception to this rule that where there are no domestic creditors whose rights are to be protected, or no local interests adverse to the suit, the courts of a state will recognize a nonresident receiver, and permit him to prosecute an action therein." This is permitted as a matter of comity, but the doctrine will not be extended, to the detriment of resident creditors. The right of this same receiver to sue in the courts of this state was recognized in *Rogers v. Raines*, 38 S. W. 483; and in the same case it was held that the collection of an attorney's fee was unauthorized, and a judgment denying it was approved. See *Association v. Scott* (Ky.) 34 S. W. 235. The appellants *Elwel & Smith* show themselves interested in the property sought to be sold, and are therefore entitled to prosecute the appeal, although there has been a dis-

missal of it, as to Johnston, for want of revivor. The judgment erroneously contains the sum of \$150, and is reversed for the rendition of a judgment in accordance herewith.

#### BULLOCK v. BIRD et al.

(Court of Appeals of Kentucky. Nov. 17, 1897.)

SALE OF FRUIT TREES—SUFFICIENCY OF EVIDENCE AS TO SOUNDNESS.

Plaintiff's evidence tending to show that the fruit trees, for the price of which the note sued on was executed, were in good condition when shipped to defendant, and properly packed, the fact that but few, if any, of the trees lived, does not authorize the court to set aside a verdict for plaintiff; it appearing that trees that had not been transplanted at all were killed by the unusual cold weather at that time.

Appeal from circuit court, Breathitt county.

"Not to be officially reported."

Action by Bird, Dew & Hale against Park Bullock on a promissory note. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. J. C. Bach and G. W. Fleenor, for appellant. Jas. M. Sebastian, for appellees.

GUFFY, J. The appellees instituted this action in the Breathitt circuit court to recover judgment on a note for \$123. The substance of the defense is that appellant, Bullock, purchased a lot of fruit trees from appellees, who were engaged in the nursery business, which trees were to be delivered to him in good order and condition; and it is alleged in the answer that the trees were in bad condition, not properly packed, and were in fact dead, or nearly so, when delivered to him, and that by reason thereof he lost his commissions and time, in having sold the trees, and being unable to collect therefor, because the trees were dead when delivered, and parties to whom he had sold them refused to receive and pay for them. It is also alleged in the answer that, at the time of the execution of the note, appellees warranted the trees to be all right, and agreed that, if they did not live, the note should not be collected, and that it was made payable the May thereafter so as to give time to ascertain whether or not the trees in fact did live, and that such stipulation was to have been inserted in the note, but was left out by mistake, and that appellant signed it believing that the stipulation was in the note. All the material averments of the answer and counterclaim were denied by appellees, and by agreement the cause was transferred to equity, and heard as an equity suit. The proof upon the part of appellees seems to be that the trees were in good condition when shipped to appellant, and were properly packed. It seems that the written contract required appellant to receive and account for the trees at the nursery, but for some cause—either for lack of notice, or otherwise—he was in fact not present when the trees were packed and boxed for delivery. Appellant testified to the agreement made, that appellees, at the time of the execution of

the note, guarantied or warranted the trees to live. There is also proof tending to show that but few, if any, of the trees did in fact live. But it is also in proof that the winter of 1892-93, the period covered by the contract, was a severe winter, and that fruit trees were killed by the cold weather that had not been transplanted at all; hence it is not unreasonable, taking all the proof into consideration, to conclude that the trees in question were in good condition when shipped, and were killed by the unusually cold weather mentioned. Upon final hearing the court adjudged in favor of appellees, and defendant appealed. Considering all the evidence together, it seems to us that the judgment of the court below was fully authorized. Judgment affirmed.

### OHANEY et al. v. RAMEY.

(Court of Appeals of Kentucky. Nov. 17, 1897.)

PAYMENT—SUFFICIENCY OF EVIDENCE—CONFORMITY OF JUDGMENT TO PLEADINGS.

1. The fact that timber was mortgaged to secure the debt sued on strengthens defendant's testimony that the proceeds of the timber were paid on that debt, and not on other debts due plaintiff, and is sufficient, with such testimony, to sustain the plea of payment.

2. It was error to render judgment for the amount of an account not referred to in the petition.

Appeal from circuit court, Pike county.

"Not to be officially reported."

Action by J. B. Ramey against George Ohaney and others, to recover the amount of a note paid by plaintiff as surety for defendants. Judgment for plaintiff, and defendants appeal. Reversed.

Auxier & Auxier, Bas T. Belcher, and Connolly & Connolly, for appellants.

GUFFY, J. The appellee, Ramey, instituted this action in the Pike circuit court against the appellants; alleging, in substance, that they executed their note to T. J. Bevier for the sum of \$300, payable on the 1st of March, 1894, and that the note was executed for two mules bought by appellants of said Bevier, and that plaintiff signed said note, at defendants' request, as their surety, and that defendants executed to plaintiff a mortgage on the mules, to indemnify him as such surety. It is further alleged that defendants did not pay the note at maturity, and that plaintiff was compelled to pay it some time in the month of May, 1894, and that defendants had not paid same to plaintiff, nor any part thereof, except \$70; and plaintiff prayed judgment for the residue of said note, and for a sale of the mules to satisfy same. The substance of the defense is payment to the plaintiff, which plea was denied. A considerable amount of proof was introduced, especially by the defendants, in which they undertake to prove payment, and the manner and circumstances under which payment was made. It seems, from their proof, that plaintiff had run and sold a lot of timber for them, the

proceeds of which were, by their direction, and by agreement with plaintiff, applied to the payment of the note in suit. Appellee's contention is that the proceeds were applied, except \$60 or \$70, by consent of appellants, to other debts due from them. The court, upon final hearing, adjudged that the plaintiff, Ramey, "recover of the defendants the sum of \$481.78. The items going to make up said sum are as follows: Surety note for \$300; company account, \$106.78; amount paid for defendants to Morgan Sloan, \$27.50; amount paid for defendants to James A. Goff, \$24; and amount paid for defendants to Jonathan Chaney, \$27.50,—and will recover interest on same from the 19th day of July, 1895, and his costs herein expended, subject to the following credit: \$318.50. Items going to make up said credit are as follows: \$218.50, timber sold by plaintiff belonging to defendants as a company, after deducting expenses of \$100 for hauling for plaintiff by defendants as a company. None of the individual transactions between plaintiff and defendants are taken into account in this judgment, but are left open and untouched, for future settlement or adjudication." The court further adjudged to appellee a lien on the mules for the payment of the sum found due, and adjudged a sale of same, and from that judgment the appellants prosecute this appeal.

It seems to us that the proof in this case clearly sustains the plea of payment. It will be further seen that the plaintiff only sought a judgment for the amount paid by him as security for appellants on the note to Bevier; but the court seems to have rendered a judgment, not only for that, but for the assumed account due plaintiff from appellants, not at all referred to in the petition. It will be seen from the mortgage that some timber was included in same, as well as the mules; and this fact strengthens the testimony of appellants in support of the plea of payment. It is reasonable to suppose that the proceeds of the mortgaged timber would be applied to the payment of the debt that it was intended to secure. For the reasons indicated, the judgment appealed from is reversed, and the cause remanded, with directions to dismiss appellee's petition, and for proceedings consistent herewith.

### WOOD v. CORLEY et al.

(Court of Appeals of Kentucky. Nov. 17, 1897.)

HOMESTEAD—MISTAKE IN ALLOTMENT—RIGHTS OF CREDITORS.

A creditor who has stood by at the allotment of a homestead to his debtor, under a deed of assignment for the benefit of creditors reserving the homestead, and has received his pro rata upon his debt in the settlement made by the assignees, without any objection to the allotment, for about three years, cannot complain of a mere mistake of judgment as to value on the part of the commissioners in making the allotment.

Appeal from circuit court, Shelby county.  
"Not to be officially reported."

Action by James T. Wood against W. B. Corley and others to enforce a judgment. Judgment for defendants, and plaintiff appeals. Affirmed.

Beckham & Son and Pryor J. Foree, for appellant. G. G. Gilbert, for appellees.

**DU RELLE, J.** The appellant brought suit to subject the homestead of appellees to the payment of his debt (he having obtained judgment, and a return of nulla bona), alleging that appellee Corley in February, 1892, made an assignment for the benefit of his creditors, reserving out of the property a homestead; that the homestead was set apart to him, but not by order or judgment of any court; that the homestead so set apart was worth more, and would sell for more, than \$1,000; and that the allotment was made by mistake. It appears from the testimony that the allotment was made by commissioners appointed and sworn by the county court; that the appellant, who was a creditor, was present at the time; and that appellee, who was very old, and unable to take any part in making the allotment, desired time to consider whether he would take the homestead set apart for him, or \$1,000 in money, but, being pressed to decide at once, decided to take the land. Under what authority the commissioners were appointed, and whether or not by agreement, does not appear, as the record of the settlement by the assignees, and of the litigation which grew out of it by one of the creditors, against them, to set aside a sale of the real estate made by one assignee to the other, is not filed in this suit, and the facts in regard to it do not appear, except by references made in the testimony taken in this proceeding. It is not claimed that any mistake was made in the boundary, or in the amount of land allotted, but only that it was a mistake of judgment upon the part of the commissioners as to what the property was worth. Seven witnesses, including the two commissioners (one of whom is a brother of appellant), one of the assignees, and a brother of the other, have testified as to the value of the property, fixing it generally at about \$1,400. Eight witnesses testify that it is not worth more than \$1,000. The appellant states that he is willing to give \$1,500 for it, but a solution of his willingness to do so may lie in the fact that all over \$1,000 would be paid by a cancellation of his worthless judgment. Undoubtedly, if the homestead had been so set apart by appraisers appointed by the sheriff, or by commissioners appointed by the county court under the act of 1894 in regard to assignments, the plaintiff, not having excepted or made any objection at the proper time, but having proved his claim before the assignees, and received dividends thereon, could not now bring a

separate suit to subject the surplus value of the homestead over \$1,000, should it prove to be worth more than that amount; and we are inclined to the opinion that having stood by at the allotment, and received his pro rata upon his debt in the settlement made by the assignees, without any objection to the allotment, for some three years, he cannot be heard to complain of a mere mistake, not of fact, but of judgment, in making the allotment. It appears that there was a litigation in which the action of the assignees was attacked, and in which a pro rata of the amount recovered against them was paid to appellant. This would seem to bring this case directly within the ruling in *Hasty's Heirs v. Berry* (Ky.) 1 S. W. 8. Moreover, the alleged excessive value of the homestead allotted is not at all satisfactorily made out by the evidence. For the reasons indicated, the judgment is affirmed.

#### BOTTOMS v. McFERRAN et al.

(Court of Appeals of Kentucky. Nov. 18, 1897.)  
ASSIGNMENTS—ATTACHMENT OF FUND IN COURT.

1. The assignment to a trustee or agent of a specific fund to pay a particular debt is not such an assignment for creditors as the statute requires shall be acknowledged and lodged for record.

2. Under Civ. Code, § 207, providing for the attachment of a fund in court by leaving with the clerk a copy of the attachment, with a notice specifying the fund, no lien attaches by leaving a copy of the attachment with the master commissioner, who holds the fund subject to the order of the court; and the subsequent service of the attachment on the clerk does not give the attaching creditor priority over one to whom the fund has in the meantime been assigned.

Appeal from circuit court, Boyle county.

"Not to be officially reported."

Contest between J. A. Bottoms, executor, attaching creditor, and S. B. McFerran and others, assignees of the attached fund. Judgment for S. B. McFerran and others, and J. A. Bottoms, executor, appeals. Affirmed.

Charles C. Fox, for appellant. R. P. Jacobs, for appellees.

**HAZELRIGG, J.** Section 207 of the Civil Code provides that, "If the property to be attached be a fund in court, the attachment shall be executed by leaving with the clerk of the court a copy thereof, with a notice specifying the fund; and, if several orders of attachment be executed upon such fund in the same day, they shall be satisfied out of it ratably." In the case before us, appellant attempted to attach funds in court by leaving a copy of the order with the master commissioner, who held the funds subject to the further orders of the court. Subsequently the appellees obtained from the debtor a written assignment of the fund sought to be attached, and in which authority was given Harding, as trustee or agent, to collect the fund in court, and pay same to appellees. After this assignment, appellant had his attach-

ment served on the clerk. The chancellor adjudged the fund to the appellees, who held the assignment, and we think this was proper.

The assignment of this specific fund was not, as contended by counsel for appellant, such an assignment for the benefit of creditors as to require it to be acknowledged and lodged for record, under the provisions of the statute. The paper operated as an absolute appropriation of the fund in dispute, and as the order of attachment served on the master did not operate to create a lien, because not secured as required by the Code, the assignees took the fund free from any lien. The second attachment came too late. Judgment is affirmed.

#### KRISH v. FORD et al.

(Court of Appeals of Kentucky. Nov. 10, 1897.)

#### ADJOINING LANDOWNERS — DAMAGES FROM EXCAVATIONS — INSTRUCTIONS.

1. It was defendant's duty, if necessary to go beneath the foundation of a party wall in making an excavation for a cellar under his building, to notify the adjoining landowner of his intention, and to have the work done promptly and by skillful persons, especially as it was being done in the winter; and for his failure to do so he is liable in damages.

2. It is not error to refuse an instruction, though abstractly a correct proposition of law, if it does not apply to the facts of the case.

Appeal from circuit court, Boyd county.

"Not to be officially reported."

Action by C. W. Ford and others against H. Krish to recover damages for injury to plaintiffs' storehouse. Verdict and judgment for plaintiffs, and defendant appeals. Affirmed.

R. C. Burns, for appellant. L. T. Everett, for appellees.

BURNAM, J. Appellees brought this action to recover damages for injury to their storehouse, occasioned, as they allege, by the negligent, unskillful, and careless manner in which appellant, by his agents and servants, dug away and excavated the earth adjoining and beneath their party wall and foundation, when the weather and surrounding soil were in an unfavorable condition for such work, and without notice to appellees. The facts are: Appellees purchased from one Wellman a part of a lot fronting on Main street, in Catlettsburg, and erected upon the lot a two-story brick business house, in the erection of which appellees, by agreement with Wellman (who then owned the remaining portion of the lot and the lots adjoining same on the west), built a party wall, one-half the party wall standing on the ground of appellees, and one-half on the ground of Wellman, each paying one-half the cost of building the wall. After the erection of this building, Wellman sold to the appellant the adjacent lot, including his interest in the party wall, and in the winter of 1892-93 appellant erected a brick business house thereon. The proof shows that the excavating

for the cellar under this building and the erection of the building itself were all done during the winter time, and that after the excavation for the cellar had been made, and before it was covered in, water stood in it, and there were a good many freezes. Davis, the party who did the work of excavating for the cellar for appellant, testifies that, in digging the cellar, he left the earth standing next to the party wall, and, when he had finished his work, he told appellant that it would not do to take the earth away from the wall, as it would cause it to sink and fall, but that appellant directed him to do so, and said he would pay him \$5.00 extra; that he made this excavation as directed by appellant; and that, as a consequence, the wall sank, and the house and plastering was cracked, etc. Appellees testify that appellant gave them no notice of his intention to make the excavation complained of below the foundations, and that they did not know that this was to be done.

The doctrine is that a landowner cannot, by building or otherwise, increase the lateral pressure upon the land of an adjoining owner, so as to take away from the adjacent owner the right to the use and enjoyment of his land to the full extent he might have enjoyed it had no such change been made; and, if he does, he cannot recover damages for any injury he may sustain by reason of the exercise by his neighbor of any of his original rights, unless they are exercised in an unskillful, careless, or negligent manner, or unless reasonably certain that injury would result from such acts, and such neighbor failed to apprise him of his intention, or to afford him an opportunity to use a proper preventative. See *Shrieve v. Stokes*, 8 B. Mon. 453. Applying this rule to the facts of this case, we think there can be no question that the defendant had the right to make the necessary excavation for a cellar under his building, and, if necessary, to go below the foundation of the party wall in doing this; but the law imposed upon him the duty of exercising care in digging beneath the party wall, and adjacent to it; and it was also his duty to have this work done promptly, and by skillful and capable persons, especially as the work was being done in the winter time, and the exposure to the elements necessarily added greatly to the risk and danger thereof, and to have notified the adjacent property holders of his intention to go beneath the foundation of the party wall, so that they also could have had the opportunity to use all proper precautions to avoid injury to their property. It seems to us that the instructions given to the jury conform to this view of the law, and that they are not prejudicial to the appellant.

Appellant complains of the failure of the court to give instructions A, B, and C, offered by his counsel. By instruction A the jury were told that, if they believed from the evidence that plaintiffs agreed to build the

party wall mentioned in the pleadings for a consideration which was paid to them, it was the plaintiffs' duty to erect the party wall in a proper and skillful manner, and if they failed to do so, and sustained an injury thereby, the jury would find for the defendant. While this instruction may be abstractly a correct proposition of law, we do not think it applies to the facts of this case. The undisputed evidence shows that the party wall was built jointly by appellees and appellant's vendor, and there is no allegation or proof that it was not built in a proper and skillful manner, or in accordance with the contract between the parties. Instructions B and C are substantially embodied in the instructions given to the jury. Perceiving no error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

### BLOOK v. OLIVER et al.

(Court of Appeals of Kentucky. Nov. 19, 1897.)

WAREHOUSE RECEIPTS—COLLATERAL SECURITY—  
PRIORITY OF LIENS.

1. S. delivered, to the G. Bank, warehouse receipts for 250 barrels of whisky at the time of the execution to the bank of a note for \$2,000, the note providing that the collateral was deposited to secure that note and all other indebtedness owing to the bank by the payor, which then exceeded \$5,000. When S. discharged the \$2,000 note, he took up receipts for only 200 barrels of the whisky. Before the discharge of the note to the bank, S. delivered to B. duplicate warehouse receipts for the 250 barrels of whisky to secure a note indorsed to B. at the time. *Held*, that the receipts for the 50 barrels of whisky left with the bank were held by it to secure the other indebtedness of S., and the subsequent pledge of those receipts to the bank to secure a new indebtedness does not show a different intention; and therefore the title to the 50 barrels did not, upon the discharge of the first note to the bank, inure to the benefit of the holder of the junior receipts.

2. S. paid the original note to the G. Bank with a check on the L. Bank. Thereafter, on the same day, he made a draft on O., and discounted it at the L. Bank, depositing as collateral the receipts for the 200 barrels of whisky taken up from the G. Bank. With the proceeds of the discount placed to the credit of S. the L. Bank met the check given by S. to the G. Bank. *Held*, that the receipts for the 200 barrels of whisky when taken up by S. ceased to be outstanding receipts, and the title to the whisky thereupon vested in B., who held the junior receipts, thus giving him priority over the subsequent pledgee.

3. While a creditor who has surrendered collateral upon the payment of the secured debt by check is entitled, if the check is dishonored, to reclaim the collateral, yet when the check is paid the payment relates back to the delivery of the check, and the collateral is to be regarded as surrendered as of that date.

4. Though the act of March 6, 1869, § 6, prohibits, under penalty, a warehouseman from issuing duplicate receipts, such receipts are valid as between the parties, and when the original receipts are taken up the title to the property vests in the holder of the junior receipts, who is entitled to priority over a subsequent pledgee of the original receipts, it not being necessary that they should be taken up and canceled by the warehouseman in order to give vitality to the junior receipts.

Appeal from circuit court, Jefferson county.

"To be officially reported."

Action by J. G. Mattingly and others against A. R. Sutton and others to settle partnership accounts. Intervention by Leon Block dismissed, and he appeals. Modified.

Fairleigh & Straus, for appellant. Strother & Gordon, for appellees Oliver & O'Bryan. Gibson & Marshall, for German Security Bank.

DURELLE, J. The firm of J. G. Mattingly & Sons, distillers, prior to February 23, 1892, was composed of J. G., P. J., and L. D. Mattingly. On that date A. R. Sutton became a member of the firm, under the following agreement, signed by all the parties: "It is agreed between the undersigned that A. R. Sutton shall furnish from time to time sufficient capital, at 7 per cent interest thereon, to the firm of J. G. Mattingly & Sons, to enable said firm to distill and manufacture whisky in Kentucky in the manner and to the extent they have presently undertaken to do. In consideration of furnishing said capital said A. R. Sutton shall have one-third interest and right in and to the property of all kinds, business, and profits of said partnership of J. G. Mattingly & Sons. It is further agreed that said firm shall consign and deliver to said Sutton the whisky so distilled and manufactured for sale on account of said firm in the usual course of trade. The partnership contract of J. G. Mattingly & Sons heretofore made, of date November 3, 1891, is so modified by and subject to the terms and conditions of this agreement. This 23d day of February, 1892." From that time Sutton was the financial manager of the concern, and procured all the money for carrying on the business. As whisky was manufactured, warehouse receipts therefor were executed and placed in his hands, and were by him sold or pledged as security for notes executed for money borrowed. The receipts were signed by Mattingly & Sons, and issued to A. R. Sutton & Co., though the "Co." meant nothing, no one being associated with Sutton except the Mattingly firm. It appears—though we do not regard this fact as important—that, for a time after Sutton became a member of the firm, the receipts used were printed on yellow paper, taken from an old book of warehouse receipts used by a former firm of the same name, and that it was determined to have new receipts printed on green paper, to be used in future transactions, and that the yellow receipts should be taken up and green ones substituted therefor. Be that as it may, green receipts, duplicates of the outstanding yellow receipts, were issued and delivered to Sutton. On June 8, 1892, Sutton, as A. R. Sutton & Co., executed his note to Joseph Wolf for \$2,500, due December 3d, and deposited as collateral yellow warehouse receipts for 250 barrels of whisky. This note was paid at maturity, and on the following day (December 7th) Sutton executed his note to the German Security Bank for \$2,000, due

December 29th, and pledged as collateral security the same yellow warehouse receipts for 250 barrels. On the same day the note to the German Security Bank was executed, Sutton, as Sutton & Co., drew a note for \$2,500, payable to A. R. Sutton, dated December 6th, at four months, and on the 13th of December indorsed this note to Leon Block, the appellant, and delivered to Block as collateral security green warehouse receipts for the same 250 barrels of whisky, bearing the same serial numbers as those covered by the yellow warehouse receipts, which were then held by the German Security Bank. There was, therefore, a duplicate issue of outstanding receipts covering the same identical whisky; the yellow receipts held by the bank being undoubtedly at that time valid, and the green receipts held by Block invalid, inasmuch as the yellow receipts were first issued. On December 29th, Sutton paid the note due at the German Security Bank by a check on the Louisville Banking Company, took up of the yellow warehouse receipts held by the bank as collateral only receipts covering 200 barrels, and left with the bank the receipts covering the remaining 50 barrels. On the same day he drew a draft on Oliver & O'Bryan, of Kansas City, for about \$2,700, payable in four months, and discounted it at the Louisville Banking Company, depositing the yellow warehouse receipts which he had obtained from the German Security Bank as collateral. The Louisville Banking Company placed the proceeds of the discount to the credit of A. R. Sutton & Co. in time to meet Sutton's check given to the German Security Bank when it reached the Banking Company on that day through the clearing house. Oliver & O'Bryan accepted the draft for the accommodation of Sutton. The note at the German Security Bank contained a clause providing that the collateral was deposited to secure that note and all other indebtedness owing to the bank by the payor. At that time the German Security Bank had other notes of Sutton & Co. to an amount exceeding \$5,000. Some days after the payment of the note—the bank still holding yellow receipts for 50 barrels of whisky, being 50 of the barrels covered by the green receipts in the hands of Block—Sutton executed a new note to the bank, and the yellow receipts for the 50 barrels were specially pledged as collateral for that note. Sutton did not pay the Oliver & O'Bryan draft, the Block note, or the indebtedness to the bank (which was renewed two or three times); and accordingly, having enforced their liens upon the collateral held by them respectively, the bank became the owner of the yellow receipts for 50 barrels, Oliver & O'Bryan became the owners of yellow receipts for 200 barrels, and Block the owner of green receipts covering the same 250 barrels covered by the yellow receipts. This suit was brought by Mattingly and others against Sutton and others to settle the partnership accounts. A receiver was appointed, and Block

intervened, making the appellees Oliver & O'Bryan and the German Security Bank defendants, claiming that the warehouse receipts held by him are valid, and that he is the owner of the 250 barrels of whisky, and praying for a cancellation of the yellow receipts held by Oliver & O'Bryan and the German Security Bank. The court below dismissed the intervention.

It is claimed on behalf of Block that, when Sutton took up the note at the German Security Bank and left the yellow receipts covering 50 barrels in the bank's custody, the bank was a mere bailee for Sutton; that it must be inferred from the fact that those receipts were subsequently specially pledged to secure a new indebtedness that they were not held by the bank as collateral for Sutton's other indebtedness to it; and that, being held by the bank as Sutton's bailee, they are in the same condition as if they had been taken up by Sutton, and thereby lost their validity,—the title to the whisky covered by them becoming again vested in Mattingly & Sons, and inuring to the benefit of the holder of the junior green receipts. We cannot concede the justice of this contention. In the absence of any specific agreement, the fair and natural presumption is that the bank held the receipts as collateral for Sutton's other indebtedness; nor can the fact that it subsequently allowed Sutton to pledge those receipts to it specially as collateral for a new note destroy the presumption that so long as it held collateral, and indebtedness existed, it held it as collateral. We are therefore of opinion that the trial court properly dismissed the intervention as to the German Security Bank.

But the contention between Block and Oliver & O'Bryan presents a different question. Sutton was undoubtedly a member of the firm of J. G. Mattingly & Sons, with full power to act for it, and in these transactions, as clearly appears from the evidence and the agreed facts, was acting as a member of the firm or as its agent. It follows, therefore, that when, on December 29th, Sutton obtained from the German Security Bank the yellow receipts covering 200 barrels of whisky, they thereby came into the hands of the firm of J. G. Mattingly & Sons, and ceased to be outstanding receipts. It is contended, on the other hand, and upon abundant authority, that if Sutton's check on the Louisville Banking Company had not been paid the German Security Bank could have reclaimed from him the note and collateral which were taken up by its delivery. That is undoubtedly true. Numerous cases of the kind have been cited, in which, when checks were dishonored, the notes and collaterals securing them, which had been taken up by means of such checks, were held to have been wrongfully obtained from the holders, and to be recoverable. We do not doubt the correctness of those cases. But it is further contended that, inasmuch as the check was not paid through the clearing

house until after the discount of the Oliver & O'Bryan draft at the Louisville Banking Company, with the yellow receipts pledged as collateral, the payment to the German Security Bank must be considered as having taken place at the time when the check was paid, and therefore the receipts were not freed from the lien of the bank until after they had been subjected to the lien of the Banking Company, and that, therefore, they never did cease to be outstanding warehouse receipts. In this reasoning we cannot concur. While it is true that, if the check had been dishonored, its delivery would not have been a payment of the note, on the other hand it seems to us equally true that, not having been dishonored, it was a payment as of the time of its delivery, and the subsequent payment of the check related back to and gave effect to the delivery of the check itself.

It is earnestly insisted on behalf of appellees Oliver & O'Bryan that the issue of the green receipts was a willful and knowing violation of the statutes by Mattingly & Sons, and that the evidence introduced as to their motive in issuing the green receipts is incompetent, because in criminal prosecutions construing acts similar to ours, which imposed a penalty for a violation of the provisions of the act, it has been held that "It is immaterial whether the defendant intended a fraud upon the bank or other persons, if in fact his act, knowingly committed, was within the prohibition of the statute." *Sykes v. People* (Ill. Sup.) 19 N. E. 705; *State v. Stevenson*, 52 Iowa, 761, 3 N. W. 743.

But it is further insisted that the green receipts, having been issued after Mattingly & Sons had parted with their title to, and constructive possession of, the whisky, were "conceived in sin and born in iniquity," illegal from the start, and no vitality could be given them until the original yellow receipts had been placed where they could do no harm, by the warehousemen themselves taking them up and canceling them, and that both these acts must be done before any validity could exist in the green receipts, as the statute prohibits, under penalty, the warehouseman from issuing any receipt for goods while any former receipt for any such goods shall be outstanding and uncanceled. Act March 6, 1869, § 6. But, while their issue was prohibited by the statute, they were not thereby rendered void. As between Block and Mattingly & Sons, the contract was perfectly valid. The first delivery of the yellow receipts, it is true, carried the title to the whisky to the holder of the receipts, but the junior receipts were entirely valid as against the warehousemen who issued them. The law provided a penalty against the warehouseman who issued the duplicate receipts; but to hold that the receipt was therefore absolutely void, as against the maker, who incurred the penalty, would be to make the innocent suffer for the guilty. And this point has been expressly decided by this court in

the case of *Cochran v. Ripy*, 13 Bush, 509, the reasoning of which is in direct accord with the views here expressed: "As to the third proposition, it is evident that the penalty imposed on the warehouseman and others who shall knowingly and willfully violate the provisions of the law was intended to secure innocent parties from the frauds that might be practiced in the giving of false receipts; and while certain acts are prohibited, and a penalty imposed upon the party committing the wrong, we are not disposed to extend the punishment by declaring the contract void as to the innocent party, and thereby inflict punishment on those whose interests it was the object of the statute to protect. The purpose of the penalty was to prevent fraud, and for the protection of those who might come into the possession of warehouse receipts. We recognize the fact that, as a general rule, there is no distinction between mala prohibita and mala in se; but as said by Mr. Justice Swayne in the case of *Harris v. Runnels*, 12 How. 79: 'Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it intended that a contract made in contravention of it should be void. It does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it.' And in this case, although the original liability was created upon the pledge of a receipt prohibited from being issued by the warehouseman, as the property was not in his warehouse, yet the subsequent delivery of the receipt by the renewal in September, 1874, upon the consideration that the liability should continue, was not in violation of the statute, or based upon any illegal consideration. We are satisfied, however, that it was never contemplated by the lawmaking power that the innocent party should be denied all remedy upon the contract or against the party violating the statute. Such an interpretation would defeat the purpose and policy of the statute, by aiding the guilty and punishing the innocent. Conceding the facts relied on by the appellees, as a defense to the action, to be true, the appellants were entitled to recover."

Nor does the point appear to us well taken that the yellow receipts must be taken up and canceled before any validity could attach to the green receipts. The plausibility of the contention that they must be canceled, so as to prevent innocent persons from being deceived thereby, is more apparent than real, for it is the date of issuance, and not the date written upon the receipt, that decides the question of which has the prior equity. We think, therefore, that, being valid as against Mattingly & Sons when first issued, whenever that firm came into possession of the property—or of the receipts, which, in law,



is the same thing—the title thereupon vested in the holder of the junior receipts, which then became the only outstanding receipts. The title which Mattingly & Sons acquired upon obtaining the yellow receipts from the bank instantly inured to the benefit of Block as the holder of the outstanding green receipts, and made them effectual to transfer the title to the whisky; and if thereafter the same, or other, yellow receipts, covering the same property, should be reissued by Mattingly & Sons, they would stand precisely in the same attitude as the green receipts stood before the yellow receipts were taken in. For the reasons stated the judgment is affirmed as to the German Security Bank, and reversed as to Oliver & O'Bryan, with directions to set aside the judgment in their favor, and for further proceedings consistent with this opinion.

**McKEE v. CINCINNATI, N. O. & T. P. RY. CO.'S RECEIVER.**

(Court of Appeals of Kentucky. Nov. 18, 1897.)

**RAILROADS—FENCES AND CATTLE GUARDS.**

1. Under Ky. St. § 1790, making it the duty of railroad companies and of owners of lands adjoining the right of way to construct and maintain a good and lawful fence to the extent of one-half each along the division line of the right of way and the land of adjoining owners, and section 1793, providing that all corporations and persons owning or operating railroads "as aforesaid shall erect and maintain cattle guards at all terminal points of fences constructed along their lines, except at points where such lines are not required to be fenced upon both sides, and at public crossings,"—the "terminal points" at which cattle guards are required to be constructed are points where the parallel fencing for any reason stops, and not points at which the road enters and leaves a farm.

2. A railroad company may at any time remove cattle guards at a point at which it is under no legal obligation to maintain them, the rights of the parties not being regulated by the law as to division fences on farm lands.

Appeal from circuit court, Pulaski county.

"To be officially reported."

Action by Alfred McKee against the receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company to recover damages for defendant's failure to maintain cattle guards. Judgment dismissing petition on demurrer, and plaintiff appeals. Affirmed.

G. W. Shadoan, for appellant. O. H. Waddle and C. B. Simrall, for appellee.

**HAZELRIGG, J.** By section 1790, Ky. St., it is made the duty of railroad companies and of owners of lands adjoining the company's right of way to construct and maintain, except in specified cases, a good and lawful fence to the extent of one-half each along the division line of the right of way and the land of adjoining owners; and by section 1793 of the Statutes it is provided "that all corporations and persons owning or controlling or operating railroads as aforesaid shall erect and maintain cattle guards at all terminal

points of fences constructed along their lines, except at points where such lines are not required to be fenced upon both sides and at public crossings. But, where there is a private passway across said railroad, the landowner for whose benefit it is kept open shall bear one-half of the expense of cattle guards and gates, the former to erect the gates, the corporation or person operating the railroad to erect the cattle guards."

The contention of the appellant, as set out in his petition below, is that it was the duty of the railroad company operating its line through his farm to construct and maintain cattle guards at the points where the road entered his farm, and where it left it; and that the terminal points referred to in the statute are the points where the division fences of the various property owners approach the railroad or come up to the right of way; and that while the company did construct such guards when it built its road, in 1876, it had in 1894 torn them away, by reason of which his farm had been trespassed upon by straying stock, and his crops destroyed, to his great damage, etc. We think this contention is based on a misconception of the statute. The fences "along their line," at the terminal point of which cattle guards were to be erected, are those running parallel with the railroad. The primary purpose of the law is to have the roadway entirely fenced in, for the protection of the traveling public, though protection to stock is also secured by the statute. The provision "except at points where such lines are not required to be fenced on both sides" shows this to be the proper construction; for it is where the right of way is not fenced that the landowners with division fences between them would need cattle guards, and where the statute would require them if its purpose was to compel the company to inclose the lands of adjoining owners. The remedy of the landowner is to build his part of the fence along the right of way, and require the company to do likewise. Then no cattle guards will be needed, except at public and private crossings, and this the statute requires; and at terminal points in the parallel fencing along the right of way, and this is what the statute demands. These points are not necessarily between the property lines of the various owners, but are wherever the lateral fencing for any reason stops, and where, from the want of cattle guards at the stopping points, the road under fence would be left open to trespass. The company, not being under any legal obligation to maintain cattle guards at the points of entering and leaving the complainant's farm, might remove them at any time. These guards were not division or partition fences between his lands and those of the company. They were wholly on the lands of the company, and the rights of the parties are not to be regulated by the provision of law as to division fences on farm lands. The averments of the amendment as to the failure of the company to maintain cattle guards at

certain public crossings on public roads running on the north and the south of the plaintiff's farm are indefinite, and it is not made certain how such failure affected his rights, or caused him any loss. The judgment sustaining a demurrer to the petition is affirmed.

**BEAVEN et al. v. CITIZENS' NAT. BANK OF LEBANON.**

(Court of Appeals of Kentucky. Nov. 18, 1897.)

**GUARDIAN AND WARD—INVESTMENT BY GUARDIAN IN HER OWN NAME—RIGHTS OF CREDITORS.**

A guardian deposited her wards' funds in bank with her own, and out of the common fund purchased bank stock in her own name. She continued to treat the trust fund as cash in settlements made by her, and for a period of eight years collected and appropriated the dividends on the stock to her own use. When proper credits are allowed her there will be but a small balance due by her as guardian, and the wards are amply secured by her bond. *Held* that, while there is some evidence showing that the stock was paid for out of the trust money, it is not sufficient, as against the circumstances recited, to entitle the ward to the stock as against a creditor of the guardian who extended credit with knowledge of her ownership of the stock, and without knowledge of any equity of the wards.

Appeal from circuit court, Marion county.  
"Not to be officially reported."

Action by Citizens' National Bank of Lebanon, with attachment, against Cordella Hill to enforce a judgment. Judgment for plaintiff, and Thomas A. Beaven and others, claimants of the attached property, appeal. Affirmed.

H. W. Rives, for appellants. J. P. Thompson, for appellee.

**BURNAM, J.** This appeal is prosecuted from a judgment of the Marion circuit court by appellant Beaven, for himself and as next friend of the infant children of C. J. Hill, deceased, subjecting to sale, in an attachment suit against Cordella Hill, the mother and guardian of the infant children, 15 shares of stock in the Citizens' National Bank of Lebanon, which was attached by the bank to satisfy a debt due it by Cordella Hill as surety for her son. It is claimed by appellants that the bank stock so subjected had been purchased by defendant, Cordella Hill, with funds which she held as guardian of the infant children, with the knowledge of the bank officers, and that it belongs to them, and is not liable for the individual debt of the guardian. C. J. Hill, the father of the infants, died in 1883, the owner of a good farm of about 300 acres, with a considerable amount of live stock, farming utensils, etc., which he devised to his wife for the purpose of supporting herself and raising their children. He also left an insurance policy for \$2,500, taken out for the benefit of his wife and children, which did not pass under the will. After the death of decedent, his widow qualified as guardian of her infant children and executed bond with good

security. She collected the amount of the insurance policy in December, 1883, and placed the whole in bank to her credit, together with other money which she had. Decedent left surviving him seven children, the oldest of which was 15 years of age at the date of his death, and one of them, Mary Threasa, died in August, 1889, at the age of 16. In June, 1887, Mrs. Hill purchased 16 shares of the stock of the National Bank of Lebanon, of which one Kirk was then cashier. The certificate of this stock was taken out in her own name, and was paid for by checks drawn in her own name on the Marion National Bank and the National Bank of Lebanon. The evidence shows that the dividends on this stock were placed to the individual credit of Mrs. Hill, and were checked out in her own name. It also discloses that in November, 1887, about five months after the purchase of this stock, she made a settlement through her attorney with the county court as guardian of her children, but in that settlement no mention or allusion was made to any investment of the children's money in bank stock. In that settlement she simply charged herself with seven-eighths of the insurance money and 6 per cent. interest thereon. Some time thereafter the National Bank of Lebanon went into liquidation, and the Citizens' National Bank was organized, largely from the stockholders of the old bank. In the new organization Mrs. Hill took 15 shares of stock, the certificate of which was also issued to her in her own name, and this is the stock in dispute. Subsequently to the issuing to her of the last-named certificate, Mrs. Hill became the surety of her son John B. Hill, on notes to the Citizens' National Bank, which were renewed from time to time. Her son failed in business, and made an assignment, whereupon the bank brought suit on the notes, which amounted to about \$3,000, and recovered judgment by default. Execution issued, and was returned, "No property found," and the bank then instituted this action, attaching the bank stock standing in the name of Mrs. Hill, and seeking to subject it to the satisfaction of its judgment. This is resisted by Mrs. Hill and by the appellants herein, on the ground, as before stated, that the stock was not in reality her property, alleging that it was bought with the insurance money which Mrs. Hill had collected as guardian of her infant children, and that it belonged to them; and it is also charged that appellee had knowledge of these facts; all of which is denied in the pleadings and by the testimony of all the bank officials, who prove that they supposed the property to be that of Mrs. Hill individually, and that the loan of the various sums of money made to her son on her name as surety was based upon the knowledge of the fact that she was a stockholder in the bank, and owned in her own individual right the stock sought to be subjected. The testimony of

Mrs. Hill in regard to this fund is about as follows: She says that after collecting the insurance money in December, 1883, it was put in the Marion National Bank to her individual credit; that about \$1,100 of it was used to discharge a debt due by her husband to the Marion National Bank for money which had been borrowed to pay for a lot of mules; that subsequently, in January, the mules were sold, realizing the sum of \$2,860; that the money arising from the insurance policy, the money arising from the sale of the mules, and all her individual money and the proceeds of the farm were put to her individual credit, indiscriminately, in the Marion National bank; and that no separate account was kept of any of these funds. It appears that \$2,000 was checked out of the bank to purchase a note from one Phillips, and also about \$600 was checked out to loan to a school committee. It is contended that the money used to purchase the Phillips note and the money loaned to the school committee were exclusively composed of the money which arose from the insurance policy, but it is worthy of note that they do not correspond in amount with the interest of the children in the insurance money. No explanation is attempted to be made as to what became of the \$2,860 arising from the sale of the mules, or something like \$2,000 which the appellant Cordella Hill received from the estate of her deceased father and mother, or from any of the divers sums of money which arose from the proceeds of the farm, other than the statement that these various sums of money were used for the support, education, and maintenance of the children and to pay the current family expenses.

We think there can be no question that whenever a guardian, acting within the scope of his powers, has funds in his hands belonging to his ward which he ought, in pursuance of his fiduciary duty, to employ in the purchase of property for the benefit of his ward, and he does purchase the property with such funds, and takes the title thereto in his own name, without any declaration of trust, then a trust with respect to such property at once arises in favor of the cestui que trust. As equity imputes an intention to fulfill the obligation resting upon the guardian, independent of any element of fraud, it regards the trustee as intending to perform the obligation, and to act in accordance with fiduciary duty, and not in violation thereof, and therefore treats the purchase as made for the benefit of the person beneficially interested. And this doctrine extends to all persons who stand in a fiduciary relation to others. See 2 Pom. Eq. Jur. §§ 587, 1049; 1 Perry, Trusts, §§ 127, 128; 2 Perry, Trusts, 835, 836. To follow the money, however, and impress it with the trusts as against innocent third persons, it must be distinctly traced and clearly proven to have been invested in the security sought to be subjected; and if the trust fund has consisted of money, and has been mingled

with other moneys of the trustee in one mass, undivided and undistinguishable, and the guardian has made investments generally from the money in his possession, the cestui que trust cannot claim specific lien upon the property or funds constituting the investment. See Hill, Trustees, p. 522; Ferris v. Van Vechten, 73 N. Y. 113.

The testimony of the guardian demonstrates that she has paid at least one of her children the full amount coming to him as ward; that another one has died; that she has expended in the necessary and proper education of several others (which she had the right to do, under the statute) largely more money than their interest in the funds in her hands as guardian; and that upon settlement, with proper credits allowed to her on this account, there would be but a comparatively small balance due by her as guardian. It further appears that her bond is amply good to protect the infants in all their rights, and the contest is therefore, in reality, one between the sureties on the guardian's bond and the attaching creditors for any balance that might be found due by her as guardian. The question as to the right of her surety to defeat the claim of the attaching creditors to the fund in contest is one of fact as well as of law, the proper determination of which depends upon whether the trust funds were actually and exclusively used to purchase the bank stock in controversy. It is not sufficient to show that it was the intention of the guardian or her security, or of her attorney, that the insurance money should be invested in the bank stock in question, but it must be made clear by proof that it was paid for out of the trust money; and, while there is evidence in the record in behalf of appellants conducing to show that this was done, we are met, on the other hand, with equally convincing facts and circumstances which conduce to show that the guardian never at any time kept this particular fund distinct and separate from other funds in her hands, and that the stock was not paid for exclusively by the insurance money; that she took the certificate in her own name; that she treated the fund as cash in settlements made by her as guardian, and that for a period of eight years she collected and appropriated the dividends to her own use, and never, so far as this record shows, until after she was sued by appellee on its note, did she, in any proceeding or settlement made by her as guardian, intimate that the stock did not belong to her individually. There was no obligation on her part to invest the money of her wards in this stock. She had the right to keep the fund in money, and to account to the children for interest precisely as she did. Our statute does not designate this species of investment as proper security in which to invest trust funds, although such investments have been approved by this court in certain cases; but we think there can be no doubt that, if this bank stock had be-

come worthless, under the facts disclosed by this record, she would have been accountable for the amount due the children on settlement in cash.

It does not appear that special importance should be attached to the mere private conversations had with a former officer of the bank by the attorney of the guardian with regard to her intention to invest the money of her ward, as such transaction was never perfected, and there was no duty or responsibility of such officer with regard to the matter in any way, especially as the funds loaned by the bank on the credit of Mrs. Hill were loaned long after the death of such officer, and after the management of the bank had changed hands. There is not the slightest pretense that any fraud was practiced upon the children or the security by the guardian or the attaching creditors in this matter, or that the interest of the children requires that this stock should be subjected to their claim; and, in view of all the facts and circumstances of the case, we do not feel authorized to disturb the finding of the chancellor. The judgment is affirmed.

#### BRADFORD v. BRADFORD.

(Court of Appeals of Kentucky. Nov. 17, 1897.)

##### LIMITATION OF ACTIONS—RES JUDICATA.

As defendant's answer and cross petition show that the claim asserted thereby accrued more than 15 years before the pleading was filed, and also that a suit on the same claim was dismissed on demurrer, a demurrer to the pleading was properly sustained.

Appeal from circuit court, Pendleton county.

"Not to be officially reported."

Action by N. P. Bradford against Moses Bradford to enforce a vendor's lien. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Fryer, for appellant. Leslie T. Applegate, for appellee.

GUFFY, J. The appellee instituted this action in the Pendleton circuit court against the appellant on a note executed as part consideration for a tract of land conveyed to appellant by appellee; seeking to obtain judgment for the amount due, and seeking to enforce his purchase-money lien upon the land mentioned. The appellant filed an answer and cross petition which attempted to plead an indebtedness of appellee growing out of the fact of appellee's having been, or having assumed to have been, the guardian of appellant. The court sustained a demurrer to that answer and cross petition, and that presents the first question for decision. It appears from the answer and cross petition that the liability, if any, of appellee, accrued more than 15 years before the filing of the answer. The answer also discloses the fact that appellant some time before instituted suit in the Pendleton circuit court, seeking to

recover on the same claim set up in the answer, and that a demurrer had been sustained to his petition, and the action dismissed. It results, therefore, that the demurrer was properly sustained. It seems to us, also, that the demurrer of appellant to the petition was properly overruled. The appellant then filed an amended answer, the substance of which was that appellee had taken possession of and used the land in controversy from the date of the note until the present, and that the same was worth \$75 per year, aggregating the sum of \$900, which he pleaded as a counterclaim. After issue joined, a trial resulted in a judgment in favor of appellee for his debt, and for enforcement of his lien upon the land; and from that judgment appellant has appealed. Without reciting the testimony at length, it is sufficient to say that the evidence fully sustains the judgment of the court below, and that judgment is affirmed.

#### BRASHEARS v. FRAZIER et al.

(Court of Appeals of Kentucky. Nov. 17, 1897.)

##### APPEAL—CERTIFICATE TO TRANSCRIPT.

The certificate of the clerk, that the transcript "contains in substance the complete and material parts of the proceedings" in a certain case, being defective, the appeal will be dismissed.

Appeal from circuit court, Perry county.

"Not to be officially reported."

Action by James H. Frazier and others against Robert O. Brashears. Judgment for plaintiffs, and defendant appeals. Dismissed.

Robert O. Brashears, in pro. per. Dishman & Hays and D. D. Fields, for appellees.

GUFFY, J. The certificate of the clerk to this transcript is defective. The material part thereof reads as follows: "I, John A. Craft, clerk of the Letcher circuit court, do hereby certify that the foregoing contains, in substance, the complete and material parts of the proceedings taken and made by the plaintiff and defendant, Robt. O. Brashears, which are copied from the original papers and records of this office in the action of Jas. H. Frazier, etc., Plaintiffs, vs. Robt. O. Brashears, Defendant." Some other statements are embodied in the certificate not material. The certificate is dated January 24, 1894, and signed, "John A. Craft, Clerk." This court will not pass upon or determine any case which is not certified to as required by law. The motion of appellee to dismiss this appeal is therefore sustained, and the appeal is dismissed.

#### BRASHEARS v. FRAZIER.

(Court of Appeals of Kentucky. Nov. 17, 1897.)

##### APPEAL—CERTIFICATE TO TRANSCRIPT—NECESSITY OF BILL OF EXCEPTIONS.

1. A certificate of the clerk that "the foregoing is a true copy, in substance," of the records in a certain action, is insufficient.

2. In the absence of a bill of exceptions, the court will presume that a peremptory instruction was properly given.

Appeal from circuit court, Letcher county.

"To be officially reported."

Action by James H. Frazier against Robert O. Brashears. Judgment for plaintiff, and defendant appeals. Affirmed.

Robt. O. Brashears, in pro. per. Dishman & Hays, John L. Scott & Son, and D. D. Fields, for appellee.

GUFFY, J. The appellee insists that this appeal should be dismissed on account of the failure of the clerk to properly authenticate the transcript filed, and it is further insisted that no bill of exceptions has been filed; hence the law presumes that the peremptory instruction given to the jury was proper, and that the pleadings support the verdict. The certificate of the clerk is as follows: "I, John A. Craft, clerk of the Letcher circuit court, do hereby certify that the foregoing is a true copy, in substance, of the records of this office in the action of J. H. Frazier vs. Robt. O. Brashears. Given under my hand, clerk of said court, this May 5, 1894. John A. Craft, Clerk Letcher Circuit Court." The clerk being only a ministerial officer, it is his duty to correctly copy the records of the court, and certify to the same as being a correct copy. He cannot properly determine as to the substance of the records, but must copy same as made, and as they appear in the record, in order to properly present the transcript for appeal. In addition to this, there seems to be no bill of exceptions or evidence; hence the presumption of law is that the peremptory instruction was proper, and, as the pleadings support the judgment, the judgment appealed from must be, and is therefore, affirmed.

#### CLARK v. ROBERTSON et al.

(Court of Appeals of Kentucky. Nov. 17, 1897.)

ATTORNEY AND CLIENT—PURCHASE BY ATTORNEY IN HIS OWN NAME.

H., as attorney, brought suit in C.'s name on a note assigned to C. by R. The note was received by H. from R., who represented that C. owned only one-third of it, and undertook, as H. claims, to transfer to him the other two-thirds, requesting that suit be brought in C.'s name. At a sale of land made to satisfy the lien by which the note was secured, H. became the purchaser, and took the deed to himself. Held that, though C. was the owner of the whole note, yet H., under the facts, as he understood and had the right to understand them, had the right to purchase and hold the property.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by J. W. Clark against R. P. Robertson and H. M. Haskins to set aside a deed. Judgment for defendants, and plaintiff appeals. Affirmed.

W. S. Morrison, for appellant. R. A. Miller and Wilfred Carnico, for appellees.

GUFFY, J. It appears from this record that one Granville Johnson executed a note to R. P. Robertson for \$150 as a fee to defend the son and daughter of said Johnson, and executed a mortgage upon a house and lot in Owensboro, Ky., to secure the payment of said note. It also appears that the note, which was negotiable, was by Robertson discounted to the Owensboro Savings Bank, and was by said bank transferred to the appellant, Clark. Some time afterwards the appellee H. M. Haskins, as attorney for the appellant, J. W. Clark, instituted suit in the Daviess circuit court, and obtained a judgment against Johnson for the amount of the said note, and also judgment enforcing the lien upon the house and lot, and the same were sold, and purchased by Haskins at the amount of the debt, interest, and costs, and deed made to him by the court's commissioner. The petition showed that Clark was the owner of the note, and all the proceedings had showed that he was the sole owner of the note and judgment. Some time after the execution of the deed, Haskins wrote to Clark that he was ready to pay him his (Clark's) part of the debt,—\$50 and interest. It seems that some correspondence, and perhaps conversation and dispute, were had between Clark and Haskins, in which it appears that Haskins claimed he was the owner of \$100 of the note by assignment from Robertson; while Clark contended that he was the sole owner of the note by assignment from the bank, which was the assignee of Robertson. Finally Clark instituted this action against Robertson and Haskins, in which he alleged, in substance, that Haskins was his attorney, and that by arrangement between him (plaintiff), Haskins, and Robertson suit was to be brought, and the property purchased for Clark, provided it did not bring more than the debt; and he supposed the same had been done, until after the property had been conveyed to Haskins. He asked that the deed be set aside, and the property adjudged to him. Haskins denied all the material averments of the petition, except he admitted bringing the suit as heretofore stated, and the purchase of the property, and the conveyance thereof. The court, upon final hearing, adjudged that Haskins was entitled to hold the property, but rendered a judgment in favor of appellant against Haskins for the amount of the note with interest, and also for some back taxes paid by Clark, and adjudged a sale of the property to pay same. From the judgment refusing to adjudge the property to Clark he excepted, and prayed an appeal, and Haskins excepted, and prayed an appeal from the residue of said judgment, but no cross appeal has been taken; hence that judgment is not before us for revision.

The proof conduces to show that appellant never had any conversation with Haskins before the institution of the suit to foreclose the mortgage, nor until after the conveyance aforesaid; but that he, at the instance of

Robertson, took up the note from the bank, and left it with Robertson, to be sued on in the name of and for the benefit of him (appellant). Robertson gave the note to Haskins to sue on, and Haskins claims that he, at the instance and for the accommodation of Robertson, to prevent Johnson from being offended at him, instituted suit in the sole name of Clark, although he (Haskins) claims he was in fact the owner of \$100 of the note by assignment from Robertson, and was not notified by Robertson that Clark claimed, or had any right to, said \$100. Haskins also claims that no arrangement was made as to the purchase of the property for Clark. The testimony of Robertson is not very clear as to the details of the matter, but he very fully sustains Clark in his claim of the entire ownership of the debt in question. It is not necessary to state fully all the evidence introduced. The contention of appellant is that, Haskins being his attorney, and having brought and prosecuted the suit to judgment, and having bought the property, and taken the deed in his own name, the same is held in trust for appellant, and that he is entitled to the property. This contention is denied by appellee, and it is also insisted that this case does not come within the rule of law contended for by appellant, even if the rule be as claimed. It seems to us, under the evidence in the case, that Haskins believed, and had the right to believe, that he was in fact the owner of two-thirds of the debt, and, this being true, it would seem that he was not guilty of any breach of trust or bad faith in purchasing the property, bidding therefor the entire amount of the debt, and taking the conveyance to himself. Under the facts as understood by Haskins, and as he had the right to understand them, from Robertson, from whom he in fact received the note, we think he had the right to purchase and hold the property in question. It also seems clear from the testimony that Clark was entitled to the full amount of the note sued on, and also to the repayment of the taxes paid by him, and that the court did not err in rendering judgment accordingly. Judgment affirmed.

#### BALDWIN et al. v. DEWITT.

(Court of Appeals of Kentucky. Nov. 17, 1897.)

#### REPLEVIN—VERDICT—APPELLATE JURISDICTION.

1. The defendant having by his counterclaim asked judgment against plaintiffs for \$46, the amount paid by him on the piano, which plaintiffs sought to recover, and of which they took possession under an order of delivery, a verdict "for defendant" is sufficient, in the absence from the record of the instructions, to support a judgment for defendant for \$46.

2. It seems that no appeal by plaintiff lies from a judgment for defendant on his counterclaim for \$46, where there is no judgment awarding to him the possession of the property sued for, of which plaintiffs took possession under an order of delivery.

Appeal from circuit court, Franklin county.  
"Not to be officially reported."

Action by D. H. Baldwin & Co. against E. H. Dewitt. Judgment for defendant, and plaintiffs appeal. Affirmed.

Frank Chinn, for appellants. John B. Lindsey, for appellee.

GUFFY, J. The appellants instituted an action in the nature of claim and delivery against appellee, to recover one Hinson & Rosin piano, No. 1,892, with stool and piano cover, all of the value of \$100. The claim of appellants is, in substance, that they had the right to the possession of the piano, for the purpose of selling same to pay the balance of the purchase money due thereon, which was something less than \$100, exclusive of interest. The writing relied on provided, in substance, that, upon the default of monthly payments stipulated for, the trustee, Rosen-garten, for himself or by agent, should have the right to take possession of said piano, and sell the same, for the purpose of paying the purchase money. An order of delivery was issued, and the property taken thereunder. The substance of the defense is that the said piano was practically worthless to defendant; and that, after the payment of \$41, appellants agreed and contracted with him to take back the piano No. 1,892, and deliver him one United Makers' piano, No. 7,053, with stool and cover, at \$140, and to credit the payments made on the first piano as if made on the last, and defendant to retain the first piano until the last one was delivered; and that defendant paid the further sum of \$5; and that on April 18, 1894, defendant executed and delivered to plaintiffs another mortgage, of which a duplicate thereof is filed herewith, being, in substance, the same kind of contract entered into in regard to the first named piano. It is further alleged by defendant that appellants failed to comply with this last-named contract, and that he had been damaged thereby in the sum of \$110, besides the \$46 paid, and asked judgment against plaintiffs for \$156. The appellants denied the execution of the last-named contract, as well as the payment of the last-named \$5. A demurrer was sustained to the second paragraph of defendant's answer. Afterwards defendant filed an amended answer and counterclaim. So much of defendant's answer as relied upon the defects of the piano first purchased was stricken out. It may be remarked that the contract filed and relied on by appellants, as well as the alleged contract filed by appellee, have been heretofore held by this court to have the force and effect of a mortgage. Sundry exceptions are filed to depositions, some of which were sustained, and some overruled, which need not be noticed. A jury trial resulted in a verdict for defendant. At the conclusion of defendant's testimony, the plaintiffs moved to instruct the jury to find for plaintiffs, which motion was overruled. The instructions given to the jury seem to have been objected to, but the clerk says the instructions are not found

in the papers, hence are not copied. The jury returned into court the following verdict: "We, the jury, find for defendant. [Signed] R. K. McClure, Foreman." Thereupon the defendant moved the court for a judgment for defendant upon the verdict, to which plaintiffs objected, and plaintiffs moved the court for a judgment for plaintiffs, notwithstanding said verdict, to which defendant objected, and the court, not being advised, took time. Afterwards the court rendered the following judgment: "This cause having been heard upon the objections of plaintiffs to the motion of defendant for a judgment upon the verdict herein, and upon the objections of defendant to the motion of plaintiffs for a judgment notwithstanding said verdict, and the court being advised, it is adjudged that plaintiffs' said motion be overruled, to which plaintiffs except, and that the motion of defendant be sustained, to which plaintiffs except; and it is further adjudged that the defendant recover of the plaintiffs, D. H. Baldwin, Lucian Wulson, A. A. Van Buren, Geo. W. Armstrong, Jr., and Clarence Wulson, composing the firm of D. H. Baldwin & Co., the sum of \$46, with interest from this date until paid, at the rate of six per cent. per annum, and his costs herein expended,"—to all of which plaintiffs excepted, and filed grounds for new trial, which grounds are, in substance, as follows: (1) That the verdict is not supported by sufficient evidence, and is contrary to law. (2) Court erred in overruling plaintiffs' motion for peremptory instruction to the jury to find for the plaintiffs. (3) The court erred in giving instructions to the jury upon which the verdict was found. (4) Court erred in overruling motion of plaintiffs for judgment notwithstanding the verdict. (5) The court erred in rendering judgment for defendant for \$46, or any sum, upon said verdict. Appellants' motion for new trial having been overruled, they prosecute this appeal.

It will be seen that no judgment for money was asked for by appellants against the appellee in their petition, but the object was to secure the possession of the piano, for the purpose of selling same, in satisfaction of the debt due thereon. It further appears that defendant asserted no claim to the piano so taken under the order of delivery, and asked no judgment for the return thereof, but sought to recover damages for the failure of plaintiffs to comply with the second contract, and also sought judgment for the \$46 paid thereon. The motion for peremptory instruction was properly overruled. The other instructions given are not before us, and must be presumed to be correct.

The contention of appellants, among other things, is that the answer did not present a good defense, and that the verdict was not supported by sufficient evidence, and the court erred in overruling their motion for judgment notwithstanding the verdict. We think the evidence was sufficient to authorize a verdict in appellee's favor. We are also of the opin-

ion that appellants' motion for judgment notwithstanding the verdict was properly overruled. It is, however, insisted by appellants that the verdict did not authorize any judgment to be rendered, for the reason that no amount was fixed by the jury. It is impossible to tell what issue was presented for determination in the absence of the instructions. The legal presumption would be that only such issues were presented as called for a simple verdict for defendant or for plaintiffs, and the finding for defendant unquestionably meant that appellee was entitled to the \$46,—at least, that is the reasonable and fair construction to be given; and it would seem that \$46 was the least amount that could be adjudged to appellee under the finding of the jury; and, as he does not complain on account of the smallness of the verdict, the judgment cannot on that account be set aside at the instance of appellants. There is no judgment given awarding to appellee the piano taken under the order of delivery, and it seems to us that the judgment appealed from is \$46, and for that reason this court has no jurisdiction on this appeal. But, whether this be true or not, the judgment must be affirmed, for the reason that it seems to be sustained by the law and facts. Judgment affirmed, with damages.

#### MACKIN v. WILSON.

(Court of Appeals of Kentucky. Nov. 18, 1897.)

APPEAL—TRIVIAL AMOUNT IN CONTROVERSY—DISMISSAL.

Where the amount involved is \$3.02, the maxim, "*De minimis non curat lex*," will be applied, and the appeal dismissed.

Appeal from circuit court, Marion county.

"Not to be officially reported."

Action by Joseph Mackin against Margaret Wilson. From a judgment in favor of defendant, plaintiff appeals. Dismissed.

H. W. Rives, for appellant. Lefe S. Pence, for appellee.

LEWIS, C. J. The amount involved in this appeal is \$3.02. "*De minimis non curat lex*." Appeal dismissed.

#### BENNETT v. BENNETT.

(Court of Appeals of Kentucky. Nov. 16, 1897.)

DIVORCE—RESTORATION OF PROPERTY—ALIMONY.

1. In an action by the husband to enforce an order, embraced in a judgment for divorce, restoring to each party the property received from the other in consideration of marriage, the wife introducing no proof to overcome the presumption, under Civ. Code, § 425, that property received by her from the husband without valuable consideration, during the marriage, was received in consideration of marriage, the husband is entitled to an order restoring the property.

2. The wife, when required upon a divorce to restore property obtained from the husband in consideration of marriage, should be allowed to retain rents received by her from the property, the chancellor determining, on equitable principles, whether she is entitled to anything additional in the way of alimony.

Appeal from circuit court, Campbell county.  
 "Not to be officially reported."

Action by W. H. Bennett against Maria L. Bennett to enforce an order, embraced in a judgment of divorce, for the restoration of property. Judgment for defendant, and plaintiff appeals. Reversed.

For opinion on former appeal, see 26 S. W. 892.

Holt & Holt and E. W. Hawkins, for appellant.

**HAZELRIGG, J.** This case was sent back on the former appeal to give the then appellant, now appellee, an opportunity to show either (1) that she had in fact paid for the property in dispute with her own means, or (2) was entitled to it under some arrangement by which the plaintiff discontinued the old suit as to the property, taking his judgment merely for the divorce. Upon the return of the case, the issues were completed; but no proof was offered by her to overturn the statutory provision that, when property is obtained by the wife from the husband without valuable consideration, it is to be deemed to have been obtained in consideration or by reason of marriage. Nor did she show any right growing out of the order discontinuing the suit as to the property. We are constrained to hold, therefore, that the husband is entitled to an order restoring the property in dispute to him. The wife seems to have gotten the rents of the property since 1883, but how much this amounted to is not disclosed. She should be allowed to keep what she has received; and whether this is as much as she equitably ought to receive of the husband's estate in the way of alimony we cannot tell. This should be determined by the chancellor on equitable principles, considering the pecuniary condition of both husband and wife. The judgment is reversed for proceedings consistent herewith.

#### BARTRAM et al. v. BURNS et al.<sup>1</sup>

(Court of Appeals of Kentucky. Nov. 20, 1897.)

##### FRAUDULENT CONVEYANCES—IMPROVEMENTS.

Where a conveyance is without fraudulent intent, though in fraud of the grantor's creditors, because without valuable consideration, the grantees are entitled to a first lien for lasting and valuable improvements made by them, less value of the rent, after deducting taxes paid.

Appeal from circuit court, Lawrence county.

"Not to be officially reported."

Action by R. T. Burns and another against W. H. Bartram and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Wm. M. Fulkerson, for appellants. Holt & Holt, for appellees.

**PAYNTER, J.** At the time W. H. Bartram made the deed to his children, he was indebted to Burns and Daniel. The considera-

tion of the conveyance was partly love and affection for his children. Indeed, it appears to have been the principal consideration for the conveyances. He could not thus voluntarily convey away his property until he had paid his debts. The judgment of the court below in sustaining the attachments and giving liens was correct. The court, however, did err in refusing to permit the defendants to file the amended answer which they tendered. If the conveyance of the father to the children was with fraudulent intent to cheat his creditors, and they were made aware of his purpose, then they would not be entitled to assert a claim for lasting and valuable improvements which they may have made upon the property. If the design of the children in accepting the deeds was not to aid in defrauding the creditors of their father, but was done in good faith, and they made the improvements under such circumstances, they are entitled to a first lien to the extent such improvements enhanced the value of their respective tracts of land. If the facts as averred in the amended petition be true, then the children are entitled to be adjudged their liens for amounts which their lasting and valuable improvements increased the value of the land; but from this should be deducted the reasonable rent of the land from the time the deeds were made, less taxes paid on the land. The right of the children to be allowed for lasting and valuable improvements cannot be defeated by simply adjudging Burns and Daniel the liens upon property, and selling it to satisfy them. Although the court may not enter an order vacating the deeds, that fact would not deprive the defendants of their right to assert their claim for improvements. If it did, then the children might be deprived of all claim for the improvements, because it might require all the tracts of land to pay the debts of Burns and Daniel. The judgment is reversed, and case remanded for the trial of such issue as may be formed on the claim for lasting and valuable improvements.

#### NICHOLAS et al. v. SHIPLETT.

(Court of Appeals of Kentucky. Nov. 20, 1897.)

##### GIFT OF LAND—RIGHTS AGAINST PURCHASER.

One whose mother deeded to him, while a minor, land for which, after he had recorded his deed, she gave a bond for a deed to another, can maintain a suit for the land against the other taking possession thereof, though there was no valuable consideration for the deed.

Appeal from circuit court, Pulaski county.

"Not to be officially reported."

Action by Robert Shiplett against J. R. Nicholas and others. Judgment for plaintiff. Defendants appeal. Affirmed.

O. H. Waddle, for appellants. Denton & Cook, for appellee.

**HAZELRIGG, J.** While the appellee was about 17 years of age, his mother, in consid-

<sup>1</sup> For opinion on rehearing, see 43 S. W. 686.



eration of the sum of \$100, conveyed him a tract of mountain land of the value of some \$500. This conveyance, some months after its execution and acknowledgment, was carried by appellee to the proper office, where it was duly recorded. After this, the mother, expecting, as she says, that her son would consent to the trade, attempted to sell the land to appellant, John Nicholas, and executed a bond for title therefor. The sale was on a long credit, and nothing has ever been paid. The son refused to consent to the sale, and, the appellant having taken possession, he brought this suit for the land, and to stay waste. The chancellor granted the relief prayed for. There can be no doubt of the correctness of the judgment. It is attempted to show that the son did not accept the deed from his mother, but he did accept it, and had it recorded. Whether there was a valuable consideration for the conveyance is not material; a good consideration is sufficient. Nor is it a matter of concern to appellants whether the mother might not avoid the conveyance for some sufficient reason. She is not trying to do so. On the contrary, she testifies in support of the son's claim. Only costs seem to be adjudged against the appellants, and we think the chancellor properly adjudged them against all the appellants. Judgment affirmed.

**FAULKNER et al. v. MARION NAT. BANK et al.**

(Court of Appeals of Kentucky. Nov. 17, 1897.)

**ASSIGNMENTS FOR CREDITORS—NATIONAL BANKS—PENALTY FOR USURY—RIGHTS OF SURETY.**

1. Assignees for creditors, by agreement of all parties, took control of property of the wife of the assignor, which had been mortgaged to indemnify the assignor's surety, and, out of the proceeds, first paid the taxes, and premiums for insurance on the property, and a proportionate part of the costs of settling the two estates, including compensation for their services. *Held*, that the surety cannot complain, as the costs paid were not greater than would have been incurred if the mortgage lien had been enforced by suit.

2. Under Rev. St. U. S. § 5198, providing for the forfeiture of the entire interest where usury is taken by a national bank, and giving to the person by whom it is paid the right to recover twice the amount of interest paid, a surety, when sued on the last of several renewals of a note, is not entitled to credit by the usurious interest paid by the principal at the time of the several renewals, but only by the amount withheld by the bank when the original note was executed, where the right of the principal to recover the penalty is barred by a judgment dismissing, as settled, an action brought by him to recover the penalty.

Appeal from circuit court, Marion county.  
"Not to be officially reported."

Action by the Marion National Bank against J. M. Faulkner and others on a promissory note. Judgment for plaintiff, and defendants Burns and Faulkner appeal. Affirmed.

H. P. Cooper, for appellants. W. J. Lisle, for appellees.

LEWIS, C. J. January 10, 1895, the Marion National Bank brought this action on a promissory note executed January 4, 1893, by S. H. Burns and J. M. Faulkner, for \$2,000, due in six months, and bearing interest at the rate of 7 per cent. per annum from maturity until paid. It is alleged in the answer of Faulkner, and not denied, that the note is the last of successive renewals at the end of each six months of one for the same amount executed August 23, 1889, by Burns, as principal, and himself, as surety, though there was in fact only \$1,930 originally borrowed and received. It is also stated by him, and appears, that, in addition to \$70 retained by the bank at the outset, that sum was paid by Burns as interest at the time of each renewal. As the Marion National Bank thus charged and received interest at a rate greater than allowed by the statute of the United States under which it was organized and exists, one of the questions in this case is by what amount the note sued on should be, for that reason, credited. It appears that, at the date of the first note, Burns and his wife mortgaged real property belonging to her to indemnify Faulkner as his surety, though there then existed a prior lien upon it. August 28, 1893, Burns made a deed of assignment for the benefit of his creditors to appellees Knott and Edmunds; and it appears that, by agreement of all parties, the assignees not only took control of the estate of Burns, but also sold and collected proceeds of the property of Mrs. Burns, mortgaged to Faulkner. And thus arises the other question in this case,—as to the amount Faulkner was entitled to of the entire proceeds collected by the assignees; and that we will first consider. There was paid for his benefit by the assignees to the Marion National Bank, and placed as a credit upon the note sued on, the sum of \$1,339.69. But, of the proceeds derived from the sale of the property of Mrs. Burns, the assignees first applied \$169, the amount of taxes and insurance premiums, and \$209, the proportionate amount of expenses incurred in disposing of and settling the two estates, including compensation for their services; and because the lower court allowed these sums to be deducted, and placed to the credit of Knott and Edmunds, the assignees, they have been made parties to this appeal by Faulkner. But as the payment of taxes and insurance premiums on the mortgaged property was inevitable, and costs and expenses, as much, if not more in amount, including compensation to officers of court, would have been incurred if the mortgage lien had been enforced by action in equity, we think no injustice has been done to appellant in that matter.

Section 5198, Rev. St. U. S., provides: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section [that is, greater than allowed by the law of the state where a national bank may be established], when know-

ingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action for debt, twice the amount of interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred." April 17, 1894, Burns, the principal in all the notes, sued the Marion National Bank to recover the penalty of twice the amount of interest paid to it at a usurious rate during the two years next preceding the institution of the action; and that action appears, from the record before us, to have been, on motion of plaintiff's attorney, dismissed, at defendant's costs, as settled. Therefore, though it does not appear upon precisely what terms the action was dismissed, the agreed judgment there rendered constitutes a bar to another action by Burns for the same cause. And if, thereafter, he, while living, or his personal representative since his death, in August, 1894, could not have recovered the penalty prescribed by the statute, certainly it cannot now avail appellant, the surety. According to the judgment appealed from, appellant is not entitled to any credit on account of interest actually paid by Burns; but because, in the note sued on, a usurious rate of interest is charged, the entire interest which it carried, or had been agreed to be paid on it, was adjudged forfeited. So appellee the Marion National Bank recovers the amount of the debt sued on, without interest, except from the rendition of the judgment, to be credited by said sum of \$1,339.69, as of October 29, 1894, and \$70, as of August 29, 1889, being the amount withheld by the Marion National Bank, appellee, when the money was first loaned, and the original note executed. In our opinion, the statute does not authorize any other or greater reduction of the debt, in favor of appellant, than made by the lower court. Judgment affirmed.

#### COCHRAN v. TOWN OF SHEPHERDSVILLE.

(Court of Appeals of Kentucky. Nov. 13, 1897.)

MUNICIPAL CORPORATIONS—DEDICATION OF STREETS  
— LIABILITY WHERE THERE HAS BEEN  
NO ACCEPTANCE.

1. A municipal corporation which has never accepted, either expressly or by implication, the dedication of a street, is not liable for injuries to animals from the maintenance of a barbed-wire fence on the ground thus dedicated.

2. The mere extension of the limits of a town so as to embrace ground dedicated as a street is not an implied acceptance of the dedication.

Appeal from circuit court, Bullitt county.

"Not to be officially reported."

Action by Lula Cochran against town of Shepherdsville to recover damages for inju-

ries to a mare. Judgment for defendant on a verdict returned in obedience to a peremptory instruction, and plaintiff appeals. Affirmed.

Tom Cochran, for appellant.

WHITE, J. Appellant instituted this action in the Bullitt circuit court against the town of Shepherdsville, for damages caused by a mare of appellant being injured on a barbed-wire fence said to have been in a street in said town. The petition alleges that the fence was built by and remained in said street with the knowledge of the authorities of said town for four or five months. It alleges that the mare, by reason of her injuries, was rendered worthless, and was worth, when hurt, \$100, and that, after the injury, the plaintiff had incurred much trouble and expense in attending to the wounds on said animal, of the value of \$50, and claimed a damage, in these two sums, of \$150. A general demurrer to this petition was overruled, and answer was filed, which denies any knowledge or information sufficient to form a belief as to the alleged injury; denies that any obstruction was so near or across a highway of the town as to cause the injury complained of; denies the value of the mare to have been \$100, or damage in any sum, or that care and attention and medicine were furnished of the value of \$50 or of any sum; denies that the town authorities knowingly or negligently permitted any alleged defects to be built or remain. In a second paragraph, it is alleged that one Hancock built a fence of barbed wire and posts without any authority or permission from the governing authority of said town; and that said fence was not erected upon any property of said town, or upon any property under its control or authority, or upon any of its streets or alleys, or across any of its streets or alleys, but that said fence was built in a part of the town used as a common, and has never been under the control or authority of the town of Shepherdsville, and the town has never caused any streets or alleys in that portion of the town to be graded, opened, or in any way constructed for use, nor have the authorities of said town ever levied any tax upon the property in that portion of the town of Shepherdsville, for any governmental purpose; and that the same has been used time out of mind by the public as a common until so fenced by said Hancock; and that it was upon this fence built by Hancock, if at all, that the mare was hurt. There was also a plea of contributory negligence on the part of appellant in permitting the said mare to run loose. To this second paragraph a demurrer was filed and overruled, and then a reply controverting every allegation material to the answer. On the issue thus made, the case went to trial before a jury, and, at the conclusion of appellant's evidence, the court, on motion of appellee, gave to the jury a peremptory instruction to find for defendant, which was done. Judgment having been ren-

dered in accordance with the verdict, the appellant filed reasons, and entered motion to grant her a new trial, which was overruled, and she appeals to this court.

The proof introduced on the trial, as shown by the bill of exceptions, shows that, some years ago, one Oxley laid off a plat of ground adjoining the town of Shepherdsville, making lots and streets and alleys, and sold lots in said addition to the said town, as it was called, but the proof does not show that this plat was ever put to record; that some years ago this Oxley addition was embraced in the new boundary, as fixed by a new charter of the town of Shepherdsville; and that the barbed-wire fence was over several feet in what in Oxley's plat was left for a street, and extended across an alley as laid off by Oxley; and that plaintiff's mare ran into same, and was injured. The evidence of plaintiff (for there was none other introduced) shows that the town of Shepherdsville had never levied taxes on any part of Oxley's addition for any purpose, and also that the lot owners had never listed these lots for town taxation. It is also shown that this street where the mare was hurt had never been graded or any work done on same by any person, but was the natural surface. In the testimony it is nowhere shown that the town authorities had ever accepted the dedication made by Oxley of the street, either by an express order or by any act that would imply an acceptance.

In Dill. Mun. Corp. § 642, it is said: "In order to charge the municipality or local district with the duty to repair, or to make it liable for injuries for suffering the street or highway to be or remain defective, there must be an acceptance of the dedication, and this acceptance must be by the proper authorized local public authorities. It may be express and appear of record; or it may be implied from repairs made and ordered [citing *Gedge v. Com.*, 9 Bush, 61]; or knowingly paid for by the authority which has the legal power to adopt the street or highway; or from long user by the public." In the case of *Gedge v. Com.*, 9 Bush, 61, this court said: "A road or street dedicated to the public must be accepted by the county court or town, either upon their records or by the continued use and recognition of the ground as a highway for such a length of time as would imply an acceptance; and where a dedication has been made of the ground by deed, as in this case, the marking out of the street by order of the town authorities, connected with its use by the public as a street, would be an acceptance of the grant." The proof fails to show in this case that the town authorities of Shepherdsville had ever accepted the dedication, either expressly or by implication. It was further held in the *Gedge Case*, supra: "The fact of the town limits having been extended so as to embrace the ground where the switch was constructed is not an acceptance of the benefit of the grant from Wall." As there was no proof showing that appellee was bound to re-

pair the street, or keep it free of obstruction, or to charge appellee with any damage for failure so to do, the circuit court committed no error in giving the peremptory instruction to the jury to find for defendant. Finding no error, the judgment is affirmed.

#### VAUGHN et al. v. DIGMAN et al.

(Court of Appeals of Kentucky. Nov. 24, 1897.)  
REFORMATION OF INSTRUMENTS—SUFFICIENCY OF  
EVIDENCE—BUILDING CONTRACT—  
PERFORMANCE.

1. A contract will not be reformed for mistake; the contracting parties being experienced business men, the terms of the writing clear and explicit, and the testimony decidedly in support of the contention of plaintiff, that the writing sued on expresses the real contract.

2. A contractor may recover the contract price for the brickwork on a building, though he has not finished the chimneys, where his failure to do so was due to defendants' refusal to perform their agreement, by putting on the roof timbers, so that the work might proceed.

Appeal from circuit court, Livingston county.

"Not to be officially reported."

Action by R. H. Digman and others against G. W. Vaughn and another on a written contract. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wm. Marble and J. C. Hodge, for appellants.  
Bush & Warter and S. B. & R. D. Vance, for appellees.

BURNAM, J. Appellants, who are experienced housebuilders, contracted to erect a block of buildings in the city of Grand Rivers, and thereafter, on the 18th day of November, 1891, entered into the following written contract with appellees, to do the brickwork thereon: "Grand Rivers, Ky., November 18, 1891. This contract witnesseth that R. H. Digman, John Gabe, and William Allen, all of Henderson county, Kentucky, as parties of the first part, do contract and agree with George W. Vaughn and John H. Lawson, of Grand Rivers, Livingston county, Kentucky, as parties of the second part, to build and complete all of the brickwork of the building to be known as the 'Massachusetts Block,' situated at the corner of the Dover road and Tennessee avenue; to begin said work on Monday, the 23d day of November, 1891; to push the work without delay, and complete the work as soon as possible, according to the specifications below. And the parties of the second part contract and agree to pay the parties of the first part therefor the sum of five thousand nine hundred and sixty-five dollars, to wit, four hundred dollars when the first floor timbers are on, one thousand dollars additional when the second floor timbers are on, one thousand dollars additional when the third floor timbers are on, and the remainder, less the amount paid for freight on brick, at thirty-five dollars per car, when the job is fully completed. Specifications: First story, two and one-half bricks thick, and sixteen

feet in height from the bottom of second floor timbers; second floor, two bricks thick, and thirteen feet from bottom of second-floor timbers to bottom of third-floor timbers; third story, one and one-half bricks thick, and twelve feet from bottom of third floor timbers. All walls to be laid in good lime and sand mortar, two front walls to be laid in black mortar, and bricks in latter walls to be uniform in color. All walls to be properly bonded; blind headers on the front and bonded headers on the back walls. Chimneys to be built where shown on plans, and topped out in cement mortar. The parties of the first part to furnish all of the material, do all the hauling, and furnish all the different kinds of labor to complete the above work in a good and satisfactory manner. The parties of the second part agree to furnish lumber for scaffolding, and for roof over brick pile, and ground floor for brick; also, will let parties of the first part have all tools for rough masonry, to wit, hods, hoes, shovels, mortar boards, and water barrels; same to be returned on completion of job. Parties of the second part to do all of the excavating to properly prepare for the brickwork." And on the 10th day of June, following, appellees instituted this suit on the written contract, alleging that they commenced and prosecuted the work under the contract with due diligence until the 28th day of March, 1892, and did all the work necessary thereon to receive the roof timbers of the building; that at that time they were compelled to suspend work, in order that these timbers might be put in; that appellants failed and refused to put them in so that they could entirely complete the contract by putting up the chimneys, which was all the work that remained to be done under the contract. They also seek to recover judgment for certain items for extra work alleged to have been contracted for subsequently to the date of the original agreement, and allege that defendants have become insolvent, have no property in the state subject to execution, or not enough thereof to satisfy plaintiffs' demand, and that the collection thereof will be endangered by delay in obtaining judgment and return of "No property;" and they sued out an attachment. Defendants, by way of answer, deny that they were indebted to plaintiffs in any sum whatever, or that they were compelled to suspend work on account of any failure on their part to furnish roof timbers, or to perform any act required of them by the terms of their agreement. They also deny the grounds of the attachment, and, by amended answer, allege that the contract does not conform to the real agreement made by the parties thereto; that it was expressly agreed and understood that appellees were to complete the brickwork of the building according to the plans of the architect, by which plans the walls were to be 45 feet high from the bottom of the first-floor timbers to the roof timbers, and that it was made a part of the contract that all of

the partitions of the first story were to be brick; that these stipulations were left out of the written contract by mutual mistake at the time the contract was reduced to writing; that it was the duty of appellees to have built the outer walls 3 feet higher than they did, to receive the roof timbers, and to have finished all the brickwork, including the chimneys, before they had the right to institute this action. Plaintiffs, by way of reply, deny all the affirmative allegations of the answer, and allege that the written contract expresses the whole of the contract made between the parties; deny that there was any part of the agreement omitted from the writing, except the changes which were made subsequently thereto in the height of the second story, etc.; and deny the right of appellants to vary, contradict, or reform the written agreement between them.

Undoubtedly, where the parties to an agreement have made a mistake in reducing their contract to writing, either through a mistake which is mutual, or through the mistake of one party which has been fraudulently procured by the other, courts of equity will correct the writing in accordance with the manifest intention of the parties; and the weight of authority holds that parol testimony is competent to establish the terms of the original agreement, and to show the fraud and mistake in the execution of the written instrument; but, to be effectual, such testimony must be plain and conclusive as to such alleged error. But this principle has no application under the facts of this case, as the testimony is decidedly in support of the contention of appellees. The contracting parties were experienced business men. The contract was executed and delivered, and its terms were clear and explicit in every part.

Counsel for appellants insist very strenuously upon the proposition that this suit has been prematurely brought, on the ground that plaintiffs admit that they have failed to finish the chimneys, which were a part of the brickwork contracted for by them; but on this point appellees allege, and, we think, conclusively prove, that their failure to finish the chimneys was due to the failure and refusal of defendants to perform their agreement, by putting on the roof timbers, so that the work might proceed; and they also allege and prove (we think, substantially) that they stopped work at the request of appellants at this point. While there can be no doubt that it is a correct principle of law that conditions precedent must usually be complied with before an action can be maintained upon a contract, it is also a general principle that one who prevents the happening or performance of a condition precedent, upon which his liability, by the terms of a contract, is made to depend, cannot avail himself of his own wrong, and relieve himself from responsibility to the obligee, or be permitted to avoid his liability for the nonperformance of such precedent conditions, which he himself has oc-

castioned. See *Marshall v. Craig*, 1 Bibb, 383; *Majors v. Hickman*, 2 Bibb, 217; and *Jones v. Walker*, 13 B. Mon. 165. We think the proof in the case supports the conclusions reached by the chancellor, and the judgment is therefore affirmed.

#### DEWHURST v. SHEPHERD'S EX'R.

(Court of Appeals of Kentucky. Nov. 17, 1897.)

##### EXECUTORS AND ADMINISTRATORS—PROOF OF CLAIMS.

1. A claim against the estate is properly rejected where it is excepted to, and no evidence is heard.

2. Under Ky. St. § 3870, requiring a proving witness to give in his affidavit the reasons why he believes the claim to be just, an affidavit failing to state any reasons for the belief of the affiant is insufficient.

Appeal from circuit court, Bullitt county.

"To be officially reported."

Action by R. C. Shepherd, executor of John H. Shepherd, for a settlement of his testator's estate. Judgment rejecting the claim of John Dewhurst, and he appeals. Affirmed.

Chapeze & Halstead, for appellant. J. F. Combs, for appellee.

WHITE, J. In August, 1893, R. C. Shepherd, executor of John H. Shepherd, brought an action in the Bullitt circuit court, seeking a settlement of the estate of said John H. Shepherd, and said action was referred to the master commissioner to take proof of claims, etc. The appellant, John Dewhurst, filed a claim with the commissioner against the estate for the sum of \$294 in gross. The items composing said account are not shown at all. The claimant, Dewhurst, verifies said account as the law directs, and the affidavit of the only witness, W. J. Phelps, states that he has examined the account, and he believes the same to be reasonable, correct, just, due, and unpaid, and by an amendment says that the same is a just demand against the estate of John H. Shepherd. This claim was reported by the commissioner, and by him allowed. The executor excepted to this claim, because the same was not proven, is unjust, and denied the fact of indebtedness to Dewhurst at all. The court sustained the exceptions, and rejected said claim, and from said order and judgment said claimant appeals to this court.

There is no bill of exceptions in the record, and nothing to show that on the trial of the exceptions any evidence was heard, and, as the correctness of the claim was denied by the exceptions, the burden of proving the same was on appellant to establish his claim, and, he having failed to do so, it was properly rejected. Besides, the affidavit of the proving witness does not meet the requirements of the statutes. Section 3870 of the Kentucky Statutes provides: " \* \* \* It shall also be verified by a person other than the claimant, who shall state in his affidavit

that he believes the claim to be just and correct, and give the reasons why he so believes." The evident object of the part of the statute supra we have italicized was to compel a claimant to bring a witness who had some knowledge of the facts, so he could give a reason for testifying that it was just or that he believed it was just. This the witness Phelps wholly failed to do. Finding no error, the judgment of the circuit court rejecting this claim is affirmed.

#### FLOYD et al. v. SHARP.

(Court of Appeals of Kentucky. Nov. 16, 1897.)

##### ESTOPPEL—PARTITION.

Where a mother consented that her own land, as well as land descended to her children from their father, should be divided among the children, to take effect at her death, two of the children at whose instance such division was made, and one of whom is in possession, under that division, of the whole of the land descended from the father, are estopped, after the mother's death, to claim the whole of her land under a subsequent deed from her conveying to them the fee.

Appeal from circuit court, Whitley county.

"Not to be officially reported."

Action by I. L. and Nancy Floyd against Franklin Sharp to vacate a deed and quiet title. Judgment for defendant, and plaintiffs appeal. Affirmed.

Crawford & Mason, Lester & King, and K. D. Perkins, for appellants. R. D. Hill and Tye & Sharp, for appellee.

BURNAM, J. Isaac Floyd died the owner of 30 acres of land, leaving surviving him a wife and nine children. His wife owned in fee 160 acres of land adjoining the 30 acres left by her husband, and after his death she continued in possession of both tracts of land. After the death of Isaac, and before the death of his wife, with the consent of the mother, Virginia Sharp, one of their daughters, sold her interest in the entire tract of 190 acres of land to one Henry C. McNeil, who had married one of the daughters; and William Floyd and Katherine Floyd, two other children, sold, with the consent of their mother, their interest to the appellant Isaac L. Floyd. Johnson Floyd, another heir, sold his interest to the appellant Nancy Floyd; and the heirs of Polly Rains, another daughter, sold their interest to the appellee. These sales were all made previous to the death of the mother, with her consent, and apparently upon the assumption that she had only a life estate in the 160 acres as well as in the 30-acre tract. After these sales, in September, 1890, I. L. Floyd, H. C. McNeil and his wife (who was one of the heirs), and appellant Nancy Floyd filed a petition in the Whitley county court, making their mother, Malinda Floyd, and the children who had not disposed of their interest, and the appellee herein, defendants, in which they asked to have the farm, composed of both tracts of land, di-

vided by commissioners, subject to the right of their mother to use same during her life. The record shows that this division was made by commissioners appointed for that purpose, and deeds made to take effect at the death of the mother. It was alleged that appellant I. L. Floyd was entitled to three-ninths, appellant Nancy Floyd to two-ninths, McNeil and wife to two-ninths, Margaret Wells to one-ninth, and appellee to one-ninth; and the court, by commissioner, conveyed by deeds, which were recorded in the county court, to each party, their respective allotments. The testimony shows that in this allotment appellant I. L. Floyd was allotted as his portion the 30 acres which had belonged to his father, the other interests being allotted from the 160-acre tract; and that on the day the commissioners were engaged in allotting the land the defendant Margaret Floyd was present, understood what was going on, and was consulted about how the land ought to be divided; that she notified the commissioners that appellant I. L. Floyd had built a house on the land with his own money, that she wanted his part laid off where the house was located, or that he should have permission to move it. The cost of this procedure was paid proportionally by the parties to whom the land was conveyed. Long after this proceeding in the county court,—in July, 1892,—Malinda Floyd, the mother, ignoring the proceeding in the county court, executed a general warranty deed to I. L. Floyd and Nancy Floyd to the 160 acres to which she held title, reciting that it was executed in consideration that they were to take care of, maintain, and support her during the remainder of her life. After her death, in 1893, appellee, Sharp, took possession of the portion of land which had been allotted to him by the proceeding in the county court, and this suit was instituted by appellants against him, asking the court to adjudge the conveyance made in the county court proceeding void, and that their title be quieted against any claim of defendant under the county court deed. Appellee resisted the relief sought, and pleaded the facts recited herein by way of defense and estoppel; further alleging that the mother had been overreached by appellants in obtaining the deed to the land in fee simple; that she had intended to convey to appellees only the life estate which she had reserved, and which had been secured to her in the county court proceeding. We think there can be no question that Malinda Floyd had the right in her lifetime to consent that her children might divide the real estate belonging to her, and also the estate which descended from their father, to take effect at her death; and, as this division was made with her consent, and at the instance of the appellants in this suit, and as one of them is holding, and is in possession of, the whole of the 30 acres of land to which Isaac Floyd held title under this allotment, they are estopped from claim-

ing adversely to their conduct, acts, and declarations in the county court proceeding. The general principle is that, where one acts with bad faith either in admissions or declarations which he has made, and has induced others to act upon these declarations, he shall be bound by them, and shall not thereafter, in a controversy about the same matter, claim adversely to his first contention. See *Crockett v. Lashbrook*, 5 T. B. Mon. 545; *Hanley v. Foley*, 18 B. Mon. 520; *Greer v. Greer's Adm'r* (Ky.) 12 S. W. 152; and *Bigelow, Estop.* 687. For the reasons given, the judgment is affirmed.

#### MAYSVILLE & B. S. R. CO. et al. v. BEYERSDORFER et al.

(Court of Appeals of Kentucky. Nov. 9, 1897.)

RAILROADS—INJUNCTION RESTRAINING THE TAKING OF STONE NEAR RIGHT OF WAY.

Where a railroad company seeks to enjoin the owner of land from removing stone from his own land, which is valuable only for the stone and river frontage, the burden is on plaintiff to show that the removal of loose stone from the beach will damage or endanger plaintiff's road-bed.

Appeal from circuit court, Pendleton county.

"Not to be officially reported."

Consolidated actions by the Maysville & Big Sandy Railroad Company and the Chesapeake & Ohio Railroad Company against John Beyersdorfer and others to enjoin defendants from taking stone near plaintiffs' rights of way. Judgment for defendants, and plaintiffs appeal. Affirmed.

Wadsworth & Cockran, for appellants. Rardin & Rardin and John H. Barker, for appellees.

WHITE, J. These consolidated actions were all instituted in the Pendleton circuit court by the appellants, the Maysville & Big Sandy Railroad Company and the Chesapeake & Ohio Railroad Company, against the several appellees, John Beyersdorfer, Fred Bauer, Jacob Roth, and Mike Shultz. In each action the appellants sought to perpetually enjoin appellees from taking stone, either loose or by quarrying, out of the bank of the Ohio river, and near the right of way of appellants' road, although it was from the lands of the appellees Beyersdorfer, Roth, and Shultz; the said appellants alleging that by thus removing the stone from the bank the lateral support would be taken away from its right of way, and cause same to give way, and be destroyed, and thereby irreparably injure appellants. The answer to the petition is a general and specific denial of any damage or injury, past, present, or threatened. However, it is not denied that stone is being taken by defendants from their own land, but it is denied that such taking in any way injures or will injure the plaintiffs' right of way, or will cause same to cave in or give way. It is also denied that

ever at any time the defendants, or any person under their authority, had removed any stone from the right of way of plaintiffs at all. The pleadings in all the cases being the same, by agreement of all parties the cases were consolidated, and heard together, the proof all being taken as one case. Upon trial before the chancellor, the temporary injunction was dissolved, and the relief asked for denied, and the three actions dismissed absolutely. From that judgment this appeal is prosecuted.

From the testimony it appears that the right of way of appellants is from 70 to 80 odd feet wide along the lands of appellees, and is away from the river some 100 to 300 feet, thus leaving a strip of appellees' land along the river bank that is cut off from their other lands by the railroad; and it seems from the evidence that this strip cannot be cultivated, and is valuable to the appellees only for the stone that may be taken, and the river frontage. If appellees be denied the right to take stone from this strip of land, it is, for all practical purposes, valueless, and would, in effect, be adjudging to the appellants appellees' land without any compensation. This ought not to be done, unless it be clearly shown that the use appellees were making of their land was actually damaging appellants' rights, derived from appellees in purchasing the right of way, or would necessarily damage appellants. The evidence nowhere shows that appellees were taking stone from appellants' right of way, but, on the contrary, all agree that all the stone was taken on appellees' own land, and off the right of way. It is not shown that in getting the stone the appellees blasted or excavated, but only took up the loose stone, washed out by the river, and that lay on the beach, and this some distance from appellants' right of way. There is some dispute or difference as to whether appellants' roadbed is on a solid ledge of rock, or just simply the side of a hill containing rock, and this, it seems to us, is the only material issue made by the evidence. If the roadbed is on a solid ledge of rock, then the removal of loose stone on the beach, though further down the hill, would not in any way endanger the roadbed, or cause it to cave or slide; while, if it was of a clay foundation, with loose stone in it, the taking away of any part of the foundation might endanger the roadbed, and cause damage. On this proposition the burden was on appellants to show by the evidence that the removal of loose stone on the beach damaged or endangered their roadbed. It seems to us that the evidence of appellees clearly shows that the removal of the loose stone, as it was done, did not damage and did not endanger the roadbed of appellants, and, this being shown, the appellants were not entitled to the injunction and relief sought. The judge of the circuit court, having reached this conclusion, and denied the injunction, and dismissed ap-

pellants' petitions, we are of opinion committed no error, and the judgment herein is affirmed, with damages.

### MUDD v. ROGERS.

(Court of Appeals of Kentucky. Nov. 23, 1897.)

#### **LIBEL AND SLANDER—SPECIAL DAMAGES.**

1. Words charging an indictable offense punishable by an infamous or corporal punishment, or involving moral turpitude, are actionable per se.

2. Words charging that plaintiff "is a drummer for a whore house" are not actionable per se, as it cannot be said that by general acceptance among the public among whom they were used they were understood as charging the indictable offense of inducing virtuous women to enter upon a life of shame, or of inducing persons to attend whore houses, and then commit fornication or adultery.

3. As such words certainly imported an infamous occupation, whether indictable or not, a petition alleging that they were intended and understood to charge the indictable offenses referred to, and that by reason thereof plaintiff has been socially ostracized, shows special damage, and is good.

Appeal from circuit court, Daviess county.  
"To be officially reported."

Action by James D. Mudd against William Rogers for slander. Petition dismissed on demurrer, and plaintiff appeals. Reversed.

Jo Kaycraft and William Carico, for appellant. Sweeney, Ellis & Sweeney, for appellee.

GUFFY, J. The court below sustained a demurrer to the petition in this action with leave to amend, but the court refused to allow the first and second amended petitions offered by plaintiff to be filed, and dismissed plaintiff's action, to reverse which judgment this appeal is prosecuted.

The material portion of the petition reads as follows: "The plaintiff, James D. Mudd, says he is a single man, having never married, is a resident of, and business man in, the state of Kentucky, and has been for many years, and has an extensive acquaintance, both business and social, in Daviess county, Kentucky. He says he has always stood high socially and as a business man in said county and state, and especially in Louisville, Ky., and enjoyed the confidence of all the good citizens thereof for correct business dealings and proper social demeanors, until very recently, to wit, on the — day of August, 1895,—plaintiff cannot say, because he does not know the precise day,—the defendant, William Rogers, did maliciously, wrongfully, unlawfully, falsely, and slanderously utter and publish, publicly and privately, and in the presence and hearing of Joe Price and William Winfried and many other good citizens of said county and state, unknown to plaintiff, with intent to injure and destroy his good name and reputation and character, and which did injure and destroy his said good name and reputation and character among the citizens aforesaid, the

following words, to wit: 'He (meaning plaintiff, James D. Mudd) is a drummer for a whore house,'—thereby conveying the idea that plaintiff made a living by and his business was to solicit whore-house customers, and procure men and women to commit fornication and adultery, and inveigle young women into lives of shame and ruin. The above language was used, uttered, and published by defendant for and with the intent aforesaid, and is false, malicious, and slanderous, and injured and destroyed the good name and character of plaintiff amongst all the good citizens of said county and state and country; so that plaintiff is now, because of said slanderous words, avoided and shunned by all good citizens, both male and female, his former associates, by whom he was always before said slander honored and respected, all to the damage to plaintiff in the sum of ten thousand dollars, for which sum plaintiff prays judgment against defendant, and judgment for his costs herein expended and for all proper relief."

The first amended petition is as follows: "That the defendant, in using, uttering, and publishing the slanderous words complained of in his original petition, viz. 'He is a drummer for a whore house,' intended to and did convey the meaning and idea that plaintiff was a drummer and solicitor for a whore house; that 'whore house' meant and was a bawdy house, or place where men and women meet together for and did there commit acts of fornication and adultery; that this is the true and universally accepted meaning of the term 'whore house,' and was so understood by those who heard defendant use said language, and it was understood by and intended by defendant that those who heard him should so understand him. Defendant intended that those who heard him should understand him, and that they did understand him, that plaintiff's business was to solicit and procure men and women to meet at such whore or bawdy house, and there commit acts of fornication and adultery, and that plaintiff's avocation and business was to aid and entice unmarried girls under the age of 21 years of age to enter such whore or bawdy house, that they might there be seduced and lose their virtue; and this was the true meaning of the slanderous language used by the defendant as aforesaid. Plaintiff says that prior to the uttering and publishing of said slanderous language aforesaid he (plaintiff) had a large number of acquaintances and friends and associates in Davless county and other parts of the state of Kentucky, and that the publishing of said slander has lost him many of said friends, and has lost him their respect and esteem, and has rendered him odious in the community, and he has otherwise suffered in his reputation and good name, as stated in his original petition. Wherefore, the premises considered, he prays as in his original petition, and he says the foregoing state-

ments are true." Plaintiff then offered his second amended petition, which is as follows: "The plaintiff further amends his petition, and says that at the time and place mentioned in the petition of the speaking and publishing of the slanderous words named in the petition the defendant further said, spoke, and published of and concerning this plaintiff the following words, to wit: 'He is a drummer for a whore house in the city of Louisville, Kentucky,'—and by said language the defendant meant to and did accuse the plaintiff of aiding and assisting in the keeping of a whore house or bawdy house in the state of Kentucky, and that it was the business of plaintiff to solicit and procure, for given compensation and reward, men and women to meet at such whore or bawdy house, and there commit acts of adultery and fornication; and that the avocation of plaintiff and the business of plaintiff was, and that plaintiff was engaged in the business and avocation of, aiding and enticing unmarried girls under the age of twenty-one years to enter such bawdy house, that they might there be seduced and lose their virtue, and this was the true meaning of the slanderous language used by the defendant as aforesaid, and defendant intended to convey this idea to those who heard him, and those who heard said slanderous language did so understand defendant. Plaintiff says the language so used by defendant was false, malicious, unlawful, and slanderous, and was so used and published by defendant with the intent to injure and destroy plaintiff's good name and reputation and character, and it did injure and destroy his good name, reputation, and character among his many friends and acquaintances. He says that on the evening on which said slanderous language was spoken of and concerning him he (the plaintiff) had gone with a young lady, to wit, Miss V. Winstead, to a party or social gathering, and it was at said party that said language was used by the defendant, and that, by reason of the use and publication of said slanderous language, the said lady refused to permit him (plaintiff) to accompany her home, and refused and still refuses to associate with plaintiff, and that by reason of the speaking and publication of said slander plaintiff was deprived of the pleasure and amusement of said social gathering, and the young ladies there refused to permit him to dance with them on account thereof, and that by reason of said slander he has lost the society of, and the pleasure of associating with, the aforesaid Miss Winstead, and nearly all the other young ladies and citizens in that community. Wherefore plaintiff's feelings were greatly injured, and subjected to great shame, mortification, and lost his reputation as aforesaid, and he was thereby brought into universal execration. Wherefore, the premises considered, he prays as in his petition."

The contention of appellee is that the words charged to have been spoken by the



appellee are not actionable per se, and also that the meaning or import of the words as claimed by the appellant is not the fair and reasonable meaning of the words charged to have been spoken. The contention of appellant is that the words charged an indictable offense, and also imputed moral turpitude, hence were actionable per se; but, if that be not true, the intent of defendant, and the reasonable meaning conveyed by the slanderous words, were as set forth in the amended petitions offered to be filed, and that he sustained special damages as set out in the amended petitions offered to be filed. If the slanderous words charged in their common acceptation mean that appellant was engaged in the business of inducing virtuous women to enter into whore houses, and enter upon a life of shame, then the charge would import a felony, and would be actionable. If the words spoken necessarily imply the charge that defendant was engaged in the business of promoting a whore house, and thereby inducing persons to commit the crime of fornication or adultery, he would be guilty of an indictable offense, and therefore the words charged to have been spoken would be slanderous per se.

We are not inclined, however, to hold that the terms used necessarily imply, or, in effect, charge, the appellant with the acts or offense aforesaid. We cannot say, as a matter of law, that the term "drummer for a whore house" is equivalent to charging that appellant was guilty of the indictable offense heretofore mentioned; but it is perfectly manifest that the charge imputed improper conduct, or a disreputable avocation; hence the charge might, and reasonably would, work special injury to plaintiff. There can be no question but what the charge, if true, would greatly tend to degrade the appellant, and justly debar him from the society of pure ladies and gentlemen, and thus inflict upon him the damages of shame and mortification alleged by him in the amended petitions which he offered, and which were improperly rejected. It is a well-settled rule of law that words are to be construed, as a general rule, according to the general usage and acceptation accorded or given to them by the public at large among whom they are used; hence it is that we cannot say as a matter of law that the slanderous words charged to have been uttered at the time and place of such utterance were actionable per se; but, inasmuch as it is certain that they imported an infamous occupation, it was competent for appellant to show by special averments special damage resulting to him from the utterance and publication of the alleged slander. In *Lemons v. Wells*, 78 Ky. 118, this court, in discussing the question of slander, said: "At common law, actionable words per se were such as imported a felony, but many public offenses were felonies at common law which are mere misdemeanors by more enlightened American statutory law. The gen-

eral rule is that any words which charge a person with an indictable offense, which is punishable by an infamous or corporal punishment, or which involves moral turpitude, are actionable in themselves. *Brooker v. Coffin*, 5 Johns. 190; *Bissell v. Cornell*, 24 Wend. 354; *Cooley, Torts*, 196." If the appellant was engaged in the business of inducing persons to attend whore houses, and there commit fornication or adultery, he was guilty of an indictable offense. 1 Bish. Cr. Law, § 483. If the words were not actionable per se, yet plaintiff was entitled to recover, if they were false, by alleging and showing special damages. *Newm. Pl. & Prac.* 319, and cases cited. The damage or injury resulting to plaintiff from the publication of the slander, if his allegations be true, can scarcely be computed in dollars and cents. The treatment that he received from his theretofore friends and associates, and especially the ladies, to a sensitive and high-toned gentleman, would be immeasurable; and, if the charges were false, and their utterance and publication brought upon the appellant the disgrace and ostracism which he alleges, he is certainly entitled to maintain this action, and to recover damages to some extent commensurate with the injuries inflicted. For the reasons indicated, the judgment of the court below is reversed, and the cause remanded, with directions to permit the two amended petitions to be filed, and for further proceedings consistent with this opinion.

#### MAY, County Attorney, v. FINLEY, Comptroller.

(Supreme Court of Texas. Dec. 23, 1897.)

#### MANDAMUS—GENERAL DENIAL—CONFLICT OF COURTS OF LAST RESORT.

1. In mandamus a general denial goes for naught, and the facts alleged in the petition must be taken as true.

2. That Code Cr. Proc. art. 98, which undertakes to invest the recorders of incorporated cities with the authority of justices of the peace, has been held unconstitutional by the court of criminal appeals, is no reason why the county attorney should not be paid for prosecuting criminals in the recorder's court of the city of Galveston, the act having been declared constitutional by the supreme court, and both courts having final jurisdiction over all cases coming before them.

Petition for mandamus by Edward D. May, county attorney, against R. W. Finley, comptroller. Granted.

Spencer & Kincaid, for petitioner. M. M. Crane, Atty. Gen., and T. A. Fuller, Asst. Atty. Gen., for respondent.

GAINES, C. J. This is a petition for a writ of mandamus to compel the comptroller of the state to issue his warrant upon the state treasurer in favor of the petitioner for the sum of \$50. After alleging that the petitioner is the county attorney of Galveston county, and that the respondent

is the comptroller of the state, and some other formal matters, the petition proceeds as follows: "Your petitioner further represents that on the following dates the following named defendants were charged by complaint in the recorder's court of the city of Galveston, sitting as an examining court in and for said county, with the respective offenses specified after the name of each defendant, and were on said dates each severally tried for the respective offenses with which they were charged, and that in each of said trials the state of Texas was represented by your petitioner as county attorney of Galveston county, viz. [Here follow the names of the defendants and of the offenses with which they were respectively charged.] And that thereafter, at the March term of the criminal district court of Galveston county, the grand jury of said county returned indictments against each of said defendants for the respective offenses charged against them, and for which they were tried and examined in the recorder's court; and that thereafter, on the 23d day of March, 1897, your petitioner made out under oath an itemized account, wherein is shown and set forth the number of each case in the recorder's court, and the number of each case in the criminal district court of Galveston county, the name of each defendant, the date of the examining trial of each defendant, and the fees due your petitioner, being the sum of five (\$5) dollars in each case, and amounting in the aggregate to the sum of fifty (\$50) dollars, which account was, on the 27th day of March, 1897, presented to and approved by the Honorable E. D. Calvin, judge of the criminal district court of Galveston county, for the sum of fifty (\$50) dollars. Said account, together with the approval of the judge of the criminal district court indorsed thereon, is hereunto annexed, marked 'Exhibit A,' and made a part hereof." The account, duly verified by the oath of the petitioner, and approved by the judge of the criminal district court of Galveston county, is attached to the petition as an exhibit. It was also alleged that the respondent, upon demand being made upon him, had refused to draw his warrant for the sum claimed by the petition. The comptroller has answered by a general demurrer and a general denial.

In a mandamus proceeding a general denial goes for naught, so that the facts stated in the petition are to be taken as true. *Sanson v. Mercer*, 68 Tex. 494, 5 S. W. 62. We understand that, if there were no question as to the validity of that provision of the charter of the city of Galveston which attempts to confer power upon the recorder of the city to exercise within the city limits the authority of a justice of the peace, or of the provisions of the Code of Criminal Procedure, which purport to confer the same jurisdiction (Code Cr. Proc. art. 98), the comptroller would not have hesitated to

issue his warrant for the account in controversy. There is a regrettable conflict between the decisions of the court of criminal appeals and those of this court upon the question of the validity of the legislation which undertakes to invest the mayors or recorders of incorporated cities in this state with the authority of justices of the peace within the city. The court of criminal appeals, in cases properly arising before them, have held such legislation in conflict with the constitution. *Leach v. State* (Tex. Cr. App.) 36 S. W. 471; *Ex parte Knox* (Tex. Cr. App.) 39 S. W. 670. The same question came before us in a civil proceeding, and, while we felt the importance of maintaining uniformity of decision between our two courts of last resort, and recognized as well the learning and ability of that court as the force of the argument by which they supported their conclusion, we were constrained to differ from them, and to hold the legislation constitutional. *Harris Co. v. Stewart* (Tex. Sup.) 41 S. W. 650. We patiently investigated and carefully considered the question before announcing our conclusions in the case cited, and now see no good reason for changing our opinion.

But the main contention on behalf of the state seems to be that, since the court of criminal appeals have held that the mayors or recorders of cities have no jurisdiction to try offenses against the state, and since, upon a proper proceeding, that court will hold that any judgment or order rendered by such officers in state cases is void, prosecutions for infractions of the penal laws of the state before such tribunals are practical nullities, and that services rendered by the officers of the state in such case should not be compensated. If amended article 5 of the constitution had provided, as probably should have been done, that the decision of the court of criminal appeals upon the construction of all statutes relating to criminal offenses, and upon all questions relating to the jurisdiction of the courts over such offenses, should be final and controlling, there would be force in this contention. But such is not the case. That court and this have each final jurisdiction over all cases and questions which come before them. The constitution provides no means by which a conflict can be determined or reconciled. Each court, in deciding a question which has been determined by the other, will doubtless give great weight to the opinion of the other, but is not bound by it. Upon a pure question of criminal law we should be strongly inclined to follow the decision of the court of criminal appeals, and should hesitate long before holding differently from them. But many of the city charters purport to confer upon the mayor or recorder the jurisdiction of a justice of the peace, not only in criminal, but also in civil, cases. The result is that it is a question which affects not only the admin-

istration of the criminal, but also of the civil, laws. If we should yield to the decision of the court of criminal appeals upon the question of the criminal jurisdiction of the mayor or recorder, by the same rule they should yield to the decision of this court upon the question of civil jurisdiction; and yet, if the law be in conflict with the constitution as to the one jurisdiction, it is necessarily so as to the other. If the legislature could not confer the criminal jurisdiction, it could not confer the civil; and neither court could, upon any just grounds, hold that the statute was good in part and void in part. It is valid or invalid as a whole.

It results that there is no way out of the difficulty; there is no middle ground. We therefore have a case in which the petitioner, the county attorney of Galveston county, has, under the law, prosecuted upon examining trials certain felony cases before a court which, in our opinion, is a court of competent jurisdiction, and in which the defendants have been held to answer the offenses with which they were respectively charged and have been indicted. For such services the county attorney is allowed a fee of five dollars in each case, to be paid by the state. Code Cr. Proc. art. 1092. Such being the case, can we refuse to recognize and enforce the right because another court of equal authority has held that the tribunal in which the services were rendered was without jurisdiction? We think not. The opinion of this court upon questions coming before it in cases of which it has jurisdiction is the law of the case, and every party to the suit has the right to demand that we give it effect. It follows that, in our opinion, the peremptory writ of mandamus should issue as prayed for, and it is so ordered.

#### EUSTIS et al. v. CITY OF HENRIETTA.

(Supreme Court of Texas. Dec. 13, 1897.)

CITY TAX COLLECTOR—FEES—TAX SALE—DEED—  
CONSTITUTIONAL LAW—COURT OF APPEALS  
—ENTRY OF JUDGMENT.

1. Rev. St. 1895, art. 2460, authorizes sheriffs to charge \$1.50 for levying an execution, and \$2 for executing a deed to each purchaser. Article 5206 allows the tax collector of a county the same compensation for selling property for taxes that a sheriff receives for execution sales. Article 5198 provides that the laws governing county tax collectors shall also govern the tax collectors of cities and towns. Article 5208 allows the county tax collector to charge for but one levy in case "he has levied upon more than one tract of land belonging to the same individual, corporation, or company," and for advertising the lands he can charge against each tract only its proportion of the cost for advertising the whole number. *Held*, that when the tax collector of a city levied upon 99 parcels of land all belonging to the same person, and sold them to the city, conveying them by one deed, he could charge only \$3.50 for the levy and deed of the whole, and 25 cents for advertising each parcel, and that a charge of \$2.50 costs was a greater sum than allowed by law.

2. Where a tax collector sells land for taxes, the deed given by him is conclusive upon the purchaser claiming thereunder as to the facts relating to the sale therein stated.

3. A tax sale of land for an amount greater than the tax collector is authorized by law to charge is void.

4. Sayles' Civ. St. art. 447, is unconstitutional in so far as it requires the payment of taxes precedent to making a defense against a void claim of title under an illegal tax sale.

5. Under Rev. St. 1895, art. 1042, it is the duty of the court of civil appeals to enter judgment in accordance with the answers given by the supreme court to a certificate of dissent upon being notified thereof.

Certificate of dissent from court of civil appeals of Second supreme judicial district.

Action by the city of Henrietta against M. E. Eustis and another. There was a judgment of the court of civil appeals (41 S. W. 720) affirming a judgment for plaintiff, and a certificate of dissent was sent to the supreme court.

W. G. Eustis, for appellants. J. A. Templeton and Emmett Patton, for appellee.

BROWN, J. Upon dissent of Justice Hunter, the court of civil appeals has sent to this court the following questions: "On July 3, 1897, it was ordered by this court that the judgment stand affirmed, Justice Hunter dissenting. A motion by the appellants to certify the points of dissent has been granted by this court. We refer to the former opinion of the majority of this court (37 S. W. 632) as containing a correct statement of the case, and this court, without dissent, adopts the conclusions of fact there set out, and proceeds to certify to your honors the following questions, forming the subject of dissent: (1) The majority hold as a conclusion of fact that the sale by virtue of which the tax deed was executed was not in excess of the costs thus authorized; or, in any event, that a necessary inference is that the record will not support the conclusion that such sale was so in excess. From this conclusion of fact Justice Hunter dissents, holding that the question is one not of fact, but of law, and holding that the lands described in the deed, including the property in controversy, were sold for more costs than the law charged them with. The question certified in this connection is whether or not the tax deed, under article 447, Sayles' Rev. Civ. St., is conclusive evidence that the block 31 was sold for \$10 taxes and for \$2.50 costs, as recited in said deed, and whether or not this amount of costs was more than was prescribed by law. We refer to the majority and dissenting opinions, accompanying this certificate, for a statement of such portions of the record as constitute the basis for the conflicting views. (2) Conceding that the sale by virtue of which the tax deed was executed was in excess of the costs authorized by law, would this fact of excess avail the appellants in avoidance of the deed, in the absence of the payment or tender of payment of the taxes legally due, it being further

found that the levy and the assessment of the taxes and the sale were in all other respects valid? (3) Conceding, as is found without dissent, that the true amount of the taxes due to the city on block 31 at the date of the filing of this suit was \$174.50, do the allegations of the defendants' answer herein, showing a tender of \$55, in connection with an offer to pay whatever should be found to be due against their property, show a tender of the payment of the taxes due, within the meaning of article 447, Sayles' Rev. Civ. St., or were the allegations such an offer to do equity as entitled the pleaders in this case to have a decree in their favor permitting them to pay the true amount of taxes found to be due by the court against said property within a reasonable time after the date of the judgment? The allegations of this answer are as follows: "That in case the court shall find that said property is subject to any taxes due plaintiff, that defendants are ready and willing, and have always been ready and willing, to pay same, and will pay same as soon as the amount of legal tax, if any, is ascertained by the court." We also respectfully refer to the majority and dissenting opinions herein filed, respectively, on July 3 and July 5, 1897, for a more detailed exposition of the points of dissent and their materiality."

The first ground certified contains two questions: (1) Was the amount specified in the deed (\$2.50) a greater sum for costs than was by law allowed to the officer? (2) Was a recital in the tax deed of the amount of taxes and costs for which the land in question was sold conclusive upon the purchaser? The dissenting opinion of Justice Hunter states clearly the law by which we are to determine the amount of costs which the tax collector of the city of Henrietta was authorized to charge against this land. Article 5198, Rev. St. 1895, is in the following language: "The provisions of this chapter in reference to the seizure and sale of real and personal property for taxes, penalties and costs due thereon, shall apply as well to collectors of taxes for towns and cities as for collectors of taxes for counties, and they shall be governed in selling real and personal property by the same rules and regulations in all respects as to time, place, manner and terms and making deeds as are provided for collectors of taxes for counties." Article 5206, Rev. St. 1895, provides that the collector for a county shall receive, for seizing and selling property for taxes, the same compensation as is allowed by law to sheriffs or constables for making levy and sale in similar cases, but no commissions on the sales should be allowed. By article 5208, Id., the tax collector is allowed to charge for but one levy in case he "has levied upon more than one tract of land belonging to the same individual, corporation or company," and for advertising the lands he can charge against each tract only its proportion of the cost for advertising the whole num-

ber, and no more. Article 2460, Id., authorizes sheriffs to charge \$1.50 for levying an execution, and \$2 for executing a deed to each purchaser. But one deed was made, embracing 99 parcels of land; and, under the statutes as cited above, the tax collector was entitled to charge, for levy and deed for the whole, \$3.50, or about 4 cents for each parcel, and 25 cents for advertising each parcel, making a total cost of 29 cents that might be charged against the land in controversy. The amount charged was \$2.50; that is, \$2.21 more than was lawful. Is the recital in the deed of the amount of tax and cost for which the land was sold conclusive against the purchaser? By article 5198, Id., before copied into this opinion, the tax collectors of towns or cities were required to observe the same rules, in selling land and in making deeds, as was provided for the government of tax collectors of the counties. Article 5185, Id., so far as applicable to this question, is in the following language: "The collector of taxes shall execute and deliver to the purchaser, upon the payment of the amount for which the estate was sold, and costs and penalties, a deed for the real estate sold, \* \* \* which deed shall state the cause of sale, the amount sold, the price for which the real estate was sold, the name of the purchaser, firm, company or corporation on whom the demand for taxes was made." It will be observed that the law requires that the deed shall state the "cause of the sale," which we understand to be the failure to pay the taxes assessed against the property, and the cost of levying and advertising it for sale. Article 447, Sayles' Civ. St., provides that the deed to be made by the assessor and collector upon a sale for city taxes shall be conclusive evidence "that the property was sold for taxes or assessments as stated in the deed." Taking this language in connection with that quoted from article 5185, Rev. St. 1895, we think that it means that the deed of the tax collector made in pursuance of a sale for city taxes shall recite the failure of the owner of the property to pay the taxes for the years for which the sale was made, and also the cost of making the sale, stating the amount of each, and that this recital is conclusive proof of the facts stated. As against the purchaser, it was competent for the legislature to make the deed conclusive proof of the facts stated therein, for the reason that he voluntarily accepts it, and asserts title under it. If the facts are not correctly stated in the deed, he can have it corrected. Independent of the statute, the recital in the deed would be conclusive upon the purchaser, and estop him to deny that this land had been sold for \$10 taxes and \$2.50 costs. *French v. Edwards*, 13 Wall. 506; *Brady v. Dowden*, 59 Cal. 51; *Den v. Morse*, 12 N. J. Law, 331; *Sharon v. Shaw*, 2 Nev. 289. In *French v. Edwards*, above cited, the court said: "The vendee, by accepting the conveyance with this solemn declaration of the officer as to

the manner in which his power was exercised, would be estopped from denying that the fact was as stated." We answer the first question that the sum shown in the deed as cost for which the land was sold was in excess of what the law authorized, and that the recital in the deed from the tax collector to the city of Henrietta was conclusive upon the latter, and estops the city to deny the facts as stated.

The second point of dissent certified contains two questions, which we state as follows: (1) Was the sale of the land void, on account of the excess of costs for which it was sold? (2) If void, could the owner of the land defend against the deed without paying all taxes legally due on the land? The sale of the land was void, because the tax collector sold it for an amount greater than the law authorized him to charge. *Lufkin v. City of Galveston*, 73 Tex. 343, 11 S. W. 342. In that case the court said: "It is said in the case cited that 'the rule as established by the authorities is that, if the excess be as much as the smallest coin authorized by law, the sale is void.' See, also, *Huse v. Merriam*, 2 Greenl. 373; *Case v. Dean*, 16 Mich. 12. There is reason for the rule. It is to the interest of the public that illegal taxes should be so declared, and a trivial sum exacted of each taxpayer becomes a matter of importance as applied to the body of the taxpayers at large, and may become important in amount to each individual owner of property by reason of the continued exactions of successive years."

"We deem it necessary to a clear understanding of the matter to review to some extent the former opinions of this court upon the second point embraced in the second question. Upon a former appeal of this case to the court of civil appeals of the Second supreme judicial district, that court certified to this court the following question: "(3) If the action of the court was correct in holding the tax deed void by reason of the sale having been made to pay a larger amount than was due, or if it should appear that the deed is void by reason of insufficient description of the property conveyed, could appellee avail himself of such defects without showing the payment or tender of the taxes legally due on the property?" To which this court replied: "This provision applies to tax sales the equitable rule that, where a purchaser at a void sale has discharged a lien upon the property, the owner will not be permitted to recover the property without first paying the sum applied to the discharge of the lien. In case of purchase by the city as in this instance, we think it was in the power of the legislature to require the payment of all taxes due upon that property as a condition to the right of the delinquent to set up defects in the title of the city." *City of Henrietta v. Eustis*, 87 Tex. 14, 26 S. W. 619. Upon this answer the court of civil appeals reversed the judgment of the district court, and remanded the case. In case of *Ozee*

*v. City of Henrietta* (Tex. Sup.) 38 S. W. 768, the court of civil appeals of the Second supreme judicial district certified to this court the following question: "Fourth. Does the ruling of the supreme court in answer to third certified question in the case of *City of Henrietta v. Eustis* (Tex. Sup.) 26 S. W. 619, apply to the facts of this case as herein presented, so as to debar defendants from defenses to plaintiff's suit, as based upon said deed, when it cannot be said in the language of the opinion that the land in suit was acquired under the deed?" To which question this court replied, by Chief Justice Gaines, as follows: "In answer to the fourth question, we will say that the ruling in the case of *City of Henrietta v. Eustis*, 87 Tex. 14, 26 S. W. 619, does not affect the determination of the questions certified in the present case." The chief justice then proceeds to show that the question then presented was not properly involved in that which was certified in *City of Henrietta v. Eustis*, and therefore was not decided, and concludes in this language: "The statement embraced in the certificate showed that the first question was in the case. It did not show that the deed was void for insufficiency of description, and therefore the second, while hypothetical in form, appeared to us in fact abstract. It was therefore not considered, and our answer was to the first of the alternative questions submitted as one, and was not intended to embrace the second." This opinion by Chief Justice Gaines was delivered January 28, 1897. Upon the second appeal of this case the court of civil appeals affirmed the judgment of the district court, Justice Hunter dissenting (37 S. W. 632), upon which dissent that court certified to this court for its opinion, with others, the following question of law: "Second. If not [that is, if the deed was not void for uncertainty of description], then was the sale and deed void? And, if void, could appellants dispute the validity thereof, without paying or at least tendering all taxes due, and, as included within this question, is the law requiring this to be done constitutional?" The opinion of this court in answer to the question propounded was filed March 8, 1897. In reply to the question quoted, this court said: "The majority of the court of civil appeals construed the opinion of this court in the same case delivered upon certified question as holding that law to be constitutional." Citing the case in which the former opinion was rendered, and quoting from that opinion, as we have hereinbefore quoted in this opinion, this court continues: "It is evident that the court did not have in mind the constitutional question involved while discussing the provisions of article 447; and we have examined the briefs and arguments then before us, and find that the constitutionality of the law was not raised, although some of the authorities cited treat of the question in that light. The language quoted from the former opinion shows that the question decided in that case was that the law might require of

the owner the payment of taxes other than that for which the sale was made. 'his court would not have passed upon a constitutional question without mentioning the constitution itself." In the last opinion, the court then proceeds to quote from article 447, and said: "The effect of this provision, as applied to the facts of this case, is to deny the defendant Eustis, when sued for the property by the city of Henrietta, the right to defend his title and possession of the property against the city, by showing that the city had acquired no title under the proceedings through which it claimed." The opinion then proceeds to discuss the question, citing authority, and concludes: "We answer the second question that the law, in so far as it required the payment of taxes as a precedent to making a defense against a void claim for title under a tax sale, is unconstitutional, and therefore the defendant could, under such circumstances, make his defense without either paying, offering to pay, or tendering the money into court." 39 S. W. 567. After this court had "notified" the court of civil appeals of our decision upon the questions of dissent, that court adhered to its former judgment, Justice Hunter dissenting again; whereupon that court certified the points of dissent before copied. The second point in the second question is the same, in substance, as the third question certified in the former certificate of dissent, to which this court gave an explicit answer. We call attention of the honorable court of civil appeals to article 1042, Rev. St. 1895, which reads thus: "After the question is decided the supreme court shall immediately notify the court of civil appeals of their decision, and the same shall be entered as the judgment of said court of civil appeals." It is the duty of the court of civil appeals to enter judgment in this case in accordance with the answers given to the former certificate of dissent, to which we respectfully refer that court for answer to this question.

It is unnecessary for us to answer the third question, since we hold that the owner could not be required to pay the taxes as a condition precedent to making the defense.

In addition to the authorities cited in our last opinion upon the question of the constitutionality of article 447, Sayles' Civ. St., we call attention to the case of Lufkin v. City of Galveston, 73 Tex. 342, 11 S. W. 341, in which practically the same question was involved. In that case the lot in controversy had been sold for 70 cents in excess of what was legal, and the question arose whether the invalidity of the deed could be shown without making proof "that the land was not subject to taxation at the date of the sale; that the taxes or assessments had been paid; that the land had never been listed and assessed for taxation and assessments; or that the same had been redeemed." Judge Gaines, for the court, said: "The constitution limits the power of the legislature to declare the conclusive effect of a tax deed. As to these facts, which must exist

in order to call into exercise the power of the officer to make the sale,—the facts essential to give him jurisdiction over the property,—an inquiry in the courts of the country cannot be precluded. To say that this could be done would be to hold that the owner could be deprived of his property by the arbitrary action of an officer proceeding under the pretense of lawful authority. This would be simply to enable one man to transfer the property of another for a purpose not authorized by law, and would not be according to the due course of the law of the land. *McCready v. Sexton*, 20 Iowa, 356. We think, to make a tax sale valid, the collector should have the power to sell, not only for a part, but for the whole, of the amount he is attempting to collect, and that the excess of interest charged in this case is a question affecting the authority of the officer to make the sale. The language of the statute does not necessarily require a construction which would preclude the owner from raising this question. We hold that it was not intended by the legislature that such construction should be placed upon it."

#### HOEFLING et al. v. DOBBIN.

(Supreme Court of Texas. Dec. 13, 1897.)

On motion for rehearing. Denied.  
For former opinion, see 42 S. W. 541.

BROWN, J. We find no error in our former opinion in this case, and this motion must therefore be overruled. The defendant in error suggests that the opinion of this court might be understood by the trial court to mean that the proof of certain facts stated with regard to the trust claimed by plaintiff in error to have been created by the transaction would constitute a defense to any claim that Dobbin might make against Hoeftling for a violation of his trust. The petition upon which the case was tried is based upon a sale made by Dobbin to Hoeftling, and there are no allegations in the petition which claim that Hoeftling in any way violated any trust reposed in him. If Hoeftling was by the transaction intended to be the trustee of Dobbin and of Kampmann, then he was not the purchaser from Dobbin; and, whatever may be his liability as a trustee, he is not liable as a purchaser. If he was a purchaser, then the evidence which would exonerate him from liability as trustee would not be admissible, because, his real character being that of purchaser, no liability of a trustee could attach to him; and, on the other hand, if he was a trustee, then the obligation of a purchaser was never contracted by him. The opinion was directed to the case made, and, we think, will not be misunderstood by the court, and misapplied to a different case. The motion for rehearing is overruled.

DENMAN, J., did not sit.

## MILLER et al. v. GIST et al.

(Supreme Court of Texas. Dec. 16, 1897.)

**TRESPASS TO TRY TITLE—EVIDENCE OF ACREAGE—INNOCENT PURCHASER—STRANGER TO SUIT—LIMITATIONS—PLEADING TITLE—SUSPENSION OF JUDGMENT BY APPEAL—RIGHTS OF PARTIES.**

1. In a suit to recover lands, plaintiff claimed on the basis of a conveyance of 170 acres of a national road certificate location. The instrument described the quantity as "about 170 acres," and the field notes of the survey, introduced in evidence, showed that they embraced 177 acres. *Held*, that the quantity was sufficiently shown to be 170 acres.

2. After a conveyance by an ancestor to plaintiff, the heirs conveyed the entire tract to D., who had notice of plaintiff's rights. D. reconveyed a half interest to the heirs, and a sixth interest to E. The heirs did not show a valuable consideration for the reconveyance. From a judgment in favor of plaintiff, only D. and the heirs appealed. *Held*, that the question of bona fide purchaser, without notice of plaintiff's right, was not before the appellate court.

3. Where a national road certificate was relocated, after a transfer with warranty of so much of it as was located on a certain tract, on the issue of a patent the transferee took by estoppel the legal title to a like undivided interest in the land so patented.

4. Where parties in possession of lands, and paying taxes thereon, bring suit to remove a cloud from title, and are defeated, plaintiff's rights, as against strangers to the suit, are not affected; and, as to such strangers, limitations continue to run.

5. In trespass to try title, where a party would rely on a title accruing by virtue of limitations, he must plead it.

6. Though a judgment is suspended pending an appeal, it is not thereby so vacated as to allow limitations to continue to run after its rendition, in a suit to recover lands held adversely.

7. In trespass to try title, it appeared that defendant D., while in possession and claiming the entire tract, had, as against certain plaintiffs, acquired title by limitations. It was decided that D. was entitled to an undivided third. *Held* that, after setting off D.'s one-third, the interest of such plaintiffs, as against the other defendants, should be reduced by one-third.

Error to court of civil appeals of Second supreme judicial district.

Trespass to try title by M. E. Gist and others against E. H. East and others, consolidated with a like action of Emma Miller and another against E. H. East and others. There was a judgment for plaintiffs Emma Miller and another for a one-sixth interest in the land in controversy, and for defendants as to the balance; and plaintiffs M. E. Gist and others appealed to court of civil appeals, and defendants appealed from so much as was in favor of plaintiffs Miller and another. From the judgment there rendered (41 S. W. 396), certain defendants bring error. Modified.

F. E. Dycus, for plaintiffs in error. W. E. Forgy, Carrigan & Montgomery, and G. G. Wright, for defendants in error.

GAINES, C. J. On February 4, 1895, Emma A. Miller, joined by her husband, W. B. Miller, brought an action of trespass to try title against E. H. East, F. E. Dycus, M. M. Miller, Jr., and others, to recover the

west half of a survey of 640 acres of land lying in Archer county, and patented to Madison M. Miller, as assignee of George W. Barnett. On the 28th of October of the same year, Mrs. M. E. Gist and her husband and others brought suit against the defendants in the first suit, whose names have been given, and John Baxter, to recover an undivided interest of 85 acres in the same land. The two suits were consolidated and tried as one, and resulted in a judgment in favor of Emma A. Miller, the plaintiff in the first suit, for an undivided one-sixth interest in the land, and that the plaintiffs in the second suit take nothing. The defendants who had an interest in the litigation appealed, as did also the plaintiffs in the second suit. In the court of civil appeals the judgment was reversed, and judgment was rendered that the plaintiffs in the second suit recover 78<sup>12</sup>/<sub>14</sub> acres, undivided, of the land in controversy, and that the recovery of Emma A. Miller be restricted to a life estate in an undivided one-sixth interest of what should remain. The defendants Dycus and M. M. Miller, Jr., have sued out this writ of error.

The certificate by virtue of which the land in controversy was located and patented was issued to G. W. Barnett under an act "to open and establish the Central National road," approved February 5, 1844, and was transferred by the grantee to Madison M. Miller, October 25, 1855. The certificate was located by the assignee upon two surveys in Ellis county,—one of 170 acres, approximately, and the other of 463 acres. On the 1st day of February, 1859, Miller conveyed so much of the certificate as covered the smaller survey by an instrument, of the body of which the following is a copy: "Be it known that I, M. M. Miller, of the state of Texas and county of Dallas, for and in consideration of one dollar per acre, have this day bargained and sold, and do hereby convey, unto John F. Thomas, of the state aforesaid, and county of Ellis, so much of certificate No. 2 issued to Geo. W. Barnett on the 6th day of January, 1845, by Geo. W. Still, Sup. C. N. road, and approved the same date by the commissioners of said road, for 640 acres, as may cover a tract of vacant or unsurveyed land situated in the north part of Ellis county, bounded on the north by the A. M. Lavender 640-acre survey, on the east by James Conway survey, on the south by a small survey for W. H. Morris, and on the west by a survey for M. B. Runnels, supposed to be about 170 acres. To have and to hold unto him, the said John F. Thomas, his heirs and assigns, forever, the title to so much of said certificate, and also to the above-described land, when patented by virtue of said certificate. I do hereby guaranty unto him the said Thomas that said certificate is valid and genuine, and that my right to convey it to him is in every way unim-

cambered, and hereby authorize the comm'r of the gen'l land office to issue a patent to him for the above described land, when survey and application is made in due course of law. I do hereby acknowledge the receipt of \$170.00 from said John F. Thomas. Should the said quantity of land contained in the above-recited boundaries be less than 170 acres, I hereby promise to pay back to said Thomas, for the deficiency, at the rate of \$1.00 per acre; he, the said Thomas, binding himself to pay to me the rates of \$1.00 per acre for the excess that may be above 170 acres. This, the 1st day of Feb'y, 1859." It seems that, by reason of the fact that the certificate was filed upon two separate tracts of land, a question arose as to the validity of the locations. It was accordingly withdrawn, and located in Archer county, upon the land in controversy. Madison M. Miller was thrice married. The certificate was acquired during his second marriage. He died after the third marriage, leaving his third wife surviving him. She was the plaintiff in the first suit. There was no issue of the third marriage. Miller left three children,—one daughter by his first wife, and two (a son and daughter) by the second. M. M. Miller, Jr., one of the defendants, was the son. The defendants at the time of the institution of the suits were the owners of whatever interest these two daughters inherited from their father. John F. Thomas died in the year 1836, and at the time of the bringing of the suits there were living five of his daughters, and one son. Those were the real plaintiffs in the second suit. All his other children had then died without issue; but one, a daughter, left a husband surviving, who was still living at the bringing of this suit. The court of civil appeals held that his interest had, at the time of the trial, been acquired by the defendants, by virtue of the statute of limitations. One W. N. Coombs bought the land in controversy at a sale made under an order of the county court of Dallas county by the administrator of the estate of one George W. Guess, and it was conveyed to him. Coombs sold and conveyed the land to defendant East and one Milton in 1883, and this deed was in that year duly registered. East and the heirs of Milton brought suit for the land against one Dugan, and in the year 1886, upon the trial of the case, the land was adjudged to Dugan. The judgment was affirmed in the supreme court in 1891. Thereafter, in the same year, M. M. Miller, Jr., and the other children of the patentee, conveyed their interest in the property to defendant Dycus, who then conveyed to defendant Miller an undivided one-half interest in the property, and then to East 106 $\frac{1}{2}$  acres. Thereafter defendant Miller reconveyed to defendant Dycus a one-sixth interest. East, Dycus, and Miller brought suit against Dugan, and in September, 1891,

recovered a judgment for the land against him. Defendant East and Milton took possession of the land in 1883, and held it until the death of Milton. He and Milton's heirs continued to hold it until they sold their interest. The date of the latter transaction does not clearly appear, but East continued in possession and paid the taxes until 1891. All the defendants pleaded the statute of limitations of five and ten years against all the plaintiffs in both suits. All the plaintiffs, save a son of John F. Thomas, in reply to the plea of limitations, pleaded coverture.

Emma Miller, the plaintiff in the first suit, did not appeal, nor has she complained in this court of the judgment of the court of civil appeals as to her. Nor have the plaintiffs in error complained of the judgment of that court in her favor, but, as against the heirs of Thomas, they have assigned numerous errors. They first complain that the transfer from Miller to Thomas conveyed only so much of the certificate as was located upon the smaller survey in Dallas county, and that it was incumbent upon the heirs of Thomas to prove how many acres that survey contained. The transfer, however, describes the quantity as "about 170 acres," and we think this prima facie evidence of the fact that that was the true quantity. The heirs of Thomas only claimed upon the basis of a conveyance of 170 acres of the certificate. Besides, the field notes of the survey were introduced in evidence, and showed that they embraced 177 acres. Why this was not evidence of the fact, we do not see.

East also testified that when he bought from Dycus he paid the purchase money without any knowledge of the claim of the Thomas heirs, and it is urged that the court of civil appeals erred in holding that the registration of the transfer from Miller to Thomas was constructive notice of their rights. Dycus, as appears from the evidence, knew of the transfer long before he bought. Defendant Miller did not prove that he paid anything when Dycus reconveyed a half interest in the land to him. Under this state of the evidence, East not having appealed, we do not see that the question of bona fide purchaser was before the court.

It is further insisted that the claim of the Thomas heirs was a stale demand, and that the court of civil appeals erred in not so holding. The case of *Abernathy v. Stone*, 81 Tex. 430, 16 S. W. 1102, is relied upon in support of this contention. In that case, however, the owner of the certificate had located it upon two or more tracts of land, and, before patent had issued, conveyed one of the tracts by metes and bounds, without express covenants of warranty. Subsequently the grantee floated the whole certificate, and located it upon several parcels of land in another county. The grantee, having been guilty of laches, brought suit to recover such proportion of the new locations as the



number of acres in the land bought by him bore to the number of acres in the certificate; and it was held that his claim was equitable, and his demand stale. Here, however, although the certificate had been located, the transfer was to so much of the certificate as covered the land located by it, and contained what we construe to be a full covenant of warranty. In such case we think the decision in *Barroum v. Culmell*, 90 Tex. 93, 37 S. W. 313, applies, and that upon the issue of the patent the heirs of Thomas took, by estoppel, the legal title to an undivided interest in the land so patented.

It is also complained that two of the plaintiffs in the second suit, namely, Mrs. Thomson and J. W. Thomas, were barred by limitation. They were not shown to be under disability when East and Milton took possession, in 1883. It seems to us, they were barred as to East, and may have been barred as to Milton's heirs, or as to the purchaser from them. East held possession from 1883 to 1891 under a duly-registered deed, and paid in the meantime all taxes. It is true that, during the time he held possession, he and Milton's heirs brought suit against Dugan presumably to remove cloud from title, and that in 1886 a judgment for the land was rendered against them, in Dugan's favor. The case, however, was appealed to the supreme court, and not decided till 1891. 15 S. W. 273. We are of opinion that the rights of East and Milton's heirs, as against all the world except Dugan, were not affected by this suit. East, at least, kept his flag flying, and acquired by limitation whatever title Mrs. Thomson and J. W. Thomas had in the land. The deed under which he and Milton claimed was to the entire interest in the land, and recognized no co-tenancy. No repudiation on his part of the interest of the Thomas heirs who were not under disability was necessary to set the statute in operation against them. East, at least, could have defeated their claim, to the extent of one-half of the interest claimed by them; but in the judgment of the court of civil appeals, he was allowed one-third of the whole tract, and has not complained in this court. We incline to think that the evidence showed an outstanding title by limitation in East to one-half of the land, as against all the plaintiffs who were not under disability of coverture, and possibility in the grantee of Milton's heirs to the other half, and that, if Dycus and Miller had pleaded such outstanding title, they should have defeated the suit of Mrs. Thomson and J. W. Thomas. Ordinarily, in an action of trespass to try title, it is not necessary to plead an outstanding title. But a title accruing by virtue of the statute of limitations, if relied on, must be pleaded.

But it is urged that since Dugan recovered the land against East and Milton's heirs, and Dycus and Miller recovered of Dugan, Dycus and Miller have whatever title East and Milton's heirs had, and have a right to avail

themselves of this title in this suit. The difficulty in the way of that contention is that the judgment in the case of East and others against Dugan was rendered in 1886, which was less than five years after East and Milton went into possession. Although the judgment was not affirmed until 1891, during the time of the appeal, it was suspended, but not vacated. It was effective from its date, and not merely from the time of its affirmation. While, if no appeal had been taken, and if Dugan had got possession under the judgment, he may have tacked his possession to that of East and Milton, the fact is that he never had possession, and neither East nor Milton ever held the land for him. He could not have successfully asserted title by limitations, nor can Dycus and Miller do so by reason of their judgment against him.

So far, we find no error in the judgment of the court of civil appeals. But since East recovered an interest of 100% acres in the land in controversy, and since, as we think, the statute of limitations ran in his favor against Mrs. Thomson and J. W. Thomas, they should not have recovered all their interest at the expense of Dycus and Miller. East recovered one-third of the land, as against them, and that recovery extinguished one-third of their respective claims. We are of opinion, therefore, that the judgment of the court of civil appeals should be so reformed as to allow defendants in error Mrs. Thomson and J. W. Thomas each to recover only as undivided interest of 8.77 acres in the land in controversy. As so reformed, the judgment is affirmed.

### CALISHER v. MATHIAS.

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

#### ASSIGNMENTS FOR CREDITORS — ATTACHMENTS — PRIORITY — EXECUTION AND DELIVERY — RIGHT TO SURPLUS — INSOLVENCY.

1. On an issue as to whether there had been an execution and delivery of a deed of assignment to the assignee, and an acceptance by him, prior to the levy of a certain attachment, an instruction that the jury might consider such facts and testimony as they deemed proper was misleading, as it conveyed the idea that the jury had the right to select only such evidence as they deemed proper, when it was their duty to consider all the facts bearing on the disputed question.

2. Where the delivery of a deed of assignment, and the acceptance of the trust thereunder, constituted the matter in dispute, an instruction that the title of the assignee to the property assigned vests from the moment of the "execution" of the assignment was calculated to mislead, as the statute on assignments (Rev. St. 1895, art. 76) uses the words "execution and delivery."

3. A statutory assignment, if executed and delivered before the levy of an attachment, passes title to the assignee.

Appeal from district court, El Paso county; Leigh Clark, Special Judge.

Action by A. Mathias, as assignee of Herman Neufeld, an insolvent debtor, against J. Calisher, an attaching creditor of plaintiff's

assignor. There were verdict and judgment for plaintiff, and defendant appeals. Reversed.

Millard Patterson, for appellant. W. B. Brack, for appellee.

FLY, J. Appellee, as assignee, under an assignment for creditors made by Herman Neufeld, instituted suit to recover damages arising from the seizure by attachment and conversion of certain goods by appellant. The case was tried by jury, and resulted in a verdict and judgment for appellee. The only issue was as to whether there had been an execution and delivery of the deed of assignment to the assignee, and an acceptance by him of the trust, prior to the levy of the attachment. The following instruction was given by the court: "You are further instructed that the 'indorsement' or 'return' of a sheriff upon a writ of execution is but prima facie evidence of the truth of the matters therein stated, and that such return is subjected to be disputed or overthrown by other facts and testimony adduced upon the trial, and in arriving at the truth or falsity of such return you may take into consideration such other facts and testimony in the case as you may deem proper."

The first assignment complains of the latter portion of the instruction because it placed the discretion of considering only such facts as might be deemed proper in the power of the jury. We think the assignment is meritorious. The charge conveyed the idea to the jury that they had the power to select only such evidence on the point as they saw proper, when it was their duty to consider all the facts bearing on the point.

In a special charge asked by appellee the court informed the jury "that the title of the assignee of an insolvent debtor to the property assigned vests from the moment of execution of the assignment." While the due execution of an instrument may include delivery as stated in the court's charge, yet, in a case where the contest was as to the question of delivery of the deed and acceptance of the trust, the charge was calculated to mislead a jury. The statute on assignments seems to recognize a distinction between execution and delivery, as it uses the words "execution and delivery." Rev. St. 1895, art. 76. The ninth special charge is open to the same objection.

The fourth assignment of error complains of the following charge requested by appellee and given by the court: "In the event of a verdict for the plaintiff for the value of the goods levied on, then the judgment in favor of Calisher against Neufeld would be in force for the full amount thereof, and Calisher would be at liberty to proceed by garnishment against Mathias to subject any balance in his hands after the paying of costs and expenses of his administration and any accepting creditors or prior garnishments. This

is his only remedy. If Neufeld was insolvent or unable to pay his debts as they matured at the time of the execution of the assignment, it does not devolve upon plaintiff to prove what were the expenses of administration, or costs, or whether any creditors accepted or not, nor whether there were any accepting creditors or prior garnishments. These are not issues in this case at all, if Neufeld was insolvent when he executed this assignment." We are unable to see the pertinency of such a charge. It was not only impertinent and totally inapplicable, but was positively vicious in informing the jury that the only remedy appellant had was in following the gratuitous advice therein given. It was, in effect, informing the jury that appellant could not recover. We are of the opinion that the instrument executed by Neufeld was a statutory assignment, and, if executed and delivered before the levy of the attachment, passed title to the assignee. The other errors assigned are not likely to occur on another trial, and need not be discussed by this court. For the errors indicated the judgment will be reversed, and the cause remanded.

#### HOUSTON & T. O. R. CO. v. GAITHER.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 16, 1897.)

#### MASTER AND SERVANT—RAILROADS—NEGLIGENCE—PLEADING—INSTRUCTIONS—APPEAL—ASSIGNMENTS OF ERROR.

1. On an issue of negligence by defendant railroad company in causing the death of an employé, where the defense was that some person unknown to, and not under the control of, defendant had abstracted a bolt from a switch, thereby causing the accident, a charge that if such contention was true, and defendant had not been guilty of "any negligence" in not discovering such defect before the accident, the jury should find for defendant, did not impose extraordinary care on defendant.

2. The court instructed that if "the rails, or their fastenings, or the switch, or the switch rods, were out of repair, or not properly fastened together," and defendant company was thereby guilty of negligence, and deceased came to his death as a result of such negligence, the jury should find for plaintiff. *Held*, on a contention that the instruction did not limit the liability of the company to the particular act of negligence causing the death, that the instruction was proper, where the accident was due to a missing bolt that should have held the switch rods together.

3. Where the petition specified that defendant was guilty of negligence, in that it permitted its track and switches at the place where the accident occurred to remain in a defective condition for a long time prior to the accident, and this was supported by evidence that a missing bolt, which was the proximate cause of the accident, had been loose for a long time prior thereto, it was proper to charge upon the subject of defendant's failure to discover such defect in time to prevent the accident.

4. An instruction that the failure of the railroad company to do certain acts for the safety of its employes constitutes negligence is not objectionable where the charge as a whole informs

<sup>1</sup> Writ of error denied by the supreme court.

the jury that they are the sole judges as to the existence of negligence.

5. Where it was admitted and proved that the accident was due to a missing bolt that should have held the switch rods together, an instruction was properly rejected the burden of which was that the jury should find for defendant if they believed that the accident was the result of causes incident to the business of railroading.

6. It is not error to reject a special instruction where the propositions involved therein are sufficiently covered by the general charge.

7. On an issue of negligence by defendant railroad company in causing the death of an employé, where the defense was that some person unknown to and not under the control of defendant had abstracted a bolt from a switch, and thereby caused the accident, a charge that if the switch rods were disconnected by reason of the bolt being abstracted by some person alien to defendant, and if the accident was occasioned thereby, then defendant would not be liable, was properly refused, as disregarding the question of defendant's negligence in failing to discover the removal of the bolt.

8. An assignment of error in overruling a motion for a new trial, based on the points in the previous assignments, is too general.

Appeal from district court, Collin county; J. E. Dillard, Judge.

Action by Rachel Gaither and others against the Houston & Texas Central Railroad Company. From a judgment in favor of Rachel Gaither, defendant appeals. Affirmed.

The portion of the sixth instruction to which defendant excepted in his fourth assignment of error was as follows: "The jury are further instructed that the term 'negligence,' as used in these instructions, means the failure of a railway company to perform any duty required of it by law to secure the safety of its employes, or the failure of such railway company to use ordinary diligence and skill to prevent injury to its employes engaged in operating its engines and cars."

R. De Armond and P. B. Muse, for appellant. R. T. Shelton and Abernathy & Beverly, for appellee.

FINLEY, C. J. Rachel Gaither filed her original petition on September 7, 1894, claiming damages for the death of J. A. Gaither (she being his surviving wife), charging that her husband, at the time of his death, was in the employ of the Houston & Texas Central Railroad Company, as fireman; that on June 2, 1894, in an accident to the south-bound passenger train, at Howe, by which the engine on which her said husband was employed was turned over and derailed, her husband suffered death by scalding, through the negligence of said railway company. An amended petition, filed on April 1, 1895, made the father and mother of said J. A. Gaither, deceased, parties plaintiff. The grounds of negligence relied upon for a recovery, as set forth in the amended petition, are substantially as follows: (1) The unskillful and unsafe construction of the roadbed, track, and switches, and the defective condition in which they were permitted to remain at the place of the accident; (2) that the cross-ties at the place of accident were not held firmly on the

roadbed, but were loose; (3) that the rails were loose, and not firmly attached to the cross-ties, and the rails were not properly fastened together, and insufficient bolts and fish plates were used to hold the rails; (4) that the engine was out of repair, and the iron and wood of same were unsound, rotten, and broken; (5) that the switch was negligently permitted to be open and remain open at place of accident. Defendant answered by general denial, and especially that the wreck which was the occasion of the death was caused by the abstraction of the switch bolt by some party or parties, strangers to and unknown to defendant, and without any negligence on the part of the defendant. Trial was had on October 31, 1896, resulting in judgment against defendant, in favor of Rachel E. Gaither, in the sum of \$6,000, and nothing for H. H. Gaither and M. M. Gaither, the father and mother of deceased. From such judgment, this appeal is prosecuted by the railway company.

Material facts proven: It is conceded that J. A. Gaither, deceased, was employed as a fireman on defendant's trains at the time of his death; that death was caused on June 2, 1894, by the overturning of the engine on which deceased was employed, at Howe; and that plaintiffs are related to the deceased as claimed, the material question being, was there negligence on the part of the defendant? It is also conceded that the accident occurred at a switch into a side track; that the target indicated that the switch was set for train to proceed safely down the main track; that the target is connected with two "bridle rods" which are attached to the switch, and control it; that these bridle rods are connected with each other by a knuckle joint into which a pin is inserted; that, on the occasion in question, this pin was out of place, and the switch was not in the condition indicated by the target; and that this fact was the immediate cause of the accident. The switch target indicated that it was set for the main track, but the connecting pin being out of the bridle rods caused the rails to open while the engine was going over the switch, and, after the front wheels of the engine had passed over the switch onto the main track, the rails opened, and the hind wheels of the engine went into the side track, and this caused the derailment and wreck.

The issues of fact upon which there was a contest in the evidence were: (1) How did the switch become open while the target indicated it was set for the main track? (2) Was the defendant guilty of negligence in failing to discover the condition of this switch, and remedying it in time to have prevented the accident?

The evidence of the plaintiff upon the first issue tended to show that the switch was out of repair; that the bolt to the switch rod which held the switch in position was loose; had no key in it; and that it worked out from the jar and shaking of the track, and

was liable to work out of its place by the jarring and shaking of the track caused by engines and trains passing over it. The testimony of the defendant on this issue tended to show that the switch was in good condition, but that the bolt had been abstracted by some person not under the control, and without the knowledge, of the railway company. The evidence was amply sufficient to justify the jury in reaching the conclusion that the switch was out of repair, as contended for by plaintiff, and that the switch was open as a result of this defective condition.

Upon the second issue, the evidence was sufficient to justify the conclusion that the switch had been defective for some time, and that the railway company was guilty of negligence in not discovering and remedying this defect. Though the jury might have believed and accepted the theory of the defendant that the rod was abstracted by some person alien to its employment, and without its knowledge or consent, still the evidence indicated that the employes of defendant were not sufficiently watchful as to the condition of this switch, and the jury were warranted by the evidence in concluding that the railway company was guilty of negligence in not discovering that the switch was out of place. No question is made as to the amount of the recovery, and we conclude that the evidence justified a verdict for \$6,000 as damages sustained by appellee on account of the negligence of the railway company.

The first assignment of error is as follows: "The court erred in clause 14 of its instruction to the jury in prescribing the highest possible degree of care on the part of defendant in discovering the condition of the switch in time to prevent accident, to entitle plaintiff to verdict." This assignment is in the form of a proposition, and will be so treated, in connection with the following proposition: "Under proper pleadings, defendant is responsible for the exercise of reasonable care in seeing that its appliances were in safe condition, and for reasonable care in discovering a defect wherever it occurred." Clause 14 of the court's instruction is as follows: "The jury are further instructed that if they believe from the evidence before them that defendant's engine was overturned upon which J. A. Gaither was laboring as an employe, and that J. A. Gaither lost his life as a result of such accident; and if they further believe from the evidence that said accident and consequent death was caused by some unknown person or persons over whom defendant had no control, by taking out a bolt which held its switch together, —and that the defendant's agents and employes were not guilty of any negligence in failing to discover the malicious act of such unknown person or persons before the accident,—then they should find a verdict for the defendant." We fail to see anything in this portion of the charge which imposes the highest possible degree of care on the railway company. The paragraph complained

of presents the special defense set up by the railway company, that some unknown person or persons, over whom defendant had no control, had abstracted the bolt from the switch, thereby causing the misplacement of the switch. The court charged that this would be a good defense if the railway company was not guilty of negligence in failing to discover this condition of the switch before the happening of the accident. The charge correctly presented the issue to the jury, and the assignment will not be sustained.

The second assignment of error complains that the charge of the court fails to limit the liability of the railway company to the particular acts of negligence causing the death of J. A. Gaither. We do not think the charge subject to this criticism. It presented to the jury the acts of negligence alleged by the pleadings, and instructed them that, if the accident in which J. A. Gaither lost his life was occasioned thereby, the plaintiff was entitled to recover. The jury were also instructed that, if J. A. Gaither's death was not caused by the negligence of the agents and servants of the railway company, plaintiff could not recover. Paragraphs 8 and 13 of the charge of the court are as follows: "(8) The jury are further instructed if they believe from the evidence before them that on and before the 2d day of June, 1894, J. A. Gaither was an employe of the defendant company, and was employed as a fireman in running and operating one of its engines on its line of road running through Grayson county, Texas, near the town of Howe, and near a switch on defendant's line of road described in plaintiff's petition; and if the jury further find and believe from a preponderance of the evidence that the rails, or their fastenings, or the switch, or the switch rods, were out of repair, or not properly fastened together at said place, and that the defendant company was thereby guilty of negligence, and that, in consequence of such negligence on the part of the company (if it existed, which is a question alone for the jury to determine), defendant's engine was thrown from the track and overturned, and that said J. A. Gaither lost his life as the result of such accident,—then it would be the duty of the jury to find a verdict for plaintiff, and assess their damages as hereinafter directed in the instructions." "(13) The jury are further instructed, if they believe from the evidence that J. A. Gaither was scalded to death by the overturning of defendant's engine, upon which he was employed as a fireman, yet if they further believe from the evidence that said accident and death was not caused by the negligence of the agents and servants of defendant, as charged in plaintiff's petition, they should find for the defendant."

The third assignment of error assails the charge of the court upon the ground that it charged the jury upon the subject of the failure of the defendant to discover the disconnection of the switch in time to prevent the

accident, while plaintiff's petition alleged no such ground of negligence; and, further, that the evidence did not warrant the submission of such issue. This assignment is not sustained by the record. The acts of negligence were specifically set out as follows: "Defendant was guilty of negligence by the unskillful and unsafe manner in which it built and constructed its roadbed and its track and switches at and near the place of the injury, and in the manner and defective condition that said defendant permitted them to be and remain; that the place where said locomotive and cars were derailed and said injury occurred was at and near the north end of a switch or side track on and connected with and a part of defendant's said line of railway, and said side track extended from near the place of said injury in a southerly direction, and almost parallel to the main track of defendant's said line of railway. The defendant company was further guilty of negligence in this: That the cross-ties at and near the point of derailment and injury were not laid firmly on the roadbed, and were loose, and were suffered to remain in that condition, and did so remain, for a long time prior to the injury herein complained of; that the rails on the line of railway at and near the place of derailment and injury, and particularly at and near the end of said side track, were loose and easily moved, and were not firmly attached to the cross-ties which supported the same, and the rails were not properly fastened together, but were insecurely and carelessly fastened together. The bolts necessary to hold the fish bars were negligently placed, and were wholly insufficient to hold the rails together or in proper place; and in many places at and near said point of derailment there were no fastenings to hold the fish bars and rails together and in their proper place, and the bolts, keys, and fastenings necessary to hold the switch bar in place were wholly insufficient and insecure, and failed to hold and keep same in proper place. The bolt which should have held and connected the switch bar with the rails and track was out, and the bolt had no key to hold it in place, and these were necessary to keep the track in good condition, and the same had been in this defective condition for a long time prior to the injury. All of which was well known to the defendant, or should have been known by the exercise of reasonable and ordinary care, and all of which deceased, J. A. Gaither, was ignorant, and could not have discovered by the exercise of reasonable and ordinary care." Plaintiffs further charged that the switch at said point was negligently permitted to come open, and remain open, and was so open at the time of the derailment and injuries as herein complained of; that the acts of negligence "herein set forth were the proximate cause of the death of said J. A. Gaither; \* \* \* that all the foregoing acts of negligence and defective condition of defendant's track, switch, and roadbed were at the time

of the injuries herein complained of well known to the defendant company, and could have been known by the exercise of due and proper care, \* \* \* and unknown to the deceased." The evidence was sufficient, under these allegations, to justify the charge of the court.

The fourth assignment complains that the charge is upon the weight of the evidence, and that it, in effect, charges the jury that the failure to do certain acts would constitute negligence on the part of the railway company. Considering the charge of the court as a whole, we do not think it subject to this objection. The jury were expressly told by the court that it was their exclusive province to determine the question of the existence of negligence. The case was before us on appeal from a former trial, and the judgment reversed upon the same objection to the charge of the court. 35 S. W. 179. The judge evidently on the last trial undertook to avoid the error which caused the reversal on the former appeal, and we think his charge fairly leaves the issues of fact in the case to be determined by the jury.

The fifth assignment of error complains of the refusal of the following special charge: "You are instructed that all persons taking employment in railroads or other service enter such service assuming all the risks that are usually and ordinarily incident to the particular service in which they engage, and from injuries received from casualties or accidents that are the result of causes naturally and reasonably to be anticipated in its ordinary conduct there is no remedy; and if you believe from the evidence that the deceased, Gaither, was in the employ of the defendant as a locomotive fireman, and that the accident in which he lost his life was the result of causes and hazards incident to the business of railroading, and was not caused by the want of ordinary care on the part of defendant in furnishing and providing reasonably safe machinery and appliances the deceased, Gaither, was to use in his employment, then the plaintiffs cannot recover in this suit, and you will find for defendant." The court did not err in refusing this special instruction. The cause of the derailment was fully explained. The evidence conclusively showed that the derailment was caused by a misplaced switch; and it was equally clear from the evidence that the switch became misplaced through the defective condition of the switch, or through interference by some unauthorized person. The evidence did not raise the issue of unexplained derailment, which would have authorized a charge of the character asked. To have given this charge would have tended to confuse the jury.

The sixth assignment is based upon the refusal of the following special charge: "You are instructed that plaintiffs must recover in this case, if at all, upon the acts of negli-

gence charged in his petition, which may be established by evidence; and if the evidence shows you that the defendant may have been negligent in some particular, in the construction of its track as charged in plaintiff's petition, but you also believe from the evidence that such negligence did not occasion the accident, you will not consider such acts in making up your verdict." The proposition of law embodied in this special instruction is sound; but we think the general charge of the court sufficiently covers it.

The seventh assignment is based upon the refusal of this special instruction: "You are instructed that if you believe from the evidence that the switch rods on the north switch in the yard at Howe station on defendant's railway were disconnected by reason of the bolt being abstracted by some persons alien to the defendant, and that the accident resulting in the death of Gaither was occasioned thereby, then defendant would not be liable for such acts, and you will find for defendant." The proposition embodied in this special charge was given in the main charge, with the qualification that, if the railway company was guilty of negligence in failing to discover the condition of the switch, the plaintiff might recover. The court did not err in refusing this charge.

The eighth assignment attacks the verdict as not being supported by the evidence. This assignment is not sustained by the record. The evidence abundantly justified the jury in reaching the conclusion that J. A. Gaither came to his death from the negligence of the railway company, as alleged in plaintiff's petition.

The ninth and last assignment complains of the overruling of the motion for new trial, based upon the various points hereinbefore considered. This assignment is too general to be considered as an assignment, and, besides, there are no other propositions involved than those already considered.

We find no error in the judgment, and it is therefore affirmed.

SASS et al. v. HOUSTON & T. C. R. CO.  
et al.

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

**CARRIERS—LIABILITY FOR IMPROPER COMPRESSION OF COTTON.**

Where a shipper of cotton had a special agreement with a compress company located between the place of shipment and point of destination, in regard to its compression, providing for inspection by a certain person at the point of destination, the railroad company which transported it was not liable for improper compression, though the shipper stamped on the bill of lading that the cotton was to be compressed in transit, and, in the absence of such contract, the railroad company might have been liable under the rules of the railroad commission, providing that when the bill of lading is so stamped the railroad company must comply with such instructions, if there is an accessible compress, and assume the cost of compression, on specified conditions.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by Sass & Cohen against the Houston & Texas Central Railroad Company and the Ennis-Calvert Compress Company. From a judgment in favor of defendant railroad company, and sustaining a plea to the jurisdiction by the other defendant, plaintiffs appeal. Affirmed.

Jones & Garnett, for appellants. Baker, Botts, Baker & Lovett, Frank Andrews, Eugene J. Wilson, and Louis J. Wilson, for appellees.

JAMES, C. J. Appellants in October, November, and December, 1894, shipped cotton over the Houston & Texas Central Railway, consigned to Galveston; and, in making each shipment, plaintiffs stamped on the bill of lading that the cotton was to be compressed in transit. The rules established by the railroad commission of Texas, at that time in force, provided: "First. A shipper desiring his cotton to be delivered at point of destination uncompressed shall give the railroad notice of such desire by inserting in his bills of lading the notation, 'To go through uncompressed,' or other plain words of similar import; and it shall be the duty of the railroad company accepting such shipment to make delivery at destination accordingly. Second. A shipper desiring his cotton delivered at destination compressed shall, when no compress is in operation at shipping point, give the railroad company notice of such desire by inserting in his bills of lading the notation, 'To be compressed in transit;' and it shall be the duty of the railroad company accepting the shipment to comply with such instructions, if there is an accessible compress at a station directly intermediate between shipping point and destination. Third. Railroad companies shall assume the cost of compressing cotton which is to be delivered at destination compressed, only on the following conditions: (1) Cotton shall be compressed at shipping point when an accessible compress is in operation at such point. (2) When no compress is in operation at shipping point, the cotton shall be compressed at a station directly intermediate between shipping point and destination, and distant seventy miles or more from such destination. Compresses being in operation at two or more stations directly intermediate between shipping point and destination, the compress nearest to shipping point shall be selected to compress such cotton. (3) The amount of the cost assumed by railroad companies shall not exceed 10 cents per 100 pounds out of rates that are not less than 45 cents per 100 pounds at Houston. Out of rates less than 45 cents per 100 pounds, the railroad companies shall assume only so much of the cost of compressing as will make the aggre-

gate of such cost and the current freight rate not to exceed 45 cents per 100 pounds." Plaintiffs alleged, among other things, that Calvert, Tex., was the point on the line of said railway where, under the said rules and requirements, all of the cotton shipped was to be compressed. It appears from the evidence that the railway company delivered the cotton for compression to defendant the Ennis-Calvert Compress Company; that it was compressed by said company, and then returned to the railway company, and carried to its destination, without any default on the part of the railway company, unless it can be said to be responsible for the imperfect compression of the cotton. The action is based on the failure of the railway company to perform the duty alleged as devolving upon it by the law and said rules, to have the cotton properly compressed; that is to say, "as required by usage and by the rules aforesaid." It appears that a large portion of the cotton was not compressed to a certain density that custom required (the rules of the commission making no provision in this respect), and the cost of recompressing it at Galveston was the basis of the damages asked. By a trial amendment, plaintiffs alleged that, before they would permit their cotton to be compressed by the said Compress Company at Calvert, they inquired of such company its rules, custom, and guaranty respecting its work, and received a reply that it would guaranty its work, and make good all bad compressing, subject to the opinion of one H. Riesel, who was an expert in such matters, living in Galveston; that, in reliance thereon, they permitted and required said cotton compressed at Calvert. It was further alleged in this connection that both plaintiffs and the compress company knew that Riesel would condemn, as improperly compressed, any bale that was not compressed to a density of not less than 22½ pounds to the cubic foot; that, when the said cotton reached Galveston, Riesel did so condemn the work for that reason. The testimony showed an express agreement between plaintiffs and said compress company, and the several facts, substantially, as alleged in the said amendment, and also showed that plaintiffs knew that the compress company did not usually compress cotton to a density of 22½ pounds to the cubic foot. The compress company interposed a plea to the jurisdiction of the district court of Harris county, on the ground that it was entitled to be sued at its domicile (Robertson or Ellis county), alleging, among other things, that there was no liability on the part of the railway company in respect to the subject-matter; that, if there existed any liability in respect thereto, this defendant was the party liable, and was in fact the real and sole defendant; and that the railway company had been fraudulently joined for the purpose of giving the said court jurisdiction over this

defendant. It is deemed unnecessary to refer to the action had on the demurrers, etc. The court, upon hearing the testimony, determined that no cause of action existed against the railway company, and rendered judgment in its favor, but declined to pass on the merits of the case between plaintiffs and the compress company, and sustained its plea to the jurisdiction.

It is claimed that plaintiffs should have had judgment against the railway company. In considering this question, we think it unnecessary to determine to what extent, if any, the railway company was, by said rules of the commission, required to see to the manner of compressing the cotton. The peculiar facts of this case, in our opinion, were sufficient to relieve the company from exercising any such supervision, assuming that such was its duty ordinarily. It is shown that the plaintiffs had a special contract with the compress company with regard to the compression of this cotton, providing the manner in which it should be compressed, and also the manner in which, and by whom, the proper or improper compression by the compress company was to be arrived at, viz. by the inspection and judgment of Riesel at the point of destination. It was the agreement of plaintiffs and the compress company that the latter should receive the cotton and compress it; that, upon its reaching Galveston, Riesel (not the railway company at Calvert) was to pass on the question whether or not the compress company had complied with the agreement. The contract showed that it was not contemplated that the railway company should take any part in the compression of the cotton. No complaint is made of the railway company's conduct in any other respect, and we conclude that the district court was correct in rendering judgment in its favor. The court, in sustaining the plea to the jurisdiction, must be considered to have found it to be a fact that the joinder of the railway company was fraudulently made, with a view to conferring upon the court jurisdiction of the compress company, and therefore its action in this regard must be held warrantable. The judgment is affirmed.

#### STATE ex rel. DOWLEN v. RIGSBY.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 11, 1897.)

#### QUO WARRANTO—COUNTIES—JUSTICES OF THE PEACE.

1. A county commissioners' court abolished precinct No. 5 in one order, and at the same time established by another order a new precinct 5, composed of the territory embraced in the old precinct and of a part of the territory previously belonging to precinct No. 1. The justice of

<sup>1</sup> Writ of error denied by supreme court. See 43 S. W. 1101.

the peace of precinct 1 resided in that part of his precinct which was set over to precinct 5. The commissioners' court appointed the old justice of precinct 5 justice of new precinct 5. *Held*, that quo warranto was not the proper remedy for the justice of precinct 1 to oust the justice of precinct 5 from exercising the office in precinct 1.

2. Under Const. art. 5, § 18, providing that "each organized county shall be divided from time to time, for the convenience of the people into precincts" by the commissioners' court, an order of the commissioners' court abolishing precinct 5 of their county, and creating a new precinct 5, composed of that territory and a part of another precinct, is valid; it not being material that the court did not redistrict the whole county.

3. A justice of the peace, though his compensation depends upon the territory over which he exercises his jurisdiction, and is elected for a certain term, takes his office subject to the power of the commissioners' court to change the boundary of his precinct.

4. The fact that an order of the commissioners' court changing the boundaries of precincts was made at a special term is no objection to it.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Information by the state, in the nature of quo warranto, on the relation of P. A. Dowlen, against W. L. Rigsby. There was judgment for the respondent, and the state appeals. *Affirmed*.

M. L. Broocks and Votaw, Chester & Dies, for the State. O'Brien, Bordages & O'Brien and S. V. Brown, for appellee.

WILLIAMS, J. This was a proceeding in the nature of a quo warranto, instituted by the district attorney by information, based on the relation of P. A. Dowlen, against appellee, Rigsby, in which it was alleged that the relator was the justice of the peace of precinct No. 1 of Jefferson county, and that respondent had intruded himself in the office, and asking that respondent be ousted. The answer of the respondent denied such intrusion, and set up the facts as they were shown by the evidence and are now stated.

Prior to the election of 1896 the county of Jefferson had been divided into precincts, two of which were No. 1 and No. 5. At that election the relator was elected and subsequently qualified as justice of the peace of precinct No. 1. Another person was elected to the same office, in No. 5, and qualified, but was afterwards required to give another bond, having failed to do which, his office was vacated. While matters stood thus, the commissioners' court, at a special session held on the 13th day of April, 1897, entered an order abolishing precinct No. 5, as then defined, and, at the same time, entered another order, establishing a new precinct No. 5, composed of the territory embraced in the old precinct and of a part of that previously belonging to precinct No. 1. The territory taken from precinct No. 1 had yielded more than \$500 per annum, and at least half of the perquisites of the office of justice of the peace of such precinct. At the same time the commissioners' court appointed respondent to fill the vacancy in the office of justice of the

peace of precinct No. 5. Upon these facts, the court below rendered judgment for the respondent, and the state has appealed.

The only question which the counsel for the parties have discussed is as to the validity of the action of the commissioners' court in taking from precinct No. 1 a part of its territory, and adding it to precinct No. 5. There is at the threshold of the case a question as to the applicability of the remedy adopted to the nature of the case made by the evidence. If the respondent was legally the justice of the peace of precinct No. 5, it would seem that the extent of his powers, as such, or of the territory over which his jurisdiction extended, cannot be tried by quo warranto. "Since the remedy by quo warranto or information in the nature thereof is employed only to test the actual right to an office or franchise, it follows that it can afford no relief for official misconduct, and cannot be used to test the legality of the official action of public or corporate officers. So, when a public officer threatens to exercise powers not conferred upon him by law, or to exercise the functions of his office beyond its territorial limits, the proper remedy would seem to be by injunction, rather than by quo warranto information. Thus, an information will not lie to prevent the legally constituted authority of a city from levying and collecting taxes beyond the city limits, under an act of the legislature extending the limits, and the constitutionality of such an act cannot be determined upon quo warranto information. Nor will an information lie against the officers of a municipal corporation to determine whether certain territory has been properly annexed to the municipality." *High, Extr. Rem.* § 618, citing *People v. Whitcomb*, 55 Ill. 172; *Stultz v. State*, 65 Ind. 492.

It may be urged that, because the commissioners' court abolished the old precinct No. 5, and attempted to create a new one, and their action in creating the new precinct was beyond their powers, therefore there was no such precinct, and no office to be filled, and hence the respondent, in exercising the duties thereof, was an intruder. We hardly think this position can be maintained, even if it be conceded that the attempt to take away a part of the territory of one precinct, and add it to another, was illegal and void. The two orders of the court should be treated as one act. Precinct No. 5, as it previously stood, was abolished only in order that the new precinct might be formed. The abolition was so dependent on the further action that, if the latter should fail, the former must necessarily fall with it, and leave the precinct as it was before. It cannot be conceived that the first action would have been taken but as preparatory to and a part of the second. Hence, if it is true, as claimed by appellant, that the formation of the new precinct was illegal, it is also true that the old remained as before. The appointment and qualification of respondent made him the possessor of the office of justice of the peace, whatever might be the limits of his territorial jurisdiction. But since no objection is urged to the proceeding, and as



the facts are shown raising questions which, had objection been made, appellant might have presented under a different prayer, we think it best to decide the real controversy between the parties.

We are of the opinion that the action of the commissioners' court was authorized by law, and was valid. Section 18, art. 5, of the constitution, is as follows: "Each organized county in the state, now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. The present county court shall make the first division. Subsequent divisions shall be made by the commissioners' court provided for by this constitution. In each precinct there shall be elected at each biennial election one justice of the peace and one constable, each of whom shall hold his office for two years and until his successor shall be elected and qualified; provided, that in any precinct in which there may be a city of eight thousand or more inhabitants, there shall be elected two justices of the peace. Each county shall in like manner be divided into four commissioners' precincts, in each of which there shall be elected by the qualified voters thereof one county commissioner, who shall hold his office for two years and until his successor shall be elected and qualified. The county commissioners, so chosen, with the county judge as presiding officer, shall compose the county commissioners' court, which shall exercise such powers and jurisdiction over all county business as is conferred by this constitution and the laws of the state, or as may be hereafter prescribed." When the commissioners' court was organized, in pursuance of the constitution and the laws passed thereunder, it possessed all powers conferred by both. When the court was once established, no legislation was needed to enable it to exercise the powers given by the above provision, to divide the county into precincts. The direction is plain and simple, and without condition or restriction, except that as to the number of precincts. It is said that no procedure is prescribed by which the power is to be exercised. If any was needed, the statute supplied it, when it required that the proceedings of the court should be recorded in its minute book. Rev. St. 1895, art. 1534. This was all that was necessary. The power to divide the county into justices' precincts is also given by the statute, but not in terms so explicit as those used in the constitution. Rev. St. 1895, art. 1537. There can be no doubt that both constitution and statute confer the power, and the only question is as to its extent. It is contended that a limitation upon the power is found in the constitutional provision fixing the terms of office of precinct officers; and that, since they are to hold for two years, it follows that the precincts cannot be changed during the terms, because the power to alter them would practically enable the court to destroy the office. The language of the constitution expresses no such limitation. The division is to be made "from time to time." The reason

for the division is to be the convenience of the people; and the judge, both as to time and convenience, is the court. The limitation contended for by appellant would require the insertion in the constitution of a proviso which the court cannot read into it. The only limitation imposed serves to indicate the scope of the power. That limitation requires as many as four, and does not allow more than eight, precincts. But for it the county might have been cut up into as many precincts as the court saw proper to establish. By it the intention is made more manifest that, within the limits, the court is to determine the number. As to the time of making the division, it is equally plain. The language "from time to time, for the convenience of the people," clearly means that the convenience of the people, as judged by the court, shall control in determining the time when a division is proper. The phrase "from time to time" repels the idea that it was the purpose to fix any particular time.

If it should be urged that the provisions contemplate a complete, and not a partial, division, the answer is that, in effect, they are the same. When two precincts are made out of one, or the boundaries between two are changed and defined, leaving all of the others unchanged, the effect is the same as if an order were entered setting out anew the boundaries of the unchanged precincts, as well as those changed. As no form of procedure is prescribed, there could be no substantial objection to such action. The power to establish the precincts does not necessarily conflict with the provision fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts. This is no anomaly in our law. All county officers whose compensation is derived from perquisites, and therefore depends to some extent on the territory in which they exercise their functions, hold their offices subject to lawful power to alter that territory. While the office is property, it is held subject to the proper exercise of all such powers as these. There is no contract between the state and its officers which forbids such action. *Mechem, Pub. Off.* § 855. The fact that the orders in question were made at a special term of the court does not affect their validity. Special terms are authorized by law, and the only one of the powers possessed by the court which it is forbidden to exercise during such terms is that to levy a tax. Rev. St. 1895, arts. 1552, 1553, 1540. Affirmed.

#### LINDSEY v. SINGLETARY et al.

(Court of Civil Appeals of Texas. Dec. 8, 1897.)

#### ACTION ON CONTRACT—BURDEN OF PROOF—EVIDENCE—INSTRUCTIONS—REVIEW.

1. When the court instructed the jury that, in order for plaintiffs to recover, they must prove that piling of the length, breadth, and quality named in the contract had been tendered, which instruction was reiterated, a failure in one part

of the charge to mention the length in connection with the piling is not reversible error.

2. Witnesses are not compelled, in testifying as to the length and dimensions of piling, to have memoranda of the length and dimensions, to enable them to testify.

3. In a contract to deliver goods at a certain place, if the authorized agents of the parties who contracted to take them refuse to take them at another place, on the ground that the goods are not of the quality or dimensions contracted for, it is not necessary, in order to maintain an action on the contract, that the goods be taken to the spot designated in the contract for delivery.

4. When objections are sustained to a question, the bill of exception must show what the answer would have been, or an assignment based on it will not be considered.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Action by Singletary & Partin against H. C. Lindsey. Verdict for plaintiffs. Defendant appeals. Affirmed.

Greer & Greer, for appellant.

FLY, J. Appellees sued appellant to recover damages resulting from a breach of contract. The contract was to the effect that appellees were to deliver to appellant red-cypress piling, of the best quality, and of certain lengths and dimensions. Appellees prepared the piling according to the terms of the contract, and delivered a portion of it, and offered to deliver the balance, but appellant refused to accept or pay for the piling. The damages to appellees amounted to \$3,407.40, as found by the jury. The general demurrer to the petition was properly overruled. A cause of action was stated, and, if it had not been, the answer supplied the supposed deficiency. The court was justified in assuming in the charge that the contract was admitted in the pleadings. Appellant answered as follows: "And for special answer herein this defendant says that on the 4th day of June, 1896, he received a proposition from the said plaintiffs to furnish for the Neches river bridge the best quality of red-cypress piling (a copy of which said proposition is hereto attached, and marked 'Exhibit A'), and that afterwards this defendant accepted said proposition, by letter dated June 10, 1896. It was understood, however, in said letter of acceptance, that instead of the piling being 14 inches at the but, as is called for by said proposition, they were to be 15 inches, and which was subsequently agreed to by and between the said plaintiffs and defendant. The defendant further says that said piling are not of the best quality of red-cypress piling, and do not, in dimensions and in lengths, comply with the contract; and of this he puts himself upon the country." It is insisted that the contract was not complete in itself, and ought to have been construed in the light of letters and other testimony. Appellant admitted a complete contract, and the facts showed it. There was nothing whatever in the contract or other testimony that tended to show that the engineers of a railway company were to inspect the piling. The engineer was to do nothing but give an estimate of the lengths of

piling required, and he gave the "bill of lading," by stating how many pieces were desired, of certain lengths. Special charge No. 1 asked by appellant was quite complex, embodied issues not raised by the evidence, and was not calculated to assist the jury in arriving at a proper verdict. The answer of appellant admitted the execution of a contract, and presented but two defenses, namely, that the piling was not of the "best quality of red cypress," and was not of the lengths and dimensions mentioned in the contract. The answer of appellant left nothing at issue between the parties except the quality and size of the pilings. There was nothing in the charge of the court that invaded in any manner the right of the jury to pass upon the above issues.

The second assignment of error is not well taken. The charge of the court presented the issues made by the pleadings. The court instructed the jury that, in order for appellees to recover, they must prove that piling of the length, breadth, and quality named in the contract had been tendered. This is reiterated in the charge, and we do not believe that the jury was misled by a failure in one part of the charge to mention the length in connection with piling. No objection was made to receiving the piling on account of length. The only objection urged was as to the quality and breadth. There was no testimony showing that the piling was not of the proper length. The special charge asked in regard to a better quality of red cypress was properly not given, because there was no evidence that there was any better quality.

The fifth assignment is not well taken. The testimony of appellees as to the length and dimensions of the piling were properly admitted. They were not compelled to have memoranda of the length and dimensions, to enable them to testify. The objections to the fourteenth paragraph of the charge have no merit in them. We have considered the two points in the fifth assignment, although they are in no manner connected with each other, and the proposition under it does not touch either point. It was shown that Phillips and Peters were agents of appellant, and that they refused the piling at the depot, and it was not necessary to take them to the spot designated in the contract. Phillips had agreed to have them transferred to cars, to be transported to destination, but afterwards refused to receive the piling.

The seventh assignment of error complains that the court refused to allow evidence to be introduced in the court that there was a better quality of red cypress than that tendered by appellees. This assignment would have been meritorious, and would have necessitated a reversal, had there been any sufficient bill of exceptions to support it. There are two bills of exception referred to in the assignment, one of which has no reference whatever to the subject-matter of the assignment, and the other states that certain questions were asked a witness in regard to Louisiana cypress being superior to that tendered by appellees, but fails

to show what the answer of the witness would have been. Where objections are sustained to a question, the bill of exceptions must show what the answer would have been, or an assignment based on it will not be considered. *Reddin's Heirs v. Smith*, 65 Tex. 26; *McAuley v. Harris*, 71 Tex. 639, 9 S. W. 679; *Cheek v. Herndon*, 82 Tex. 146, 17 S. W. 763.

The eighth assignment of error complains of the rejection of testimony to the effect that the piling should be delivered subject to the inspection of railway engineers, and refers for support to bills of exception Nos. 1, 2, 3, 5, and 7. None of them has the most remote connection with the subject-matter of the assignment, except 3 and 7, and in neither of these is there any intimation of what the witnesses would have answered to the questions.

So little regard has been paid to statutes and rules, in preparing this case for submission to an appellate court, that we have experienced great difficulty in seeking out and passing upon the points intended to be presented. No briefs were filed for the appellees, and the briefs of appellant have given but little assistance to the court. Under a rigid enforcement of the rules, most of the assignments would not have been considered. We conclude that there is no error requiring a reversal, and the judgment will be affirmed.

#### GALVESTON, H. & S. A. RY. CO. v. McCRAV et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 17, 1897.)

#### MASTER'S LIABILITY FOR INJURY TO SERVANT— NEGLECT—ACTION FOR DEATH—PLEADING—AMENDMENT—APPEAL—RECORD.

1. A railway brakeman whose duty it is to inspect his train in regard to the loads thereon being in proper condition is not charged with knowledge of defects in loading which he cannot discover from inspection.

2. Where one end of a steel rail weighing 700 pounds fell from a train running much faster than its schedule, and struck on the south side of the track, and the rail was then thrown by the momentum of the train clear over the train to the north side of the track, 90 feet from where it first struck, a request to charge that there was nothing to support the claim that the rate of speed was dangerous, or had anything to do with the rail falling from the car, was properly refused.

3. In an action by a widow and children for damages for causing the death of their husband and father, defendant elicited from the widow on cross-examination the fact that deceased's mother was living. *Held* that the mother being entitled under the statute to share in the damage recovered, it was incumbent on plaintiff to request the court to postpone the trial until the pleadings could be amended by making her a party; and, this not having been done, plaintiff could not recover.

4. Papers which are no part of the record from the court below, but which are filed in the first instance on appeal, cannot be considered by the appellate court.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Louisa McCray and others against the Galveston, Harrisburg & San Antonio

Railway Company. From a judgment for the plaintiffs, and an order denying a new trial, the defendant appealed. The judgment being affirmed, the defendant moved for a rehearing. Motion granted, original opinion withdrawn, and judgment reversed.

As we have concluded from a consideration of this motion that one of appellant's assignments of error is well taken, we will withdraw our former opinion, because it contains conclusions of fact which have no place in an opinion reversing and remanding a cause. This is the second appeal in this case. The first appeal was from a judgment in favor of the present appellant, which was affirmed by this court (32 S. W. 548); and our judgment was, on error to the supreme court, reversed (34 S. W. 95), and the cause remanded for trial in the district court. The opinions referred to sufficiently state the nature of the case. The judgment now appealed from is in favor of appellees for \$10,000.

Upson, Bergstrom & Newton, for appellant. Franklin & Cobbs and Yale Hicks, for appellees.

NEILL, J. (after stating the facts). The appellant requested the court to charge the jury: "If you believe it was the duty of the deceased, Jesse McCray, to look over said train, and see whether the loads thereon were in proper and safe condition, then you are instructed that he is chargeable with notice of any defect in loading said train, or in the manner in which it was loaded, and you will find your verdict for the defendant." The failure of the court to give this charge is assigned as error. The court had already, when this charge was asked, at the request of appellant, given the following special charge: "If, from the evidence, you believe that it was the duty of the deceased, Jesse McCray, to inspect the cars in the train on which he was riding, and, if you further believe from the evidence that such accident arose from the defective loading of the rails on said car, then you are instructed that plaintiff cannot recover for any defects in the loading of said rails which he might have discovered in the inspection thereof." The charge just quoted presents, in almost the language of the supreme court, correctly the principle of law applicable to the pleadings and the facts in this case. *Railway Co. v. Kizziah*, 86 Tex. 88, 23 S. W. 578. The charge refused exonerates the appellant from liability if it was the duty of deceased to ascertain whether the train was properly loaded, whether he could have from such inspection discovered the defective loading or not. "It was the duty of the railroad company," says the supreme court in its opinion on the other appeal, "to place the cars in the hands of its employes in a condition reasonably safe to be handled by them in the course of transportation." And its employes, when they took charge of the train at the commencement of its transit, had the right to assume that this duty had been per-

<sup>1</sup> Writ of error denied by supreme court.

formed, and, if no defect in the loading was then perceptible, to assume, as long as the load remained in the condition it was in when the train started on its journey, that there was no defect in the way it was loaded. The answer of the appellant alleged that it was the duty of McCray, "in taking his position on the train," to look it over, and see that it was properly loaded, but it was not pleaded that such was his duty at all times, and especially at intermediate points. And to have given the charge would have been unwarranted by the pleadings and the evidence, and, besides, in our opinion, unsupported by the law; for, if it was deceased's duty to inspect the train at stations, all the evidence on the point shows that it was discharged by him; and the charge asked would have made him responsible for a defect in the loading, though it may have been such as he was unable to discover. We believe the charge was properly refused.

The appellant also requested the court to instruct the jury as follows: "There is no testimony to support the claim of plaintiffs that the rate of speed at which said train was running was dangerous, or had anything to do with the rail falling from the car, and you will not consider the same." The court refused the request, and it is assigned as error. The evidence shows that the speed of the train was much beyond its schedule. This, together with the fact that the momentum of the train was such as to throw a rail weighing 700 pounds, after one end had struck the ground, on the south side of the track, clear over the train, to the north side, and 90 feet from where it first struck, is, in our opinion, sufficient evidence on the question of the speed of the train to warrant the court in refusing the charge requested. The charge of the court, with the special instructions given at the request of appellant, taken as a whole, correctly enunciates the law applicable to the facts in this case, and the assignments of error which complain of it are not well taken.

The sixth and seventh assignments of error, which complain of the testimony given by the witness Hoyt as an expert, are fully disposed of by the opinion of the supreme court, where like objections to such evidence were fully discussed, and it was held that the witness was qualified as an expert to testify as to how steel rails should be loaded on flat cars, and to state that in his opinion, if the cars had been properly loaded, the accident could not have occurred. In the light of that opinion, we hold that these assignments of error are not well taken.

The appellant, on cross-examination, elicited from Louisa McCray the fact that deceased's mother was living. The witness also testified that she knew her husband had never sent any money to his mother, who lived in Indiana, since they married, which was seven or eight years ago; that her husband gave her every cent of his wages, and she bought

his clothes, and supplied the family with food and clothing therewith. One of appellant's grounds in its motion for a new trial was that it appeared for the first time on the trial of said cause that deceased's mother was still living, and that she was not made a party to the suit. The failure of the court to grant a new trial on this ground is assigned as error. This is the assignment we believe to be well taken. *Railway Co. v. Wilson*, 85 Tex. 518, 22 S. W. 578; *Railroad Co. v. Spiker*, 59 Tex. 435; *Railway Co. v. Culberson*, 68 Tex. 664, 5 S. W. 820. In the first case cited, it is said by the supreme court "that when the evidence develops the fact that the deceased, for causing whose death damages are sought, had other relations who, under the statute, can share in the damage recovered, the proceedings must be arrested until the pleadings are so amended that the suit can be conducted for the use of all the beneficiaries." This defect, disclosed by the evidence, requiring an amendment, was in the pleadings of the plaintiff; and, in our opinion, it was for her to request the court to postpone the trial until she could amend by making the mother of deceased a party to the action; and it was not incumbent upon the defendant to cure a defect in the pleadings of its adversary. It is our duty to pass upon the case as presented by the record from the court below, and we cannot consider papers which are no part of the record, but filed here in the first instance for the purpose of avoiding the effect of the error indicated. Because of the error stated, this motion is granted, and the judgment of the district court reversed and remanded.

#### JENNINGS et al. v. SHINER.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 17, 1897.)

JUDGMENTS—VALIDITY—INJUNCTION—WHEN LIES  
—DISTRICT COURT—JURISDICTION—JUSTICES OF  
THE PEACE—PLEA OF PRIVILEGE—WAIVER.

1. Since no appeal or certiorari is allowed from a judgment in justice court for less than \$20, the district court has jurisdiction to enjoin the execution of a void justice's judgment for less than that amount.

2. Injunction lies to restrain the execution of a judgment void for want of jurisdiction over the subject-matter or over the person of defendant.

3. A justice of the peace has power to hear and determine a plea of privilege to be sued in the county of one's residence, and hence, where there is testimony warranting a finding against the plea, the finding will not be reviewed in the district court.

4. Where a plea of privilege to be sued in the county of one's residence, when properly entered and established, is ignored, or improperly overruled, by a justice, the execution of the judgment rendered by the justice may be enjoined as void for want of jurisdiction.

5. Consent to continuance of a case, after a plea of privilege is filed, is not a waiver of the plea.

<sup>1</sup> Writ of error denied by supreme court.

Appeal from district court, Frio county; M. F. Lowe, Judge.

Action by M. K. Shiner against R. J. Jennings and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Hudson & Smith, for appellants. J. M. Eckford, for appellee.

JAMES, C. J. This was a suit in the district court brought by appellee for injunction to restrain a threatened execution upon a judgment of the justice's court for \$14.95, interest, and costs, alleged by him to be void because the justice's court had no jurisdiction of his person. The injunction was perpetuated, and the judgment declared void. There being no appeal or certiorari allowed from justices' judgments for less than \$20, the district court had jurisdiction to grant injunctions in respect thereto, as in other cases. In this state, injunction is the proper remedy to restrain the execution of a void judgment, whether it be void for want of jurisdiction over the subject-matter or the person of defendant. *Railway Co. v. Rawlins*, 80 Tex. 580, 16 S. W. 430. The suit in the justice's court was upon an account. The ground stated in the petition for the injunction is that defendant, a resident of Bexar county, pleaded in the justice's court his privilege to be sued in the latter court, notwithstanding which the justice overruled the plea, tried the case, and rendered the judgment against him. We are of opinion that, if such a plea was properly interposed and established, there was a want of jurisdiction in the court that would warrant an injunction against the judgment. From the statement of facts, while it appears that the justice overruled the plea, it does not appear but that he did so upon testimony that warranted that result. In applying for an injunction on the ground relied on in this case, it was clearly necessary to aver and prove either that the evidence going to establish the plea was all in favor of it, or that the facts stated in the plea were admitted; for, if there was conflicting testimony heard on the issue, the decision by the justice on the facts should not be reviewed. He undoubtedly had power to hear and determine the evidence relating to the plea, and, if this was done upon testimony that would warrant finding against the plea, his jurisdiction over the defendant was properly and finally determined. If, however, the justice ignores the plea when his action is asked upon it, or ignores proof that clearly establishes it when offered, and overrules it, we think it would present a proper case for injunction. The evidence in this case is not sufficient to authorize the injunction, and therefore the judgment will be reversed, and here rendered. There is no merit in the proposition that consent to a continuance of the case, after a plea of privilege is filed, is a waiver of it. Reversed and rendered for appellant.

## LINDSLEY v. PARKS.

(Court of Civil Appeals of Texas. Dec. 8, 1897.)

MECHANIC'S LIEN — PLEADING — AMENDMENT — HARMLESS ERROR — CONTINUANCE — COSTS.

1. Where a house and lot are both subject to a mechanic's lien, the filing, at the time of a foreclosure thereof, of an amendment to the petition, stating the value of each separately, being unnecessary, is harmless error.

2. It is not error to refuse an application for a continuance, sought for the purpose of securing evidence to meet an immaterial issue raised by a trial amendment.

3. One who is estopped, by representations made, from asserting a claim to a lot superior to a mechanic's lien thereon, will be bound by such lien, although not a party to the contract on which it is based.

4. When one is not liable upon an issue of debt raised in a foreclosure of a mechanic's lien, but is a proper party to the suit on the question of the right of foreclosure, and the suit is decided against him on that issue, the costs may be adjudged against him as well as against the other defendant.

Appeal from district court, Llano county; W. M. Allison, Judge.

Action by W. T. Parks against Charles Tipple and Henry D. Lindsley. Judgment for plaintiff, and defendant Lindsley appeals. Affirmed.

D. A. McFall, for appellant. C. L. Lauderdale, for appellee.

KEY, J. Appellee, W. T. Parks, instituted this suit against Charles Tipple and appellant, Henry D. Lindsley, to recover for material and labor used in the construction of a residence on lots Nos. 15 and 16, in block 136, in the Llano Improvement & Furnace Company's addition to the town of Llano, and to foreclose a mechanic's lien on said property. Appellee's petition embraced two theories: One, that he had a contract with both Tipple and Lindsley for the construction of the house; and the other, that, if Lindsley was not a party to the contract, he was estopped, by representations made to appellee, from denying that the lots belonged to Tipple and were free from any claim of his. Tipple made no defense. Lindsley denied that he had made any contract with appellee; set up the fact that he had previously sold the lots to Tipple, retaining a vendor's lien, secured by deed of trust on the lots; that afterwards the trustee had sold the lots, and he (Lindsley) became the purchaser. The court rendered judgment in favor of appellee against Tipple for the amount of his debt, and against both Tipple and Lindsley for a foreclosure of his mechanic's lien and for costs. Lindsley has appealed. The case was tried without a jury, and no conclusions of fact and law were filed. The testimony shows that, in the summer of 1892, Parks and Tipple entered into a contract for the erection of a building, as alleged in the plaintiff's petition; that the plaintiff furnished the material and built the house in accordance with the con-

tract; and that Tipple owed the plaintiff a balance due therefor of \$613.33 at the time the case was tried. It was also shown that the written contract remained in the possession of Tipple, and appellee was unable, for that reason, to file it for record, but that he instituted this suit within four months after the debt was due. It was further shown that, about the time the contract was made, Lindsley, who had previously owned the lots, executed a deed conveying them to Tipple, reserving a vendor's lien to secure certain unpaid purchase money for the lots; that at the same time Tipple executed a deed of trust, conveying the lots to Phillip Lindsley, as trustee, to secure said unpaid purchase money, which deed of trust, together with the deed from appellant, Henry D. Lindsley, to Charles Tipple, the transcript shows was filed for record September 26, 1892, but it does not appear in what county nor in what office said instruments were filed for record. The testimony further shows that Lindsley was not a party to the contract for the erection of the building. There was testimony tending to show that, before appellee built the house, Lindsley stated to him that the lots belonged to Tipple, and misled appellee, and caused him to believe that Tipple had the right to make such contract, in reference to building a house upon the lots, as would create in appellee's favor a lien upon the house and lots superior to any claim that Lindsley might have. In other words, the representations referred to tended to produce the impression that Lindsley had no claim whatever upon the lots. The case has been on appeal once before (*Parks v. Tipple*, 34 S. W. 676), and it was then held, under the facts above stated, that appellee was not required to record his contract in order to secure or preserve his lien.

The trial amendment filed by appellee, and of the filing of which appellant complains, merely stated the value of the lots and of the house separately; and as the court held that both were subject to appellee's lien, and as that holding was correct, it was not necessary that the amendment should have been filed, and the ruling of the court in permitting it to be filed, after the parties had announced ready for trial, was harmless error, if error at all.

What has just been said concerning the amendment answers the assignment of error which complains of the action of the court in overruling appellant's application for a continuance. The continuance was asked to enable appellant to obtain testimony to meet the issues raised by the trial amendment. These issues being immaterial, the court did not err in overruling the application for continuance.

Appellant has no assignment of error charging that the judgment is not supported by the testimony, on the theory of estoppel; and as there is testimony tending to support that theory, and the court filed no conclusions of fact finding against appellee on that issue, we must decide the case upon the theory that

appellant concedes the evidence to be against him on that issue. *Walker v. Cole*, 89 Tex. 323, 34 S. W. 713. Appellant does charge in his seventh assignment of error that he was not shown to be a party to the contract for building the house, but he does not charge that the testimony fails to show that he made such representations to appellee, concerning the lots, as will in law estop him from asserting a claim thereto superior to the title held by Tipple at the time appellee made his contract with Tipple. If the court below had filed conclusions of fact, and had not found upon the issue of estoppel, or had found against appellee upon that issue, the case would be different; but the appellant being content to bring the case to this court without any findings of fact by the trial court, and not having charged in his assignments of errors that the judgment is not supported upon either issue presented by appellee's pleadings and evidence, and there being testimony tending to support the allegations of estoppel, we must treat the judgment as sustained by the testimony.

Although held not to be liable to appellee upon the issue of debt, appellant was a proper party to the suit upon the question of appellee's right to foreclose his lien; and the court having decided in his favor, and against appellant, upon that issue, it was proper to adjudge the costs against both Tipple and appellant. We have considered all the questions presented in appellant's brief, and, finding no reversible error, the judgment will be affirmed. Affirmed.

#### JOSKE v. IRVINE.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 17, 1897.)

FALSE IMPRISONMENT—ARREST WITHOUT WARRANT  
—CITY ORDINANCES—DAMAGES—JOINT  
LIABILITY—TORTS.

1. Under San Antonio city charter, which provides (section 103) that the city council shall have power to pass and repeal ordinances, rules, and police regulations; (section 131) that the city marshal shall perform such other duties than those enumerated, and be invested with such other powers, as the city council may by ordinance require and confer; (section 229) that the policemen of the city shall have power to arrest all offenders against the law of the state or city ordinances; and (section 230) that the marshals and policemen may arrest any person committing any offense in their presence, or on complaint of any person, without a warrant,—the city council had no authority to pass an ordinance empowering police officers to arrest, without warrant, any citizen who might be by them deemed suspicious, as Code Cr. Proc. 1895, art. 249, only authorizes such arrest of "persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

2. In an action for damages for false imprisonment, a charge that plaintiff might recover such sum as would fairly compensate him for the

<sup>1</sup> Writ of error granted by supreme court.

physical inconvenience, mental anguish, and humiliation endured by him as the natural and proximate result of his arrest and imprisonment, was justified where the petition alleged humiliation, insult, disgrace, pain, anxiety, and injury.

3. Where defendant, by his acts and language, encouraged and promoted the unlawful arrest of plaintiff, he was responsible for the consequences thereof, as though made at his instance.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by James F. Irvine against Alexander Joske for damages for false imprisonment. There were verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Franklin & Cobbs, for appellant. C. K. Breneman, for appellee.

FLY, J. The petition of appellee alleged his unlawful arrest and imprisonment by one Joe Shely, a police officer of the city of San Antonio, under the direction and authority of appellant, and claimed damages in the sum of \$5,000. A trial by jury resulted in a verdict and judgment in favor of appellee for the sum of \$250.

We find that appellee was unlawfully arrested and imprisoned by Joe Shely, a policeman of the city of San Antonio, and that said arrest and imprisonment was directed and authorized by appellant. The arrest was made without a warrant, and not under circumstances authorized by law. Appellee was confined in jail for nearly 24 hours before any complaint was made, and the complaint, when made, charged no offense, and appellee was then released.

The first assignment of error complains of the admission of testimony tending to show that appellee was not guilty of any criminal offense in connection with the goods that were lost by him. The assignment is not well taken. The evidence did not damage the case of appellant, in the view of the case taken by this court. It was immaterial.

The court instructed the jury that the arrest and imprisonment of appellee by Officer Joe Shely was unlawful, and this charge is assigned as error. In considering this assignment, we assume that it was shown that by ordinance of the city of San Antonio it is made the duty of policemen to arrest all dangerous and suspicious characters. Shely swore that he arrested appellee by virtue of that ordinance. It is claimed by appellant that the ordinance was authorized under the city charter. The provisions are as follows:

"Sec. 229. The policemen of the city shall have power to arrest all offenders against the law of the state or ordinances of the city, by day or night, and keep them in the city prison to prevent their escape until they can be brought before the proper officer, unless such offender shall give a good and sufficient bond for his or her appearance for trial."

"Sec. 103. The city council shall have the power to pass, publish, amend or repeal all ordinances, rules and police regulations not contrary to the constitution of the state, and

necessary for the order or good government of the city, or the trade, commerce and health, or that may be necessary and proper to carry into effect the powers herein vested in the corporation or any of its officers; to enforce the observance of all such ordinances, rules and police regulations, and to punish violations thereof by fines and imprisonment, or either or both, or by work on the streets or other public works, as may be provided by ordinance, and required by judgment of the court."

Also that part of section 131 which empowers the city marshal "to perform such other duties and shall be invested with such other powers, rights and authority, as the city council may by ordinance require and confer, not inconsistent with the constitution and laws of the state."

We find nothing in the articles quoted to authorize the city council of the city of San Antonio to pass an ordinance empowering police officers to arrest any citizen who might by them be deemed dangerous and suspicious. That no such dangerous grant of power was intended by the legislature is shown by section 230 of the charter, which prescribes the circumstances under which arrests without warrants may be made. It is as follows: "The marshals and policemen may arrest any person committing any offense against the peace of the city or a breach of any city ordinance committed in their presence, or on complaint of any person, without a warrant." So jealous have the American people been of the preservation of the personal liberty of the citizen that safeguards have been thrown about it in the organic law, both state and national, and in the defense of it the citizen has been clothed with resistance even to the extent of taking human life. Indeed, the vitality and force of our system of government rests upon individual liberty, and our laws are framed upon the great principle that, so long as the citizen does not infringe upon the rights of others, he shall be protected in the enjoyment of absolute personal liberty. Our state constitution grants to the citizen security in his person, and our criminal procedure has carefully specified the circumstances under which he may be arrested without warrant by state and county officers, and has clearly indicated the only circumstances under which a town or city may authorize an arrest without warrant, upon suspicion. In article 249 of the Code of Criminal Procedure of 1895 it is provided: "The municipal authorities of towns and cities may establish rules authorizing the arrest without warrant, of persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws." That article applies to all towns and cities, whether chartered specially or by the general statute, and there is nothing in the charter of San Antonio that indicates that the legislature intended to remove that city from the operation of that law. On the other hand, the pow-

ers and duties of the officers are, in the charter, to be limited by the constitution and statutes of the state. See section 131, above cited. The ordinance of the city of San Antonio under which Shely claimed that he acted was not offered in evidence, and the only proof offered of its existence was the testimony of Shely. Admitting that this testimony was true, and that the city of San Antonio, through its council, did confide in its policemen the power, at discretion, to adjudge a citizen a suspicious person, and cast him into prison, it is the opinion of this court that it was an attempt to confer upon its policemen a power unprecedented in a free government, and utterly subversive of the principles upon which our whole system is founded. The grant of such power is unauthorized by constitution, statutes, and the charter, and will meet with no sanction or favor in the courts of the country. It attempts to clothe the petty officers of a city with more power than is granted to any department of our government,—the power to pass summary judgment upon a human being, and incarcerate him in a dungeon, although innocent of any crime against law or society, and without the opportunity of being heard in his own defense. The facts in this case offer a pregnant example of the consequences flowing from the exercise of such power. The trial judge properly instructed the jury that the arrest was unlawful.

The view of the case above indicated disposes of the second, sixth, and seventh assignments of error, as well as that portion of the third assignment which attacks the charge of the court that permits a recovery without reference to probable cause. There was nothing in the facts that raised the question of probable cause for the arrest. It was not urged as a defense that appellant had any probable cause for the arrest. His defense was that he did not authorize it and that Shely was empowered to arrest a suspicious character. The court charged the jury: "And if you believe from the testimony that the defendant, Alexander Joske, requested or directed the officer Joe Shely to arrest and confine said plaintiff in jail, then you are instructed that plaintiff is entitled to recover of defendant, Joske, as damages, such sum as will fairly compensate him for the physical inconvenience, mental anguish, and suffering and humiliation of mind, if any, you find he did so suffer as the natural and proximate result of his arrest and imprisonment." The petition alleged humiliation, insult, and disgrace, pain, anxiety, and injury, and justified the language of the charge, and we do not think that the jury were led by it to believe that they were authorized to assess double damages. The size of the verdict does not indicate that any damages were doubled. The charge is not open to the attack made upon it.

The fifth assignment of error attacks the charge because it presents the defense of not requesting or directing the arrest in a negative manner. The assignment is without merit.

The law embodied in special charges Nos. 3

and 4 requested by appellant was embodied in the charge of the court, and it was not error to refuse to repeat it.

The tenth assignment of error attacks the charge for giving an instruction that was almost identical with instruction No. 3 requested by appellant, and which it is urged should have been given.

The only other question presented is, was appellant responsible, as alleged, for the arrest of appellee? The jury found that he authorized and directed the arrest and imprisonment, and, as indicated by our finding of facts, this court will not say there was no testimony to sustain the verdict. There are circumstances that tend to prove that the arrest was made at the instance of appellant. It was not necessary that appellant, in terms, should direct the officer to make the arrest; but if he, by his acts and language, encouraged and promoted the arrest, he was responsible. "Where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all." Cooley, Torts (2d Ed.) p. 153; McGarrahan v. Lavers (R. I.) 3 Atl. 592; Malinleml v. Gronlund (Mich.) 52 N. W. 627; Wolf v. Perryman, 82 Tex. 112, 17 S. W. 772. The judgment is affirmed.

#### PIONEER SAVINGS & LOAN CO. v. PAN-COAST et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 17, 1897.)

**BUILDING AND LOAN ASSOCIATIONS—RIGHT TO WITHDRAW—CONTRACTS—LOAN TO SHARE-HOLDER—PAYMENT AND CANCELLATION.**

1. Plaintiff, holding certain shares in the defendant association, contracted a loan from it, and secured it by her note, a deed of trust, and the assignment of her shares. The stock certificate issued to plaintiff contained an agreement authorizing the withdrawal of such shares on certain conditions, and promising to pay, in such event, a sum equal to all installments paid, with interest at 10 per cent. thereon from the date of the several payments. Having fully complied therewith, plaintiff gave notice of such withdrawal, and requested that the sum due be applied in payment of such loan. It appeared that the amount due plaintiff exceeded the sum borrowed. *Held*, that plaintiff was entitled to a judgment canceling such note and deed of trust, though the business of such association may have resulted in a loss.

2. Under Act Minn. April 22, 1889, relating to building associations, and declaring that the provisions thereof relating to withdrawals should not apply to any association, theretofore organized, issuing shares which matured at a fixed time, such provisions were not inhibitory of plaintiff's withdrawal from the defendant association; it appearing that such association was incorporated prior to the enactment thereof.

3. It will be presumed, in the absence of proof to the contrary, that such provision for withdrawal was duly authorized, and therefore valid.

<sup>1</sup> Writ of error denied by supreme court.



Appeal from district court, Bexar county; J. L. Camp, Judge.

Suit by Mary A. Pancoast against the Pioneer Savings & Loan Company and another. From a judgment in favor of plaintiff, the Pioneer Savings & Loan Company appeals. Affirmed.

John A. Green, Sr., John A. Green, Jr., and Geo. D. Emery, for appellant. Thomas Haynes, for appellees.

NEILL, J. This suit was brought by Mary A. Pancoast, a feme sole, against the appellant and the appellee John F. Elliott, to cancel a certain note and mortgage, described in our conclusions of fact, and for an accounting with the loan company. The appellant answered that its predecessor, the Building, Loan & Protective Union, had loaned Mrs. Pancoast, who was a shareholder in the company, \$4,500, and, to secure payment of the loan, she had executed a note and deed of trust, and had assigned a certificate for 63 shares, of \$100 each, as security for the money; that the stock shares had not matured, and that under the laws of Minnesota, by virtue of which the National Building, Loan & Protective Union and appellant were incorporated, she was not entitled to withdraw from the association, and have her payments on the stock and interest thereon credited upon the debt, until her stock matured; that on account of losses by the company the value of her stock was much less than the amount she had borrowed from appellant; that Mrs. Pancoast had defaulted in the payment of her dues on the stock, and, by virtue of the by-laws of the company, had forfeited all payments made thereon, and that, by resolution of the board of its directors, such forfeiture was declared, and the payments made by her on the stock had inured to the benefit of the stockholders of the company, of which she ceased to be a member, by reason of the forfeiture; that she was indebted to appellant in the amount—principal and interest and attorney's fee—due upon the note sued on, for which it prayed judgment, with a foreclosure of its mortgage lien upon the land given to secure such indebtedness. The case was tried by the court without a jury, and judgment rendered in favor of Mrs. Pancoast for \$8.85, and a decree entered canceling the note and deed of trust given by her to secure the same, and also for cancellation of her stock certificate for her shares issued by the National Building, Loan & Protective Union. From this judgment and decree the Pioneer Savings & Loan Company has appealed.

#### Conclusions of Fact.

On the 1st day of May, 1890, the appellee, Mary A. Pancoast, became a stockholder in the National Building, Loan & Protective Union, a corporation under the laws of

Minnesota; and it issued to her its stock certificate No. 25,198, for 63 shares of its stock of series C, which certifies that she was constituted a shareholder in said union, and held 63 shares therein, of \$100 each; and in consideration of a payment of the admission fee, and the performance of all agreements, and her full compliance with the terms, conditions, and by-laws printed on the front and back, respectively, of said certificate, which were referred to and made a part of the contract, the union agreed to pay her, her heirs, administrators, executors, or assigns, the sum of \$100 for each of said shares at the end of 6½ years from said date, payable in the manner and upon the conditions set forth in the by-laws attached to said certificate. The terms and conditions printed upon the certificate, among others, are as follows: "First. The shareholder hereby agrees to pay, or cause to be paid, a monthly installment of sixty cents per month on each share named in this certificate, and a quarterly installment of twenty-five cents on each share. The first quarterly installment is payable with the first monthly installment, and one with each third monthly installment thereafter during the continuance of this certificate, and a further sum of twenty-five cents on each share, as a withdrawal installment, for each month in which there is no quarterly installment, payable as before specified. The monthly, quarterly, and withdrawal installments are each and all payable to the secretary of the union, without notice, on or before the last Saturday of the month in which they respectively fall due. Second. If the shareholder shall fail to pay any of said installments or interest and premium on his loan, when due, he shall pay a fine, for each delinquency, of ten cents per share on each delinquency on each share of his stock for the first month of such delinquency, and twenty cents per share for the second month, and thirty cents per share for the third month; and if all such monthly, quarterly, and withdrawal installments, and all such interest, premium, and fines, be not fully paid within ninety days after such first delinquency, this certificate shall wholly lapse, and this contract shall wholly cease, and become null and void, as to any promise or obligation of the union, and all the payments made upon this certificate shall thereupon be and become the absolute property of the union, and the union shall thereupon not be liable for any sum whatever under this certificate: provided, however, that the provision of this clause shall be subject to the right of withdrawal of stock hereinafter provided in the clause in relation to withdrawals. Third. Withdrawals. When the holder hereof has kept this certificate in force for a period of five years or more from the date hereof, by making all the payments herein required, he may withdraw the same, upon sixty days' notice

thereof, in which event the union promises to pay such shareholder a sum equal to all monthly and withdrawal installments paid on this certificate, together with ten per cent. interest thereon from the date of such several payments. All liability of the holder of this certificate under the terms hereof shall cease with the date of the notice of withdrawal by either of the methods herein provided for, and all further liability of the union under the terms of this certificate shall cease with the performance of its part of the promise hereinbefore contained in relation to such withdrawal: provided, however, that the union shall not be obliged to allow withdrawals for more than one-half the amount received in any month as monthly and withdrawal installments: provided, further, that the union reserves the right to pay off and take up any certificate issued under the foregoing provisions for withdrawal, at any time that it may elect, upon payment of the principal sum, and the interest thereon to the time of payment. Fourth [in part]. In case the union has a surplus of funds, it has the right to retire this certificate at any time after three years from its date, by paying a sum equal to all moneys paid by the holder hereof as monthly and withdrawal installments, with 10 per cent. interest thereon from the dates of such respective payments; and the holder agrees to surrender the same, and shall be released from further obligation." "Eleventh. The by-laws of the union, which are attached to and indorsed hereon, are a part and parcel of this contract; and such by-laws and this certificate are to be construed together, as a part of the same contract between the union and its members." "Thirteenth. The holder of this certificate shall have no claim or interest in the affairs, assets, or funds of the union, or control over them, except as specially set forth in this contract, or in the by-laws; and he or she assumes no further liability, of any kind whatever, except as stated in this certificate and by-laws." Among the by-laws printed on the back of said certificate, and made a part of the contract between Mrs. Pancoast and the union, are the following, stated in substance: Article 1, § 2: "The objects of this union are to afford its shareholders a safe and profitable investment, and a protection for their savings and families." Article 2, § 1: "The certificate of stock, and terms and conditions thereof, and the by-laws, and the application for membership, form the contract between the union and its several members." Section 5 (in part): "All loans, whether upon stock or real estate, shall fall due at the maturity time of the stock. On all loans the member shall pay interest at five per cent. per annum, and a premium of five per cent. per annum, which are payable in monthly installments, at the home office of the union, on or before the last Saturday of each

month." Section 7: "Should a shareholder whose property is mortgaged to the union desire to release the same by the prepayment of his indebtedness, he shall, upon application to the union, be allowed to do so, upon thirty days' notice to the union, and paying all indebtedness to the union upon his stock or otherwise, and payment of such an additional amount of interest and premium as shall be required by the board of directors, not to exceed three months, in addition to the month in which the payment is made." Section 17: "The by-laws may be amended, supplemented, altered, repealed, or suspended by a two-thirds vote of the directors of the union; but no such amendment shall alter any contract or certificate already made, without the assent of the holders thereof."

On the 1st day of June, 1890, Mary A. Pancoast, in order to obtain a loan of \$4,500 from said union, made and delivered to it a promissory note for that sum, payable 77 months after date, with 5 per cent. interest per annum, and 5 per cent. premium per annum, and both payable monthly. In order to secure payment of said note, she assigned her said certificate of shares to said union, as collateral security, and further, joined by her husband, Aaron Pancoast (who is now dead), executed and delivered a deed of trust to John F. Elliott, as trustee, upon the following described property, situated in the county of Bexar and state of Texas, to wit: A lot in that portion of the city of San Antonio known as "La Villita," on the east side of the San Antonio river, having a front of 79 feet, more or less, on the west side of Presa street; said lot being the eastern one-half of the middle one-third of a lot formerly belonging to John C. Hays. Said deed of trust, which is of record, in volume 81, p. 231, of the records of said Bexar county, provided that it should be null and void upon the payment of said note. On the 15th of June, 1890, said appellee received in cash from said union, for the note so secured, \$4,324.50; the said union having deducted from the face amount \$63 for withdrawal installments upon said certificate for the months of June, July, September, and October, 1890, and the further sum of \$112.50 for interest and premium on the said loan for three months beginning with June, 1890. All negotiations between appellee Mary A. Pancoast and said union, on said shares of stock and loan, took place, and said certificate was delivered and money received, in Bexar county, Tex.

The National Building, Loan & Protective Union was incorporated by virtue of the laws of the state of Minnesota on the 16th day of December, 1885. After stating the name of the corporation, its charter is as follows: "(2) The general nature of the business to be transacted by the corporation shall be carrying on the business of a building and loan association, the purchase, sale and holding of real estate, lands, tenements and here-

ditaments, the building of houses and improvement of real estate, by the raising of funds to be loaned to its members for such purposes, the issuance of shares of stock of the corporation to its members and collection of membership fees, dues, assessments and premiums on the same, mortgaging and leasing of real estate, loaning and investing the moneys and funds of the corporation. (3) This corporation shall commence on the 12th day of January, A. D. 1886, and shall continue thirty years. (4) The capital stock of this corporation shall be fifty million dollars, divided into five hundred thousand shares of one hundred dollars each, which stock shall be represented by the subscription of shares by its members to be paid in such installments as may be provided by the by-laws of the corporation. The capital stock may be increased at any time by the board of directors as provided by the laws of the state of Minnesota. The corporation may commence business when one thousand shares of stock have been subscribed. (5) The highest amount of indebtedness or liability to which this corporation may at any time be subject shall be fifteen thousand dollars above its liabilities to its members on its certificate of shares, but such indebtedness or liability may be increased for the purpose of redeeming its certificate to an amount not to exceed fifty thousand dollars. [The sixth, seventh, eighth, and ninth paragraphs of the charter relate to the organization of the union, and are not material to this case.] (10) The board of directors shall from time to time adopt by-laws, rules, and regulations for the government of the association, and the conduct of its business." On the 17th day of June, 1889, the said union filed its charter with the secretary of the state of Texas, and obtained a permit to do business in said state. The National Building, Loan & Protective Union continued to do business under that name until May 26, 1891, at which time, by amendments to its articles of incorporation, it changed its name to the Pioneer Savings & Loan Company, and since that time has been known by that name. Up to the time of the trial of this case, it continued to do business as formerly; its name being only changed as stated, but its identity not affected.

The act relating to building, loan, and savings associations doing a general business, passed by the legislature of the state of Minnesota, and approved by the governor April 22, 1889, is, so far as it may affect this case, as follows:

"Section 1. Whenever any number of persons, not less than ten, desire to be incorporated as a building and loan association for the purpose of accumulating the savings and funds of its members and lending the funds so accumulated, they shall make and execute a written declaration to that effect in the form now provided by the statute for the execution of deeds of real estate to entitle the same to record."

"Sec. 4. For every loan made, a note non-negotiable or bond secured by first mortgage on real estate shall be given, which security shall be in double the value of the loan, and satisfactory to the directors, and shall be accompanied by a transfer and pledge of the share of the borrowers to the association. The shares so pledged shall be held by the corporation as collateral security for the performance of the conditions of said note or bond and mortgage; provided, that the shares, without other security, may, in the discretion of the directors, be accepted as security for the loans of an amount not exceeding their withdrawal value as provided by this act."

"Sec. 27. Any shareholder whose stock has not been declared forfeited in such association and whose share or shares are not pledged upon a loan may withdraw such share or shares from the association at any time after one year by giving at least 60 days' notice in writing to the secretary of his intention to do so. Upon receipt of such notice the same may be considered a withdrawal by such person, and the association may within 60 days dispose of said stock, and the member shall assign the same for that purpose. At the end of 60 days the association shall pay to the member so surrendering as follows: \* \* \* If such stock is more than two years old the member upon such surrender shall receive in addition to the amount specified at least three-fourths of all profits standing to the credit of such shares. \* \* \* Provided further that the foregoing provisions in relation to withdrawals shall not apply to any association heretofore organized under the laws of this state which has issued shares of stock that matures at a fixed time."

The appellee Mary A. Pancoast paid to said union and appellant company a monthly withdrawal and quarterly installment upon said certificate, and all interest and premiums upon said note, at the times and in accordance with the terms of said certificate and note, up to and including all such installments, interest, and premiums due to May 15, 1896; the total amount so paid being \$3,477.60. The interest on this amount at 10 per cent. per annum from the time of each payment was on May 15, 1896, \$1,043.28. Since that time she has made no payments on her stock or upon the loan. On May 9, 1896, the appellee Mary A. Pancoast made application and gave notice in due form to the appellant of withdrawal from said association, and of her desire to prepay the loan made to her by the National Building, Loan & Protective Union, by having the withdrawal value on her stock applied upon the loan; she having then, as before stated, paid all installments and dues for six years. After this notice was given and application made, on August 8, 1896, the appellant refused to accept such notice and application as binding upon it, upon the ground that she

had no right to give any notice of withdrawal until she paid her mortgage indebtedness in full, and insisted that she pay her dues, or suffer forfeiture of her contract, in accordance with its terms. In the communication containing this refusal, it stated that it could not accept the stock certificate and apply it at a greater amount than its actual value, which it claimed to be \$2,572.10, and that, if she wished to surrender it at any time before the 30th of August, upon that basis, the company would accept it for that amount; otherwise, unless the dues were paid by her, they would declare the stock forfeited as soon as it was 90 days in arrears. No further payments having been made upon the stock to the 5th day of November, 1896, by a resolution of appellant's board of directors Mrs. Pancoast's stock was declared forfeited for nonpayment of dues thereon. Emerson Cole, the president and general manager of the Pioneer Savings & Loan Company, testified that each share of stock of series C, bearing the same date as that of Mrs. Pancoast, which had paid all its dues in full to May 15, 1896, had the same value, and that the amount paid by Mrs. Pancoast as monthly withdrawal installments on her stock was \$3,477.60; that the net earnings credited to said stock, after deducting the losses of the corporation, was \$40.95; and that the payments and profits added gave the total value of her stock at that time.

#### Conclusions of Law.

It is contended by appellant that the laws of Minnesota were a part of the contract between it and Mrs. Pancoast, and that such laws expressly forbade the withdrawal of shareholders whose stock was pledged as collateral security for a loan of the association. If it should be conceded that the law of appellant's domicile entered into, and became a part of, the contract, it does not appear from the record that there was any law of Minnesota, in force at the time appellant was incorporated, imposing such inhibition. As is seen from our conclusions of fact, the appellant was incorporated on the 16th day of December, 1885; and it is expressly provided by the act of April 22, 1889, that the provisions of that act relating to withdrawals "shall not apply to any association heretofore organized under the laws of this state which has issued shares of stock that mature at a fixed time." It is a general principle in the law of corporations—applicable to every kind of written contract executed ostensibly by the corporation, and to every kind of act done by its officers and agents in its behalf—that where the officer or agent is the appropriate officer or agent to execute a contract or to do an act of a particular kind, in behalf of the corporation, the law presumes a precedent authorization regularly and rightfully made, and it is not necessary to produce evidence of such authority. 4 Thomp. Corp. 5029. In the absence, then, of proof to the contrary, it will

be presumed that the contract between appellant and Mrs. Pancoast, authorizing her, in the event that she kept her certificate in force for a period of 5 years or more from its date, to withdraw upon 60 days' notice thereof, and the promise of appellant to pay her a sum equal to all monthly and withdrawal installments paid on the certificate, together with 10 per cent. interest thereon from the date of such several payments, was valid. This contract being valid, and said appellee having fully complied with the same, and the sum equal to all monthly and withdrawal installments paid by her on the certificate, together with 10 per cent. interest thereon from the date of such several payments, being in excess of the money borrowed, for which the note and mortgage were given, she had a right to have the amount paid by her, together with the interest, credited upon her debt, and withdraw from the association. After the appellant owed her, under the terms of its contract, more than she was due it upon the note and mortgage, it could not object to her having what was due her appropriated to the payment of the debt she owed the concern. The amount due her was properly estimated upon the basis of the contract between them, and the fact that the association may have lost in its venture did not relieve it from the terms of its obligation. It had no lien upon her certificate of shares, further than to secure what was due from her; and, when this debt was paid according to the contract, the lien on her certificate of shares, as well as the mortgage on her property, was extinguished when she gave the company notice of withdrawal. From this it follows that the court did not err in rendering judgment in her favor, canceling the note and mortgage in controversy.

It appears from exhibits attached to appellant's motion for a new trial that appellant's counsel were notified after the trial began that appellant had gone into voluntary liquidation. The fact that it was in liquidation did not signify that it was insolvent. Besides its president testified that it was not, and could not, from its very nature, become, insolvent. If the appellant wished to postpone the trial because it had gone into liquidation, its counsel should have requested such postponement; but they failed to make such request, but took chances on a verdict; and, having done so, appellant could not afterwards complain.

The contention of appellant that it was entitled to a judgment for the amount of its mortgage and unpaid interest to the date of trial, together with a foreclosure of its lien upon the land described in the mortgage, cannot be entertained by this court. It amounts to the corporation saying to appellee: "According to my contract, I owed you more than enough to cancel your indebtedness to me; but, because you asked me to perform my obligation, I have taken from you, and appropriated to myself, all the mon-

ey you intrusted to my hands. Now, that which was yours is mine; and I must have that which could have never been mine, had I lived up to my agreement." The judgment of the district court is affirmed.

# ROSE v. TAYLOR et al.

(Court of Civil Appeals of Texas. Dec. 8, 1897.)

## VENDOR AND PURCHASER—LIEN—WANT OF NOTICE—FOLLOWING PROCEEDS—PRE-EMPTION RIGHT—HOMESTEAD—PRIORITY OF LIENS.

1. Where vendor's lien notes, made in consideration of a bond for deed, have been negotiated, the vendor cannot extinguish the lien as against the holder of the notes by retaking possession of the land, though the purchaser has abandoned the contract without having the bond recorded.

2. Vendor's lien notes, made in consideration of a bond for deed, were negotiated. The purchaser abandoned the contract without recording the bond, and the vendor retook possession of the land, and exchanged it for a pre-emption right which had been but partly perfected. The pre-emptor had no notice of the vendor's lien notes. *Held*, that the lien followed the proceeds to the pre-emption right, and attached before the vendor's claim of homestead.

3. The lien would attach if the pre-emptor had some real interest under the pre-emption law which could be transmitted at the time of the exchange, a mere naked right being insufficient.

Appeal from district court, Bell county; John M. Furman, Judge.

Suit by A. J. Rose against J. M. Taylor and another. From a mere money judgment denying him a vendor's lien on certain lands, plaintiff appeals. Reversed.

Harris & Saunders, for appellant. Geo. W. Tyler, for appellees.

FISHER, C. J. Rose brought this suit against Taylor to recover the balance due upon a promissory note for \$800, executed by Taylor in favor of plaintiff, and also to recover judgment against one Hair on certain notes executed by Hair to Taylor, which were delivered to Rose as collateral security, and to foreclose a lien upon 54 acres of land situated in Archer county, Tex. There was practically no question raised as to the personal liability of the defendants Taylor and Hair, but the contest is upon the question as to the right of plaintiff to foreclose the lien upon the lands situated in Archer county. The defendant Taylor alleged that this land was his homestead, and that he was the head of a family, and the land was not subject to the lien asserted by the plaintiff. The court below took this view of the question, and held that the land was not subject to plaintiff's lien, and therefore declined to foreclose it. The ruling of the court in this respect presents practically the only question in the case. The nature of the lien, together with the facts bearing upon that question, is stated

in the findings of the court, which we here set out in full:

"On January 1, 1887, James M. Taylor borrowed \$800 from A. J. Rose, with which to make a cash payment on a 160-acre tract of land out of the Wm. Newland survey in Bell county, Texas, purchased by Taylor from D. C. Freeman. To secure this loan, Taylor gave his note to Rose for \$800, due January 1, 1888, with 12 per cent. interest from date, and 10 per cent. attorney's fees, with vendor's lien and deed of trust on the Newland land, subject to the superior vendor's lien in Freeman for the balance of the purchase price of said Newland tract, the amount of which is not shown by the evidence. Taylor also transferred to Rose, as collateral security for said note, three notes of J. J. Hair, aggregating \$800, which were secured by vendor's lien on 33½ acres of land out of the J. B. Castleman and David A. Thompson surveys, and 15 acres out of another survey in Bell county, Texas, which will be hereafter referred to collectively, as the '48½ acres.' These notes of J. J. Hair were given in August, 1886, and matured as follows: January 1, 1887, \$300; January 1, 1888, \$300; and January 1, 1889, \$200; and Taylor had executed to Hair a bond for title, but said instrument was never placed upon record in Bell county. Taylor also gave Rose a deed of trust on a flock of sheep then in Taylor's possession in Bell county. On account of the crop failure of 1887, Taylor fell behind in his payments to Freeman, and finally surrendered the Newland land back to Freeman, the evidence being that Taylor's indebtedness to Freeman equaled, and perhaps exceeded, the value of the Newland land at the time of its surrender to Freeman. In the latter part of 1887, J. J. Hair abandoned the 48½ acres purchased from Taylor, and left the state of Texas, but returned to Texas in the early fall of 1889, and has ever since resided in Bell, Williamson, and Cherokee counties, and has ever since been insolvent. Hair did not return to Taylor his bond, nor make a formal reconveyance or surrender of the 48½ acres of land to any one, but simply abandoned it. Taylor thereupon retook possession of the 48½ acres, and occupied it by tenants till about the latter part of the year 1890. Taylor resided in Bell county from January 1, 1887, till about February 1, 1891 (the exact date not being shown). Taylor offered to Rose to sell Rose the 48½ acres, and take up his note held by Rose, and for Rose to pay him (Taylor) the difference (the evidence not showing how much difference he asked), but this was declined by Rose. The credit of January 13, 1890, with previous payments thereon, reduced the balance due on Taylor's note to less than \$150. Taylor made payments on his note to Rose, as follows: November 6, 1888, \$96; June 17, 1889, \$99.55; September 7, 1889, \$488; and January 13, 1890, \$140.45,—aggregating \$824. And Taylor has made

written acknowledgments to Rose of this indebtedness as late as February, 1892, this suit having been filed December 24, 1894. The balance unpaid on said note from Taylor to Rose at this date, January 9, 1897, is \$325.03. Taylor sold the flock of sheep on which Rose had a deed of trust to McKenzie, took notes from McKenzie in payment, which were turned over to Rose, and the credit of \$488 above mentioned is given therefor. In November, 1890, Taylor, without the consent of Rose, began negotiating an exchange of the 48½ acres of land in Bell county for the pre-emption right of Mrs. Sallie Edwards, a widow, in and to 54 acres of land in Archer county, Texas, which had first been pre-empted by one Keith, who sold his right to Sallie Edwards; and said Keith and Sallie Edwards had occupied the 54 acres of land in Archer county a portion of the time required by the pre-emption laws, but the time of occupancy was not completed when the exchange was made; and when Taylor moved on the land the incomplete term of such occupancy would thereafter have to be completed by actual occupancy of said 54 acres by Taylor. Taylor moved on the 54 acres in Archer county in February, 1891, and has occupied it and claimed it ever since as a homestead, he being during all of the time of the transactions herein mentioned, and still being, the head of a family; and said 54 acres of land in Archer county is his homestead. Otherwise it is not shown that Taylor has complied with the requirements of the pre-emption laws, so as to entitle him to a patent, nor is it shown that he has ever obtained a patent to said 54 acres of land. He did, however, get a deed from said Sallie Edwards, conveying same to him, but the deed is not in evidence. In this exchange of lands Mrs. Sallie Edwards was represented by her agent, J. F. Edwards; and said agent was informed, before the exchange was consummated, that Taylor had previously contracted to sell the 48½ acres in Bell county, and that the purchaser had gone back on the trade, etc.; but no particulars were asked or stated, said agent simply remarking that, if the abstract of title to the 48½ acres showed up all right, he guessed it would make no difference. Such abstract from the Bell county records was subsequently furnished, which showed the title to the 48½ acres in Taylor, and the exchange of deeds was made between Taylor and Mrs. Sallie Edwards, the negotiations occurring at Wichita Falls, Texas. Taylor also told this agent all the facts connected with the 48½ acre tract of land, and the facts about the Hair notes held by plaintiff. Otherwise than as above, Sallie Edwards had no notice of the claim of plaintiff, Rose, upon the 48½ acres in Bell county, Texas. I further find that there was no fraudulent or dishonest intention on the part of Taylor in any of the transactions involved in this litigation, nor is any such intention charged by plaintiff against him.

#### "Conclusions of Law.

"(1) I find the notes given by J. J. Hair to Jas. M. Taylor, and transferred by Taylor to Rose, were barred by limitation before the institution of this suit; and I find in favor of said Hair on his plea of limitation and for costs. (2) I find in favor of plaintiff, Rose, against defendant Taylor for the balance due on the \$800 note sued on, and amounting to \$325.03, with 12 per cent. interest from date of this judgment, and for the additional sum of \$32.50 as attorney's fees, and for costs. (3) On the remaining issue, to wit, has plaintiff, Rose, a lien upon the 54 acres of land in Archer county, Texas, I find in favor of defendant Taylor upon the following grounds: (a) The facts and circumstances are not sufficient to show an equitable lien in favor of Rose upon the land in Archer county, Texas. I find no authority for the relief invoked by plaintiff. (b) The plaintiff, Rose, by his laches in not having the lien upon the 48½ acres in Bell county placed upon record, or foreclosing the same, thereby lost and forfeited the same by the sale thereof by Taylor to Mrs. Sallie Edwards. (c) Taylor did not acquire title to the Archer county land, but simply the "claim" or inchoate right of Sallie Edwards to become the owner of the land under the pre-emption laws of the state, provided Taylor thereafter should complete the three-years occupancy. Then, and not till then, he would be entitled to a patent, by complying with certain other legal requirements. The title to the land was in the state of Texas, and would remain in the state unless and until the occupancy should be completed, and other legal requirements should be complied with. The pre-emption and homestead donation laws are based upon a beneficent public policy, to wit, that it is better for homeless families, though insolvent, and pursued by creditors with judgments, liens, etc., to be provided with homes and shelters and the means of support, than to be wanderers and tramps; and the only consideration required by the state is actual occupancy for a prescribed period and certain other legal formalities, and the right thus given by the state is personal to the pre-emptor. If the plaintiff acquired any lien upon Taylor's land in Archer county, it attached at the moment Taylor acquired his rights from Sallie Edwards. Could any one have a lien upon the public domain? Certainly not. Again, if such lien had been immediately foreclosed, and Rose or any one else became the purchaser (who then possessed a home, and was not entitled to pre-empt), could such purchaser have completed the occupancy, and obtained the patent to the land? Would he have acquired any right by such purchase? The answer is certainly 'No.' Again, if such a lien attached at the time Taylor acquired the pre-emption right of Mrs. Edwards, it would have to be limited and restricted in a decree of foreclosure to the right then acquired, and could

not be extended over, and applied to the subsequent rights acquired by Taylor by further occupancy or otherwise. In such decree there would have to be an apportionment or segregation or partition of the right acquired by Taylor from Mrs. Edwards from the rights subsequently acquired by Taylor by his occupancy, and this would have to be based on evidence of the relative value, or in some other way determined; all of which is a legal impossibility and absurdity. I conclude that Taylor acquired no property by the exchange with Mrs. Edwards on which a lien, either expressed or implied, could be ingrafted, and that plaintiff has never had a lien upon the 54 acres of land in Archer county conveyed to Taylor by Mrs. Sallie Edwards."

The plaintiff, in his petition, alleged that Taylor and Hair were both insolvent, and that Mrs. Sallie Edwards, from whom defendant Taylor acquired the pre-emption or homestead claim in Archer county, acquired the land in Bell county, upon which the plaintiff had a lien, by reason of the transfer of the vendor's lien notes executed by Hair to Taylor without notice of the rights of plaintiff, and of his lien upon that land. Therefore plaintiff was not in position to foreclose his lien as against her upon that tract of land. Taylor, in transferring to Rose as collateral security the vendor's lien notes, which were executed by Hair as the purchase price of the 48½-acre survey sold by Taylor to Hair, vested Rose with a lien upon that land, which could not be discharged by reason of Taylor regaining possession of the land, and electing to hold the trade between him and Hair abandoned, upon the failure of Hair to pay for the land. Taylor, when Hair failed to pay off and discharge the vendor's lien notes due, could repossess himself of the land, and thereby extinguish the rights of Hair as a purchaser; but such effect would not be given to that transaction as between Taylor and Rose as to cancel and discharge the lien held by the latter. If Taylor, by the transaction to which Rose was not a party, sold the property upon which the latter had a lien to an innocent purchaser, and thereby placed it beyond the power of Rose to foreclose his lien upon the property, the latter, in equity, could follow the proceeds of the sale in the hands of Taylor, and the lien already existing in his favor would attach to such proceeds, and it would be liable for his debt, to the same extent as formerly existed against the land. Now, the pre-emption or homestead claim acquired by Taylor in exchange for the land incumbered in Rose's favor, would be subject to the same liability to the lien of Rose as would be the case if other property had been acquired by Taylor as the proceeds of such sale. The consideration of the purchase price of the land in controversy upon which the lien is sought to be foreclosed, being the land given in ex-

change by Taylor, upon which Rose had a lien to secure his debt, the lien of the latter, in equity, immediately attached to the land so acquired by Taylor, upon the making of such exchange. Such being the case, the homestead rights set up by Taylor were subject to this lien, and were subordinate thereto. This lien, as between Rose and Taylor, was a charge upon the land when the homestead rights were acquired. What is here said in this connection is upon the theory that some real right existed in Mrs. Edwards under the homestead or pre-emption laws, when she transferred her pre-emption or homestead claim in Archer county to Taylor. It is held that a settler asserting a right under the pre-emption or homestead laws may sell his interest therein before the three-years time of actual occupancy required by law has expired, and the vendee may continue the possession, and upon the completion of the unexpired term is entitled to patent, and that a vendor's lien for the unpaid purchase money can be enforced upon the land by the original occupant against his vendee. *Johnson v. Townsend*, 77 Tex. 644, 14 S. W. 233; *Palmer v. Bennett*, 81 Tex. 451, 19 S. W. 304. In the first case it is said: "It is clear under the acts of 1873 and 1879, as found in the Revised Statutes, a settler's inchoate right by incomplete occupancy was an assignable right; that it constituted such an interest as would support a sale, and a lien thereon, as between the parties, if the assignee continues the possession, and obtains title. Johnson obtained title by virtue of his own and the possession by previous occupants, which had been assigned to him, and for which he gave his notes. We think he obtained from Thomas a valuable interest in the land, which, being kept alive against the state by continued possession on his part until he was entitled to the land, was sufficient as a consideration to support the notes and the liens therein expressed." In the latter case it is said: "One who has pre-empted land may sell it prior to the completion of the occupancy of three years, and, if the possession be kept up by the vendee or vendees, the patent issues in the original right, and the land does not become vacant." These cases were suits to foreclose vendors' liens in favor of the original pre-emptor. If there was such a compliance with the law on the part of Mrs. Edwards or the original settler as would create in her favor a pre-emption or homestead right in the Archer county land, then it is clear that under the decisions quoted it was such an interest as was subject to sale or vendor's lien; and when Taylor purchased he acquired this interest, and it would inure to his benefit. The steps taken by the original pre-emptor to acquire the land would result to the benefit of the purchasers from him, and the interest thus acquired was a tangible right, which, if followed up by subsequent occupancy, would

give a perfect title. If there was, at the time that Taylor acquired the Archer county land in exchange for the Bell county land, upon which Rose has his lien, such a tangible interest in Mrs. Edwards, although incomplete, which, if followed up by the subsequent acts required by law, would complete and vest the final right in Taylor, we can see no solid reason why the principles decided in the cases cited would not apply to the facts of this case; for if, as there decided, such a right or interest exists in the original settler or pre-emptor, that is the subject of sale or lien, which in the first instance the vendee may acquire, and which in the second he may become liable for, we cannot see why the tangible interest thus recognized should not be subject to an equitable lien, such as is sought to be foreclosed in this case. If such an interest was acquired by Taylor as the result of the transfer of the land, upon which Rose originally had his lien, equity would fasten upon this land a lien equally as effective as that which existed upon the land which was given in exchange for it. In effect, it would be a case in which the lien holder was following the proceeds of the property upon which his lien originally existed.

The claim of Taylor and his wife to the homestead right conferred by the constitution could no more be urged to defeat a lien of this class than would be the case if the lien was express or created by contract between the parties prior to the assertion of the homestead rights, for immediately upon the acquisition of the land by Taylor the lien of Rose attached; consequently, whatever homestead right was asserted was subsequent and subordinate thereto.

This view of the question is upon the theory that there was some right existing in Mrs. Edwards under the homestead and pre-emption laws that could be transmitted at the time that Taylor bought the pre-emption claim. If she was a squatter upon the land, not intending to acquire it under the homestead or pre-emption laws, and without any steps being taken by her or her vendor to so acquire the land, a purchaser from her would acquire a mere naked right, only such as could be conveyed by a squatter; and, in such a case, there would be no tangible interest existing to which a lien could be fastened.

We understand from the findings of the trial court, and from the manner in which the parties treat the case in this court, that Mrs. Edwards did have some interest in the land as a homestead or pre-emption claimant at the time that she sold to Taylor, but there is no express finding to this effect; nor do the facts establish such an existing right. If it had been shown that Mrs. Edwards, or her vendor, Keith, previous to the sale to Taylor, had, up to that time, taken the steps required by law to acquire the land as a homestead or pre-emption claim,

we would have reversed the judgment of the court below, and rendered judgment here in favor of the appellant; but, in view of the uncertainty upon this branch of the case, we will reverse the judgment, and remand the case for further trial. Reversed and remanded.

# GARRETT et al. v. ROBINSON.

(Court of Civil Appeals of Texas. Dec. 8, 1897.)

## PLEADING—SUBSTITUTED PLAINTIFF—DEEDS—CONSIDERATION—ORAL EVIDENCE—PAYMENT OF NOTE.

1. Defendant in an action on a note by an indorsee cannot, by cross bill, claim that the indorser was still the owner of it, and ask to have him substituted as a party plaintiff.

2. Though a deed recites that its consideration was \$300 cash and a note of \$300, executed by the grantee, yet oral evidence is admissible to show that the payment of a note executed by the grantor, and held by the maker, was an additional consideration for the deed.

3. Where payment of a note is pleaded, and the payee testifies that it was never paid, and was not part of the consideration in a subsequent transaction between the parties, and the maker testifies that he thought it was not mentioned, though he intended so to do, the evidence was insufficient to show that the note was settled in the transaction.

Appeal from district court, Rusk county; W. J. Graham, Judge.

Action by Sam Robinson against John T. Garrett and another. From a judgment for plaintiff, defendants appeal. Reversed.

This suit was brought by Sam Robinson against John T. Garrett and Josie Garrett upon a promissory note made by them on the 4th of January, 1894, for \$300, payable to D. T. Robinson or order, on the 1st day of November, 1895, with interest from the 1st day of January, 1894, at the rate of 10 per cent. per annum, together with 10 per cent. attorney's fee if collected by law. The note recites that it is in "part payment for a certain tract of land in the headright survey in Rusk county, Texas, this day [date of note] deeded to John T. Garrett and Josephine Garrett," and that it is a vendor's lien upon the land. The petition alleges that the plaintiff is the owner and holder of the note, and that it was given in part payment of certain lands situated in Rusk county, Tex., being an undivided half of all lands in said county conveyed by A. W. Duke and wife to D. T. Robinson and John T. Garrett, and by D. T. Robinson to John T. Garrett and wife. It is then averred that plaintiff holds a vendor's lien on four certain separate and distinct tracts of land, which are described by metes and bounds; and a foreclosure of the alleged lien is asked. The appellants (defendants below) answered: (1) By pleas in abatement, that plaintiff is a minor, and without legal capacity to prosecute the suit; (2) by general demurrer; (3) by general denial; (4) by special plea, in which they allege that plaintiff is not the real owner of



the note, but that the payee, D. T. Robinson, is its real owner, and that he made a pretended transfer of it to the plaintiff after maturity, without consideration; and (5) by what they term a cross bill, in which they allege that D. T. Robinson and his wife, on the 8th day of May, 1894, executed to defendants their promissory note of that date, by which they promised to pay plaintiff, on the 15th day of November, 1894, \$349, with 10 per cent. interest from May 1, 1894; that defendants are still the owners and holders of said note; and that it has never been paid. In the "cross bill," so called, defendants offer to allow D. T. Robinson a credit on the note sued on by Sam, equal to the amount due them, and pray that such credit be allowed. They also pray for general and special relief. Neither D. T. Robinson nor his wife are asked to be made parties to the suit; nor does the so-called "cross bill" pray for service on them. After this answer was filed, Sam Robinson and his father, D. T. Robinson, filed a supplemental petition, in which it was averred that in event it should be found Sam was a minor, as alleged by defendants, D. T. Robinson appears as next friend of Sam, and adopts the pleadings filed by him, and prays for all the rights and remedies he may be entitled to. This petition also contains the following: "And, further, if it should be found that plaintiff had no title to the note sued on, then said D. T. Robinson adopts the pleadings of plaintiff herein, and makes himself party hereto, and prays for judgment on note sued on, and for foreclosure on land described in plaintiff's petition, subject to lien in said note and deed for said land prayed for by plaintiff." Following this, the plaintiff denied the allegations in defendants' answer, and pleaded that the note set up by them was, before the note sued on was executed, fully paid off and discharged. Afterwards the plaintiff filed a trial amendment, in which he alleged that the note set up in defendants' answer was given for a part of \$700 paid by Robinson and Garrett, for the land conveyed by the deed to them from one Duke and wife, on April 14, 1894; that afterwards, on or about June 4, 1894, Robinson and Garrett had a full and final settlement of all matters then between them, by which Robinson deeded to Garrett and wife all his interest in the lands mentioned, and considered in the deeds of Duke to Robinson and Garrett, and on such settlement the note set up by defendants was fully settled and discharged by said deed, and was part of the consideration therefor; and, in such settlement, Garrett made Robinson, over all offsets and claims, the note sued on by plaintiff. On these pleadings, defendants having dismissed as to Mrs. E. O. C. Robinson, the case was tried before a jury, who found Sam Robinson to be a minor, and returned a verdict in favor of plaintiff, D. T. Robinson, in the sum of \$421.50, and that the note sued on was a vendor's lien on the land described in

the deed from Duke and wife to John T. Garrett and D. T. Robinson, dated January 30, 1894. Upon this verdict, judgment was rendered in favor of D. T. Robinson, as next friend of Sam Robinson, for the latter's use and benefit, with a decree foreclosing a vendor's lien on two of the tracts of land described in plaintiff's petition, from which judgment we have this appeal.

J. H. Turner, for appellants. John R. Arnold, for appellee

NEILL, J. (after stating the facts). As, from an examination and consideration of the record, we concluded it was our duty to reverse the judgment, we have made a statement of the pleadings for the purpose of calling attention to defects in them, so that they may be amended before another trial. It will be observed that Sam Robinson is the plaintiff in this case, and whether the suit is prosecuted by him in person, or by him through his next friend, so long as he alleges he is the sole owner and holder of the note sued on, he can be the only plaintiff. Other parties could have come, or may come, into the suit, upon leave of the court, as interveners, or new parties could have been or may be made defendants. But the original defendants could not, under any principle of pleading, elbow Sam out of the way, substitute his father for him as the plaintiff, state his cause of action for him, and set up a defense to it, as was done in this case by the so-called "cross bill" of the appellants. It is, indeed, difficult to determine from the pleadings, evidence, and charge of the court whether the case tried was one in which Sam Robinson, by his next friend, or D. T. Robinson himself, was the real plaintiff. It would seem, however, without looking to the judgment, that it was tried on the assumption that D. T. Robinson was himself the real plaintiff in the action. The evidence is uncontroverted that the note sued upon was transferred after maturity by the indorsement of the payee to the real plaintiff, Sam Robinson. This made him its owner. Having received it after maturity, the note was subject in his hands to all offsets and defenses that the makers had, before it was transferred, against the original payees. And as such offset was pleaded by the defendants against D. T. Robinson, as though he were the real plaintiff, and such pleadings were not excepted to, we would not be inclined to disturb the judgment in favor of Sam Robinson, were it not for other errors which require its reversal.

It is not for us to go back to the rat-trap enterprise from which the transactions culminating in this suit originated, and state fully the evidence adduced on the trial. It is sufficient to say that the appellant John T. Garrett and D. T. Robinson were partners in exploiting a rat trap, on which the

former had obtained a patent, and, as such partners, had acquired certain lands upon which the lien is claimed in this case. The note described in the answer of appellant was made to him by D. T. Robinson and wife for Robinson's part of the cash advanced the partnership by appellant for the purchase of some of the lands. This note appellant has held from the date of its execution until the case was tried. The contention of D. T. Robinson, by his pleadings and upon the trial, is that this note was satisfied and extinguished by the sale of the lands for which the note sued on was executed, and that its satisfaction was a part of the consideration received by Robinson for the sale of the land to Garrett. The deed from the former to the latter recites a cash consideration of \$300, and the promissory note for \$300, which is the one plaintiff sued on. D. T. Robinson was permitted to testify, over appellants' objections, that the note set up by appellants in their answer was paid off and settled by the conveyance or deed made by him to them, above referred to; the objections being that the deed contained the terms and conditions on which the same was made in plain and unambiguous language, recited a contract complete within itself, and that such testimony tended to vary and contradict its terms, and was, in the absence of pleadings setting up fraud or mistake, inadmissible. The admission of the testimony is assigned as error. The assignment is not well taken. In actions of this character between the parties to a deed, oral testimony is admissible to prove the true consideration, whatever may be the consideration recited in the instrument. *Lanier v. Foust*, 81 Tex. 189, 16 S. W. 994; *Taylor v. Merrill*, 64 Tex. 494; *McLean v. Ellis*, 79 Tex. 398, 15 S. W. 394.

In its charge, the court instructed the jury to ascertain whether or not the note set up by defendants in their answer was settled by the deed from Robinson to them, and, if it was so settled, to find for plaintiff. This is objected to, upon the ground that there was no testimony tending to show that the note was settled in that way. It is also complained in another assignment that the verdict is contrary to the evidence, in that there was no evidence to show that the note referred to was settled in said transaction, and that a new trial should have been granted on that ground. D. T. Robinson testified that he did not remember that the note, as such, was mentioned in the transaction; that he did not think it was; that it was his carelessness in not taking it up, but that he never thought of it. The defendants testified that said note was no part of the consideration for the deed, and that it was not mentioned during the negotiations of the trade, and was never demanded by Robinson. If, as the testimony of both the parties shows, the note in question was never mentioned by either in

the transaction, we cannot see how it could have been settled or extinguished by it. While there may have been some testimony upon the issue submitted by the part of the charge complained of, yet we believe that the evidence is wholly insufficient to show that the note was settled in the transaction. We think, therefore, that the court erred in not granting a new trial for that reason. Such other errors as are assigned will not likely arise upon another trial. For the reason indicated, the judgment of the district court is reversed, and the cause remanded.

UNSWORTH v. STRAUGHAN, Judge, et al.  
(Court of Civil Appeals of Texas. Dec. 8, 1897.)

APPEAL—AFFIRMANCE.

Where no brief is filed for either party a case which shows no fundamental errors in its record will be affirmed.

Appeal from district court, Tyler county; Stephen P. West, Judge.

Action by J. R. Unsworth against J. P. Straughan, as county judge, and Mr. Dies, as county attorney, to have an election declared void. From a judgment for defendants, plaintiff appeals. Affirmed.

NEILL, J. This suit was brought by appellant against J. P. Straughan, as county judge of Tyler county, and Mr. Dies, as county attorney of said county, to have an election held in Tyler county on the 11th day of July, 1896, to determine whether or not the sale of intoxicating liquors should be prohibited in said county, declared void, on account of certain alleged frauds and irregularities, and to enjoin appellees from the publication of the result of the election until the question of its validity could be adjudicated. The cause was tried by the court without a jury, and the trial resulted in a judgment in favor of appellees, upholding the validity of the election. There is no brief filed either by appellant or appellees, and we have examined the record only for fundamental errors; and, finding none, we affirm the judgment of the district court.

GUNN et al. v. WYNNE et al.<sup>1</sup>  
(Court of Civil Appeals of Texas. June 19, 1897.)

HOMESTEAD—SELECTION—ABANDONMENT—INTENTION—DECLARATIONS IN INTEREST—INSTRUCTIONS.

1. Husband and wife left their farm, and bought a house in town, and resided there for eight years, and, the night prior to the levy of an attachment on the farm, moved back to it, and claimed it as their homestead. *Held*, that

<sup>1</sup> Writ of error denied by supreme court.

evidence that when the husband purchased the town house he did not intend to abandon the farm homestead, but moved to town to educate his children, is admissible, there being no such abandonment of the homestead as would preclude them from showing their intention.

2. When husband and wife are in accord, evidence of the intention of the wife in regard to the selection of a homestead is admissible, as pointing to the intention of the husband.

3. Where several contiguous tracts of land, purchased at different times, and in the aggregate much larger than a homestead, are cultivated and used by the owner without distinction as to artificial lines separating them, and the owner is not called upon to designate what portions he will claim as a homestead until a controversy arises in relation thereto, a charge which fails to define to the jury what uses must be made of land in order to make it a part of the homestead is not misleading.

4. A charge that a homestead claimant's intention not to abandon his farm home upon his removal to the city, and his purpose to return to it and reoccupy it as a homestead, must have been a continuous, abiding intention and purpose, fairly presents the idea of a request that if, at any time after his removal from the farm to town, he formed an intention to abandon the old homestead, the formation of such an intention worked an abandonment of the country homestead.

5. A special charge is properly refused where the general charge fairly embraces the same point.

6. Where one moved upon land the day before an attachment was levied thereon, and claimed it as his homestead, his declaration, made after the attachment had been levied, but before he knew of it, that he intended to stay there until he died, is admissible.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

Trespass to try title by W. T. Gunn and others against A. B. Wynne and others. From a judgment for certain of the defendants, plaintiffs appeal. Affirmed.

Burdett & Connor and Hale & Hale, for appellants. Park & Birmingham and E. D. Scales, for appellees.

FINLEY, J. This is an action of trespass to try title to the several tracts of land described in plaintiffs' second supplemental petition, brought by plaintiffs against all the defendants. In said supplemental petition, plaintiffs admitted that the land described therein and in their original petition was for many years the homestead of Wynne and wife, and that they used and occupied it for many years as such; and they further alleged that said premises so occupied and used as their homestead had long since been abandoned as their homestead, and had not been used and occupied by them as a homestead for a long period of years; that said property was situated in the country, and not in a town or a city or a village; that about the year 1885 the defendant A. B. Wynne bought a house and lot in the city of Paris (within its corporate limits), and that he and his wife, about that year, together with their family, moved to town, and went into and on said premises in town, and occupied the same as their homestead continuously since then, using and claiming it as

their homestead. They further alleged that Wynne and wife entirely and permanently abandoned the property in controversy as a homestead and place of residence about May 5, 1886, at which time they moved to town, and have never since resided on any of the land in controversy, or in any manner used it as their homestead since their removal to the house and lot in Paris. Plaintiffs further alleged that on December 31, 1893, O. C. and E. S. Connor, as the executors of W. B. Aikin, deceased, sued out a writ of attachment against the defendant A. B. Wynne, out of the district court of Lamar county, Tex., in cause No. 5,717, wherein O. C. Connor and E. S. Connor, executors of W. B. Aikin, deceased, were plaintiffs, and George M. Settle, W. T. Gunn, and A. B. Wynne were defendants, which said writ of attachment was levied on all the lands in controversy on December 31, 1893, at 8:45 o'clock p. m., as the property of said A. B. Wynne; and that on April 3, 1894, said plaintiffs in said cause recovered judgment against said defendants for the sum of \$2,933.33, with 10 per cent. interest from said date, and all costs of suit, and foreclosing the attachment lien on said property, and that subsequently the land was duly sold according to law by virtue of an order of sale issued on said judgment, at which sale plaintiffs became the purchasers, and on July 3, 1894, the sheriff of Lamar county made a deed to said plaintiffs for said land, upon their complying with their bid at said sale. Said deed conveyed all the right, title, and interest that said A. B. Wynne had in said lands on December 31, 1893. They further alleged, showing other suits against A. B. Wynne and other parties, and levy of attachments upon the lands in controversy, judgment foreclosing attachments, and sale under said judgments and deed by sheriff to these plaintiffs. All the defendants, except A. B. Wynne and E. C. Wynne and Bryant Hester and Catherine Hester, filed a disclaimer as to all of said land. Defendants Bryant Hester and Catherine Hester made default. Defendants A. B. Wynne and E. C. Wynne answered by general demurrer and plea of not guilty, and pleaded specially that two of the tracts sued for, and fully described in their answer, were the homestead of said defendants, and had been such for more than 20 years. They also filed an admission that plaintiffs had a good cause of action as set forth in the petition, except so far as it might be defeated in whole or in part by the facts of the answer filed by them. Defendants were given the right to open and conclude in the evidence and argument. There was a trial by jury between plaintiffs and defendants A. B. Wynne and E. C. Wynne, and a verdict in favor of plaintiffs for all the land sued for, except the land described in said defendants' answer, and a verdict in favor of said defendants for said land. There was a judgment in favor of plaintiffs

against all of the defendants except Wynne and wife for all of the land sued for, and against Wynne and wife for all the land except the land described in their said answer, and in their favor for said land claimed by them as homestead. From this judgment the plaintiffs have appealed.

The issues of fact which were involved upon the trial, which arose under the pleadings and evidence, and are involved in the verdict and judgment, are as follows: (1) Did the appellees ever abandon their country homestead? (2) If the country homestead was ever abandoned by appellees, did they re-enter and occupy the property in good faith, with the intention of again making it their homestead, prior to the time that the writs of attachment under which appellants claim were levied upon it? There was sufficient evidence adduced upon the trial to warrant the jury in reaching affirmative answers to each of these questions, and hence we conclude that the property involved upon this appeal was the homestead of appellees at the time the writs under which appellants claim were levied upon the property. The general conclusion of law necessarily follows, that the property being the homestead, and as such exempt from forced sale, under the constitution and laws of this state, no title passed to appellants by reason of the sales under the writs of attachment, and therefore plaintiffs were not entitled to recover. We will notice the points raised by assignments of error:

The first, second, fourth, and sixth assignments of error, each relating to the subject of the court's action in admitting evidence tending to show that when A. B. Wynne purchased the house and lot in Paris, and removed to it with his family, he did not intend to abandon his old homestead in the country, but moved to Paris for the purpose of educating his children, and with the intention of returning to his country homestead after this object was accomplished, are grouped together and presented by appellants. Under these assignments it is urged that the purchase of the residence in the town of Paris, the leaving of the homestead in the country, and occupancy of the town residence for such a considerable time as was necessary to be consumed in the education of the children of the family, worked an abandonment of the country homestead, regardless of the intention of the appellees. We discussed this question, and decided it adversely to appellants, in the case of *Baum v. Williams*, 41 S. W. 840, decided by this court May 8, 1897, and not yet officially reported. The question is also discussed, to some extent, and the same views expressed in the case of *Mortgage Co. v. Scripture* (Tex. Civ. App.) 40 S. W. 210. See, also, *Reinstein v. Daniels*, 75 Tex. 640, 13 S. W. 21; *Wagon Co. v. Kennedy*, 75 Tex. 212, 13 S. W. 28; *C. Aultman & Co. v. Allen* (Tex. Civ. App.) 33 S. W. 679; *Farmer v. Hale* (Tex. Civ. App.) 37

S. W. 164; *Graves v. Campbell*, 74 Tex. 579, 12 S. W. 238; *Rollins v. O'Farrel*, 77 Tex. 95, 13 S. W. 1021; *Cantine v. Dennis* (Tex. Civ. App.) 37 S. W. 187; *Locke v. Bonnell*, Id. 250.

The third and fifth assignments challenge the action of the court in admitting evidence tending to show that the intention of the wife, E. C. Wynne, in removing with her husband to the house and lot in Paris, and living there, with their family, was not an abandonment of the homestead, but was for the temporary purpose of the education of their children in Paris, and a purpose to return to and reoccupy the country home as their homestead. The idea presented under these assignments is that the husband has the right to select the homestead of the family, and that the intentions of the wife should have no controlling effect in the solution of the question of whether there was an abandonment. If this were a case where the husband and wife were not in accord in their intentions and purposes relating to the homestead, the proposition might be urged with some force. But in this case the husband and wife were shown to be in perfect agreement, and the intentions and expressions of the wife as to their common purpose and intention were pertinent and material testimony in support of the appellees' claim of homestead. Upon this feature of the case the court charged the jury: "You are instructed that the husband has the right and power, without the concurrence of his wife, to determine upon which of several tracts of lands or land owned by him, which will be the homestead of himself and family; and although, in the preceding portions of this charge, the term 'defendants' is used, for the sake of convenience, in speaking of the intent and purpose of A. B. Wynne and his wife in moving to Paris, and their intent and purpose to abandon or not abandon the place in the country as their homestead, and their intent and purpose in reoccupying their place in the country, I instruct you, nevertheless, that the intent and purpose of A. B. Wynne must control; and you must look alone to his intent and purpose, in passing upon the questions presented to you, as to what the intentions and purposes of the defendants were in any particular matter." Under this charge of the court the jury could only look to the testimony in relation to the intentions of the wife as pointing to the intentions of the husband, and this use of the testimony was entirely legitimate.

The seventh, eighth, ninth, and twelfth assignments are grouped and presented together. They relate to the charge of the court, and the substance of the complaint is that the charge was misleading, in this: that there was more than 200 acres (about 342) belonging to the country home, portions of it purchased at different times, and the court failed to define to the jury what uses must be made of land in order to make it a part of the homestead. The plaintiffs, in their petition,

expressly alleged that for many years prior to the removal of the defendants from the country into town the land in controversy had been the homestead of the defendants. The uncontradicted evidence shows that the 200 acres of land claimed by defendants in their answer as their homestead was a part of the larger tract of land constituting the farm home place in the country. The evidence further shows that the land had been cultivated and used by appellees and their tenants without distinction as to artificial lines separating the different tracts which were bought at different times, and that all of the tracts were used in connection with the mansion house of appellees, and were contiguous to it. The uncontradicted evidence further showed that the 150 acres (marked on the plat as 170 acres) on which was situated the mansion house, and the several 50-acre tracts shown on the plat, were claimed by appellee Wynne as constituting the 200 acres to which he was entitled as a homestead. The uncontradicted evidence further showed that, prior to the levy of the writs of attachment, Wynne had mortgaged the remaining portions of his farm lands, and that, at the time the writs of attachment were levied, Wynne had not been called upon to designate what portions of his land he would claim as a homestead, and that the first occasion that it became necessary for him to make this designation was in making answer to this suit, when he designated the homestead as now contended for. The assignments are not well taken. *Freeman v. Hamblin*, 1 Tex. Civ. App. 157, 21 S. W. 1019.

The tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, and twenty-second assignments of error, touching the action of the court in giving and refusing charges on the question of the purchase by A. B. Wynne of a house and lot in Paris, his removal to it and occupancy of it with his family for a long period of time, and the intention of A. B. Wynne and his wife in so buying, moving to, and occupying said house and lot, are grouped and presented together. Under these assignments it is first urged, as a proposition, that the purchase of the house and lot in Paris by Wynne, and his removal to it with his family, and his occupancy of it as his residence for a long period of time, operated as a conclusive abandonment of the prior homestead in the country. This proposition we have noticed heretofore, and held adversely to appellants. It is further urged, as a proposition, that if at any time after his removal from the farm to town, Wynne formed an intention to abandon the old homestead in the country, and make any other place his home, the formation and entertainment of such intention worked an abandonment of the country homestead. The proposition is a sound one, but the assignments of error under which it is propounded cannot be sustained, for the reason that the court, in its charge to the jury, fairly pre-

sented the idea to the jury that the intention not to abandon the country home, and purpose to return to it and reoccupy it as a homestead, must have been a continuous, abiding intention and purpose.

The sixteenth assignment is based upon the refusal of this special charge: "If you believe from the evidence that the defendants A. B. Wynne and E. O. Wynne ever occupied the property in controversy as a home, and that they had abandoned it and appropriated it to other than homestead purposes at the time of the levy of the writs of attachment, or either of them, then you will find for the plaintiffs, unless you believe that at the time of the levies the defendants had reappropriated said land for homestead purposes, and were using and occupying the same as a home. Then, in that event, you will find for the defendants. But if you believe from the evidence that the defendants had abandoned the land in controversy for the purposes of a home, and that at the time of the levies they were using and occupying it as a sham and pretext to shield it from the creditors of A. B. Wynne, then you will find for the plaintiffs." The court, in its general charge, instructed the jury as follows: "On the other hand, if you find that defendants had abandoned said 200 acres in the country as their homestead, prior to said levies, and established their homestead in Paris; and if you should further find that afterwards, and prior to said levy, they, with part of their household goods, went back to reoccupy their said place in the country, not for the purpose of permanently abandoning their town place as their homestead, and to re-establish their homestead permanently on their old home place in the country, but only as a temporary expedient for the purpose of covering up from creditors of A. B. Wynne, —then you will find for plaintiffs the 200 acres described in defendants' answer, which is the only land in actual controversy in this suit." It will be seen that the main charge of the court fairly presented the very point embraced in the special instruction requested, and it was therefore not error in the court to refuse this special charge.

The twenty-fifth assignment of error is presented as a proposition, and is as follows: "The court erred in admitting in evidence, over the objections of plaintiffs, the testimony of I. N. Bailey that on Tuesday night following the levy of plaintiffs' first attachment, on the Sunday preceding, A. B. Wynne told him that he had come back home, to the land in controversy, and that he intended to stay there until he died, because said declaration was a self-serving declaration to bolster up his claim to the land in controversy, made after the writ of attachment under which plaintiffs' claim had been levied on the same." Wynne and his wife left Paris and returned to their country homestead Saturday evening, about 9 o'clock, taking with them some articles of furniture

necessary for their use. At the time he did this, he knew that Settle had failed in business, and that he (Wynne) was liable on a considerable amount of Settle's paper. He apprehended trouble from this source, and, under advice, returned to his country home, with the view of giving open and unmistakable notice that the same was his homestead. It was attempted to be shown that, in going back to the country home, he (Wynne) intended to do so temporarily, until danger from his creditors passed away. It was further shown that the writs of attachment—or some of them—were levied on the property on Sunday evening, at 8:45. The declarations of Wynne testified to were made on Tuesday evening, at which time he had no actual knowledge that the levies had been made upon his country home. As a general rule, self-serving declarations of a party are not admissible as evidence. It is equally well settled that where intention is the subject of inquiry, and acts are admitted in evidence which do not unmistakably manifest their true intent, then declarations accompanying such acts, and explanatory of them, are also admissible. Such declarations are admissible without regard to the question of whether they are beneficial or against the interest of the party making them. The adjudicated cases show that courts have been quite liberal in the admission of declarations of the parties as to intention, and such declarations are generally admitted on the question of domicile and homestead, unless they are made under circumstances which manifest a self-serving purpose. In the case of *Gallagher v. Keller*, 87 Tex. 472, 29 S. W. 647, the party claiming the homestead was allowed to show that, after the levy and sale of the property under execution, he built a house upon the lot previously designated by him as a homestead, and occupied it. Here the act of the homestead claimant was after the rights of the other party had attached, and yet the supreme court held that it was a proper circumstance to be considered by the jury in determining the question of the abiding intention to use the property as a homestead. See, also, 2 Whart. Ev. § 1097, pp. 293, 294; *Thorndike v. City of Boston*, 1 Metc. (Mass.) 242; *Kilburn v. Bennett*, 3 Metc. (Mass.) 200. The court did not err in admitting the evidence.

The twenty-sixth assignment of error attacks the verdict as not being supported by the evidence. This assignment is not sustained by the record.

The twenty-seventh assignment is based upon the refusal of the court to grant appellants' motion for new trial, upon the ground of the admission of testimony showing the intention of the wife. This proposition has already been discussed.

There are no other assignments of error presented. We find no error in the judgment, and it is therefore affirmed.

## LEWIS v. SMITH.

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

### JUSTICES OF THE PEACE—FINAL JUDGMENT.

In justice's court, where defendant pleaded a sum in reconvention, and the justice rendered a general judgment for plaintiff, such judgment adjudicates the matter so pleaded as fully as if it had given judgment for such matter, and then deducted it from the amount found for plaintiff.

Error from Galveston county court; William B. Lockhart, Judge.

Action by W. M. Lewis against George E. Smith. From an order dismissing plaintiff's appeal to the county court he brings error. Reversed.

S. E. Trezevant, for plaintiff in error.

FLY, J. Plaintiff in error sued defendant in error in a justice court on an account for \$152.25. Defendant in error pleaded in reconvention the sum of \$100. The justice of the peace rendered judgment in terms as follows: "Feb. 3/96. Cause set for trial Feb. 7/96, at which time came the plaintiff in person and by attorney, and filed amended account, and the defendant appeared in person and by attorney, and filed answer, and then came on to be heard the above-entitled cause. Both parties announced ready for trial. Jury waived, and the matters in controversy, as well of fact as of law, submitted to the court; and the court, having heard the evidence adduced, and the argument of counsel, which was fully understood and considered, gave judgment for the plaintiff in the sum of 80 cents. It is therefore considered by the court that plaintiff, W. M. Lewis, do have and recover of and from defendant, Geo. E. Smith, the sum of eighty cents, together with his costs in this behalf expended, for which he may have execution. It is further ordered that execution issue for the use of the officers of court against each party, respectively, for their costs in this behalf incurred." The cause was appealed by plaintiff in error to the county court, where it was dismissed on the ground that, the plea in reconvention not having been disposed of in the justice court, there was no final judgment. This was error. The judgment must be viewed in the light of the pleadings, and clearly disposed of the whole matter as to both parties. "Any judgment or decree leaving some further act to be done by the court before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory. But, if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final." *Freem. Judgm.* § 12. The effect of the judgment was to settle the fact that, after allowing defendant in error's account in reconvention, and weighing the other facts in regard to the matter, defendant in error was

indebted to appellant in the sum of 80 cents. It settled the matter pleaded in reconvention as fully as if it had given judgment for the sum pleaded in reconvention, and then deducted it from the amount found to be due plaintiff in error. The judgment is reversed, and the cause remanded.

# BRIN v. WACHUSETTS SHIRT CO.

(Court of Civil Appeals of Texas. Nov. 27, 1897.)

## FOREIGN CORPORATIONS—STATE LAWS—PLEADING —INTERSTATE COMMERCE—ACTION ON ACCOUNT—AFFIDAVIT.

1. A foreign corporation suing on an account need not show, in its petition, that it has filed a copy of its charter in the office of the secretary of state, and procured a permit to do business in the state, as required by Rev. St. 1895, art. 745, unless the petition shows that the transaction in suit took place in Texas, since the transaction would be "interstate commerce" if it occurred outside the state, and the statutes requiring a permit for foreign corporations to do business would not apply.

2. An affidavit verifying an account on which suit is brought, which does not comply with Rev. St. 1895, art. 2323, in that it does not allege that the facts stated therein are "within the knowledge of the affiant," nor that "all just and legal offsets, credits, and payments have been allowed," is defective, and will not support a judgment by default.

Error from Kaufman county court; John Vesey, Judge.

Action by the Wachussetts Shirt Company against Ellis Brin. From a judgment by default for plaintiff, defendant brings error. Reversed.

Wm. H. Allen, for plaintiff in error. Morrow & Boggess, for defendant in error.

BOOKHOUT, J. The defendant in error, the Wachussetts Shirt Company, as plaintiff below, sued the plaintiff in error, Ellis Brin, upon an account for merchandise aggregating \$269.50, in the county court of Kaufman county. The account is attached as an exhibit to the petition, and is verified, and alleged to be for goods, wares, and merchandise sold and delivered; but no allegation is made as to where the sale took place. The petition describes the plaintiff in the suit as a private corporation, incorporated under the laws of the state of Massachusetts, and doing business in said state. The affidavit to the account is as follows:

"State of Massachusetts, County of Worcester. Elmer H. Bates, of Leominster, in said county, being duly sworn, says that he is the treasurer of the Wachussetts Shirt Co., a private corporation duly organized under the laws of the commonwealth of Massachusetts, and that Ellis Brin, of Terrell, Texas, is justly and truly indebted unto said Wachussetts Shirt Co. in the sum of \$269.50 over and above all legal offsets, which amount is unpaid and owing; that the consideration of said claim is merchandise sold

to said debtor according to the account hereto attached. The deponent further says that said sum is justly due to said corporation, and that it has not, nor has any other person for its benefit, received any security or satisfaction whatever for said claim. Elmer H. Bates.

"Subscribed and sworn to before me, this 24th day of November, 1896. Wm. A. Putman, Notary Public."

On January 20, 1897, judgment by default was taken in said cause upon the account sued on as a liquidated claim, and from this judgment the plaintiff in error has sued out a writ of error, having duly filed his petition and bond.

Plaintiff in error, by his first assignment of error and proposition thereunder, makes the point that the plaintiff is a foreign corporation, and the petition fails to show or allege that it had filed a copy of its charter in the office of the secretary of state of the state of Texas, and procured a permit to do business in this state. It is not alleged in the petition that the plaintiff had procured any such permit, or filed a copy of its charter with the secretary of state, as is required by the statutes of Texas (Rev. St. 1895, art. 745), and therefore plaintiff in error insists it cannot maintain a suit in this state (Id. art. 746). The petition does not show that plaintiff was transacting business or soliciting business in this state. It is to be inferred from the record that the transaction took place in Massachusetts, and is "interstate commerce," and hence the statutes of this state requiring the plaintiff to procure a permit to do business in this state, and enjoining a penalty for failure so to do, by depriving it of the privilege of maintaining a suit or action, either legal or equitable, in any of the courts of this state, does not apply. We therefore overrule the first assignment of error. *Bateman v. Milling Co.* (Tex. Civ. App.) 20 S. W. 931; *Lyons-Thomas Hardware Co. v. Reading Hardware Co.* (Tex. Civ. App.) 21 S. W. 300; *Starch Co. v. Bateman* (Tex. Civ. App.) 22 S. W. 771.

The second assignment of error questions the sufficiency of the affidavit attached to the account to support a judgment by default. The judgment shows that it was a judgment by default, and rendered solely upon the affidavit attached to the account. The affidavit fails to comply with the statute, in that it does not allege that the facts stated therein are "within the knowledge of affiant," nor does it state that "all just and legal offsets, credits, and payments have been allowed." The entire affidavit is set forth in the statement above given. We think this affidavit is defective, in that it fails to show that the facts stated therein are within the knowledge of affiant; and, further, that all just, legal offsets, credits, and payments have been allowed. Rev. St. 1895, art. 2323; *Shandy v. Conrales*, 1 White & W. Civ. Cas. Ct. App. § 235. It is further held that such an affidavit will not support a judgment by default. *Duer*

v. Endres, 1 White & W. Civ. Cas. Ct. App. § 323. The judgment of the court below is reversed, and the cause remanded.

**TENNEY et al. v. BALLARD, WEBB & BURNETTE HAT CO. et al.<sup>1</sup>**

(Court of Civil Appeals of Texas. Oct. 30, 1897.)

**CORPORATIONS—RECEIVERS—RIGHTS OF CREDITORS—SUFFICIENCY OF PETITION.**

1. Where the creditors of a corporation ratify an arrangement whereby a partnership succeeds to the business, assets, and liabilities of a corporation, and accept such partnership as their debtors in lieu of the corporation, they waive the right to have a receiver appointed to administer the assets of the corporation for the benefit of its creditors.

2. Such creditors are in no position to insist that the transfer of the property of the corporation was not authorized by law, and was made in fraud of creditors.

3. Where a petition filed by a creditor prays the appointment of a receiver to administer the property of a corporation, and the prayer is sufficient for any relief which may be necessary if the receiver be appointed, but there is no specific prayer for judgment for the debt, judgment will not be rendered where the appointment of the receiver is denied.

Appeal from district court, Dallas, county; Edward Gray, Judge.

Petition for receiver filed by C. H. Tenney & Co. and others against the Ballard, Webb & Burnette Hat Company and others. There was judgment for defendants, and plaintiffs appeal. Affirmed.

Geo. H. Plowman and Alexander, Clark & Hall, for appellants. Crawford & Crawford, for appellees.

**Conclusions of Fact.**

RAINEY, J. The evidence is sufficient to support the conclusions of fact of the court below, and the same are adopted as the conclusions of this court. Said conclusions are as follows: "That about the last of February, 1895, defendant hat company was heavily indebted, and probably insolvent; that at this time George S. Ballard and Owen D. Burnette became the owners of all the capital stock of said company, and immediately caused the said company, through unanimous resolutions of its stockholders and directors, to transfer all of its property, of all and every kind, to Owen D. Burnette, for Ballard & Burnette, which latter-styled firm was then formed of George S. Ballard and Owen D. Burnette, to carry out the business of the hat company, and which said firm assumed and agreed to pay all of the debts of the hat company; that plaintiffs were the principal creditors at that time of the hat company, and that they did not, nor did the other creditors of the hat company, know of such transfer, or agree that it should be made; that immediately upon making said transfer Ballard & Burnette wrote to all the

creditors of the hat company, advising them thereof; that, in addition to writing to plaintiffs advising them of the change, Mr. Ballard went to New York about the 1st of April, 1895, and in person fully advised plaintiffs of said change, and of all the facts causing and concerning same; that by the full knowledge of all the facts the plaintiffs expressly, and by their actions and dealings with the parties fully and completely, ratified and consented to such transfer, and accepted Ballard & Burnette as their debtors instead of the hat company, and the first intimation of a different claim on the plaintiffs' part was the filing of this bill."

**Conclusions of Law.**

1. The contention of appellants, that when a corporation ceases to do business the property of such corporation constitutes a trust fund in the hands of the directors of such corporation, to be administered by them for the benefit of its creditors, is a correct principle of law. Lyons-Thomas Hardware Co. v. Perry Stove Manuf'g Co., 86 Tex. 143, 24 S. W. 16; Bank v. Goolsby (Tex. Civ. App.) 35 S. W. 713; Rogers v. Lumber Co., 11 Tex. Civ. App. 108, 33 S. W. 312. The appellants, however, are not in a position to invoke this principle. Being advised of the transfer of the assets, and knowing that Ballard & Burnette, as a firm, were exercising dominion over the same as owners thereof, and not as directors of said corporation, they elected to accept said firm as payors of the debts of the hat company. By this election they waived the right to have the assets of said corporation administered by the directors for the benefit of creditors, and therefore were not entitled to have a receiver appointed.

2. It is insisted that the transfer of said assets was not authorized by law, and, further, that it was made in fraud of creditors. We will not enter into a discussion of the propositions made on these issues, for the reason that the evidence shows that appellants were cognizant of the situation, and accepted the same; and, as it is immaterial how the transaction was consummated, they are not in a position to complain.

3. Nor do we think the contention of appellants, that the court should have rendered judgment for the appellants for the amount of their respective debts against the defendants, is correct. The action was for the appointment of a receiver to administer the property, and the petition was framed with that view. The prayer was sufficient for any relief necessary, had a receiver been appointed; but there was no specific prayer for judgment for the debts. No grounds existing for the appointment of a receiver, we are of opinion that there was no error in the court's not rendering judgment against the defendants for the amount of the debts claimed. Judgment affirmed.

<sup>1</sup> Writ of error denied by supreme court.



## OWEN v. CIBOLO CREEK MILL &amp; MINING CO. et al.

(Court of Civil Appeals of Texas. Nov. 24, 1897.)

## APPEAL—FAILURE TO FILE STATEMENT OF FACTS—CONTINUANCE.

1. Rev. St. art. 1382, authorizing the reviewing court to consider a statement of facts, when signed, approved, and filed after the time limited, on a showing of diligence to obtain the same within the time, does not authorize the consideration of a statement of facts not signed or approved at all.

2. Where appellant had over a month in which to prepare a statement of facts, and he depended therefor on attorneys who had, with his knowledge, withdrawn from the case, until it was too late to prepare the statement himself, he does not show such diligence as would entitle him to have the judgment reversed on the ground that he had been defeated of his right to have a statement of facts.

3. Where the testimony desired in an application for a second continuance is alleged to be that of one who will testify to such admissions of another as, taken with other testimony in the case, will show that certain depositions were not fairly taken, and that certain depositions showing the genuineness of a decree "material to the case" were lost, but the application does not show the decree, so that its materiality could be passed on, the application is insufficient.

4. Where a party seeking a second continuance shows that he did not search for certain lost depositions until the day of trial, that he had 18 days' notice of the time of trial, and that the deponents were during that time within his reach, the application does not show due diligence.

Appeal from district court, El Paso county; C. N. Buckler, Judge.

Action by Ernest Dale Owen, trustee, against the Cibolo Creek Mill & Mining Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Ernest Dale Owen and Seth F. Crews, for appellant. Beall & Kemp, for appellees.

JAMES, C. J. There is a motion to strike out the statement of facts. It lacks the approval of the district judge. On the 2d of June, 1897, the motion for new trial was overruled, and an order made allowing 10 days from adjournment in which to prepare and file a statement of facts. The court adjourned on June 26th. The following day the judge left for Santa Maria, Cal., where his family were, and remained away during the month of July, and probably longer. It is admitted that the statement of facts was sent by appellant to El Paso by express from Chicago, and that it arrived in El Paso a day or two after the ten days, but was, by arrangement of counsel, filed as of the 6th of July. It is shown that appellant, upon the overruling of the motion for new trial, left for Chicago, taking with him some of the papers in the case, to prepare his case for appeal; that, after the adjournment of the court, T. J. Beall, one of appellees' attorneys, went to Chicago, and that while there, about July 4th, appellant requested him to aid him in making up the statement, which

was done. In the doing of this, Mr. Owen stated, as explaining why the preparation of the statement had been delayed, that he had asked Mr. Burges or Mr. Foster, attorneys at El Paso, to prepare it, and they had not done so, and that he feared the statement would not reach the clerk in time, and requested Mr. Beall to agree that it might be filed as within the time if it reached there too late, which request was also complied with. Appellant also, after the statement was filed, requested Mr. Beall to consent that the judge might sign the statement, which request was declined. It appears that, although the names of Mr. Foster and Mr. Burges were signed to plaintiff's (appellant's) petition, they took no part in the trial of the case, but had withdrawn therefrom, and did not represent him, having given appellant notice of their withdrawal. Appellant makes affidavit that the statement was prepared substantially as stated by Mr. Beall; that he left El Paso, immediately after the trial, for Chicago; that he did not know that the judge contemplated leaving the state, nor did he learn of his absence in time to procure his signature, or reasonably attempt to do so, within the 10 days; and that, under these circumstances, no diligence on his part, or of any attorney connected with the cause, could have procured said signature within the time limited; and that the expected departure of the judge was unknown to affiant, or to either of his attorneys. Article 1382, Rev. St., authorizes this court to consider a statement of facts (when signed and approved and filed after the time limited) upon a showing being made to the satisfaction of the court that appellant has used due diligence to obtain the approval and signature of the judge thereto, and to file same within the time, and that his failure to so file the same is not due to the fault or laches of said party or his attorney, and that such failure was the result of causes beyond his control. In this instance the statement is not signed and approved by the judge; therefore we do not think the authorization given in the above statute extends to permitting us to consider the statement. *Rains v. Wheeler*, 76 Tex. 391, 13 S. W. 324. There is no other rule that does so where the statement is not signed by the judge. We do not know that the judge would have approved the same had it been presented to him. He may have made out a different statement, as he is authorized to do. It has been suggested in this state that, when appellant has failed to obtain his statement, and has exercised the high degree of statutory diligence required in such case, and has been defeated in his right to have a statement of facts, he is entitled to a reversal of the judgment, and to have the cause remanded; and this form of relief is suggested by appellant. *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313; *Railway Co. v. Underwood*, 67 Tex. 590, 4 S. W. 216; *Rains v. Wheeler*, supra. But it has been held by the supreme court that appellant should resort to manda-

mus. *Osborne v. Prather*, 83 Tex. 211. This has not been attempted. It would seem, however, that he would not be entitled to mandamus when it appears he had never placed himself in a position to ask the signature and approval of the judge to the statement in time to file it as required by law, and that, to entitle him to such remedy, he should, in any event, invoke it promptly. We are of opinion, upon the facts shown in connection with this motion, that appellant was not diligent. He had no right to rely on the attorneys whom he mentions preparing a statement of facts, they having, with his knowledge, severed all connection with the case prior to the trial. He had nearly all the month of June, and it seems did not commence preparing the statement, which could not have required much time to prepare, until the 4th of July,—a time too late for it to reach El Paso in time had the judge been there. We think the motion should be sustained.

The assignments of error nearly all depend on the statement of facts, and fall with it. The first assignment is to error in overruling appellant's second application for continuance. The statute requires in such cases (a second application) that the materiality of the testimony desired be shown. What was expected to be shown by the testimony of the alleged witness Hull was not stated. As to the witness Outhouse, the application states that William Noyes, the general manager of the Cibolo Creek Mill & Mining Company, had admitted to the witness such facts as show, together with other testimony taken in the case, that certain depositions had not been fairly and properly taken. This was not sufficient to enable the court to pass on the materiality of the absent testimony. The other ground stated was that certain depositions taken in another cause had been agreed could be used in the trial of this cause, and, when the case was called for trial, were found to be lost; that by two of the depositions appellant would show, by the witnesses testifying as experts, the genuineness of a decree known as the "Santa Barbara Decree of Confirmation" of the grant in question, which was stated in the application to be one of the most vital points, if not the most vital point, in issue. If the decree was void upon its face, the testimony sought would be immaterial; and therefore we think the application, not showing the decree, did not place the court in a position to pass on the materiality of the testimony. Nor does it appear that appellant had been diligent in this matter. It appears from the bill of exceptions that on May 11th the case was set for trial on May 29th. Appellant states in his application, substantially, that he did not make search for and discover the loss of the two depositions until May 29th, and shows that both of the deponents had testified as experts that said "decree" was genuine, that the depositions were taken in a case in the circuit court of

the United States at El Paso, and were in the custody of the clerk of that court, and that there was an agreement to use them in this case. One of the witnesses was stated to reside in Chicago, and the other in the republic of Mexico. It seems to us that appellant was not diligent in postponing search for these depositions from May 11th to May 29th, that proper effort in the preparation of his case for trial would have led to the knowledge of their loss earlier than the 29th, and in time, probably, to have retaken them, or at least the depositions of the Chicago witness. Plaintiff dismissed his action, but the case was held and tried on defendants' plea in reconvention, in which they claimed to be the possessors and owners, by fee-simple title, of certain surveys, and averring that plaintiff claimed the same under a pretended grant to Jose Ignacio Ronquillo, which was a cloud upon their title, and prayed that their title be established by decree, and said grant be declared void. The validity of the grant was in issue under the pleadings, but, without said decree before us, we are unable to say that the testimony of the said witness was material, or that the court erred in refusing a continuance for such testimony.

Nearly all the assignments of error raise the question whether or not the plea in reconvention was sufficient to support proof of title in defendants. We take it that the insufficiency of the pleading to support the judgment rendered is a question that can be raised without a statement of facts, but this contention of appellant is not well taken. It appears that when the plaintiff dismissed his action he asked to be allowed to file a plea of not guilty to the cross bill, which the court, on objection, refused to do, on the ground that the plea of general denial on his behalf was supplied by statute. This is true, and he is not complaining that he was not permitted on the trial to avail himself of any defensive matter that he had. Therefore there is no reason to give effect to the assignment on this subject. We are of opinion that the judgment should be affirmed.

#### CORDILL v. MOORE.

(Court of Civil Appeals of Texas. Nov. 27, 1897.)

#### PUBLIC LANDS—APPLICATION FOR SETTLEMENT—INSTRUCTIONS.

1. As a condition precedent to acquiring title to land under Gen. Laws 24th Leg. p. 63, providing for the sale of state lands, the lands must be classified and placed on the market for sale, and an application to purchase be forwarded to the commissioner, describing the land desired, accompanied by the affidavit of the applicant that he desires to purchase the land as a home, and has in good faith settled thereon.

2. Where one seeks to acquire title to land under Gen. Laws 24th Leg. p. 63, §§ 5, 9, providing for the sale of public lands to actual settlers, and it is shown that the land was made subject to sale on April 10th, and the application and affidavit of the party seeking title bear date

April 18th, but were actually sworn to in March, the affidavit was not sufficient to support the application.

3. In trespass to try title by one claiming under a settlement on public lands, pursuant to Gen. Laws 24th Leg. p. 63, the court instructed that "a bona fide settler, within the meaning of the law, is one who in good faith has actually settled on the land for the purpose of a home. It does not mean one who, by acts of preparation, merely manifests a purpose to settle thereon for the purpose of a home at some future time, but one who has already settled on the land for a home. The word 'actually' is used in the sense of 'real,' and not 'constructive' or 'virtual,' settlement." *Held*, that said instruction is argumentative, against the rule forbidding instructions against the weight of the evidence, and too frequently repeats the necessity for the plaintiff to show himself an actual settler.

4. Where an application is made for purchase of public land after the classification is made according to Gen. Laws 24th Leg. p. 63, § 5, but before the filing of notification of said classification by the commissioner, as provided in section 6, the filing of the notification is not essential to the efficacy of the classification, or to putting the land on the market, and the application is not insufficient for that reason.

Appeal from district court, Taylor county; T. H. Conner, Judge.

Action by J. S. Cordill against J. W. Moore. From a judgment for defendant, the plaintiff appeals. Reversed.

Kirby & Kirby and H. L. Bentley, for appellant. J. M. Wagstaff and D. G. Hill, for appellee.

TARLTON, C. J. The appellant, J. S. Cordill, as plaintiff, brought this suit of trespass to try title against the appellee, J. W. Moore, as defendant, to recover a section of land. The survey is one of the public free school sections, the legal title to which is in the state. Each party claims as a purchaser, under the provisions of the act of April 4, 1895. See Gen. Laws 24th Leg. p. 63. After plea of not guilty, the defendant, by way of cross action, asserted his ownership of the land in controversy, his actual settlement upon it at the date of the suit and at the time that it was put upon the market, and his purchase from the state; praying that the claim of the plaintiff be canceled, and that defendant be awarded his writ of possession. The jury returned a verdict for the defendant, upon which judgment was rendered in accordance with his prayer. Section 5 of the act in question contains the following provision: "When any portion of the said land has been classified to the satisfaction of the commissioner, under the provisions of this act or former laws, such land shall be subject to sale, but to actual settlers only. \* \* \*" Section 9 contains the following provision: "Any person desiring to purchase land in accordance with the provisions of this act shall forward his application to the commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant in effect that he desires to purchase the land for a home, and has in

good faith settled thereon. \* \* \*" It is thus manifest that, as a condition precedent to the acquisition of title under this act, the land must have been placed upon the market, and an application such as above described must have been made by the person desiring to purchase. In this case the undisputed evidence shows that the required classification was made, and that the land became subject to sale on April 16, 1896; and, further, that while the application of the appellee in terms purports to be in accordance with the provisions of the act, and while it bears date as of the 18th day of April, 1896, it was actually sworn to about the last of March, 1896, the affidavit serving both as an affidavit and an application.

By assignments of error complaining of the court's charge and of the verdict, the question is presented whether this application is in compliance with the law. We think that it is not. Manifestly, the law does not contemplate that an affidavit of actual settlement, necessary to a valid application, made before the land was subject to sale, would suffice as a basis for title under the terms of this statute. The affidavit stating the desire of the applicant to purchase the land for a home, and his settlement in good faith, must be made at a time when the land is subject to sale, and hence after its classification. *Cattle Co. v. Bruce*, 78 Tex. 274, 14 S. W. 619; *Snyder v. Nunn*, 66 Tex. 259, 18 S. W. 340; *Brown v. Shiner*, 84 Tex. 511, 19 S. W. 686. It might be true that when the affidavit was made, in March, 1896, the applicant was an actual settler, and yet not true that such a condition existed on April 17, 1896, after the land became subject to sale. This conclusion will require a reversal of the judgment; but, as complaints are elsewhere made of the charge of the court, we deem it proper, in view of another trial, to briefly advert to the features to which objection is made, without deciding, however, whether these features in themselves would require a reversal.

The court thus defined an actual settler: "A bona fide settler, within the meaning of the law, is one who in good faith has actually settled upon the land for the purpose of a home. It does not mean one who, by acts of preparation, merely manifests a purpose to settle thereon for the purposes of a home at some future time, but one who has already actually settled upon the land for a home. The word 'actual' is used in the sense of 'real,' and not 'constructive' or 'virtual,' settlement." We think that the negative feature, at least, embodied in this definition, is suggestive of argument, and, under the evidence in this case, might be regarded by the jury as an intimation that the court entertained the opinion that the acts of the appellant did not constitute a settlement, within the meaning of the law, but were acts of preparation merely, and that to this extent the charge violates the

rule forbidding an instruction upon the weight of the evidence. *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117. It is true that the definition accords with the views and expressions of our supreme court (*Busk v. Lowrie*, 86 Tex. 132, 23 S. W. 983; *Baker v. Milman*, 77 Tex. 46, 13 S. W. 618); but the scope of a judicial opinion, expounding the law of the subject considered, is naturally more extended than that of an instruction to a jury, so that language apt and apposite in the one may easily become misleading in the other. It is questionable whether any definition of the term "actual settler" should be given in the charge. Like the expression "reasonable doubt," the words so import their own meaning that an attempt to enlarge upon them would probably confuse and mislead.

We think that the court's instruction in another aspect is subject to the criticism that it too frequently repeats the necessity imposed upon the plaintiff of showing himself to be an actual settler. It would be sufficient that the charge should once and in effect impose upon the plaintiff the burden upon this issue. *Railway Co. v. Harriet*, 80 Tex. 81, 15 S. W. 556; *Blum v. Strong*, 71 Tex. 321, 6 S. W. 167.

The testimony would not justify us in concurring with the appellee that a verdict in favor of the plaintiff would have been without support in the evidence.

We also overrule the appellee's proposition that the plaintiff's application should be deemed insufficient, because made before the filing in Taylor county of the notification by the commissioner of the general land office of his classification of the land, and that it was subject to sale. The plaintiff's application was after the classification had been made, in accordance with section 5 of the act. We do not think that the notification prescribed in section 6 is essential to the efficacy of the classification, or to the putting of the land upon the market. Reversed and remanded.

#### BORCHERS v. MEAD.<sup>1</sup>

(Court of Civil Appeals of Texas. Oct. 16, 1897.)

##### PUBLIC LANDS—SETTLEMENT.

1. In an action to establish title to public land as an actual settler it appeared that plaintiff put a covered wagon bed on the land, placed bedding and provision box in it, set up a stove outside, fenced in a small piece of ground, put some feed in the inclosure, ate dinner there, and stayed all night; that on the second day thereafter he made application to purchase as an actual settler; that no other improvements were made, and that applicant had been on the ground several times, but never longer than a day and night, and in the mean time had pursued his usual business, off the land. *Held*, that the question of his good faith, and whether or not his after-conduct was in keeping with his declared purpose to become a settler, was for the jury.

2. Where objection is made that certain material facts are not shown, and there is evidence to the contrary in the statement of facts, the objection is not sustained by the record, and will not be considered.

3. Where one seeks to show that certain land was not subject to purchase by an actual settler, because occupied under a lease to a third party, and the evidence shows that such lease had been canceled, and the unearned lease money returned, before the purchaser undertook to occupy the land, evidence that the lease ought not to have been canceled would not vary the effect of the fact that it was canceled.

4. In an action to establish title to land, on the ground that plaintiff is an actual settler, it is proper to refuse to instruct that "going on land, and putting up a small corral on it, and putting down inside the corral a wagon bed, with bedding and other articles, and leaving the land, and only returning to the land occasionally, and spending a day or night at a time, does not constitute one an actual settler, under the law."

5. The question of whether or not one is an actual settler on land is a question of fact, and not of law.

Appeal from district court, Donley county; H. H. Wallace, Judge.

Action by George S. Mead against Frank Borchers. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Duncan G. Smith, for appellant. Brownling & Madden, for appellee.

STEPHENS, J. December 28, 1896, appellee, a single man, applied to the commissioner of the general land office to purchase as an actual settler a section of grazing land in the pasture of Rowe Bros., in Donley county, previously sold to appellant. His application was rejected, and this suit was brought January 21, 1897, to establish his claim to the land. Upon a verdict so finding, judgment was entered in his favor; hence this appeal.

The controlling question is, was he an actual settler? There being little or no conflict in the evidence, the answer may be found in the following excerpt from his testimony on cross-examination: "I went and settled on the land in controversy on the 26th day of December, 1896. My uncle, Ed Bennett, who lives about two miles from Clarendon, went with me to the land on the morning of December 26, 1896. We took dinner there that day. We put down a wagon bed on the land, and put up the bows on it, and put on a wagon sheet, and I put my bedding and a provision box with grub in it in the wagon bed. I set a small heating stove out on the ground, near the wagon bed. We took a spool of barb wire and some cedar posts along. We inclosed the wagon bed with a fence made of cedar posts and three strands of barb wire. The inclosure is probably as large as half of the court house. It is a small inclosure. I put some Kaffir corn and some sorghum inside the inclosure for feed. This was December 26, 1896. My uncle returned to Clarendon the same day, in the evening. I remained on the land till the next day, the 27th day of December, 1896, when I returned to Clarendon. On the 28th, the day following, I made my application to purchase

<sup>1</sup> Writ of error denied by supreme court.

the land in controversy, as an actual settler. I have never made any other improvements on the land. In three or four days after I made my application to purchase the land, I went back to the land, and remained on it till the next day, when I returned to Clarendon. In about a week [I went] to the land in the morning, and took dinner there, and returned to Clarendon in the evening of the same day. Do not know how often I have been back to the land since that time. I can't tell. I have never been on the land more than a day and night at any one time. I have been engaged in breaking horses and mules for parties about Clarendon, since I filed on the land. My work has been breaking horses and mules. I have not put any further improvements on the land, because the commissioner of the general land office refused to award me the land. I do not know where I got the money to make the first payment on the land. I have always had money. I have some money now. I have but little property. I have two horses and two mares and six head of cattle. I have no other stock. I have a wagon and harness. Since I put my wagon bed on the land, and inclosed it by fence, I have used some planks on the wagon, instead of a wagon bed."

We are unable to distinguish this case from *Busk v. Lowrie*, 86 Tex. 128, 23 S. W. 983, and *Atkeson v. Bilger* (Tex. Civ. App.) 23 S. W. 415. Upon the authority of these cases, we therefore hold that appellee was not an "actual settler," as defined and construed in the opinion of Justice Brown in the case first cited, but that he had merely, to quote from his testimony, "filed on the land." The judgment must therefore be reversed, and as the decision turns entirely upon the effect of his unquestioned acts, and his counsel would probably not want the case remanded, the judgment will be here rendered against him. We find no merit in the assignments raising other questions. Reversed and rendered.

#### On Motion for Rehearing.

(Dec. 11, 1897.)

We have concluded to grant the motion for rehearing, and affirm the judgment, being now of opinion that this case is distinguishable from those cited in the conclusions heretofore filed as authority for the disposition then made of the appeal. Of the cases so cited, the decision in *Atkeson v. Bilger* (Tex. Civ. App.) 23 S. W. 415, turned mainly upon its own peculiar facts, and need not be discussed. In the other case, that of *Busk v. Lowrie*, 86 Tex. 128, 23 S. W. 983, which had controlling influence, the claimants were denied the rights of actual settlers, upon the ground that the acts relied on by them to evidence such rights were merely acts of preparation for settlement, which had not been pursued to actual settlement when the applications to purchase were made. There the claimants were both married men, with families, and the preparations made were not

such as to enable them to then and continuously thereafter live on the land, which they did not even undertake to do. No shelter of any sort was provided or attempted for their families, nor even the means of sustaining life out of doors. They merely went on the land, spent a few hours preparing it to move to, leaving all the means of living thereon behind them, and then went away, returning to their former places of abode. In the case at bar, appellee, who was an unmarried man, carried with him to the land in dispute, as will appear from the quotation made in our former opinion from his testimony, all the essentials of a bachelor's life, such as "bedding and a provision box with grub in it," a heating stove, provender for his horses, and a wagon bed, covered and made stationary, to lodge in; inclosing all with the formidable barb-wire fence. Having made the requisite preparations, he at once entered upon his "pursuit of happiness" in the new but crude habitation, by eating and sleeping on the land; having no other place of abode, and only leaving it, according to his version, for the pursuit of his business, that of horse-breaking. Whether all this was real or only colorable, whether his after-conduct was in keeping with his declared purpose so manifested, was for the jury, and we must accept their finding as conclusive.

As this conclusion leads to an affirmance of the judgment appealed from, we adopt as our conclusions of fact the statement of the material facts proven on the trial, as set forth in appellant's brief (beginning on page 4, and ending near the top of page 14), which appellee accepts "as substantially correct," but which need not be copied here.

The first four assignments of error submitted in appellant's brief complain of the court's rulings in the admission of evidence. These were all carefully examined on the original hearing, and overruled. By reference to the court's explanations appended to the bills of exception, and the several acts of the legislature involved, it will be readily seen that there is no merit in these assignments.

The charge complained of in the sixth assignment (the fifth not being copied in the brief) seems to be entirely in accord with the provisions of Acts 1895, pp. 65, 67, § 11, the issue of abandonment being raised by the evidence under the plea of not guilty.

Under the seventh and tenth assignments it is contended that the land had not been classified and put upon the market; but if the evidence to the contrary, as set forth in appellant's statement of the material facts, was properly admitted, as we have already determined, the contention is not sustained by the record.

The proposition of the eighth assignment is that there was error in refusing appellant's second special charge, because there was evidence tending to show that the land in controversy was under lease to Rowe Bros., and

hence not on the market for sale to a single man. The evidence placed it beyond controversy that the lease to Rowe Bros. had been canceled, and the unearned lease price returned to them, before appellee undertook to acquire the land. This seems to have been done under the false assumption that appellant had acquired a right to the land under his purchase as an actual settler on other land, which was prior to appellee's application, when, according to all the testimony, he had never made any such settlement, or even approximated it. If, then, the lease ought not to have been canceled, it is yet clear that it was in fact canceled, and that Rowe Bros. practically acquiesced therein, and became vendees of appellant. See, in this connection, Acts 1891, p. 180, § 15.

There was no error, as complained in the ninth assignment, in refusing to charge that "going upon the land, and putting up a small corral on it, and putting down inside the corral a wagon bed, with bedding and other articles, and leaving the land, and only returning to the land occasionally, and spending a day or night at a time, does not constitute one an actual settler, under the law."

Whether or not one is an actual settler is a question of fact, and not of law, as was recently decided by us in *Cordill v. Moore*, 43 S. W. 298. The charge was objectionable for other reasons, which need not be stated.

The eleventh and last assignment is too general. Rehearing granted, and judgment affirmed.

**ARMSTRONG v. AMES & FROST CO. et al.**  
(Court of Civil Appeals of Texas. Oct. 30, 1897.)

**ACTION FOR WRONGFUL ATTACHMENT—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS—EVIDENCE—HARMLESS ERROR.**

1. It is proper to refuse a special instruction which, in so far as it is correct, is covered by an instruction given.

2. In an action by the assignee of a corporation for wrongful attachment, the issue was whether such company had disposed of its property, in part, with intent to defraud its creditors, as alleged in the attachment affidavit. The court charged that any act done by a debtor with the intention to hinder his creditor, and which has that effect, is a fraud on the creditor, and that if said company had disposed of any notes or money, the same being the proceeds of sales of defendant's goods under the contract which had been introduced, otherwise than as provided in said contract, and that said company intended, by said disposition of said notes or money, to hinder defendant in collecting its debt, then the affidavit for attachment was true. *Held*, that such instruction was proper, there being evidence tending to raise the issue presented by it.

3. In an action for wrongful attachment, plaintiff was not prejudiced by the admission of evidence, in support of the allegations of the answer, that at the time of the attachment, and for a long time prior thereto, plaintiff's assignor had been disposing of its goods at retail, in violation of its charter powers, which authorized exclusively a wholesale business.

4. Nor was it prejudicial error to submit to the jury a special issue, in conformity to such allegations and the evidence supporting them, as

to whether said company had sold the goods at retail.

5. In an action for wrongful attachment, it was not prejudicial error to refuse a special charge asked by plaintiff to the effect that acts beyond the charter powers of plaintiff's assignor, in the sale of goods at retail, did not necessarily constitute a disposition of its property with intent to defraud, and that evidence of the same was only admitted for its general bearing and significance, if any, on the issue of fraudulent disposition of the property.

6. It was harmless error to permit a witness to testify to facts shown by a ledger, with the keeping of which he had nothing to do, where substantially the same facts were shown by other witnesses.

7. In an action by an assignee against an attachment creditor of the assignor, for the value of goods attached, wherein the issue was whether the assignor had disposed of its property with intent to defraud its creditors, as stated in the attachment affidavit, defendant's agent testified that its claim against the assignor was about \$9,600; that it was incurred for bicycles sold the assignor under a contract which was in evidence; and that they bought during the year between \$9,000 and \$10,000 worth of bicycles. *Held*, that the last clause was not objectionable because the witness stated the kind of goods sold, when he did not sell the goods, but got his information as to the amount of goods sold from a ledger, with the keeping of which he had nothing to do, since his evidence showed that an examination or production of the books was not necessary to show that the goods sold were bicycles.

8. In an action for wrongful attachment, evidence, on cross-examination of plaintiff's witness, who had been interested as purchaser of the goods subsequent to the attachment, tending to show that they were unsalable is admissible on the question of damages.

9. In an action by an assignee against an attachment creditor of the assignor for the value of the attached property, the burden is on plaintiff to show that the attachment was wrongful.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action by Marvin B. Armstrong, assignee for benefit of creditors of the F. H. Collins Company, a corporation, against the Ames & Frost Company and others, for the value of a stock of goods attached by defendant company as the property of plaintiff's assignor. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

R. W. Flournoy, for appellant. Humphreys & McLean, for appellees.

Statement of the Case, with Conclusions of Fact.

TARLTON, C. J. On December 24, 1894, the Ames & Frost Company brought suit against the F. H. Collins Company, a private corporation organized under the laws of the state of Texas, and conducting a mercantile business in the city of Ft. Worth. Plaintiff caused a writ of attachment to be levied upon the property of the F. H. Collins Company. One H. H. Fulton, the agent of the Ames & Frost Company, made the affidavit in attachment; alleging an indebtedness in the principal sum of \$9,678.19, and in the further sum of \$127.61 interest, and further alleging, among other matters not necessary to mention, "that said defendant has

disposed of its property, in part, with intent to defraud its creditors." The writ of attachment was levied upon the entire stock of merchandise, store fixtures, and furniture belonging to the F. H. Collins Company; the property being invoiced by the sheriff at the sum of \$16,952.03, and its value assessed by that officer at \$8,476. The property was subsequently sold, under an order of sale issued in the cause, and bought by Ames & Frost Company, for the sum of \$6,600. Afterwards judgment, with foreclosure of attachment lien, was recovered, in the sum of \$10,022.88 and costs, which was credited with the proceeds of the property previously sold. On December 28, 1894, the F. H. Collins Company executed to Marvin B. Armstrong a general assignment, exacting releases, under the provisions of title 7a, Sayles' Civ. St. The assignee (appellant herein) on January 26, 1895, brought this suit against the Ames & Frost Company and the sureties on its attachment bond to recover the value of the stock of goods which had been attached; alleging that the property had been wrongfully seized and converted by means of the attachment, and that the affidavit for attachment, in so far as it charged that the F. H. Collins Company had disposed of its property, in part, with intent to defraud its creditors, was untrue. A trial of the case, had on November 28, 1896, resulted in a verdict and judgment for the defendants (appellees in this court). The jury, in their verdict, sustained the allegation in the attachment affidavit that the F. H. Collins Company had disposed of its property, in part, with intent to defraud its creditors; and, as this finding rests upon sufficient evidence, we are constrained to approve it.

#### Opinion.

The finding by the jury adverse to the appellant on the paramount issue of fact, concerning the fraudulent disposition by the F. H. Collins Company, as charged in the affidavit for attachment, will require an affirmation of the judgment, unless error prejudicial to the appellant was committed by the court in its instruction to the jury, or in its action regarding the admission of evidence. Hence we proceed to consider the several assignments of error complaining of the court's action in the respects indicated:

1. In submitting the issue of the fraudulent disposition by the F. H. Collins Company of its property, as charged in the affidavit for attachment, the court in its principal charge, gave the following instruction: "You are instructed that Ames & Frost Company, by its contract with F. H. Collins Company, under which it sold goods to F. H. Collins Company, had no lien on the wheels sold by it to F. H. Collins Company; and if you believe from the evidence in this case that said Collins Company made no other disposition of the wheels bought by it from Ames & Frost

Company than to apply the proceeds of the same to the payment of its just debts, whether the debts owing to Ames & Frost Company, or to any other person or persons, and did not dispose of any of them with any intent to defraud Ames & Frost Company, nor any other creditor, and find, also, that it had not, prior to the time the attachment was sued out, disposed of any of its other property, other than what it obtained from Ames & Frost Company, with intent to defraud any of its creditors, then you will, in answer to the first question, find that the affidavit was untrue at the time it was made." In connection with this instruction, the court granted the following special charge requested by the appellee: "You are charged that any act done by a debtor with the intention to hinder or delay his creditor in the collection of his debt, owing by the debtor to the creditor, and which has that effect, is a fraud on the rights of the creditor. If, in this case, you find that F. H. Collins Company had disposed of any notes or money, the same being the proceeds of the sales of goods of the Ames & Frost Company under the contract which has been introduced in evidence, otherwise than is provided in said contract, and you further find that said F. H. Collins Company intended, by such disposition of said notes or money, to hinder or delay or prevent said Ames & Frost Company from collecting their debt, then the affidavit for attachment would be true, and you will so find." In this connection the court also refused a special instruction requested by the appellant to the effect that, in order to find for defendants on the issue as to whether or not the ground for attachment as alleged in the affidavit existed, the jury must believe from the evidence that the F. H. Collins Company disposed of some portion of its property with intent to defraud its creditors, and that if said F. H. Collins Company did not dispose of any portion of its property with such intent, the jury should find for plaintiff on such issue, though they might believe from the evidence that said F. H. Collins Company failed to comply with its contract with the Ames & Frost Company, and disposed of goods bought from said Ames & Frost Company, to other persons, with no intention or purpose to pay the Ames & Frost Company therefor.

We overrule the tenth and eleventh assignments of error, first urged in the appellant's brief, complaining of the action of the court in granting the special instruction requested by the appellees, and in refusing that requested by the appellant. The propositions of the latter, in so far as they were proper, were covered by the main instruction hereinabove quoted. The evidence tended to raise the issue presented by the special instruction of the appellees. The first proposition embodied therein should, in its application, be referred to the facts stated in its concluding proposition. The evidence upon

which the special instruction rests consisted in the contract between the F. H. Collins Company and the Ames & Frost Company, admittedly executed February 2, 1894, and upon the testimony of the agent of the latter company, tending to show that, in violation of the terms of the contract, the F. H. Collins Company had appropriated the goods referred to in the instruction to a purpose other than that specified in the contract, and with the intention to hinder, delay, or prevent the appellee from collecting its debt. By the terms of this contract, it appeared that in consideration of an order for bicycles, to be shipped during the season of 1894 by the appellee to the F. H. Collins Company, and of an agreement by the appellee to give to the F. H. Collins Company an agency for the sale of Imperial wheels for 1894, the F. H. Collins Company undertook to give to the appellee on the 1st of each month a three-months note, bearing 8 per cent. interest, for all goods shipped the previous month; that, as collateral security to the notes thus given, the F. H. Collins Company further undertook to give to the appellee, as soon as received, all first-due customers' notes received for sales of the machines, and all cash received on such sales, the cash to be not less than \$25 for each wheel; that these customers' notes were to be made payable, by the indorsement of the F. H. Collins Company, to the order of the Ames & Frost Company, and were to be forwarded to the Ames & Frost Company as soon as received by the F. H. Collins Company; that the Ames & Frost Company were to indorse such paper for collection to the F. H. Collins Company, which undertook to collect the paper, and to deliver the proceeds, with the cash received from the sale of machines, up to the cost of the wheels, upon the note first falling due. It was further agreed that the proceeds of all such collateral paper were to be applied by the F. H. Collins Company to the liquidation of their notes to the appellee; that no note was to be renewed by the appellee more than once; that the payment of all cash received on account of machines sold should not be deferred longer than the 1st of each month after the sale; that the F. H. Collins Company should use all diligence in the sale of machines for cash, and in the collection of such paper indorsed to it for collection; that if it should find, 10 days before maturity of any unrenewed note it had given the Ames & Frost Company, that the amount received from the sale of machines and from the collection of sales paper would not be sufficient to pay such unrenewed note, it might, at its option, notify the Ames & Frost Company, and give a new note, at three months, bearing 8 per cent. interest, for the amount of the deficiency (the new note to arrive at the office of the Ames & Frost Company seven days prior to the maturity of the note to be taken up), in which event the Ames & Frost Com-

pany agreed to send check for said sum, or to be drawn on for it, to be used only in the payment of the notes to the Ames & Frost Company; that all notes once renewed were to be paid at maturity; that the machines, when sold at retail, were to be sold, as far as possible, for cash, but, when on payments, one-third of the selling price of the wheels should be paid in cash by the customer, and the balance in payments of not less than \$15 per month, secured by chattel mortgage on the machines sold, properly filed and recorded. The testimony of the agent, Fulton, was to the effect that, when the attachment was sued out by the appellee, more than \$9,000 worth of goods had been furnished by it to the F. H. Collins Company under the terms of the foregoing contract; that only \$2,855 worth of wheels and \$739 worth of customers' notes were producible by the F. H. Collins Company on demand by him for an accounting; that \$6,000 worth of the goods shipped under the contract had disappeared from the F. H. Collins Company's stock; and that the manager of the company could give no satisfactory or definite explanation of the disposition which had been made of the sum represented by this discrepancy. It thus appears, contrary to the proposition urged by the appellant, that there was testimony supporting the special instruction complained of.

Under the second proposition advanced by the appellant under these assignments, we proceed to consider whether the facts set out in the special instruction constitute a fraudulent disposition of property by the debtor, within the meaning of the attachment statute. Determining the rights of the Collins Company and of the appellee, with reference to the goods referred to in the charge, by the terms of the contract in question, we are of opinion that an obligation—moral and legal—rested upon the Collins Company to appropriate the proceeds of the goods in accordance with the stipulations of the contract, and that a diversion of these proceeds, made by the Collins Company, with intent to hinder, delay, or prevent the appellee from the collection of its debt, was violative of this obligation, was a wrong upon the appellee, and constituted, within legal contemplation, a fraud upon its rights. A diversion of these proceeds, with such an intent, should be regarded as the infliction of an injury upon the creditor entitled to them under the specific terms of its contract. It would not, we think, be essential that fraud involving the existence of conscious turpitude should co-exist with the intent to hinder, delay, or prevent, in order to justify the injured creditor in resorting, under these circumstances, to the remedy of an attachment. When, as in this instance, the jury were required to believe, in order to find a verdict for the plaintiff, that the Collins Company, in breach of the trust reposed in it, and evidenced by its solemn contract, and



in violation of its obligation, had diverted the proceeds of the goods, which it had undertaken to account for or to remit to the appellee, to a purpose other than that contemplated by this contract, and with the intent to hinder, delay, or prevent the appellee from the collection of its just demand, they were, in legal contemplation, required to find that the Collins Company intended by this diversion to defraud the appellee; and this without reference to whether the intent to defraud, in its more comprehensive sense, did or did not exist. Under the terms of the contract in question, and to the extent of the notes and money referred to, we think that the Collins Company had relinquished the right, which our law accords a failing debtor, of preferring his creditors. We regard the conclusion here announced as consonant alike with reason and the course of decision in this state. Thus, in *Gallagher v. Goldfrank*, 75 Tex. 562, 12 S. W. 961, the execution of a mortgage by a debtor for the expressed purpose of securing a creditor, but which contained a provision authorizing the mortgagee to sell the goods in due course of trade, and at customary prices, was held to be such an act as would constitute a disposition of property with intent to defraud, because the effect of the provision was to hinder and delay creditors. The court did not stop to inquire whether a wicked or a covinous intent prompted the execution of the instrument, but held the act to come within the contemplation of the attachment law, because of its necessary effect in hindering and delaying creditors. In other words, under the circumstances stated, the expression "hinder and delay" was regarded as synonymous with the expression "to defraud." See, also, *Gregg v. Cleveland*, 82 Tex. 187, 17 S. W. 777. It will be noted that we are not considering a case in which there is question of the conduct of a creditor who accepts goods in payment of his debt by means of a transfer from a debtor preferring him, and by such preference hindering, delaying, and preventing other creditors. To a question of the latter character, where the issue is between such a creditor and other creditors assailing the transfer, and where there was no restriction by contract, as in this case, are the authorities cited by the appellant applicable. *Ellis v. Valentine*, 65 Tex. 532; *Refining Co. v. Harrison* (Tex. Civ. App.) 29 S. W. 500.

2. No prejudicial error was committed by the court in admitting testimony in conformity with the allegations of defendants' answer, that at the time of the levy of the attachment, and for a long time prior thereto, the F. H. Collins Company had been disposing of its goods at retail, in violation of its charter powers, which authorized exclusively a wholesale business. Nor was there prejudicial error in submitting a special issue to the jury in conformity with these allegations and the evidence supporting them, as

to whether the Collins Company had sold the goods at retail, nor in refusing the special charge requested by the plaintiff, to the effect that acts beyond the charter powers of the F. H. Collins Company, in the sale of goods at retail, did not necessarily constitute a disposition of its property with intent to defraud, and that evidence of the same was only admitted for its general bearing and significance, if any, on the issue of the fraudulent disposition of property. We do not agree with counsel for appellant that because of the admission of this evidence, or the submission of this issue, the jury could reasonably have concluded that the company had forfeited all claim to the protection of the courts of the state. On the contrary, the jury were instructed, in the main charge of the court, as we have seen, that the plaintiff, as the assignee of the Collins Company, could recover if the allegation in the affidavit charging a fraudulent disposition of its property was untrue.

3. In his direct examination, H. H. Fulton, the agent, and a witness for the defendants, testified that the claim of his company against the Collins Company was for about \$9,600, that the indebtedness was incurred for bicycles, that the Ames & Frost Company manufactures bicycles, and that the claim he had was for bicycles sold to the Collins Company under a contract (referring to the contract of February 2, 1894). On cross-examination this witness was asked the following question: "How much did F. H. Collins Company buy from Ames & Frost Company, in wheels, during the year 1894, between the making of this new contract, on February 2d, and the time of the levy of the attachment?" To which he replied: "They bought during the year 1894 between \$9,000 and \$10,000, I know." On further cross-examination, he testified: "I know that to be a fact. I have got a memorandum of it, which I got a few days ago from a ledger,—from the actual account in the ledger. I didn't put it in the ledger. Can't say that I had anything to do with keeping the ledger. Yes; I recognized some of my own figures as I went along. I didn't sell these goods shipped in 1894. I was not the shipping clerk." Thereupon plaintiff's counsel moved the court to exclude the evidence that the F. H. Collins Company bought wheels of the Ames & Frost Company during said time to the amount of between \$9,000 and \$10,000, because his evidence showed that he did not know that to be a fact, except from the books, and that he was not qualified to testify from the books of the defendant, and because the books were the best evidence of the facts sought to be proven, and were not offered in evidence, and the books referred to were not shown to be the books of original entry of the transaction, and were not shown to be correctly kept. The court refused the motion to exclude this testimony, on the ground that the defendant did not elicit it from Fulton, but that it was elicited by plain-

tiff on cross-examination, and in such manner as that the plaintiff did not have a right to have it excluded. We think that, if the reason given by the court for refusing the motion be unsound, its action, in view of all the evidence, was not prejudicial to the appellant. The amount due by the Collins Company to the appellee was elsewhere fully established as in the sum of \$9,673.19, with interest. The amount of the judgment rendered shortly after the institution of the attachment proceedings was in the sum of \$10,022.88, manifestly representing the principal and interest of the demand. F. H. Collins, the manager of the Collins Company, testified—once on direct and once on cross examination—that his company purchased \$9,000 worth of goods from the Ames & Frost Company between February, 1894, and the date of the attachment. Of the goods thus bought, Collins admits that about \$7,000 or \$8,000 worth was for wheels purchased from the appellee company in 1894. The evidence complained of was hence only cumulative as to the value of the goods purchased, and the amount of the indebtedness. The point of objection must therefore be confined to the fact that the witness testified to the character of the goods, viz. that they were wheels. A fair interpretation of his entire statement in his direct and in his cross examination shows that, conceding the amount of indebtedness to be as stated by him, the goods representing that indebtedness were naturally, and quite necessarily, wheels or bicycles, because he stated in his direct examination that the goods in which his company dealt were goods of this character; and it was not necessary that he should examine the books of the concern, or produce them, in order to know that fact. Besides, Collins, the manager, stated that the wheels purchased by his company during the year 1894 were, in value, between \$7,000 and \$8,000. If we accept his statement as to the value of the wheels thus purchased, manifestly under the contract, the deficiency in the accounting by his company would not be removed, but would simply be reduced \$1,000 or \$2,000, which could not reasonably affect the grounds for the attachment. The fact of the deficiency would yet remain, which would justify the affidavit. The lessened degree of the deficiency would not have been sufficient to affect the controlling question on the issue of fraud.

4. The burden rested upon the plaintiff to establish that the attachment was wrongful, and the court did not err in thus charging, though it may not have been required to do so.

5. The plaintiff sued to recover the sum of \$18,952.49, as the market value of the merchandise seized by virtue of the attachment, at the time and place of the levy. It appears that the property was sold on January 26, 1895, under preliminary order of sale, to the Ames & Frost Company for the sum of \$6,600. We think that the court properly over-

ruled appellant's objection to the testimony of F. H. Collins, on cross-examination, to the effect that thereafter Elmon Armstrong and Warren Collins, stockholders in the F. H. Collins Company, bought the property levied on from the Ames & Frost Company for \$8,000 or \$8,500, and that he, as manager for the purchasers of the attached property, sold only one-fourth thereof during the year succeeding the attachment. This testimony, in our opinion, was relevant upon the issue of the value of the goods at the time of their seizure. It tended to show that the goods were unsalable, and were of less value than claimed by the plaintiff. *Oppenheimer v. Sweeney*, 63 Tex. 426.

6. We find it unnecessary to decide, and we abstain from considering, the cross assignment presented by the appellee, urging the proposition that an insolvent private corporation in Texas, which has ceased to carry on its business, and which does not intend to resume business, may not, as in this case, make an assignment for the benefit of creditors, conditionally exacting releases. The judgment is in all things affirmed.

HUNTER, J., disqualified and not sitting.

POPE et al. v. RIGGS et al.

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

CONSTRUCTION OF DEED — STALE DEMAND — EVIDENCE—WAIVER OF OBJECTION.

1. A deed describes land by locating the corners of the parcel by objects found upon the ground, and also by giving the course and distance from corner to corner. Construed by the calls for distance the deed conveyed 20 acres, but by the calls for objects it conveyed only 10 acres. The grantee claimed for many years only the 10 acres, and grantors and those claiming under them dealt with all the land over 10 acres as their own. *Held*, that grantors were not required to bring suit for the land until defendants asserted some claim to more than 10 acres.

2. In trespass to try title, evidence that plaintiffs, by certain transactions, had for many years asserted title thereto, and had conveyed it by deeds of trust, which were recorded, long prior to the time that they asserted any right to the land, is admissible.

3. Former owners of land, under whom defendants claim, were permitted to testify that the land they understood to be conveyed by their deeds was 10 acres, as described by the deed construed by its calls for objects, and not 20 acres, as construed by its calls for distance. *Held* admissible, as not contradicting the terms of the deed, but simply showing what construction the parties thereto placed upon the deed at the time they owned the land.

4. In trespass to try title, evidence of particular instances where plaintiffs have sold a part of the same tract of land to different persons is not relevant, when the parcels so sold are in no way connected with the land in controversy.

5. Actual possession of that part of the land claimed to be covered by an indefinite deed, which all parties admit to be covered by it, does not draw to it constructive possession of that part of the land which is in controversy, where it appears that it was not the grantees' purpose to assert any claim to that part of the land which is in controversy.

6. It is not error to refuse a charge which takes away from the jury one branch of the case which is in issue.

7. When the trial court, at the request of appellants, gives a charge that does not present a correct statement of the law, and upon which, in connection with the evidence, the appellants ought to have had verdict if the charge as given had been the law, the fact that the verdict was against the appellants gives them no right to complain.

8. A deed being indefinite in its description of land, construed by its calls for objects, conveyed 10 acres, and by its calls for distance conveyed 20 acres. The grantees, after 30 years' acquiescence in the first construction, set up a claim to the additional 10 acres; and in an action by the grantors to try title, and also to correct the mistake in the deed, the jury found generally for plaintiffs, and the court rendered judgment for the land and awarded a writ of possession. No judgment was rendered upon that branch of the case that sought to correct the mistake in the deed. *Held*, that an improper charge upon the question of possession by defendant, given at his request, was harmless.

9. The statement of facts in trespass to try title shows that plaintiffs' deed was not made until long after the commencement of the suit, but there are other facts in the statement which make it probable that the statement as to the date of the deed is an error. The attention of the trial court was never called to the matter. *Held*, that as a recovery of title upon a deed executed after the institution of suit is not fundamentally erroneous, unless defendant urges objections thereto at the proper time, he will be considered to have waived the objection.

Appeal from district court, Bell county; W. A. Blackburn, Judge.

Trespass to try title by Sallie J. Riggs and others against John T. Pope and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Harris & Saunders, for appellants. A. M. Monteith, for appellees.

FISHER, C. J. The appellees, Sallie J. Riggs, and her husband, W. S. Riggs, in 1888, brought suit against the appellants to recover the land described in plaintiffs' petition. The suit was one, practically, of trespass to try title, and also to correct a mistake in a deed executed by the ancestors of the plaintiffs to one Isaac Williams, under whom the defendants claim. The mistake was alleged to consist in a part of the description contained in the deed embracing more than 10 acres of land, when it was intended by the parties that the deed should only convey 10 acres of land. Plaintiffs also pleaded 3, 5, and 10 years' statutes of limitation. The defendants demurred generally and specially, to the effect that the plaintiffs' demand was stale, in so far as it sought to correct the mistake in the deed made by O. H. and S. W. Bigham to Isaac Williams. Defendants pleaded not guilty, and claimed that the deed to Williams embraced 20 acres of land; and also pleaded statutes of limitation of 3, 5, and 10 years. The demurrers were overruled. The case was tried by a jury, who found generally in favor of the plaintiffs. Thereupon the court rendered judgment to the effect that the plaintiffs recover of the defendants the land

in controversy, and awarding a writ of possession. No judgment, it seems, was rendered upon that branch of the case that sought to correct the mistake in the deed. The plaintiffs, as title, exhibited a deed from Thomas J. Allen and wife to O. H. and S. W. Bigham, conveying 1,600 acres of land off the north end of the Matilda F. Connell survey, dated June 22, 1854, which includes the land in controversy in this suit; also deed from S. W. to O. H. Bigham, dated August 14, 1857, conveying the undivided interest of the said S. W. Bigham in and to the lands acquired from Allen and wife; also deed from J. S. Bigham, R. C. Bigham, M. A. Bigham, Nancy Bigham, E. M. Whittington, and W. B. Whittington to Mrs. Sallie J. Riggs, the plaintiff in this suit. From the statement of facts in the record, this deed appears to be dated April 27, 1892, and conveys the land in controversy. Plaintiff Mrs. Sallie J. Riggs is one of the children and one of the heirs of O. H. Bigham, and she and J. S. Bigham, R. C. Bigham, M. A. Bigham, and E. M. Whittington are the only children and heirs of O. H. Bigham, deceased. Nancy Bigham was the wife of O. H. Bigham, and the mother of plaintiff Mrs. Sallie Riggs. O. H. Bigham died in 1865. S. W. and O. H. Bigham, on March 8, 1855, conveyed to Isaac Williams the following described land, containing by estimation 10 acres, more or less, and bounded thus: "Beginning at a stake N., 23 W., 10 varas from the N. E. corner of a sixteen-acre tract sold to David Williams, from which a post oak marked 'I. D. W.' bears N., 71 E., 5 varas; thence N., 23 W., 190 varas, a pile of rocks, from which an elm marked 'W.' bears N., 85 E., 7½ varas; thence S., 67 W., 594 varas, to a pile of rocks; thence S., 23 E., 190 varas, to a pile of rocks for S. W. corner; thence N., 67 E., 594 varas, to the beginning;"—which the defendants claimed embraced the land in controversy. On May 22, 1855, Williams conveyed to E. M. Stockpole the above-described land. Stockpole, on June 14, 1855, conveyed to Archelus Smith; on May 6, 1856, Archelus Smith conveyed to Beverly Pool; on August 17, 1857, Beverly Pool conveyed the same land to Gabriel Smith; on January 15, 1859, Gabriel Smith conveyed to John M. Pope. The defendants are the only heirs and children of John M. Pope. John M. Pope is dead. It also appears from the testimony of J. S. Bigham that the land in controversy, after the death of his father, in 1865, was claimed by his mother as part of her homestead, and that in 1868 his mother gave him this land in the division of the property of his father's estate, and he claimed the same from that time until the spring of 1871, at which time he sold it to Mrs. Sallie White, now the plaintiff Mrs. Sallie Riggs; and Mrs. Riggs has claimed the land from the date she purchased it, in 1871, from her brother, and the deed to the land was made to Mrs. White, now Mrs. Riggs. The land in controversy has

not been in the possession or actual occupancy of any one.

The mistake which is sought to be corrected arises from the description contained in the deed from S. W. and O. H. Bigham to Isaac Williams, of date March 8, 1855. The contention of the plaintiffs was that that deed was intended to convey only 10 acres of land, and was not intended to embrace the land in controversy; that if it did embrace the land in controversy, which itself consisted of 10 acres, there would be included in the deed 20 acres; that the intention and purpose of the parties to that deed was to convey only 10 acres, and that 10 acres was all that was actually conveyed, if the deed was construed in the light of the calls for objects which were found upon the ground; but that, if the calls for distance should prevail, the deed would embrace more than 10 acres, and would include the land in suit. There is abundant evidence in the record which tends to establish that corners once existed on the ground as called for in the deed, and this, evidently, was the way in which the jury viewed the evidence. The testimony, in addition to the calls in the deed for objects which were found upon the ground, clearly shows that it was the intention of the parties to that deed that only 10 acres should be conveyed. The jury, by the general verdict in favor of the plaintiffs, evidently concluded from the evidence that the deed only conveyed 10 acres of land, and this conclusion was based upon the testimony establishing the existence of corners, showing the footsteps of the surveyors, which the jury, under the charge of the court (which was proper on that subject), considered was of more importance than the calls for course and distance.

The plaintiffs pleaded that the defendants had only recently, within a short while before the institution of the suit, asserted a claim to this land, and that plaintiffs had continuously, for years prior thereto, asserted their right to the land. The court below admitted evidence bearing upon this issue, which we think was proper. The defendants pleaded stale demand, and if they were not in possession of the land, and had asserted no claim to it, and the plaintiffs had, for a long time prior, asserted their rights under such circumstances which the evidence tends to show may have been known to the defendants, they were not required to bring their suit until the defendants had asserted some claim. This was, in effect, held on the former appeal of this case. 21 S. W. 1013. As soon as the plaintiffs discovered that the defendants were asserting claim to the land, they brought this suit, and, until the defendants asserted such claim, plaintiffs were not required to institute the suit, either for the land or to correct the mistake in the deed, in so far as it attempted to convey the land by course and distance; and, in support of this issue, certain evidence was

offered upon the trial which had a tendency to show that the plaintiffs, by transactions concerning the land, had for many years asserted a title thereto, and some of these transactions were by deeds and deeds of trust, which were spread upon the record, which the appellants may have known of long prior to the time that they asserted any right to the land. All this testimony, we think, was admissible.

The court permitted, over the objection of defendants, former owners of the land, under whom the defendants claimed, to testify as to the quantity of land conveyed by their deeds, and as to the boundaries thereof; such testimony tending to show that only 10 acres were conveyed, which was identified by corners, and did not embrace the land in controversy. We think this evidence was admissible. The effect of it was not to contradict the terms of the deed, for, construing the deed in the light of the calls for objects, it did not embrace more than 10 acres of land, and did not include the land in controversy. It was simply giving the deed the construction that the parties themselves placed upon it at a time when they owned the land.

The sixth assignment of error is as follows: "The court erred in excluding the evidence of J. T. Pope, offered by the defendants to prove that J. M. Pope, in his lifetime, told J. T. Pope, the witness, that he (J. M. Pope) claimed the land in controversy; that he claimed all the land covered by his deed." From an investigation of this witness' evidence, as found in the record, we find that he did substantially testify that his father, J. M. Pope, claimed the land in controversy. Therefore the very fact which he seeks to prove by this witness was in fact testified to by him.

It was sought by the defendants upon the trial to introduce in evidence deeds from O. H. Bigham down to Joel D. Blair of a tract of six acres of land, and a deed from Nancy Bigham and the children of O. H. Bigham to Mollie K. Rucker of a part of said six acres of land; and the petition, answer, charge, and judgment in suit of Mollie K. Rucker et al. against Feriba H. Blair et al.; and the testimony of J. T. Pope to the effect that Feriba H. Blair was the widow of Joel D. Blair, who was dead; and that the other defendants in said suit were the heirs of Joel D. Blair; and that the land in controversy in said suit, conveyed by Nancy Bigham and others to Mollie K. Rucker, was a part of said six acres conveyed by Bigham to Joel D. Blair; also sought to introduce a deed from S. W. Bigham to J. W. Embree, conveying a tract of land about two and a half miles northwest of Belton, and a deed afterwards made by S. W. Bigham to M. J. Brown to the same land, and the record of a suit brought by Embree against Brown to recover the land. This testimony was offered for the purpose of showing that the Bighams

were in the habit of selling the same tract of land to different parties, and of claiming land that they had previously sold and conveyed to others. It is not contended that the lands embraced in these deeds are in any wise connected with the land in controversy. The court correctly refused to admit any of this evidence. It was not relevant to any issue in this case.

There was no error in the ruling of the court in excluding from the jury the record in the suit of Sallie J. Riggs and husband against the Gulf, Colorado & Santa Fé Railway Company. The dismissal of that suit by the plaintiffs, to which the defendants were in no wise parties, would not prejudice the right of Mrs. Sallie J. Riggs to the land in controversy, so far as the defendants were concerned, and the dismissal of that case could in no wise be considered as a release or abandonment of any right that the plaintiffs had against the defendants as to the land in suit.

There was no error in the modification of charge No. 2, as given by the court. It was proper, under the facts of this case. There was evidence clearly showing that the defendants asserted no claim to the land in controversy. The actual possession by the defendants of a part of the land would not draw to it constructive possession of the balance, if it appeared from the evidence that it was not their intention or purpose to assert any claim or right to that part of the land.

There was no error in refusing the charge complained of in the eleventh assignment of error. The court gave the correct charge upon actual and constructive possession. It would have been improper to have given the charge as asked. The way in which it is framed, it would take from the jury the right to consider that branch of the evidence which tends to show that the defendants did not claim the land. That was an issue in the case as one of the facts bearing upon the evidence of the title, limitation, and stale demand.

We think the charges given by the court at the request of the plaintiffs, complained of in the twelfth assignment of error, were proper. They present a correct issue, as made by the pleadings and evidence. Neither was there error in the charge as complained of in the thirteenth and fifteenth assignments of error.

The court below gave the following charge at the request of the defendants: "If the evidence in this case fails to satisfy your minds that the plaintiff Sallie J. Riggs, or her vendors, or ancestor O. H. Bigham, have had and held actual adverse possession of the land in controversy in this suit since the time O. H. and S. W. Bigham made the conveyance to Isaac Williams, and was holding possession thereof at the time of the institution of this suit, or within five years next before the institution of this suit, then you

will find for the defendants, even though you believe there was a mistake made in the deed to Isaac Williams in describing the land. The law will not allow a suit to reform a deed, so as to correct a mistake therein, after thirty years, unless the parties seeking to make the correction have been in possession of the land." In connection with this charge, the defendants claim that the verdict of the jury was contrary to the law and the evidence, in that it clearly appears from the testimony that neither Mrs. Sallie Riggs, nor those under whom she holds, have ever been in possession of the land in controversy. Therefore, in view of the charges given, the verdict should have been for the defendants. We think it was improper for the court to give this charge; that it did not present a correct statement of the law, and such being the case, and the charge being given at the request of the defendants, they can assert no right based upon it. But there is another view of this question which, in our opinion, is a complete answer to it. The judgment of the court did not undertake to correct the mistake in the deed, nor was relief granted to the plaintiffs upon that issue, but the judgment was in plaintiffs' favor for a recovery of the land, awarding a writ of possession, and it was, in effect, a judgment based upon that branch of the case that sought to recover the land in trespass to try title, independent of any correction of mistake in the deed between the parties. The effect of the judgment was to determine that the deed, under which the defendants claimed, only, in effect, conveyed 10 acres of land, according to the calls for objects which were identified as established upon the ground, and that those calls control the calls for course and distance. This question was, by the charge of the court, prominently submitted to the jury, and the judgment rendered was upon that theory.

The seventeenth assignment of error is as follows: "The verdict of the jury and the judgment of the court are contrary to the law and the evidence, in this: The evidence shows no title in plaintiff to the land in controversy at the time of the institution of this suit, and no conveyance of the same to her from any person prior to April, 1892, long after this suit was filed, and after plaintiff's last pleading was filed, and plaintiff cannot recover upon the title acquired after her last pleading was filed." It does appear from the statement of facts that on April 27, 1892, J. S. Bigham, R. C. Bigham, M. A. Bigham, Nancy Bigham, M. E. Whittington, and W. B. Whittington executed to plaintiff Mrs. Sallie J. Riggs a deed conveying the land in controversy. From other facts that appear in the record it is believed that the date of the deed given in the statement of facts is a mistake; that possibly the mistake occurred in preparing the statement of facts; and that the deed was probably executed long prior to 1892, for it ap-

pears from the record that Mrs. S. J. White, now Mrs. Sallie Riggs, did, in 1874, convey to one B. B. Seat a part of the land in controversy, and another deed executed by her to the same party in 1875, and deeds of trust executed by the plaintiff Mrs. Riggs; also deed from Mrs. White, now Riggs, conveying the right of way to the Gulf, Colorado & Santa Fé Railway Company, which right of way crosses the land in controversy, dated October 4, 1880; also the testimony of J. S. Bigham, wherein he testifies that, in 1871, the land was conveyed to Mrs. White. There is no assignment of error in the record objecting to the testimony of Bigham establishing this conveyance to Mrs. White. It appears from this testimony that, prior to 1892, Mrs. White owned the land, and from the deeds executed by her, and the deeds of trust, that she exercised rights as an owner in the land prior to 1892. But, independent of this, we do not think the question has been preserved and presented in such a way that the defendants can take advantage of it. The record does not show that this question was, by objection to the deed in evidence or upon motion for a new trial, ever called to the attention of the trial court. A recovery of title upon a deed executed after the institution of suit is not fundamentally erroneous, unless the defendants urged objections thereto at the proper time. It was an error that they could waive, if they so desired. They should have objected to this deed when it was offered, or, at least, should have called the trial court's attention to the error in this respect by a motion for a new trial, which was not done, and there is no bill of exception in the record raising this question in any manner. Therefore we think that the error was waived, if in fact the deed was executed subsequent to the time of the institution of suit. We find no error in the record, and the judgment is affirmed.

#### FINLAY et al. v. JACKSON et al.

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

#### REVIEW ON APPEAL—ABSENCE OF STATEMENT OF FACTS.

In an action to restrain the sale of an alleged homestead on execution, the finding that plaintiffs were concluded by a former adjudication between the same parties will not be reversed, in the absence of a statement of facts, or anything in the record to show that plaintiffs have any interest in the premises in controversy.

Appeal from district court, Llano county; W. M. Allison, Judge.

Action by Isabella A. Finlay and another against I. N. Jackson and others to enjoin sale of certain premises. Defendants had judgment, and plaintiffs appeal. Affirmed.

John C. Oatman, for appellants. Wm. J. Berne, Jr., for appellees.

**FISHER. C. J.** On April 2, 1896, appellant Mrs. Isabella A. Finlay, joined pro forma by her husband, J. K. Finlay, instituted this suit by injunction against I. N. Jackson, Mrs. S. A. Bower, F. C. Bower, and N. R. Porter, sheriff of Llano county, to enjoin the execution of a writ of venditioni exponas, and the sale thereunder of certain lands situated in Llano county, claimed by appellant as her homestead. A temporary injunction restraining the sale was granted, but upon final hearing it was dissolved, and a general judgment rendered in favor of the defendants. Previous to the final judgment, N. R. Porter, as sheriff, was dismissed from the case. The answer of defendants in effect alleged that the homestead right of the appellant had been litigated and adjudicated in a suit brought by J. K. Finlay, her husband, against these defendants, and that a final judgment was rendered therein in favor of the defendants, which was not appealed from, and which was still in force and effect. In that judgment the homestead right now set up by appellant Mrs. Finlay was litigated, and she, previous to the rendition of judgment, and at the time thereof, knew of the pendency of the suit brought by her husband, and alleged that the matters in the suit at bar were litigated and therein adjudicated, whereby the appellant was estopped from prosecuting this suit. The sixteenth and seventeenth subdivisions of the answer in effect deny the existence of any homestead right of the appellants in the land in controversy at the time the original execution was levied upon which the venditioni exponas was based. The case was tried before the court without a jury, who found the following facts and conclusions of law:

"First. On September 2, 1895, the plaintiff in this suit, J. K. Finlay, instituted suit No. 1,023 in the district court of this county against all the parties to this suit, and none other parties, and in the same capacities as they are sued herein. In said petition said Finlay alleged that on August 2, 1892, defendant I. N. Jackson obtained against him, in cause No. 133 in the county court of Llano county, Texas, a judgment for \$690.98, twelve per cent. interest thereon from date and costs; that said Jackson had transferred, or pretended to transfer, said judgment to defendant Mrs. S. A. Bower, and that they both, on August 1, 1893, had caused pluries execution to issue thereon to Llano county, and that N. R. Porter, as sheriff of Llano county, had levied same on two parcels of land, which said two parcels are the same parcels as are described in plaintiff's petition in this case at bar. In said petition in said cause No. 1,023 said Finlay further alleged that both of the said parcels of land were the homestead of himself and his wife, Isabella Finlay; that he bought the same on behalf of himself and his said wife; and then alleged the facts on which he based his homestead claims. And in said cause No.

1,023 a temporary injunction issued, and restrained the sale of the lands so levied upon until the December term, 1895, of this court. Second. I further find that at said December term, 1895, said temporary injunction was dissolved; that on trial said Finlay litigated for himself and wife their homestead claim in both of said parcels of land, and judgment final was rendered against him; and that he has not sought to revise said judgment by appeal or writ of error. Third. I further find that Isabella A. Finlay, plaintiff in this cause, knew, at the time said cause No. 1,023 was instituted, that it was instituted; that her homestead rights in said parcels of land were involved, and were to be litigated in said suit; and that at the time that judgment was rendered against Finlay therein she knew that fact, and also the nature of the judgment. Fourth. That the allegations of homestead designation and dedication in cause No. 1,023 were that the plaintiff bought said lands with the declared intention of making the same his homestead, and had commenced the erection thereon of a mill and race, or waterway, etc.; and in this cause the plaintiff, in addition to said former allegations, alleged actual occupancy since February, 1896, and prior to February 21, 1895, the deposit of some building material upon the ground, which, together with the material subsequently placed there, have been used in the erection of a residence house built since January, 1896. Fifth. That on August 1, 1896, a pluries execution was issued in cause No. 133 from said county court judgment, and on same day levied on the lands in question; that the sale of said lands under said execution has been enjoined in cause No. 1,023 (in September, 1895), and that said matters remained undisposed of until the December term, 1895, of the district court of Llano county, to wit, January 1, 1896, as hereinbefore stated; that thereafter, on March 14, 1896, a writ of venditioni exponas was issued, and levied on said lands to dispose of said execution levy made August 1, 1895; and afterwards, on April 2, 1896, petition in the case at bar was filed, and injunction issued, restraining further proceedings until the present term of this court. I further find that suit is now pending in the county court of Llano county, Texas, between the parties to the suit at bar, involving matters of offset to the judgment for \$600.98, as set forth by the pleadings of the parties to this suit. A trial was had in said county court, judgment rendered, motion for new trial duly filed, and overruled, notice of appeal properly entered, and afterwards, within the time required, a valid supersedeas bond filed and approved, and said cause is on appeal before the court of civil appeals of the Third supreme judicial district of Texas.

"Upon the foregoing findings of fact I make the following conclusions of law, to wit:

"1. When the husband institutes suit by injunction, on behalf of himself and wife, to restrain the sale of community real estate under

execution, claiming such real estate to be the homestead of himself and family, and therefore exempt from forced sale under execution against himself, and the homestead issue is litigated in said suit, and judgment rendered therein that the lands involved were not the homestead of said parties, and no appeal is prosecuted from such judgment, the wife, with knowledge of all the facts as they occurred, is concluded by such final judgment, and cannot thereafter, between the same parties, maintain a second suit, for the purpose of again litigating the same question with the same defendants. And I therefore conclude that the final judgment rendered on January 1, 1896, in cause No. 1,023 in the district court of Llano county, Texas, wherein J. K. Finlay was plaintiff, and I. N. Jackson, S. A. Bower, F. C. Bower, and N. R. Porter, sheriff, were defendants, is a complete defense to the suit now at bar upon the homestead issue.

"2. I further conclude that the pending of cause No. 237 in the county court of Llano county between the parties to this suit, and now on appeal in the court of civil appeals from the judgment rendered in said cause, operates as a bar to the adjudication in this court of the matters of offset involved in said county court litigation.

"3. I therefore conclude that the temporary injunction granted in this cause should be dissolved, and judgment rendered in this cause for the defendants; and it is so ordered."

There is no statement of facts in the record. In the view that we take of the case, it is unnecessary for us to pass upon the questions presented in appellant's brief, wherein she complains of the ruling of the court in holding that the former judgment rendered in the case wherein her husband was plaintiff and these appellees were defendants was *res adjudicata*, and that she was bound by the same. If we concede that there was error in this respect, the plaintiff is not in a condition to complain, because there is no fact in the record whatever that tends to show that she had any homestead right or interest in the land in controversy. The grounds alleged by her for the relief that she seeks in this case is that the defendants had levied upon, and were about to sell, her homestead, which she contends was not subject to forced sale. The burden was upon her to establish a homestead right in the land in controversy, in order to prevent a sale thereof under the execution. It is only the homestead that is exempt from forced sale, and one who asserts this right must establish the existence of the homestead. The existence of such homestead right would be the very foundation of plaintiff's case, and, if the land in question was not the homestead, any rulings that the court made upon other questions would be immaterial. If she desired us to revise the rulings made, she should have come prepared with evidence, or findings of the court, showing the existence of a homestead right in the property. She has not complied with the burden of the law in this respect, as there is not

one word of evidence in the record bearing on the homestead question. For the reasons stated, the judgment of the court below will be affirmed. Affirmed.

**SMITH et al. v. PATE et al.<sup>1</sup>**

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

**FOREIGN ADMINISTRATOR—POWERS—COMPROMISE OF CLAIM DUE ESTATE—TRESPASS TO TRY TITLE—ADVERSE POSSESSION.**

1. A foreign administrator of one who conveyed land retaining a vendor's lien has no authority without an order of the probate court to compromise the debt due from the grantee to the estate, since the power of the administrator in such respect is controlled by Rev. St. 1896, art. 1087, which requires an order of the probate court granting permission to do so before such authority exists.

2. Where an express lien is retained in a deed, the superior title to the land remains in the vendor, and descends to his heirs; and, on default of payment of the purchase money, the vendor or his heirs may maintain trespass to try title for the land.

3. A vendee in possession under a deed which retains a vendor's lien to secure payment of the purchase money holds in subordination to the title of his vendor until he repudiates such title, and the vendor has notice of such repudiation.

Appeal from district court, Bell county; John M. Furman, Judge.

Trespass to try title by Martha Pate and others against W. S. Smith and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

W. S. Helman, for appellants. Owens Miller and Bryan & Morgan, for appellees.

**KEY, J.** The nature and result of this suit are sufficiently disclosed by the trial court's conclusions of fact and law, which are as follows:

"(1) I find that, in 1878, Robert Holliday owned in fee simple the tract of land described in plaintiffs' petition, said land situated in Bell county, Texas. (2) I find that Robert Holliday died early in the year 1880, in the state of Tennessee, having removed thence from Bell county, Texas, late in the year 1878, and that at his death he left neither wife nor child surviving him, and, further, that he died intestate. (3) I find that the plaintiffs in this suit are the heirs at law of said Robert Holliday, deceased. (4) I find that said Robert Holliday, now deceased, sold and conveyed said land to W. L. Jones, by deed dated November 30, 1878, which deed was duly recorded in the deed records of said Bell county on the 30th day of November, 1878, in which deed a vendor's lien was expressly retained to secure the payment of the purchase money, evidenced by three certain promissory notes, aggregating \$1,500, executed by said W. L. Jones, and payable to said Robert Holliday, which notes were by said Robert Holliday left in the hands of W. W. Walker, in Bell county, for collection, in

whose possession they remained until they were delivered to and destroyed by W. L. Jones, in the fall of 1888. (5) I find that said W. L. Jones and wife, on the 30th day of September, 1880, executed a quitclaim deed to W. W. Walker, of all their right, title, and interest in and to said land, for the consideration of \$1,000, on credit or on time; that said transfer by Jones and wife to said Walker was at the instance of and negotiated by W. T. Bennett, as administrator of the estate of R. Holliday, deceased; and I further find that said Walker executed three notes, aggregating \$1,000, for the purchase money for said land; said notes being made payable to said W. T. Bennett, as such administrator, and by said Walker delivered to said W. T. Bennett, in Bell county, Texas. (6) I find that the three notes executed by W. L. Jones to Robert Holliday were unpaid at the death of said Holliday; and that said W. T. Bennett, as administrator, negotiated said transfer from Jones to Walker for the purpose of extinguishing the original debt, evidenced by said three notes, aggregating \$1,500, executed by said Jones to said Holliday; and that said Bennett accepted the said Walker notes for \$1,000, as extinguishing the original notes; that, after receiving the three notes from Walker, said Bennett then and there released the vendor's lien on said land, and then surrendered the three notes secured thereby, executed to Holliday by Jones, to said W. L. Jones, who then and there destroyed the said notes. Said release was not recorded. (7) I find that said Bennett qualified as administrator of the estate of Robert Holliday, deceased, in the state of Tennessee, but did not qualify as such administrator in the state of Texas. (8) I find that W. W. Walker has paid off in full the said notes, executed and delivered by him to said Bennett as such administrator. (9) I find that W. W. Walker and wife conveyed the land in controversy to defendant John T. Dulany, by deed dated July 31, 1884, the consideration being \$350 in cash, and two notes of \$750 each. (10) I find that, at the date of the transfer from Jones to Walker, the said Jones, Walker, and Dulany were each and all personally cognizant of the action of the said W. T. Bennett in negotiating the transfer from Jones to Walker, and in accepting the notes from Walker in lieu of the original notes executed by Jones to Holliday, and in surrendering the original notes to Jones. (11) I find that, at the date of the transfer from Jones to Walker, the defendant Dulany offered to give \$800 in cash for the land in controversy. (12) I find that plaintiffs claim as heirs at law of said Holliday, and that defendants claim under the deed executed by said Holliday to said Jones. (13) I find that defendant Dulany has had said land inclosed, and has been using, cultivating, enjoying, and paying all taxes due thereon for more than ten years prior to the bringing of this suit against him, on June 24, 1896. (14) I find that the reasonable rental

<sup>1</sup> Writ of error granted by supreme court.



value of said premises, during the time the same has been in defendant's possession, is about equal to the value of the improvements placed thereon by defendant, more than one year before the bringing of this suit. (15) I find that at the death of Robert Holliday, in Tennessee, he owed no debts; and I further find that said W. T. Bennett, as such administrator, has never accounted to plaintiffs, as heirs at law of said Robert Holliday, for any of the proceeds of said estate."

Conclusions of law: "(1) I find, as a matter of law, that the deed from Robert Holliday to W. L. Jones, in which a vendor's lien was expressly retained to secure the payment of the purchase money, stands upon the same footing as a mere agreement to convey at a future time upon payment of the purchase money, and that said deed is, in law, an executory contract. (2) I find that the superior title to the land in controversy remained in Robert Holliday, and, since his decease, in his heirs at law, until the purchase money is paid in fact, or until, by lapse of time, payment would be presumed. (3) I find that at common law the lapse of twenty years would raise the presumption of payment. (4) I find that there has been no adverse holding of the land in controversy; that the acceptance of the deed by Walker from Jones, and the execution of the new notes, was not a repudiation of the contract between said Jones and his vendor, who is the same party under whom plaintiffs claim; and I find that the ten years' statute of limitations does not apply. (5) I find that the plea of stale demand does not apply when the superior title remains in the heir at law of the vendor. (6) I find that the transfer of the land by Jones to Walker, having been negotiated by and at the instance of the Tennessee administrator, W. T. Bennett, and the notes for the purchase money having been made payable to and delivered in Texas to said administrator, and the Jones notes having been surrendered to W. L. Jones by the said administrator, and the vendor's lien on the said land having been released by him, the sale and transfer by Jones to Walker was, in law, a sale and transfer by said administrator, and was a novation of the original debt evidenced by said Jones notes, payable to the decedent. (7) I find that a foreign administrator cannot legally sell land belonging to an estate in Texas, without first taking out letters in Texas, and selling the same in due course of administration. (8) I find that a foreign administrator cannot make a novation in Texas by accepting a new note, payable to himself as administrator, as extinguishment of an old debt, evidenced by notes payable to the decedent; especially where there is no new consideration, and where both the new and the old notes are secured by liens on the same land. (9) I find that the surrender of the notes to W. L. Jones by said administrator, and the release of the vendor's

lien securing the same, and the acceptance of the new notes from Walker, was a novation of the original contract; was beyond the power of the administrator, and did not extinguish the original debt, and was void. (10) I find that the said W. T. Bennett, as such administrator, acted beyond his authority in said transactions, and that the heirs at law of said decedent are not bound thereby. Wherefore I find, under the law and the evidence, that the superior title to the land in controversy was in said Robert Holliday at the time of his death; that the same has not been divested out of his heirs at law, either by payment of purchase money, or by such a lapse of time as would raise a presumption of payment; that the claim of said heirs cannot be defeated in this case by the plea of stale demand, nor by the ten years' statute of limitations; and that plaintiffs ought to recover the land sued for, but plaintiffs ought not to recover for rents, as the improvements placed on said land by defendant offset the said rents."

#### Opinion.

The trial court's findings of fact are not challenged by assignment of error, and therefore we adopt them as correct, and make them the basis of our decision. We also think that court reached correct conclusions of law.

The main question in the case is: Had Bennett, acting under letters of administration granted in the state of Tennessee, authority, without an order of the probate court authorizing him so to do, to compromise the debt owing from Jones to Robert Holliday's estate, and, by accepting two-thirds of the debt in satisfaction of the entire amount, divest said estate or the heirs of Holliday of the title to the land in question? This question, in our opinion, must be answered in the negative. Whatever may be the authority of an executor or administrator under the rules of the common law, to compound or compromise claims owing to an estate, in this state, the matter is controlled by statute, and requires an order of the probate court granting permission to do so before such authority will exist. Rev. St. 1895, art. 1987. This statute was in force at the time the transaction in question occurred. Rev. St. 1879, art. 1934; Perry v. Booth, 7 Tex. 493; Trammell v. Swan, 25 Tex. 474. Such being the law, if Bennett had been appointed administrator by a court of this state, not having procured an order authorizing him to do so, he would have had no authority to make the settlement with Jones and Walker that was made, and the title to the land in question would have remained as it was before the settlement was made. Therefore, if it be conceded that the Tennessee court had jurisdiction to collect the debt owing by Jones to the Holliday estate, and thereby divest said estate and Holliday's heirs of title to the

land for which the notes were given, still, as it is not shown by proof that the laws of that state are different from those of Texas on the subject of the authority of an administrator to compound or compromise a debt, the rights of the parties must be determined by the laws of this state. *Crosby v. Huston*, 1 Tex. 204; *James v. James*, 81 Tex. 373, 16 S. W. 1067.

It is the settled law in this state that, when an express lien is retained in a deed, the superior title to the land remains in the vendor, and descends to his heirs; and, on default of payment of the purchase money, the vendor or his heirs may maintain trespass to try title, and recover the land. *Harris v. Catlin*, 53 Tex. 1; *Webster v. Mann*, 52 Tex. 416; *Summerhill v. Hanner*, 72 Tex. 224, 9 S. W. 881.

A vendee in possession, under a deed which retains a vendor's lien to secure the payment of the purchase money, holds in subordination to the title of his vendor until he repudiates such title, and the vendor has notice of such repudiation. Therefore the statutes of limitation do not apply to this case. *Roosevelt v. Davis*, 49 Tex. 463; *Keys v. Mason*, 44 Tex. 140; *Clark v. Adams*, 80 Tex. 674, 16 S. W. 552. We have considered all the questions presented in appellants' brief, and, finding no reversible error, the judgment is affirmed. Affirmed.

#### HAYES v. TAYLOR.

(Court of Civil Appeals of Texas. Dec. 4, 1897.)

##### HOMESTEAD—TAXATION—SALE—VENDORS' LIENS.

1. Title to land which was a homestead was acquired by purchase at a tax sale. The amount of taxes alleged to have been assessed and unpaid was greater in amount than could have been legally assessed against the property under Const. art. 8, § 9, as amended in 1883. *Held*, that the land was sold for a debt other than the taxes due thereon, and, under article 16, § 50, providing that the homestead shall be protected from forced sale for all debts except purchase money and taxes due thereon, the sale was void.

2. Where one purchases land at a void tax sale, and the real owner, who is occupying it as a homestead, gives a note for a transfer of the land to him from the purchaser, and a vendor's lien is reserved in the deed for the price, the transfer conveys no title, and the lien cannot be foreclosed.

Appeal from district court, Delta county; Howard Templeton, Judge.

Action by Joel Hayes against W. W. Taylor. From a judgment for defendant, plaintiff appeals. Affirmed.

J. L. Young, for appellant. Sharp & Banister, for appellee.

#### Conclusions.

STEPHENS, J. This action was brought by appellant to foreclose an alleged vendor's lien on appellee's homestead of 49.6 acres of land in Delta county. The judgment denying the relief sought rests upon conclusions

of law and fact, from which it appears that appellant acquired, in the year 1885, whatever right he had to the land, through a tax sale made that year to collect the taxes assessed against appellee for the preceding year, amounting to \$5.34, which included his poll tax and taxes assessed against his personal estate, as well as against the land. It further appears from the findings of fact that "the assessment roll of Delta county for 1884 contains the following, and nothing else, covering said land:

Owner.	Abstract No.	Certificate No.	Survey No.	Original Grantee.	Acres.	Value.
W. W. Taylor.	15			Caroline Allen.	49 6-10	\$147

—And that, when this assessment was made, as well as long before that time, and ever since, appellee was a married man, the head of a family, and the land in question was his homestead; that thereafter, to avoid a threatened suit, he made the note (for \$100) sued on, and took a conveyance of the land from appellant, in the face of which the vendor's lien was expressly retained to secure the payment of this note. The statement of facts, however, fails to show what the tax assessment of \$5.34, by virtue of which the land was sold, included, but merely recites that defendant (appellee) introduced in evidence the minutes of the commissioners' court to show the amount of taxes levied for county purposes for 1884, without showing what these minutes contained, and then copies the tax rolls for that year, as follows:

Owner.	Abstract No.	Certificate No.	Survey No.	Original Grantee.	Acres.	Value.
W. W. Taylor.	15			Caroline Allen.	49 6-10	\$147

Error is therefore assigned to the conclusion of the trial judge that the tax assessment under which the land was sold included appellee's poll tax and the tax on his personal property, and this assignment would have to be sustained, though the discrepancy is doubtless due to inadvertence in making up the statement of facts, had not the constitution and laws in force when the assessment and sale in question took place made it impossible for a valid assessment of \$5.34 to have been made against a tract of land valued at \$147. Const. art. 8, § 9, as amended in 1883. See, also, acts of legislature levying taxes for 1884. It thus appears that the land must necessarily have been sold for a debt other than the taxes due thereon, which is forbidden by article 16, § 50, of the constitution, providing that the homestead shall be protected from forced sale for the payment of all debts except for the purchase money thereof, "the taxes due thereon," etc. Being

so forbidden, the sale was void, and did not divest appellee's title or pre-existing homestead right. The debt for purchase money excepted by the constitution can be none other than that created in acquiring some sort of title to the homestead, and hence cannot arise from a contract made after such title is fully vested, and the homestead acquired. Certainly the conveyance of a void tax title to appellee, while in the full possession and enjoyment of his homestead, could not have strengthened his title thereto. Indeed, the tax sale proceeded upon the assumption that the title to the homestead was already perfect in appellee. It follows from these conclusions that appellant was properly denied the foreclosure of any lien upon the homestead. His petition failed to contain any alternative prayer, or state any facts as a basis therefor, to enforce by way of subrogation a lien against the homestead for any taxes due thereon which may have been paid by him through the void sale. Excluding immaterial findings, we therefore adopt the court's conclusions of fact, and affirm the judgment.

**McFARLANE et al. v. HOWELL, County Judge.<sup>1</sup>**

(Court of Civil Appeals of Texas. May 13, 1897.)

**TREASURER'S BOND—LIABILITY OF SURETY—EVIDENCE—TIME OF FILING.**

1. Where a surety on an official bond signs it, and places it in the hands of his co-obligor, with the stipulation that it is not to take effect or be delivered to the obligee unless another surety signs it, if the obligee has notice the stipulation will constitute a defense for the surety, in a suit on the bond.

2. In a suit on an official bond, where the issue is whether the bond was filed and approved, it may be introduced in evidence.

3. On an issue as to whether a treasurer's bond had been filed, and approved by the county judge, the evidence showed that it was found, at the expiration of the terms of the treasurer and judge, in the regular file box of the clerk, with the other county bonds. It had no file mark and no indorsement of approval, and bore date of the time of the treasurer's election. The treasurer testified that he had never delivered the bond to any one as his official bond. The county judge testified that he could not remember whether he had received and approved the bond or not, but stated circumstances tending to show that he had not. The treasurer held office for two years without objection, and no other bond was ever filed. *Held*, that the jury were warranted in finding that the bond had been filed and approved.

4. In an issue as to whether an official bond had ever been approved by the county judge, where his testimony tends to show that it had not, evidence of statements made by him may be introduced for the purpose of contradicting his testimony, but not as affirmative evidence against the sureties in the bond.

5. Nonresponsive answers in a deposition can be suppressed only on motion made before the trial.

6. The testimony, "Finding the bond in this

condition makes me think it may have been presented to me for approval and rejected," is inadmissible, as being only an opinion.

7. In an action on a treasurer's bond, the certificate of the comptroller, showing the amount paid to the treasurer during the year in which his alleged defalcation took place, is admissible in evidence.

8. The fact that the statement of the comptroller, admitted in evidence for the purpose of showing the amount of money paid to a treasurer during a certain year, contained statements of money paid in other years, which was irrelevant, did not make the whole statement inadmissible.

9. Evidence of admissions of defalcation made by a treasurer after his term of office had expired is admissible against him in a suit on his bond, but not against his sureties.

10. The fact that an officer's bond was not delivered to the county judge for approval and filing until more than 20 days after he had received his certificate of election will not render such bond void.

Appeal from district court, Jasper county; Stephen P. West, Judge.

Action by J. B. Howell, county judge, against W. M. McFarlane as principal, and W. C. Price and G. W. Smythe as sureties, on an official bond. Judgment for plaintiff, and defendants appeal. Affirmed as to McFarlane, and reversed as to Price and Smythe.

Ford, Martin & Jones and Seale & Beaty, for appellants. Votaw & Chester, for appellee.

**WILLIAMS, J.** This was an action by the county judge, for the use of the county, against McFarlane, as principal, and W. C. Price and G. W. Smythe, as sureties, upon an instrument alleged to be the bond given by McFarlane, as county treasurer, in accordance with article 921, Rev. St. 1895, for the security of the school fund of the county, to recover a balance of such fund, which he had failed to pay over to his successor or to otherwise account for. The defendants all pleaded general denial, and defendant Smythe pleaded specially, under oath, that "at the time said instrument was presented to him for his signature by Wm. M. McFarlane, the principal in said bond, and before said instrument was signed by him, it was agreed between him and said McFarlane that he would not become a surety upon said bond unless, before the delivery and approval of said bond by the county judge of Jasper county, that at least one other good and solvent surety besides W. C. Price would sign the same; and that said defendant Smythe then and there signed the said bond with the knowledge and consent of the said McFarlane that his said signature should only become operative and binding against the defendant in the event that such additional security was secured." Defendant alleged that no other good and solvent surety besides W. C. Price was procured upon said bond; that N. F. Belk, who was then county judge of said Jasper county, had full notice of the conditions under

<sup>1</sup> Writ of error denied by supreme court.

which this defendant signed said bond, and that said notice was given to him prior to the time when said bond went into the possession of said county judge, if in fact said bond was ever in his possession. A special exception to this part of the answer was sustained on the ground that it stated no defense. The answer further alleged that the bond sued on had never been tendered or delivered to the county judge to whom it was payable, and had never been approved by him. The court submitted the question last stated to the jury, and, a verdict having been returned for plaintiff, all of the defendants have appealed.

The first objection urged to the action of the court below is to the sustaining of the exception to the special answer of appellant Smythe, and we think it is well taken. As to whether or not a bond signed by a surety, and left with his principal, upon such a condition as that set out in the answer, can be enforced against such surety, where it has been delivered by the principal to the obligee in violation of the condition, and has been accepted by the obligee without notice of the condition, there is conflict of authority. The supreme court of this state has decided that, under the facts stated, the surety is liable. *Ballow v. Wichita Co.*, 74 Tex. 341, 12 S. W. 48. But none of the authorities cited, and none that we know of, hold that the surety is liable where notice of the condition is given to the obligee, either directly or circumstantially, before the acceptance of the obligation. On the contrary, all of them admit that, in such a case, the defense is available. Many authorities hold that an obligor in a bond cannot, when sued upon it, show by parol evidence that he delivered it in escrow to the obligee, or to one of several obligees, upon such a condition.

But this is not the case presented by the answer. The bond was not delivered by the surety to the obligee, but was signed and placed in the hands of his co-obligor with the stipulation that it was not to take effect or be delivered to the obligee unless another surety signed it. If the principal delivered it to the obligee, and the latter accepted and approved it, without notice of the condition upon which it had been signed by Smythe, the latter will be estopped to urge the defense. *Dair v. U. S.*, 16 Wall. 1. But if, as alleged, the obligee had notice when he received and approved the bond, this would constitute a defense for Smythe. The decision of this court in the case of *City of Hallettsville v. Long*, 32 S. W. 567, has no application here. No question was there involved as to the due execution of the bond, or its completeness as an obligation, but the sureties undertook to defeat it by an allegation that officers of the city, who received and approved it, had represented that the principal, who had been chosen to an office, was worthy to fill it, when in fact he was known

to them to be a defaulter. This was held, in substance, to have been an act outside the line of the duties of the officers taking the bond, and was not to be imputed to the city. The bond was executed, received, and approved in compliance with law, and was held to have taken effect accordingly, unaffected by the representations of the officers. The point here is that the bond was never executed by the surety so as to bind him, and it is not an unauthorized act of the officer taking it that is relied on to defeat it. The court, therefore, erred in sustaining the exception to the answer, and in excluding evidence tending to sustain it.

Though this defense of Smythe should fail, still if the bond was never delivered to and accepted by the county judge, whose duty it was made by law to take the bond, no recovery could be had upon it. This was recognized by the court below, and the question was submitted to the jury. It is urged that the court erred in admitting the bond in evidence, and that the verdict of the jury is contrary to the evidence, because the delivery and approval of the bond were not sufficiently shown. The bond was found, after the expiration of the term of office of the treasurer and of the county judge, whose duty it was to have taken the bond, in a tin file box in the office of the clerk, among other official bonds of the county. This was the proper place of deposit. It had no file mark and no indorsement of approval upon it, and bore date — day of November, 1892, which was the time at which McFarlane was elected. McFarlane testified that he had never delivered it to the county judge, nor to any one, as his official bond. The person who was county judge at the time of McFarlane's election testified by deposition, and could not remember positively whether or not the bond had ever been delivered to and approved by him, but stated circumstances tending to show that it had not. McFarlane held his office for two years, and received the school funds in that capacity without objections from any quarter, and there was no other bond which entitled him to do so. We are of the opinion that the court did not err in admitting the bond in evidence, and we cannot say that the jury were not warranted in finding for plaintiff on this issue.

The statements testified to by Votaw and Chester, as having been made to them by McFarlane, tended to weaken McFarlane's testimony, and, a proper predicate having been laid for contradicting him, were admissible for that purpose. They were not admissible, however, as affirmative evidence against the sureties. *Association v. Smith*, 70 Tex. 168, 7 S. W. 793.

The rulings of the court upon the evidence of the witness Belk are not sufficiently briefed to require us to consider them, but, in view of another trial, we will indicate our views briefly. The excluded portion of the answer

to the sixth interrogatory was not responsive to the question, but this objection could only be made by motion to suppress before the trial. The statement of facts states that the answers were excluded on motion, but at what stage is not stated. The bill of exceptions states that the rulings were made on objection urged during the trial. This objection was not available in this way. *Railway Co. v. Ivy*, 71 Tex. 417, 9 S. W. 348; *Wyatt v. Foster*, 79 Tex. 413, 15 S. W. 679.

The other objection was that the answer "was the opinion of the witness, irrelevant, and hearsay." The evidence was relevant, and was not hearsay. All of it was admissible, except the statement: "Finding the bond in this condition makes me think it may have been presented to me for approval, and rejected," which is only an opinion.

The excluded portion of the answer to the eighth interrogatory was not called for by the question, but the fact stated was admissible, unless motion to suppress was made at proper time.

The portion of the tenth answer was properly excluded, being purely an inference or opinion of the witness.

The certificate of the comptroller, showing the amount paid to McFarlane as treasurer during the year in question, was admissible. Rev. St. 1896, arts. 2308, 2436. The statement also showed the amounts paid to him in other years, and this was irrelevant, but did not render the whole statement inadmissible. Besides, the same fact was shown by the treasurer's report and by the uncontradicted evidence in the case, and, if there had been error, it would have been harmless.

The evidence of Howell to the admission made to him by McFarlane, after his term of office had expired, of a shortage in his accounts, was admissible against McFarlane, but not against the sureties. *Association v. Smith*, *supra*. The fact of shortage, however, was conclusively established. The plaintiff made out his case by showing that the treasurer had received the money sued for, and had failed to account for it, and had not paid it over to his successor.

There is evidence tending to show that, if the bond was ever delivered to the county judge, it was done more than 20 days after McFarlane received his certificate of election, and it seems to be contended that this would render the bond void. We cannot agree to this proposition. The statute is directory, and the giving of the bond within 20 days is not essential to its validity. *Mechem*, Pub. Off. § 265.

For the errors committed against the sureties, *Smythe* and *Price*, the judgment against them will be reversed, and the cause remanded for a new trial of the issues between them and the plaintiff. But as McFarlane is liable for the amount recovered, regardless of the bond, and as there is no error as to him, the judgment against him will be affirmed. Affirmed in part and reversed in part.

# FISHBACK v. PAGE et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 18, 1897.)

## EXECUTORS AND ADMINISTRATORS — SALES UNDER ORDER OF COURT—RECOVERY BY HEIRS.

1. The court ordered the sale of a lot belonging to an estate, and afterwards, and before the sale, ordered the sale of one-half of the same lot. The administrator's report and the order of confirmation showed a sale under the latter order, but the report mentioned the whole lot. The order of confirmation did not specifically mention the lot. *Held*, that the second order avoided the first, and that the order of confirmation showed that the court was affirming the second order; and, inasmuch as the confirmation did not show that the court had its attention called to, and acted upon, the unauthorized sale of the whole lot upon approving it, title to the half of the lot did not pass.

2. Where there was an illegal sale of real estate by an administrator, and the deed given by the administrator recites that the sale was made on six months' time, and there is no report by the administrator that he ever received the consideration, or applied it to the benefit of the estate, payment of money by the heirs before recovering the land from the illegal holders will not be required.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by Jesse Lee Page and another against W. M. Fishback to recover land. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jones & Wheless, for appellant. James B. & Chas. J. Stubbs, for appellees.

WILLIAMS, J. Appellees, Charles N. Smith and Jesse Lee Page, who are heirs of Parker Smith, deceased, brought this action against appellant, Fishback, and others, to recover the north half of lot 45 of section 1, on Galveston Island. From a former judgment in favor of the defendants, plaintiffs prosecuted an appeal, the decision of this court upon which will be found in 31 S. W. 424. After the cause was remanded, a judgment was rendered in favor of the plaintiffs for the land sued for, and this appeal is the consequence. The other defendants disclaimed as to the land sued for, alleging that the land claimed by them was the south half of the lot. The appellant, Fishback, in order to defeat the title which plaintiffs claimed by inheritance from Parker Smith, relied on proceedings in the administration of his estate in Grimes county. The evidence showed that the whole lot had been the community property of Smith and his wife, and that the former died in 1864, and the latter in 1869; that on the 30th day of March, 1870, E. D. Johnson was appointed administrator de bonis non of the estate of Parker Smith, and that, upon the inventory of said estate, an undivided half of the lot in question was entered; that on the 11th day of October, 1871, an order was made by the probate court authorizing the administrator to sell "lot 45,

<sup>1</sup> Writ of error denied by supreme court.

section 1, on Galveston Island": that on the 28th day of February, 1872, another order was entered, reciting the making and approval of an auditor's report, the presentation by the administrator of an application for the sale of real estate to pay debts, and granting same, and ordering the administrator to sell, on the first Tuesday in May, 1872, the lands described, among which was mentioned "the undivided half of lot 45, section 1, in city of Galveston." In connection with this, there was offered in evidence a copy of an exhibit of the condition of the estate, which bears no file mark, but which was sworn to by the administrator on the 4th day of June, 1872, before the clerk of the court in which the administration was pending. In this the administrator charges himself with several sums of money, specifying the sources from which they were received, but makes no mention of any money received for the land in question. After crediting himself with amounts disbursed, the administrator states: "The administrator would further report that he has sold the balance of the real property belonging to the estate, a report of which will be submitted at the present term of the court for approval; that he has turned over to R. S. Robinson, guardian of the minor heirs, the homestead property, situated in the city of Navasota, together with all the rentals accruing therefrom while in his possession." Defendant also offered a report of sale, having no file mark, but sworn to before said clerk on the 6th day of June, 1872. In this the administrator says he "submits this as his report of the sale of land and city lots in pursuance of an order of this honorable court rendered at the February term, 1872." The property sold is listed in the following manner:

"The Houston City property, commonly called 'Parker Smith's Addition to the City of Houston.'"

"J. Q. Yarbrough bld off."

"Lot No. 7, block 14,"

"\$15.75."

Then follows a list of lots and purchases stated in the same way, covering several pages, after which is the following:

"Galveston property, lot 45, section 1 (out-lot)."

"To Clough & Johnson, \$652." "\$326.00."

Following this is a list of Harris county land sold. The prices for which the property sold are stated in the right margin of the paper, in a line, the only variation being, as above indicated, in the case of the Galveston property.

Upon this report the following order was entered, June 7, 1872: "Estate of Parker Smith, Deceased. E. D. Johnson, Administrator. June 7th, 1872. Now comes E. D. Johnson, administrator of Parker Smith, deceased, and files his account of the sale of land and city lots made by him on the first Tuesday in May at the court-house door of said county, in accordance with a decree rendered by this court at the February term

thereof, A. D. 1872; and the same having been inspected by the court, and found correct, and in accordance with law, the said sale is in all things confirmed, and the administrator ordered to execute deeds to the purchasers as required by statute, and it appearing to the satisfaction of the court that D. W. Shannon purchased block No. 16 in Parker Smith's addition to the city of Houston, in the sum of \$100, having previously purchased said block 16 of Robinson, the immediate predecessor of the said E. D. Johnson, in extinguishment of claim held by Shannon," etc. The deed from the administrator to Clough & Johnson is dated May 23, 1872, and recorded July 7, 1874. It recites an order of the court made at the February term, 1872, for the sale of lot 45, section 1, city and county of Galveston, on a credit of six months, with security and mortgage required by statute; a sale on the first Tuesday in April, 1872; the purchase by Clough & Johnson for the sum of \$652; and conveys lot 45, section 1, "in consideration of the sum of six hundred and fifty-two dollars to me in hand paid, the receipt whereof is hereby acknowledged." The defendants, besides Fishback, showed regular title from Clough & Johnson to themselves for the south half, and Fishback showed title to himself from Clough & Johnson for the north half, of the lot. The conveyance of the south half was older in date than that of the north half, and neither party disputes the title of the other defendants. It was shown that all of the file papers in the estate of Parker Smith had been burned with the court house of Grimes county, from which we infer that the report of sale and exhibit offered in evidence were found on record. There is no evidence, however, that any of the orders of the court have ever been destroyed. The orders referred to are the only ones, affecting the property in question, which can be found; and there is no evidence among the records that the administration has ever been closed. Charles N. Smith testifies as follows: "That he had learned of the interest which he and his co-plaintiff had in the lot in question before the suit was brought. Had been previously advised that this property had been sold in good faith by the administrator of his father's estate, and the money derived from such sale applied to the discharge of the debts of the estate, but that he had not relinquished his claim to the property. His attorneys were to get one-half they might recover. His mother's second husband was R. S. Robinson. He did not know that his stepfather had been his guardian; did not know E. D. Johnson, administrator of his father's estate; and that neither of the plaintiffs had received anything from the estate. They had been shown no benefit from the sale of lot forty-five, section one, claimed to have been made by the administrator of his father's estate."

Upon these facts, we are of the opinion that the judgment in favor of the plaintiffs is correct. It was held on the former appeal that

the order of February, 1872, had the effect to revoke that of October, 1871, and to substitute, for the authority given by the last-named order to sell the whole lot, authority to sell only half of it. We see no reason to change our view upon that point, and it does not seem to be combated. It is contended that a confirmation of a sale made without previous authority will pass title to the land, such as cannot be attacked collaterally; and, while the proposition is contrary to some authorities elsewhere, and especially against the reasoning in the case of *Ball v. Collins* (Tex. Sup.) 5 S. W. 622, we are yet inclined to the opinion that it is true. We do not at present see how a contrary view can well be reconciled with the decision in the case of *Pelham v. Murray*, 64 Tex. 477, and others, which might be cited, in line with it. But we find it unnecessary to go at length into that question. As we have before pointed out, the administrator reported, and the court confirmed, a sale made in pursuance of the February order, which authorized the sale of only one-half of the land. While the whole lot is mentioned in that report, it is not mentioned in a way to call the court's attention to the fact that a sale in excess of the authority given had been made. The order of confirmation plainly shows that the court was approving what had been previously authorized, and not what had been done without authority. If a confirmation is to have the effect of passing title under a sale made without authority, it certainly should be made clear that the court acted upon the unauthorized act, and approved it. It will not be presumed to have acted illegally. Here a sale was authorized of half the land. The administrator sold not only half, but the whole. He made to the court a report stating that the sale was made in pursuance of the authority given, and the court approved it as having been so made. This is all consistent with the supposition that the court acted only on the sale made as authorized, of one half, and that the fact that the administrator had sold the other half was not called to its attention. This construction should be adopted, because it harmonizes the action of the court with its duty under the law. The course of procedure for the sale of land to pay debts of the estate was prescribed by statute; and, whatever the court may have had the power to do, it did not have the right to pass away the title to the land through illegal sales, and it should not be presumed to have done so, as long as its action can be reasonably explained otherwise. We again point out the fact that the court did not act on the exhibit of June the 4th. We cannot presume any other orders than those relied on, because all of the proceedings refer to this one order of February, as their warrant, and no circumstance suggests that there was any other authorizing the sale made. Nor can we hold that the court should have required the plaintiffs to pay any money before allowing

them to recover. It is not shown that any was ever paid to the administrator by Clough & Johnson, or, if it was, that it was applied to the payment of debts of the estate. The deed acknowledges the receipt of the price, but at the same time recites that the sale was made upon a credit of six months, with security and mortgage. It was not, then, an uncommon thing for a deed to recite payment of the consideration, when only securities were taken for the price. In the exhibit made after the deed, the administrator assumes to state the moneys which he had received, and makes no mention of any paid for this land. If the sale had been legal, it, perhaps, would be proper to presume, after this lapse of time, that the price had been paid; but, as to half of the land, it was illegal, and did not pass the title out of the estate, and hence such a presumption should not be indulged. It is doubtful if the acknowledgment of the receipt of the consideration in the deed, the sale being unauthorized, can be considered evidence against plaintiffs that the money was paid; but, whether admissible or not, such recital was not true, or else the exhibit was not, and we cannot hold that it is sufficient evidence of the fact recited. If the money had been shown to have gone into the hands of the administrator, there still would be no evidence that he paid it out on debts of the estate. How much might be presumed in favor of the correctness of his disposition of money realized from a legal sale, we need not determine. Since the sale was illegal, and passed no title, we cannot presume that he devoted the proceeds, if collected, to the discharge of burdens upon the estate. The testimony of appellee Smith is not legal evidence of the fact of receipt and application of the money by the administrator. Affirmed.

#### GOVAN et al. v. BYNUM et al.

(Court of Civil Appeals of Texas. Nov. 18, 1897.)

#### EXECUTION — SALE OF DECEDENT'S LAND — VALIDITY — COLLATERAL ATTACK.

1. Where a judgment was rendered by the district court in 1872, and affirmed by the supreme court in 1874, and the judgment debtor died in 1878, an execution thereon could not issue thereafter against the independent executrix of the deceased, she never having been a party to the suit.

2. Right of action of remainder-men for the recovery of land does not accrue until the death of the owner of the life estate.

Appeal from district court, Houston county; G. H. Gould, Special Judge.

Action by J. J. Bynum and others against Jake Govan and others to recover certain land. Verdict for plaintiffs. Defendants appeal. Affirmed.

Nunn, Nunn & Nunn, for appellants. H. W. Moore, for appellees.

GARRETT, C. J. This is an action of trespass to try title, brought by the appellees, as the devisees of William Albright, deceased, to recover of the appellants 702 acres of land, part of the Collin Aldrich league, situated in Houston county. The land was claimed by the appellant J. W. Hall through a sheriff's deed to him under an execution issued upon a judgment recovered against William Albright in the case of W. F. Corley against William Albright. On a former appeal by the present appellees the execution sale and the sheriff's deed were held to be void, and the judgment of the court below in favor of Hall for the recovery of the land was reversed, and the cause remanded. 29 S. W. 1119. The facts are as follows: In November, 1872, a judgment was rendered in the district court of Houston county in favor of W. F. Corley against William Albright for costs of suit in cause No. 1,692 (William Albright v. W. F. Corley), and from that judgment Albright appealed to the supreme court, and that court affirmed the judgment of the court below in the year 1874. After the mandate of the supreme court upon this judgment had been filed in the court below, Albright made a motion in the district court to retax the costs of the suit, which was overruled. From this order Albright appealed to the supreme court, and that court affirmed the judgment of the district court overruling the motion to retax on the 10th day of March, 1881. Pending the appeal from the judgment of the court on the motion to retax the costs, to wit, December 28, 1878, Albright died, leaving a will, whereby he appointed his wife, Ann P. Albright, Independent executrix, and she qualified in March, 1879. The testator bequeathed his entire estate, real and personal, to his wife for the term of her life or during her widowhood, with the remainder to his children, the appellees here. After the affirmance of the second judgment in the suit of Albright v. Corley, an execution was issued out of the district court of Houston county on the judgment rendered in 1872, and levied on the interest of William Albright in 1,452 acres of land, a portion of which is the land in controversy, then in possession of the widow of Albright, executrix of his will; and at the sale had under this execution the appellant James W. Hall became the purchaser of the land for the sum of \$124, which was received by the sheriff, and applied to the payment of the judgment upon which the execution was issued. The widow, Ann P. Albright, died in 1880, without ever having married again, and the appellees brought this suit against the appellants to recover the land. The court below, in its charge to the jury, followed the decision of this court on the former appeal, and verdict and judgment were rendered in favor of the appellees for the recovery of the land, and in favor of appellant Hall for the return of his bid, with interest. Upon the second trial the appellants pleaded the statute of limitations of three, five, and

ten years, and the matters presented on this second appeal are: First, that the execution, sheriff's sale, and deed were not void, but at most voidable, and not subject to attack in a collateral proceeding; and that the court erred in refusing the instruction upon limitations requested by appellants, and in instructing the jury that limitation would not commence to run until after the death of Ann P. Albright.

Upon the former appeal of this case it was held that the execution and the sale thereunder and consequently the deed through which the appellant James W. Hall claims title to the property in controversy were void and inoperative to vest any title in him. We see no reason to change the conclusion then reached. The appellants insist that, by force of articles 1044 and 1067 of the Revised Statutes of 1879, an execution was authorized against the property of William Albright, deceased, in the hands of the independent executrix of his will, Ann P. Albright, upon the filing of the mandate of the supreme court, without any further order or decree of the district court. Article 1044 provides that no cause shall abate in the supreme court by reason of the death of a party pending appeal, that the court shall proceed to adjudicate the cause as if all the parties were still living, and that such judgment should have the same force and effect as if rendered in the lifetime of all the parties thereto. In the case of a living person it would be the duty of the clerk to issue execution upon the filing of the mandate without further order of the district court. Article 1067. Suppose, however, the defendant should be dead when the clerk came to issue an execution, although alive at the time of the rendition of the judgment, the clerk would then be without authority to issue an execution. Rev. St. 1879, art. 2275. An independent executor may be sued, and, when judgment is rendered against him, execution may run against the estate of the testator in his hands. Rev. St. 1879, art. 1943. There was no suit against Ann P. Albright, and she was never a party to the suit of Albright v. Corley. No opportunity was given to her in any manner to try the question as to whether or not execution should run against property of the estate in her hands. The authorization by the statute of execution against the estate of the testator in the hands of an independent executor is only in the enforcement of the judgment in a suit to which the executor is a party. The clerk of the court certainly has no authority to determine the question necessarily involved in the issuance of an execution against the independent executor of a party who has died since judgment. But what has been said relates to a case where the party has died pending appeal. The execution under which Hall claims was issued upon the judgment rendered by the district court in 1872, and affirmed by the supreme court in 1874,—long before the death of Albright, which occurred in



1878. This fact is shown by the execution docket and the recital in the deed, the execution itself being lost. Such being the case, there is no room to invoke the construction of the articles of the Revised Statutes sought by the appellants. The judgment which was affirmed by the supreme court after the death of Albright was that of the district court upon a motion to retax costs in the cause No. 1,692 (*William Albright v. W. F. Corley*), and from which Albright appealed, and died pending appeal. There was no limitation. Ann F. Albright, who, under the will, owned the life estate, died in 1889, in widowhood, and the appellees, who are the remaindermen, brought this suit for the recovery of the land in 1890. Their cause of action did not accrue until the death of the owner of the life estate. *Cook v. Caswell*, 81 Tex. 684, 17 S. W. 385; 13 Am. & Eng. Enc. Law, 720, and authorities cited. Limitation did not commence to run until the cause of action accrued. Upon the cross assignments of the appellees, we are of the opinion that there was no error in allowing the appellant Hall to recover of them the amount of his bid and interest. There is no error in the judgment of the court below, and it will be affirmed.

#### LASATER et al. v. FANT.

(Court of Civil Appeals of Texas. Dec. 2, 1897.)

#### FORCIBLE ENTRY AND DETAINER—COMPLAINT—SUFFICIENCY—AMENDMENT.

1. A complaint in forcible entry and detainer alleged that plaintiff was in peaceful possession of the premises known as "El Lucero," in Hidalgo county, by purchase and lease, by virtue of which he is still possessed of same, and that he desires to again possess the estate on termination of said term; that certain parties entered into possession by placing posts for a fence around the land; that demand for possession was made on said parties by plaintiff; that possession was refused; and that said parties willfully hold the premises. *Held*, that the complaint was defective, in that it did not locate the land in the precinct in which the action was begun, nor sufficiently describe the land, nor state statutory grounds for bringing the action, nor show ouster of plaintiff.

2. When an amendment of a defective pleading in the county court would be equivalent to bringing a new action, no amendment can be made.

Error from Hidalgo county court; J. M. De La Vina, Judge.

Action by D. R. Fant against Ed. C. Lasater and another. From a judgment for plaintiff, defendants bring error. Reversed.

G. R. Scott & Bro., for defendant in error.

WILLIAMS, J. An action of forcible entry and detainer was instituted before a justice of the peace of Hidalgo county, on the following complaint:

"No. 11. The State of Texas, County of Hidalgo. Justice's Court, Precinct No. 6. To Jesse Dennett, Justice of the Peace in Said Precinct: D. R. Fant, by N. L. Word,

43 S.W.—21

shows that heretofore, to wit, on the 14th day of September, 1896, he was in peaceful possession of state certificates Nos. 82, 70, 68, and 59, and the tract of land called 'El Lucero,' and any and all other lands adjacent thereto, in the county of Hidalgo, and state of Texas, by right of purchase and lease, together with the improvements thereon situated; that, on said day, E. C. Lasater, by his agent, R. H. Rice, entered upon said premises, by erecting a fence or placing posts in the ground for a fence; that, by virtue of said lease and purchase, the said D. R. Fant entered into the possession of said premises, and is still possessed by the same; that being desirous, upon the determination of said term, to have again and repossess his said estate, he, for that purpose, did, on the 14th day of September, A. D. 1896, make demand in writing of the said E. C. Lasater, through R. H. Rice, agent, for possession thereof; and the said E. C. Lasater, through R. H. Rice, agent, has hitherto refused, and still does refuse, to comply with said demand, but willfully holds said premises. Whereof he prays that the defendant be cited to answer this complaint, and that he have judgment for the restitution of said premises, and for costs. N. L. Word.

"Sworn to and subscribed before me, this 14th day of September, A. D. 1896. Jesse Dennett, Justice of the Peace, Precinct No. 6, Hidalgo Co."

Citation was issued by the justice of the peace, which commanded the officer to summon the said E. C. Lasater or R. H. Rice, agent. The return of the officer states that the writ was executed by citing R. H. Rice, agent, for E. C. Lasater, etc. The case was tried September 21, 1896, and a judgment was rendered reciting the appearance of the plaintiff by N. L. Word, agent, and of the defendant by R. H. Rice, agent, and reciting the trial and the verdict of the jury, finding the defendant guilty as charged in the complaint, and adjudging restitution of the land to the complainant. Notice of appeal was given, and an appeal bond was filed, signed, "Ed. C. Lasater, per R. H. Rice, Agent," and by the other plaintiffs in error as sureties. In the county court the plaintiff filed a plea asking the recovery of damages for the use of the premises pending the appeal, and reasonable expenses incurred. On the day on which this plea was filed, judgment by default was entered by the court for the land, describing it somewhat more fully than was done in the complaint, and for \$1,000, the full amount claimed by the plea above referred to. It is from this judgment that the present writ of error is prosecuted by Lasater and his sureties on his appeal bond.

The assignments of error point out, as grounds for reversal, many irregularities in the proceedings; but it is only necessary for us to pass upon those which question the sufficiency of the complaint. The complaint was totally defective in the following par-

ticulars: (1) It did not show that the land, the possession of which was sought to be recovered, was situated in the precinct in which the action was begun; (2) it did not give any sufficient description of the land; (3) it stated no one of the grounds upon which the statute regulating this proceeding allowed it to be prosecuted. A mere comparison of the complaint with the statute renders this so obvious that further elaboration is unnecessary. The complaint, on its face, states that the plaintiff Fant still remains in the possession of the premises, and only shows that the entry complained of was made by erecting a fence or putting posts in the ground for a fence. It fails to show an ouster by the defendant, and, if it showed an ouster by Rice, it is doubtful if it would be sufficient to support the proceedings against Lasater. The complaint is so defective that it states no cause of action whatever, and an amendment of it in the county court would be equivalent to the bringing of a new action, which cannot be done in that court. Hence it is proper to reverse the judgment, and dismiss the cause. Reversed and dismissed.

#### HEDGECOXE v. CONNER.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 13, 1897.)

#### APPEAL—STATEMENT OF FACTS—JUDGMENT—CORRECTION AFTER TERM—COSTS.

1. On appeal from the ruling on a motion, made after the term, to tax the costs to the other party, the transcript need not include the statement of facts of the original action, where such statement was not made a part of the record of the hearing on the motion, either by exhibit, or by being introduced in evidence.

2. The district court has no jurisdiction to correct a valid and final judgment, after the term at which it was rendered, upon a motion filed for the purpose of taxing costs to the other party on the ground that they had been wrongfully adjudged against the moving party.

Error from district court, Archer county; George E. Miller, Judge.

Action by C. R. Conner against Otto Hedgecoxe and others. From a judgment for plaintiff against defendant Otto Hedgecoxe, said defendant brings error. Reversed.

K. R. Craig, for plaintiff in error. F. E. Dy-cus, for defendant in error.

HUNTER, J. The question involved in this case is whether the district court,—in a case where judgment is erroneously rendered against one of the parties for costs,—after the expiration of the term at which the judgment was rendered, upon motion to correct that part of the judgment so as to adjudge the costs against the other party, has jurisdiction to correct the error in the judgment. The court below held, in effect, that the motion was in the nature of a motion to correct a mistake in the entry of the judgment, and that the correction might legally be made,

where the statement of facts made up, signed, approved, and filed on the original trial showed that the judgment for the costs, as rendered, was erroneous, and that it should have been, under the provisions of the statute, adjudged and taxed in favor of the other party, and at a subsequent term corrected the said judgment so as to make it conform to the statute. This action of the court is complained of on this appeal by the plaintiff in error.

The first point presented for our decision, however, is made by the defendants in error, who move to strike out the plaintiff in error's transcript because it fails to include a statement of the facts made up and filed in the original case at the preceding term of court; there being no statement of facts or conclusions of fact filed in the case as tried upon the motion to correct the judgment. It is contended by defendants in error that the motion to correct the judgment in respect to the erroneous adjudication of the costs against him was, in effect, a motion to retax the costs, and could therefore be made at any time, and was a part of the original case, or, rather, that the original case was a part of the case made by the motion, and that, as the statement of facts filed showed the error in the judgment, it ought to form a part of the transcript in this case, and themselves file a transcript containing same. We are inclined to think differently. The statement of facts in the original case could properly become a part of the record on the trial of the motion only by the plaintiff making it a part of his motion, as an exhibit, or introducing it in evidence, and bringing it up as part of the statement of facts filed and approved on the trial of the motion. We therefore overrule the defendants in error's motion to strike out plaintiff in error's transcript.

The main question, as stated in the beginning of this opinion, now recurs. The record shows that at the September term, 1896, of the district court of Archer county, a final judgment was rendered in cause No. 312, entitled "C. R. Conner v. W. H. Baldwin et al.," and in which cause Otto Hedgecoxe had been vouched in by personal service, as a party defendant, by Conner, as warrantor of the title to the lands in controversy, against whom judgment for the purchase money was prayed for, in case he should fail to establish his title against the defendants, who, except Baldwin, were sued as nonresident and unknown heirs, claiming under adverse deeds which were sought to be canceled. The cause was tried without a jury, and the court rendered judgment in favor of plaintiff, Conner, canceling the deeds under which defendants claimed title, and removing the clouds from, and quieting the title of plaintiff to, said lands; but, as the defendants were nonresidents and unknown heirs, represented only by an attorney appointed by the court, except Baldwin, who disclaimed, judgment was rendered against Conner for all costs of the suit. The judgment also further provided as fol-

<sup>1</sup> Writ of error denied by supreme court.

lows: "It is further ordered that the defendant Otto Hedgecoxe go hence without day, and recover his costs of plaintiff, for which execution may issue." Plaintiff, Conner, excepted to this judgment, and gave notice of appeal, and made out and filed in due time a statement of the facts, upon which the case was tried and judgment rendered, and perfected his appeal by filing a proper appeal bond on September 21, 1896. He also filed an assignment of errors, which complained of the court's action in not rendering judgment against Hedgecoxe in favor of plaintiff for costs, because the evidence showed that the title conveyed to him by Hedgecoxe was not good, but that plaintiff's recovery was based upon his title as acquired by limitation. There were other assignments of error, also, but all complaining of the court's judgment in disposing of the question of costs. It appears, if we may consider our records made in the main case, that this appeal was lost by reason of the failure of the transcript to reach the clerk of this court within the time required by law. After the adjournment of the September term of the district court, to wit, on February 18, 1897, Conner filed a motion in said cause, which he indorsed as a "motion to retax costs," the grounds of which were substantially the same as set forth in his assignments of error previously filed as aforesaid. It is questionable whether proper notice of this motion was given to Hedgecoxe, but we refrain from passing on this question, because of our decided views on the main question involved. The court, on this motion, on March 3, 1897, rendered judgment as follows: "C. R. Conner vs. W. H. Baldwin et al. No. 312. March 3, 1897. This day came on to be heard for trial on the motion of the plaintiff, C. R. Conner, to have retaxed the costs heretofore taxed in this cause against plaintiff; and it appearing to the court that due notice of the motion was given by the attorney of plaintiff to K. R. Craig, attorney of record for defendant Otto Hedgecoxe, on or about the 16th day of February, 1897, and it appearing to the court that the defendants C. H. Stebbins, Fanny J. Nobles, George R. Talbot, John Randolph Grymes, and Lucien Randolph Helmeberger have filed a motion for a new trial in this cause against the said C. R. Conner and Otto Hedgecoxe, and that said suit for new trial is pending in this court, and is styled 'C. H. Stebbins et al. vs. C. R. Conner et al.,' and is No. 613, and that all the parties in this cause are now before the court in said motion for new trial, and that both suits are practically one, and should be treated herein as such, and it further appearing to the court that the said motion should be granted, so as to show that judgment was rendered in favor of plaintiffs against defendant, C. R. Conner, for all costs in said behalf incurred, it is therefore ordered and adjudged by the court that the plaintiff, C. R. Conner, do have and recover of and from the defendant Otto Hedgecoxe all

costs incurred in this court in this cause, No. 312, styled 'C. R. Conner vs. W. H. Baldwin et al.,' in which judgment was rendered on the 3d day of September, 1896. See Minute Book C, page 119, of the district court of Archer county, Texas. And it is further ordered and adjudged that the plaintiff, C. R. Conner, have his execution against the said Hedgecoxe for all costs in this cause incurred." The plaintiff in error, in one of his assignments, complains that the district court was without jurisdiction to render this judgment, correcting, as it does, a judgment rendered at a former term of the court; and this assignment we sustain. It was not a motion to retax the costs, although indorsed as such, and treated as such, by the district court. It was a motion to readjudge the costs, and, to that extent, an effort to correct an error of the court committed in rendering the judgment. *Parker v. Boyd* (decided by this court Nov. 6, 1897) 42 S. W. 1031. The district court has no jurisdiction to correct its valid final judgments upon motion, after the adjournment of the term at which they were rendered, except as given in articles 1356 and 1357 of our Revised Statutes of 1895. This was not a mistake committed by the clerk in entering the judgment. It was an error of the court, committed in pronouncing or rendering it, which could only be corrected after the term by appeal or writ of error to this court. See, also, *City of Brownsville v. Basse*, 43 Tex. 440; *Insurance Co. v. McCormick*, 20 Wis. 265; 1 Freem. Judgm. (4th Ed.) § 70. We are therefore of opinion that the judgment complained of should be reversed, and the suit or motion of defendant in error dismissed.

#### THORP et al. v. GORDON.

(Court of Civil Appeals of Texas. Dec. 4, 1897.)

#### DEFAULT JUDGMENTS—COLLATERAL ATTACK—DEVISES—CONTRACTS—CONSIDERATION—CONSTRUCTIVE TRUSTS.

1. A default judgment can be set aside for error in taking the default only by direct proceedings, and not by collateral attack.

2. Where the devisee of land which had been sold for taxes promised the executor of his devisee that he would buy the land, and convey it to the said executor, the contract was without consideration, and void.

3. Where the devisee of land takes a deed thereto from the city, which has bought the land at tax sale, and pays the amount of the taxes as consideration therefor, after having promised the executor of the estate that he would convey the land to the estate, neither the executor nor the creditors can claim a constructive trust was created by his promise.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Trespass to try title brought by W. D. Gordon, executor, against E. O. Thorp and others. From a judgment for plaintiff, defendants appeal. Reversed.

Sidney Wilson, for appellants. W. D. Gordon and Galloway & Dunlap, for appellee.

HUNTER, J. This was an action of trespass to try title, brought by appellee, as executor of the will of S. C. Eason, deceased, on November 17, 1896, to recover the east two-thirds of lot No. 10, block No. 8, according to the original town plat of the city of Sherman, known as the "Eason Homestead," corner of Lamar and Walnut streets, against E. O. Thorp, M. L. Thorp, and the city of Sherman. The answers of defendants were general denials. The case was tried by the court, without a jury, and judgment was rendered on March 23, 1897, in favor of the plaintiff, Gordon, as executor, for the lot sued for, except a part of said land, 30x50 feet off the south end thereof. It was provided in the decree that Gordon should pay to the city of Sherman a note of \$180.78, which the Thorps had executed to said city for the purchase money of said lot, and save the Thorps harmless from the payment of the same.

No conclusions of fact or of law were filed by the court, but the case comes here upon a statement of facts, from which we deduce the following: The title to the land was in S. C. Eason, but on the 7th day of April, 1893, there was \$124 taxes due to the city of Sherman, which was a lien upon it. For these taxes the land was sold by the assessor and collector of taxes for the city, on April 7, 1893, the city becoming the purchaser, bidding the amount of the taxes due, and on that day the land was conveyed to the city by the tax collector, in pursuance of said sale. The city of Sherman sued S. C. Eason in the district court of Grayson county, in trespass to try title, to recover said land, and on January 12, 1896, recovered judgment for the same, with writ of restitution. On March 23, 1896, the city of Sherman deeded the property to E. O. Thorp and M. L. Thorp, husband and wife, and the same to whom S. C. Eason had devised it by his will, for the consideration of \$130.78, for which they gave their note to the city, with vendor's lien on the land to secure payment thereof; and, the said Thorps being already in possession of the land, no writ of restitution was ever issued, but they continued to hold same after their purchase from the city, under the city's deed to them. The lot was improved, and was all the time worth from, at least, \$2,000 to \$4,000. The city had offered S. C. Eason to convey the land back to him if he would pay the taxes due against it, which proposition he would not accept, or failed to accept. His estate, including costs of administration, owed about \$500; but \$200 was paid by the sale of personal property, and \$95 paid by defendant Mrs. Thorp. The balance remains unpaid, and this land is all the property left out of which to pay debts.

The evidence is conflicting as to whether appellee requested Thorp to pay the taxes and redeem the land from the tax sale. Thorp bought the land from the city for his

own personal benefit, and took the conveyance to himself in his own right, and not for the benefit of the estate. His intention was to buy from the city, and defeat the unpaid debts due from the estate. The executor knew that the city had deeded the property to Thorp, but supposed, as he was one of the beneficiaries under the will, he had bought it in for the estate, and did not know that he had bought it for himself, and was holding it adversely to him, until a short time before this suit was brought. The evidence is conflicting as to whether Thorp had told the executor, in effect, that he would pay the taxes and redeem the land for the estate, and that the executor said he would have to sell it if Thorp did not redeem it. The record fails to disclose when Dr. S. C. Eason died. On January 5, 1895, S. C. Eason conveyed to E. O. Thorp 30x50 feet off the south end of the lot in controversy. The city attorney, before Dr. Eason's death, went to him a number of times, each time insisting that he would lose his property, as it belonged to the city. He had, he said, been advised by Mr. Gordon not to pay the taxes, as his home could not be taken from him. The city attorney told him that it could, and begged him to pay the taxes, and wrote him several letters about it, but all to no purpose. He then saw Mr. Gordon, but could get nothing from him except offers of compromise on the amount. He spoke to Gordon a number of times about the taxes after Dr. Eason's death, but could get nothing out of him, and finally had the city to deed the property to Thorp. It had been the custom of the city and its attorney to reconvey the lands to the owners when they would pay the taxes for which they had been sold, and often gave the delinquent parties long time to pay in, where they were financially embarrassed, and showed a disposition to want to pay or try to pay. Dr. Eason must have died after January 12, 1896, as judgment was rendered against him in an action of trespass to try title for the land on that day by the district court of Grayson county.

The appellants' second assignment of error complains that the judgment of the court against them is contrary to the law and to the evidence, setting out in detail why it is so, and we sustain this assignment. The city had a clear title to the property, as was established by the judgment in its favor recovering the same from Dr. Eason, in January, 1896; and, if there was error in taking the judgment by default in that case, it could have been corrected only by an appeal or writ of error, or by some direct proceeding to set it aside. Its validity could not be attacked in this collateral action.

The city could sell the property to whom it pleased, and at any price it desired and could obtain; and even if it was undisputed that Thorp had promised the executor to pay the amount demanded by the city, and cause the land to be reconveyed to the ex-

ecutor, it would not have been a binding obligation, as there was no consideration for it, and he had a right to buy it from the city the same as any other person. No constructive trust was created in favor of the executor or the creditors by his promise, if he made any, to redeem the land. They had no title, claim, or interest in the property, and there was nothing, therefore, to be the subject of a trust. We are therefore clearly of opinion that the judgment in this case ought to be reversed, and here rendered in favor of the Thorps for all the land in controversy; and so it is ordered accordingly.

P. J. WILLIS & BRO. et al. v. SMITH et al.  
(Court of Civil Appeals of Texas. Dec. 15, 1897.)

**APPEAL—STATEMENT OF FACTS—STRIKING OUT—REVIEW—CORPORATIONS—DEED—TREAS—PASS TO TRY TITLE.**

1. A statement of facts was made up and signed by the parties, and forwarded by mail to the presiding judge in time to have reached him and be returned to the district clerk, by mail, before the time in which, by law, it should have been filed; but the judge was absent, and the statement did not reach him until the court met in another county, when he approved it and forwarded it to the clerk of the district court of the county where the case was tried. The clerk received it on the 17th of September, and filed it as of the 15th day of August. A motion was made to strike out the statement of facts in the district court. *Held*, that the file mark on the statement was incorrect, and should be corrected, but, a good excuse appearing for the failure to file the statement within the time allowed, the motion to strike out should be overruled.

2. An intervener who did not agree to a statement of facts as signed by the trial judge, and is not guilty of any negligence in not preparing one, will not be bound thereby; and, as to him, the statement will, on motion, be stricken out.

3. The court of civil appeals has no jurisdiction solely upon a motion to review the approval of a statement of facts by the lower court.

4. Where bills of exception are filed long after the adjournment of the court in which the case was tried, assignments of error based thereon cannot be sustained.

5. Where there is no plea denying the existence of a corporation, as required by Rev. St. 1895, art. 1265, it is not necessary to prove its existence.

6. A deed which contains covenants of warranty executed by P. J. W. & Bro., "incorporated," is sufficient proof that the corporation entered into the covenant.

7. Where, in trespass to try title, judgment is rendered for defendant, the fact that the deeds in evidence, upon which he relied, do not accurately describe the land sued for, does not show that there is a variance in the description of the land sued for and the land recovered.

8. Warrantors brought into a suit to vouch the title of their vendee, and to answer to him on their warranty, can take advantage of any errors they assign injurious to their vendee, whether the vendee assigns them or not.

Error from district court, Coryell county; J. S. Straughan, Judge.

Action to recover land by William Kattner against Virginia B. Smith and others. P. J. Willis & Bro., a corporation, is sued as a war-

rantor to vouch Kattner's title. Defendants had judgment, and Kattner had judgment against P. J. Willis & Bro. Kattner and P. J. Willis & Bro. bring error. Affirmed.

This suit was originally brought December 28, 1893 (amended by third amended petition January 22, 1895), by plaintiff in error William Kattner against Virginia B. Smith and her husband (H. C. Smith), F. Dewald, Annie P. Harris (a feme sole), Rebecca P. Harris (a feme sole), Lillie B. Fisher and her husband (Walter P. Fisher), Cora L. Davenport and her husband (Wharton Davenport), and John W. Harris, to recover land described in the petition as follows: "Out of the J. A. Wells survey, begin in the south boundary line of same, at a point S., 71 E., 1,400 vrs. from J. A. Wells' S. W. corner, a pile of rock known as the 'S. E. Corner of Bennett Land'; thence N., 19 E., 1,603 vrs.; thence S., 71 E., 1,127 vrs.; thence S., 19 W., 1,603 vrs., south line of Wells' survey; thence N., 71 W., 1,127 vrs., to the beginning" (319.7 acres). P. J. Willis & Bro., a corporation, is sued as warrantor, to recover against it the value of so much of the land as he may fail to recover.

The petition sets up title acquired by plaintiff, Kattner, as follows: (1) Patent by the state to John W. Harris, assignee of J. A. Wells. (2) Deed from John W. Harris to D. C. McCormick. (3) Deed from D. C. McCormick to plaintiff. (4) Power of attorney from D. C. McCormick to W. G. McCormick. (5) Deed from D. C. McCormick by W. G. McCormick, as attorney, to H. C. Smith. (6) Judgment of county court of Bell county in favor of P. J. Willis & Bro. against H. C. Smith, dated September 20, 1882. (7) Execution, levy, and sale by virtue of and on said judgment. Execution, dated the 30th day of May, 1883, issued out of said above-named court to Coryell county. (8) Deed of H. C. Smith, by J. M. Lanham, sheriff of Coryell county, by virtue of above judgment, execution, levy, and sale, to P. J. Willis & Bro., dated August 4, 1883. (9) Deed from P. J. Willis & Bro. to plaintiff, dated October 17, 1891. (10) Deed from P. J. Willis & Bro., dated December 3, 1891. (11) And, solely for the purpose of common source, plaintiff shows that he relies on a deed from H. C. Smith to Virginia B. Smith, dated 29th of March, 1881. (12) And, as to the land claimed by F. Dewald and Eula Nall et al., plaintiff shows that he also relies upon a parol partition and agreement between H. C. Smith and H. R. Bennett and said Eula Nall et al. (said Bennett being the ancestor of Eula Nall et al., and owning a tract of land adjoining this tract on the west); said agreement having been made to fix the boundary line between the two tracts, "giving to H. C. Smith, then the owner of the land claimed by plaintiff, the line set out in plaintiff's petition; and by said agreement the said Eula Nall et al. are estopped from claiming the 34 acres of land set out in their

<sup>1</sup> Writ of error denied by supreme court.

original answer, filed January 16, 1894." Plaintiff alleges that, although he is the legal and equitable owner of the said land, defendant Virginia B. Smith is fraudulently claiming it under a deed executed by H. C. Smith to her, recorded in volume O, p. 718, Deed Records of Coryell County, which deed is a cloud upon plaintiff's title to the land, which is alleged to be his homestead (he being the head of a family, and residing thereon); that, while said deed is too vague and indefinite to include plaintiff's land, the claim of ownership of the land made by defendant Mrs. Smith causes the injuries complained of. It is also alleged that plaintiff acquired the land without notice, actual or constructive, of Virginia B. Smith's claim to the same, paying a valuable consideration therefor, to wit, \$1,600; that, at the time of the execution of said deed of H. C. Smith to Virginia B. Smith, he was notoriously insolvent, as was known to Virginia B. Smith, and the said conveyance was made to hinder, delay, and defraud the creditors of H. C. Smith, especially P. J. Willis & Bro., as said Virginia B. Smith, wife of H. C. Smith, well knew, and it was without consideration, and is void, and, further, that she took the land to hold for the benefit of H. C. Smith; that on October 17, 1891, P. J. Willis & Bro. executed to plaintiff a deed conveying the land, for \$1,600 then paid them by plaintiff, and P. J. Willis & Bro. covenanted to warrant and forever defend the title to the land conveyed unto plaintiff, his heirs and assigns; that defendant P. J. Willis & Bro. became an incorporation, being before a partnership doing business in Galveston, Tex.; that the members of the partnership became the promoters of the defendant corporation, and owners of all the assets of the partnership; that the partnership was at the date of the incorporation the owner of the land, and the corporation became the owner of the land described; that the defendant corporation represented to him (the plaintiff) at the date of his purchase that it was the owner of the land, and that it was free and clear of all incumbrance; that he is ignorant and unlearned, and he purchased the land relying on such representations, and paid the full purchase price of the same; that the deed to him was signed by P. J. Willis & Bro., but was acknowledged by — Willis, a member of the firm of P. J. Willis & Bro., he being fully authorized by the firm to so convey for the benefit of defendant; that P. J. Willis & Bro., defendant, recognizing their liability to plaintiff, on the 3d day of December, 1894, executed and delivered to him their deed, in writing, conveying the land to plaintiff, with general covenant of warranty of title; that, notwithstanding his deeds as described, he has been ejected from the land by defendants, and his title is clouded by the deed to Virginia B. Smith, under which she is claiming title to the land. Prayer to remove cloud,

and that P. J. Willis & Bro. be required to defend his title and possession, and for judgment against it on its warranty for the value of the land he fails to recover. Prayer for judgment against all the defendants for the premises, and that the deed of Virginia B. Smith be canceled.

On the 6th day of August, 1895, A. S. Hawkins filed his petition of intervention, claiming the land in controversy, and asked judgment therefor.

On January 16, 1894, Eula Nall and the other heirs of Bennett answered, alleging that they had sold to F. Dewald, one of the defendants, 148 acres of the land, and warranted the title, and that 34 acres of the land conveyed were included in the land sued for, and asked that they be allowed to appear and defend their warranty, disclaiming all the land except the 34 acres; that, at the time of the sale to Dewald, Kattner and defendant Dewald claimed the 34 acres of the 148 acres, and it was agreed by defendants Nall and Dewald that the balance of the purchase money (\$300) of the land sold should be deposited in the Belton National Bank until the question of title was determined in favor of defendants, when the same should be paid by Dewald. They then set up what they alleged to be the true division line, and asked judgment against Dewald for the balance of the purchase money (\$300), with foreclosure of vendor's lien.

Defendants Harris and others answered July 25, 1895, pleading general denial, not guilty, and disclaiming all the land except such as lay north of a line drawn from the southwest corner of the D. D. Thompson survey, running parallel with the south line of the J. A. Wells survey, and asked to be discharged, with their costs.

On July 30, 1895, defendants Virginia B. Smith and her husband, H. C. Smith, amended their original answer, pleading general demurrer, not guilty, and, specially, that Smith purchased the land of McCormick about July 27, 1878, it being the intention of McCormick to sell and Smith to purchase the land in controversy; that afterwards, on the 29th day of March, 1881, Smith, being indebted to his wife, Virginia B., conveyed the land to her to pay such debt, and they deny that the conveyance was to defraud creditors. And, further, the answer denies that plaintiff Kattner is an innocent purchaser, but alleges that when he purchased the land he had notice, by the record of the deed of Smith to his wife, and that he had knowledge of the conveyance, and purchased in defiance of the rights of defendant Virginia B. Smith. And they further answered that Smith had no title to the land at the time of the sale under the execution of P. J. Willis & Bro., and that the proceedings under the same were void. Defendant Virginia B. Smith, in reconvention, prays that

as she has had and held the title since the 29th of March, 1881, the claim of plaintiff, Kattner, is a cloud upon her title; and that if, in the conveyance of McCormick to Smith, and of Smith to her, there be uncertainty of description, said deeds be reformed so as to embrace the land in controversy, as was the intention of the parties thereto at the time the deeds were executed, and that she have judgment for the land, and quieting her title.

Defendant Kattner filed a supplemental petition on the 10th day of August, 1895, answering the cross bill of Virginia B. Smith, and the intervention of Nall and others, and pleaded not guilty, adverse possession in good faith, and claim for valuable improvements, and a bona fide claim of title, setting up the links in the chain of title. He prayed for judgment for value of his improvements.

August 13, 1895, the cause having been submitted to the trial judge without a jury, judgment was rendered in favor of Annie P. Harris, John W. Harris, Rebecca P. Harris, Lillie B. Fisher, Walter P. Fisher, Cora L. Davenport, and Wharton Davenport, heirs of J. W. Harris, that they recover from the parties to the suit the title and possession of that portion of the Wells survey lying north of the south line of the D. D. Thompson 160-acre survey, extended S., 71 E., to intersect the original east line of the James A. Wells survey, and that the said line be established as the north line of the tract conveyed by J. W. Harris to D. C. McCormick by deed dated February 10, 1875, referring to the record of deeds of Coryell county for the Harris deed to D. C. McCormick. The amount of land so recovered by the Harris heirs was found to be 90 acres, for which they were awarded their writ of possession. Judgment was also rendered for Virginia B. Smith, joined by her husband, H. C. Smith, against William Kattner and defendant F. Dewald, and his warrantors, Eula Nall, J. P. Nall, C. G. Bennett, Addie Bennett, and against all other parties to the suit, as her separate estate, for title and possession of all that portion of the James A. Wells survey beginning at the division line, as above established, between Harris and McCormick, at a point 450 varas S., 71 E., from the southeast corner of the D. D. Thompson 160-acre survey, for the northwest corner of this survey; thence S., 71 E., along said line as above established, 1,575 varas, to corner; thence S., 19 W., 1,153 varas, to the south line of James A. Wells' survey, for corner; thence N., 71 W. with said James A. Wells' south line, 1,575 varas, to corner (the same being the southeast corner of the Bennett tract); thence N., 19 E., with the east line of the Bennett tract, 1,153 varas, to the beginning,—containing 320 acres of land. And a writ of pos-

session was awarded her for all of said land on which William Kattner has not made his improvements in good faith, as afterwards set forth. It was also adjudged that the last line above described be established as the division line between the land sold by D. C. McCormick to H. R. Bennett by deed dated May 11, 1876, and the land sold by McCormick to H. C. Smith by deed dated July 27, 1878. It was further adjudged that P. J. Willis & Bro., a corporation, has heretofore executed a deed to plaintiff, Kattner, set out in plaintiff's third amended original petition, with full covenants of warranty, for which Kattner has heretofore paid P. J. Willis & Bro. the sum of \$1,600, and which warranty has failed. It was adjudged that plaintiff, William Kattner, recover from P. J. Willis & Bro., a corporation, the sum of \$1,600, with interest thereon from date at the rate of 6 per cent. per annum. It was further decreed that intervener, A. S. Hawkins, recover from all the parties the title and possession of that part of the J. A. Wells survey lying south of the line herein established between the McCormick tract and the Harris tract, lying east of the land recovered herein by Virginia B. Smith, which land so recovered by the intervener is estimated to contain about 111 acres, with field notes as follows: "Begin at the S. E. corner of the J. A. Wells original survey; thence N., 19 E., 1,153 vrs., to the Harris corner; thence N., 71 W., — vrs., to the N. E. corner of the tract herein recovered by Virginia B. Smith; thence S., 19 W., with said Smith east line, to the S. E. corner of said tract on the south line of the said Wells survey; thence S., 71 E., to the beginning." And Hawkins was awarded his writ of possession against all the parties. It was further adjudged that plaintiff, Kattner, had made valuable improvements, in good faith, to the value of \$1,290, which were adjudged, as between him and Virginia B. Smith, as prescribed by statute, and writ of possession awarded to her, in case she paid in one year, for the improvements, the sum allowed. Other improvements of Kattner made on the land were adjusted between him and Mrs. Smith. The matter in controversy between defendants Eula Nall, J. P. Nall, and C. G. and Addie Bennett, on their warranty deed to their co-defendant F. Dewald, was also adjudicated; the court finding that the warranty to 34 acres of the 148 acres conveyed by the deed had failed. It was also adjudged that plaintiff, Kattner, recover from P. J. Willis & Bro. costs incurred by reason of the suit on his warranty, and that he also recover of F. Dewald the costs incurred by reason of the suit against him, and that other parties recover their costs against plaintiff, Kattner. P. J. Willis & Bro. and William Kattner have brought the case to this court by writs of error. P. J. Willis &

Bro., only, has assigned errors. On the 29th of January, 1896, upon motion of Virginia B. Smith, this court struck out the statement of facts in the case, upon the ground that it was not filed in the court below until more than 30 days after adjournment of the court. Then, on December 16, 1896, this court, not considering the statement of facts, affirmed the judgment of the lower court; the cause having been (in this court) submitted October 7, 1896. 39 S. W. 377. April 26, 1897, the supreme court reversed the judgment of this court, striking out the statement of facts, and remanded the cause to this court for further proceedings, by mandate issued the 20th of October, 1897. 40 S. W. 401. October 23, 1897, Virginia B. Smith filed another motion in this court to strike out the statement of facts, based upon the action of the district court in a proceeding instituted by Virginia B. Smith and A. S. Hawkins to strike out the statement of facts in the lower court, which motion was overruled by the lower court; that court holding that the file mark on the statement, as originally made by the clerk, as of the 15th of August, 1895, was incorrect, and that it was really filed on September 17, 1895, and directing that the file mark be accordingly corrected. Peter J. Willis & Bro. excepted to the order of the court. We refer to the record of the proceeding referred to as filed in this court October 23, 1897, together with the testimony offered for and against the motion in the lower court, and make the same a part of this statement. The testimony on this proceeding showed that the statement of facts had been made out, and forwarded by mail to the presiding judge, in time to have reached him and be returned by mail to Coryell county before the expiration of the time in which it, by law, should have been filed; but the judge was away from home, on a trip, and the statement of facts did not reach him by mail until court had met in another county, where he received and approved the same, and forwarded it to the clerk of the district court of Coryell county. The clerk received it on the 17th of September, 1895, and filed it as of the 15th day of August, instead of the 17th of September.

S. B. Hawkins, for plaintiff in error William Kattner. White & Mings and Eugene Williams, for plaintiff in error P. J. Willis & Bro. S. B. Sadler, for defendant in error A. S. Hawkins. H. N. Atkinson, for defendants in error Virginia B. Smith and others.

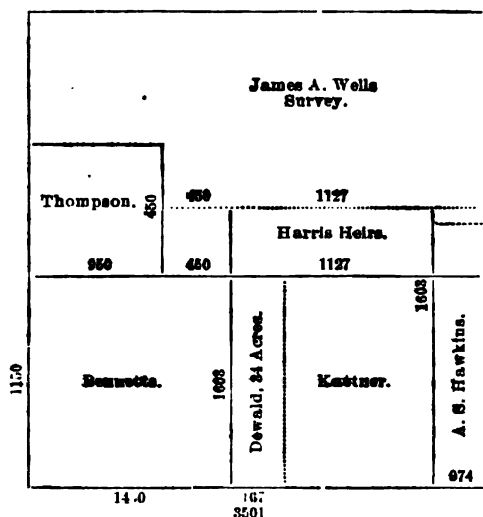
COLLARD, J. (after stating the facts). We can see no good reason why the action of the lower court on the motion should be reversed. A good excuse was shown for the delay in not having the statement deposited with the clerk earlier than it was. We believe, also, that the court did not err in having the file

date of the statement corrected, and we approve the action of that court. According to the law as declared by the supreme court on review of the judgment of this court in the case, we have no jurisdiction, solely upon a motion made here, to review the approval of a statement of facts by the lower court. *Willis v. Smith* (decided by the supreme court April 26, 1897) 40 S. W. 401. Also, believing that the action of the lower court was correct, and approving the same, we overrule the motion of Mrs. V. B. Smith to strike out the statement of facts filed October 23, 1897. On the 28th of October, 1897, intervener, A. S. Hawkins, filed a motion in this court to strike out the statement of facts in the cause, and prayed that the same be disregarded. This motion is based upon the ground that while it purports to be an agreed statement of facts, and not made up by the judge upon disagreement of counsel, it shows upon its face that he did not agree to it, and therefore it should not be considered, as to him. He recovered judgment in the court below, as intervener, for 111 acres of the land in suit. Counsel for defendants *Willis & Bro.*, Virginia B. Smith, and the heirs of Harris, and for plaintiff, Kattner, signed the statement of facts as an agreed statement. No one signed it for the intervener, A. S. Hawkins. In this condition, it was approved by the trial judge. No notice of appeal was given from the judgment of the lower court. The cause comes to this court on writ of error sued out by Kattner and P. J. Willis & Bro. In such case, no negligence being imputable to Hawkins or his counsel in failing to prepare the statement, it would not be presumed that the approval of the same by the judge was intended as his (the court's) statement of the evidence, independently of agreement of counsel. It should be considered as a statement of facts only for the parties who agreed to it, and not for Hawkins, who did not agree to it. As affecting his rights, the statement should be disregarded, and his motion and prayer to that effect are sustained. *Lacey v. Ashe*, 21 Tex. 396; *Barnhart v. Clark*, 59 Tex. 553; *Blow v. De La Garza's Heirs*, 42 Tex. 232; *Renn v. Samos*, Id. 104; *Brown v. Masterson* (Tex. Civ. App.) 38 S. W. 1027. It will not be presumed that the trial judge made up the statement of facts, unless counsel disagree. *McManus v. Wallis*, 52 Tex. 540. See, contra, *Schneider v. Stephens*, 60 Tex. 420. We will now consider the main case:

The judgment in favor of the intervener, Hawkins, will not be disturbed, as his pleadings authorized it. *Willis v. Smith* (decided by this court Dec. 16, 1896) 39 S. W. 377. The plaintiff's (William Kattner's) tune on the trial was deraigned by evidence as follows:

The following plot was introduced in evidence (agreed to as being correct), showing the James A. Wells survey, and the subdivisions of the same in controversy:





It was agreed that Annie P. Harris, Rebecca P. Harris, Lillie B. Fisher, Walter P. Fisher, Cora L. Davenport, Wharton Davenport, and John W. Harris were the legal representatives and heirs at law of John B. Harris, who executed the deed to D. C. McCormick, under which all the parties claim, and that the Harris heirs were entitled to recover all the land lying north of a line beginning at the Thompson southeast corner, and running S., 71 E., to the east line of the J. A. Wells survey, which land recovered by them from Kattner amounts to 90 acres. It was also agreed that Eula Nall, J. P. Nall, C. G. Bennett, and Addie Bennett were the only heirs and legal representatives of H. R. Bennett, deceased. Patent was issued by the state to John W. Harris, assignee of J. A. Wells, July 21, 1894, embracing 14,502,005 square varas (about 2,566.8 acres) of land, as shown in the above plot. John W. Harris, by quitclaim deed (not dated), conveyed to D. C. McCormick 640 acres of the Wells survey, which it was agreed was located by beginning at the J. A. Wells southwest corner; thence N., 10 E., 1,153 varas, with the west line of the Wells, to the Thompson corner; thence S., 71 E., 3,501 varas, to the east line of the Wells; thence, with the east and south lines of the Wells, to the beginning. The field notes embrace about 714.4 acres of land, or 74.4 acres more than 640. D. C. McCormick executed a deed to H. C. Smith, July 27, 1878, conveying "a certain tract of land, part of the James A. Wells survey, \* \* \* containing 320 acres, described as follows: Begin at the S. W. corner of the Hallmark survey; thence N., 19 E., 1,153 varas, to E. line of survey in the name of Thompson; thence S., 71 E., 950 varas, to S. E. corner of said Thompson survey; thence N., 19 E., 450 varas, to corner in E. line of said Thompson survey, a live oak, N., 35 E., 4 varas; thence S., 19 E., 1,126 varas from S. E. corner of Bennett survey; thence S., 19 E., 1,126, to place of beginning." H. C. Smith on the 29th day of March, 1881,

by deed, conveyed to Virginia B. Smith (filed in county clerk's office March 15, 1882) 320 acres, part of the Wells survey, as deeded to H. C. Smith by W. C. McCormick, "beginning at the S. W. corner of the Wells survey; thence N., with Hardeman's survey, 1,153 varas, to the S. W. corner of J. B. Thompson's 160-acre survey; thence E., with Thompson's S. line, 950 varas, to S. E. corner; thence N., with Thompson's E. line, to a point intersecting the E. boundary line of Wells, to beginning,—will include 640 acres." The above deed was introduced by plaintiff for the sole purpose of showing common source. Judgment was rendered in the county court of Bell county the 20th day of September, 1882, in favor of P. J. Willis & Bro. against H. C. Smith, in cause No. 373, for \$647.80, bearing 12 per cent. interest per annum from date, and costs. Alias execution on the judgment issued the 30th day of May, 1883, and on the 1st day of June, 1883, was levied on the land described in plaintiff's petition; describing it by metes and bounds, and reciting advertisement and sale of the same on the 3d day of July, 1883, to P. J. Willis & Bro., for \$100. The levy and return were made by J. M. Lanham, sheriff of Coryell county. J. M. Lanham, sheriff, in accordance with the sale, made deed to P. J. Willis & Bro., dated the 4th day of August, 1883, filed for record in Coryell county on the same day, conveying the land set out in plaintiff's petition. P. J. Willis & Bro. executed a deed to William Kattner, with covenants of general warranty, dated October 17, 1891, conveying the land by field notes, as described in petition of Kattner filed for record in Coryell county January 27, 1892, reciting a consideration of \$1,600 paid by plaintiff to P. J. Willis & Bro., which was actually paid in cash. P. J. Willis & Bro., "incorporated," executed deed to William Kattner, conveying same land as described in petition, for a consideration of \$1,600, acknowledged to have been heretofore paid to P. J. Willis & Bro. by plaintiff, containing covenants of general warranty of title, dated December 3, 1894, properly executed and acknowledged. Filed for record in Coryell county on the 12th day of February, 1895. D. C. McCormick executed a warranty deed to William Kattner, dated November 18, 1893, conveying the 320 acres of land described in plaintiff's petition, which recited "that it was made in lieu of a deed from McCormick to Smith, and that Kattner had acquired Smith's interest in the land." All the foregoing agreements and evidence were offered and adduced by the plaintiff. Plaintiff then read in evidence the deed of D. C. McCormick to H. R. Bennett, filed the 11th day of May, 1876, with field notes as follows: Beginning at the southwest corner of the J. A. Wells survey; thence northward, with the line of W. P. Hardeman's survey, 1,153 varas, to the southwest corner of J. B. Thompson's 160 acres; thence, with Thomp-

son's south line, 950 varas, to his southeast corner; thence, northward with Thompson's east line, "to a point from whence a line running at right angles to another point; thence, at right angles from said point, to intersect the S. line of said Wells' survey, to include 320 acres of land; thence back to the beginning." Plaintiff, Kattner, proved that he bought the land described in his petition from P. J. Willis & Bro., and paid them therefor, in cash, at the date of his first deed, \$1,600; that P. J. Willis & Bro. represented to him that their title was good; and that he knew of no adverse claim to the land by defendant Smith, or any one else; and that he bought it believing that he was receiving a good title. He also proved that Bennett pointed out to him the boundaries of the land sold by P. J. Willis & Bro. to him before his purchase, and established other facts tending to show that Bennett did not claim any land on the survey so bought by plaintiff; Bennett then having his east line fenced in part. He further offered testimony tending to show improvements made by him in good faith, and the value of the same, and other testimony was introduced showing the value of the land adjudged to parties.

Defendants, the Bennetts, who were warrantors of defendant Dewald, read in evidence the patent to John W. Harris, and deeds of Harris to D. C. McCormick and of D. C. McCormick to H. R. Bennett; being the same title papers read in evidence by plaintiff. The Bennetts also read in evidence a deed from Euls and J. P. Nall and C. G. and Addie Bennett, the legal representatives of H. R. Bennett, deceased, to defendant Dewald, without date, and without any description of land, which deed or instrument was read in evidence over the objection of plaintiff that the description was insufficient to embrace the land in controversy. C. G. Bennett, being sworn in his own behalf, and for the heirs of H. R. Bennett and for F. Dewald, testified: That his ancestor H. R. Bennett purchased a block of 320 acres out of the J. A. Wells survey, as shown by the deed before introduced in evidence, and that defendant H. C. Smith purchased 320 acres adjoining the Bennett, and east of it. That his ancestor was long since dead. That Mr. McCormick sold to his ancestor and defendant Smith before the line between the two tracts of land had been established. That Smith got the surveyor, and the surveyor and his ancestor located first the Bennett tract of land, and then located the Smith tract east of it. That in locating the Bennett tract they began at the Wells southwest corner, and ran 1,153 varas to the Thompson southwest corner; thence S., 71 E., 950 varas, to the Thompson southeast corner; thence N., 19 E., with the Thompson east line, 450 varas, where they established a rock pile for corner of the Bennett; thence S., 71 E., 450 varas, where they established the northeast

corner of the Bennett; thence S., 19 W., 1,603 varas, to the Wells south line, and to the beginning,—for the Bennett 320 acres. That the Smith land began at the Bennett northeast corner, and extended east 1,127 varas; that for many years the line then run was recognized as the division line between the two tracts, and that he pointed out said line to plaintiff, William Kattner, when he purchased the Smith land from Willis, as the true division line, but that subsequent to that time the Harris heirs fenced their land, beginning at the Thompson southeast corner, and that the Bennetts thereby lost a part of their land, and now claim their line to stop at the southeast corner of the Thompson survey, and thence S., 71 E., so as to obtain 320 acres. Defendant Virginia B. Smith introduced the patent from the state to John W. Harris, the deed from John W. Harris to D. C. McCormick, and the deed from D. C. McCormick to H. C. Smith (all being the same title papers as introduced by plaintiff, Kattner); also, deed to Virginia B. Smith (being the same as introduced by plaintiff, Kattner); to the introduction of which last deed the plaintiff, Kattner, and Willis & Bro. objected on the ground that the description does not sufficiently identify the land in controversy; which objection being overruled, plaintiff excepted. Virginia B. Smith testified to facts tending to show that the conveyance made to her by her husband, H. C. Smith, was to pay part of a note of H. C. Smith to her mother, Mrs. White, for \$500; the consideration for the deed being \$320 of the note, which note was given to her by her mother, as her part of her mother's estate. No one was present when she and her husband made the agreement to sell and purchase the land, except herself and husband. H. C. Smith testified that he paid McCormick \$320 for the land in trade, and it was then, when he purchased, worth \$320, and was not worth more than \$320 in March, 1881, when he sold it to his wife. He states that he was insolvent, but makes other statements showing that the conveyance to his wife was to pay, in part, the White note. It was after his failure that Mrs. White gave the note to his wife, and he was insolvent when he conveyed to his wife. Intervener Hawkins introduced the patent to John W. Harris and the deed of Harris to D. C. McCormick (the same title papers previously introduced by the other parties), and a general warranty deed from D. C. McCormick to him (A. S. Hawkins), conveying to him the strip of land between the east line of the Wells, and the east line of the Kattner tract, extending N., 19 E., from the southeast corner of the Wells survey, 1,603 varas; thence N., 71 W., to the William Kattner tract, as set out in his petition; and thence, with Kattner's east line and the Wells south line, to the beginning. Defendant F. J. Willis & Bro., as warrantor, read in evidence all the title papers introduced by Kattner, and the

judgment, execution, and sheriff's return of sale, as shown by evidence for Kattner. The foregoing is substantially all the testimony in the case upon contested points, and is all that need be stated.

#### Opinion.

Plaintiff in error's first and second assignments of error are addressed to the action of the court in admitting the deeds of H. O. Smith to Virginia B. Smith, and of Eula Nall, J. P. Nall, C. G. Bennett, and Addie Bennett, the legal representatives and heirs of H. R. Bennett, deceased, to defendant Dewald. Both deeds are objected to because of the insufficient description of the land. We cannot sustain these assignments of error, because there are no bills of exception to the rulings complained of which can be considered by the court. The bills of exception relied on were filed long after the adjournment of the court; that is, on the 27th day of September, 1895, and the court adjourned for the term, August 15, 1895. *Rev. St. 1879, arts. 1363-1365; Schaub v. Brewing Co., 80 Tex. 636, 637, 16 S. W. 429; White v. Harris, 85 Tex. 49, 19 S. W. 1077; Railway Co. v. Eddins, 60 Tex. 659; Lockett v. Schuremberg, Id. 611; Willis v. Donac, 61 Tex. 589.*

It is insisted by plaintiff in error Willis & Bro. that the judgment of the court is erroneous because Kattner's action against P. J. Willis & Bro. was against a corporation in that name, and there was no testimony that such corporation entered into any covenant of warranty with Kattner or any one else, and because there was no evidence of the existence of any such corporation. We find no error in the judgment, as assigned. There was no plea denying the existence of the corporation, as required by the statute (*Rev. St. 1895, art. 1265*), and it was not necessary to prove its existence. A deed was read in evidence by plaintiff, Kattner, executed by P. J. Willis & Bro., "Incorporated," containing the covenant of warranty upon which recovery was had. This was sufficient proof of the covenant.

Plaintiff in error P. J. Willis & Bro. assigns that the court erred in its judgment, "because the same is unsupported by the evidence, in that the judgment was for a breach of covenant relating to one tract of land described in plaintiff Kattner's third amended petition, whereas the land recovered by Virginia B. Smith and the heirs of Harris and the representatives of H. R. Bennett, deceased, described other and different tracts of land." In support of the assignment (there is no distinct proposition under it) a statement is made "that the lands described in the deeds to Virginia B. Smith and the heirs of Bennett cannot be identified by these descriptions as the land conveyed by Willis to Kattner, and described in plaintiff's petition, being the land sold him by Willis, whereas the correct description in the deeds to Virginia B. Smith

from her husband, and to Dewald by the heirs of Bennett, are the only descriptions of land which would take the title out of Kattner." The fact that the deeds in evidence did not describe the land sued for would not show that there was a variance in the description of the land sued for and the land recovered. Kattner sued for the land conveyed to him by P. J. Willis & Bro., and lost the suit, thus losing the land. There can be no variance as contended by plaintiff in error.

The next assignment of error relates to supposed errors of the court in admitting testimony of Smith on the issue that his conveyance to his wife, Virginia B. Smith, was made to defraud creditors. For reasons heretofore given, there being no proper bill of exceptions filed in time, the assignment cannot be considered, even if it had merit.

The issue that the evidence does not support the judgment, nor authorize a recovery by Virginia B. Smith and others, is not raised by any assignment of error. So we have not discussed the question as to whether the deeds in evidence, upon which a recovery was had, described any land. An examination of the record shows that P. J. Willis & Bro. alone assigned errors, but as warrantors brought into the suit to vouch the title of their vendee, and to answer on their warranty, they could take advantage of any error injurious to Kattner; and this may be the reason no errors are assigned by Kattner. None of the assignments of error are well taken, and, the pleadings authorizing the judgment of the court below, it is affirmed. Affirmed.

#### HARTGRAVES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

#### INTOXICATING LIQUORS — CRIMINAL PROSECUTION.

1. In a prosecution for selling liquor without a license, evidence of witnesses that they drank, at defendant's place of business, liquor that they had ordered through him, and by him kept at his place of business for their convenience, and that they became intoxicated, is admissible.

2. Where the defendant, in a prosecution for selling liquor without a license, testified that he purchased whisky and alcohol for others, and kept it at his place of business for their accommodation, he showed a clear intent to evade the law, and was in fact guilty as charged.

Appeal from Henderson county court; James A. McDonald, Judge.

T. P. Hartgraves was convicted of engaging in the sale of spirituous liquors without a license, and he appeals. Affirmed.

Richardson, Watkins & Miller, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted for engaging in the sale of spirituous liquors without a license, and his punishment assessed at confinement in the county jail for 30 days, and appeals.

The state, over the objections of the appel-

lant, introduced in evidence the conduct of divers persons at defendant's house one night after a show. The bill of exceptions bearing upon this matter states: "That in the latter part of September, 1895, there was a small show near defendant's residence. After the show (appellant being present) a number of parties, including the witnesses, collected at the defendant's place of business, and drank whisky, and some of them got under its influence, and remained most of the night, talking and carousing, and having a good time. The witnesses did not know where the whisky came from, except that some of them said the whisky they drank was whisky that had been ordered through defendant, and that he kept it there at his place of business. The witnesses did not know how or from where the others got their whisky." We are of opinion that this testimony was admissible for the purpose of showing that the defendant was engaged in the business of selling whisky; this being a material issue in the case. We have examined the charge of the court carefully, and, when viewed in the light of the testimony, we believe it to be the law applicable to the case. The instructions requested by appellant are not the law. All of the law demanded by the testimony, or any part thereof, was given in charge to the jury. This case presents a remarkable scheme or device on the part of the appellant. According to the testimony of the appellant (he being a witness), a great number of gallons of whisky and alcohol were purchased by the defendant for others; the amount really purchased not being shown. It seems from the testimony that he was a very accommodating gentleman, but, when we look to the facts and all of the circumstances, we are clearly of the opinion that he had adopted this method in order to evade the law; that in fact he was pursuing the occupation of selling whisky. The judgment is affirmed.

#### TOMLINSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

#### CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

A charge in a criminal case that if the jury had a reasonable doubt, "from the evidence," as to the guilt of defendant, they should acquit him, was not cause for reversal, although the doubt may arise from a want of evidence.

Appeal from district court, Clay county; George E. Miller, Judge.

Joe Tomlinson was convicted of rape, and he appeals. Affirmed.

Barrett & Barrett, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant prosecutes this appeal from a conviction of rape upon a girl under the age of 15 years, she not being then and there his wife. The indictment was returned September 15, 1897; the arraignment and conviction occurred on October 4th following; and the jury assessed his punishment at 15 years' confinement in the penitentiary.

The first bill of exceptions complains of the charge of the court because it instructed the jury they could convict the defendant notwithstanding the fact that the prosecutrix was 15 years of age or over at the time of the alleged intercourse; and in the same bill appellant further excepted to the charge because it places the burden of proof on the defendant to prove the prosecutrix was of the age of 15 years or over at said time of carnal intercourse. These contentions are not borne out by an inspection of the charge. The charge distinctly instructs the jury that before they can convict, under the averments of the indictment, they must find beyond a reasonable doubt that the prosecutrix was under 15 years of age, and, if the evidence did not so convince them, they would acquit. The charge as given is a pertinent, direct, and correct application of the law.

Defendant further excepted to the charge because it instructed the jury as follows: "If you have a reasonable doubt, from the evidence before you, of the guilt of the defendant, you will acquit him." The point of the exception lies in the statement that they must have a reasonable doubt, "from the evidence," of the guilt of the defendant in order to acquit. The contention is that a reasonable doubt could arise from a want of evidence as well as from the evidence, and, this being so, the charge was not in compliance with the statute, and debarred the defendant from an acquittal for the want of evidence. This same question was presented in *Zwicker's Case*, 27 Tex. App. 539, 11 S. W. 683, and underwent careful investigation by the court, and it was held in that case that a similar charge to this was not a cause for reversal.

In regard to the remarks of the district attorney, we are of opinion that they were justified by the facts, and his observations upon the law, as stated in the bill of exceptions, were correct.

It is contended that the evidence is not sufficient to support the conviction. We think it is. There is no question of the carnal knowledge of the girl by the defendant, and, while the state's testimony showing her to be under 15 years of age was attacked, the jury were authorized to disregard the attacking evidence. In our opinion, the evidence fully sustains the fact that she was under 15 years of age; in truth, the testimony offered by defendant in this respect amounts to nothing definite. The judgment is affirmed.

## BARFIELD v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

**ANIMALS—ALTERING MARK—PUNISHMENT—STATUTE.**

Laws 1898, p. 25, making the punishment of stealing a hog two to four years' imprisonment, and repealing Pen. Code 1879, art. 748, making the extent of the punishment for such stealing depend on the value of the animal, provides a punishment, without further legislation, for subsequent alterations of the marks of hogs; article 760 declaring that one altering the mark of a hog, without the consent of the owner, and with fraudulent intent, "shall be punished in the same manner as if he had committed a theft of such animal."

Henderson, J., dissenting.

Appeal from district court, Menard county; W. M. Allison, Judge.

Cloman Barfield appeals from a conviction. Affirmed.

M. Fulton and L. W. Ainsworth, for appellant. Mann Trice, for the State.

**HURT, P. J.** Appellant was convicted for altering the mark on a hog, not his own, without the consent of the owner, and with intent to defraud, and his punishment assessed at two years' confinement in the penitentiary. The statute provides that the punishment for this offense shall be the same as if he had committed the theft of the animal. Article 760 of Penal Code of 1879 provides: "Every person who shall alter or deface the mark or brand of any horse, mule, ass or cattle, or shall alter or deface the mark of any sheep, goat or hog, not being his own property, and without the consent of the owner, and with intent to defraud, shall be punished in the same manner as if he had committed a theft of such animal." Appellant insists that, at the time of the alleged offense, there was no law in existence fixing the punishment for this offense; or, if there was such law, then article 748 of the Code, which made the punishment for the alteration of the mark of a hog a misdemeanor or a felony, depending upon the value of the hog, was the only law in existence; and, inasmuch as the value of the hog in this case was not alleged, that he cannot be punished at all. At the time this offense was committed, the punishment for the theft of a hog was not less than two nor more than four years' confinement in the penitentiary. The contention is that the act of the legislature making the theft of a hog a felony did not affect the punishment which had been fixed before this act was passed, when applied to altering the mark of the hog. It was evidently the intention of the legislature to make this offense of as high and serious grade as the theft of the animal. Now, the contention is that the legislature should have passed a law in regard to the punishment for altering the mark of a hog, because the penalty for

the theft of the hog had been changed. We do not agree with this contention. The legislature had the right to, and did, in unquestionable language, fix and control the punishment for altering the mark of a hog by the penalty annexed to the theft of the animal. We are of opinion that it was not necessary for the legislature to say anything in regard to the punishment for altering the mark of a hog, more than had already been stated. An analogous case: The punishment of an accomplice is the same as that of the principal, with one or two exceptions, where it is greater. If the legislature should increase the degree of punishment of the offense as to the principal, it would be altogether unnecessary to mention the subject at all when treating of an accomplice; just so with reference to receiving stolen property, swindling, and embezzlement, etc. We are of opinion that the jury were properly instructed in regard to the punishment, and that the punishment inflicted was legal. No other questions appear in the record worthy of notice, and the judgment is affirmed.

**HENDERSON, J. (dissenting).** My brethren have agreed to an affirmation of this case, and, as I cannot agree to the conclusions reached by them, I herewith file my reasons for dissenting.

Appellant insists that, at the time the alleged offense was committed, there was no law in existence fixing a punishment for said offense; or, if there was any law in force, then it was article 748 of the Penal Code, which made the punishment for altering the mark of a hog a misdemeanor or felony, dependent on the value of the hog; and that, inasmuch as no value of the hog is alleged in the indictment, then appellant cannot be punished under said indictment. To present this matter clearly, I will state that the indictment charges the alteration of the mark of said hog to have been committed on the 28th of January, 1895; and the proof on the part of the state shows that, if the offense was committed, it was about the last of February, 1895. In 1879 the Criminal Code was passed, and article 748 thereof reads as follows: "If any person shall steal any sheep, hog or goat, he shall, if the value of the property stolen is twenty dollars or over, be punished by confinement in the penitentiary not less than two nor more than five years. If the value of the property is under twenty dollars, he shall be punished by imprisonment in the county jail not exceeding one year, during which time the prisoner may be put to hard work, and by fine not exceeding five hundred dollars, or by such imprisonment without fine." Article 760 of said Code provides: "Every person who shall alter or deface the mark or brand of any horse, mule, ass or cattle, or shall alter or deface the mark of any sheep, goat or hog, not being his own property,

and without the consent of the owner, and with intent to defraud, shall be punished in the same manner as if he had committed a theft of such animal." The law stood in this way until the act approved March 15, 1893, took effect, which was 90 days after the adjournment of the legislature, said legislature having adjourned on the 9th of May, 1893. Article 747 of the act of the 23d legislature (see Laws 1893, p. 25), reads as follows: "If any person shall steal any cattle or hog, he shall be punished by confinement in the state penitentiary for not less than two nor more than four years." So, after the 9th of August, 1893, the punishment for theft of a hog was made a felony, regardless of the value; said law having repealed the former law on the subject, making theft of hogs, if the value exceeded \$20, a felony, and, if the value was less than \$20, a misdemeanor. The question thus presented for consideration is: Did the act of 1893 become a part of article 760 (Pen. Code 1879), which made the alteration by defendant of the mark of any hog, not being his own property, without the consent of the owner, and with intent to defraud, punishable as for a felony? It cannot be a question as to the infliction of punishment under the former statute, because there is no allegation of value of the hog in the indictment. So, it is not necessary for us to discuss whether or not the former article 748, as to punishment, still remains a part of article 760. Article 16 of the Penal Code provides that "the repeal of a penal law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the provisions of such repealed law, unless it be otherwise declared in the repealing statute." Article 17 provides: "When by the provisions of a repealing statute a new penalty is substituted for an offense punishable under the act repealed, such repealing statute shall not exempt from punishment a person who has offended against the repealed law while it was in force, but in such case the rule prescribed in article 15 shall govern." The rule prescribed in article 15 is as follows: "When the penalty for an offense is prescribed by one law, and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second shall have taken effect. In every such case the offender shall be tried under the law in force when the offense was committed, and, if convicted, punished under that law; except that when by the provisions of the second law the punishment of the offense is ameliorated, the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offense was committed."

These articles, in my opinion, have no application to the question now before us. Under all the authorities, when article 760 was

passed by the codifiers (1879), and it made the punishment for the alteration of the mark of a hog the same as prescribed for the theft of a hog, that portion of article 748 defining the punishment was adopted into article 760. Reading said portion into said article, it would be thus: "Every person who shall alter or deface the mark of any hog, not being his own property, and without the consent of the owner, and with intent to defraud, shall be punished, if the value of the property is twenty dollars or over, by confinement in the penitentiary not less than two nor more than five years; if the value of the property is under twenty dollars, he shall be punished by imprisonment in the county jail not exceeding one year, and by fine not exceeding five hundred dollars, or by such imprisonment without fine." See Suth. St. Const. § 257; *Knapp v. City of Brooklyn*, 97 N. Y. 520; *Turney v. Wilton*, 36 Ill. 385; *Nunes v. Wellisch*, 12 Bush, 363; 23 Am. & Eng. Enc. Law, p. 500. And it is also a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second. *Clark v. Bradlaugh*, 8 Q. B. Div. 69. And where the provisions of a statute are incorporated or adopted by reference into another, and an earlier statute so adopted is afterwards repealed, the adopted provisions continue in force so far as they form part of the second enactment. See 23 Am. & Eng. Enc. Law, p. 500. Applying these rules of construction, which are supported by the authorities, I conclude that there can be no question that as to the punishment prescribed in the Penal Code of 1879, for altering the mark of a hog, the punishment prescribed in article 748 for theft of a hog was adopted and became a part of said article 760. And I further conclude that the repeal of said article in 1893, which changed the punishment for theft of a hog, and made it a felony, regardless of value, did not repeal said article so far as it had been adopted and became a part of article 760; or, if it be conceded that it did repeal said article so far as it had been adopted by article 760, then the question remains, did the article as changed in 1893 enter into and become a part of article 760, as to punishment? There is nothing said in the amendment as to its relation or effect upon article 760. It simply proposes to change the punishment for theft of hogs. Now, did this change, without any expression in the act referring to article 760, or any legislation amendatory to said article 760, have the effect to prescribe a new punishment for altering the marks of hogs? In other words, did article 760 reach forward to subsequent legislation, and adopt its provisions as to punishment? In some cases, subsequent legislation may be adopted into a law; but always, where prospective legislation is so adopted, the intent therefor must be expressed or very strongly implied. See

*Darmstaetter v. Moloney*, 45 Mich. 621, 8 N. W. 574. There might appear cogent reasons why the punishment should be the same, and also strong reasons why the legislature should have made the punishment for fraudulently altering the mark of a hog the same as for theft of such hog. But the question is, did they do so? I think not. And I hold that by the change in punishment for theft of hogs in 1893, which made it a felony regardless of value, and the failure by the legislature to amend article 760 of the Penal Code, leaving it as it was before, if there was any punishment for said offense at the time it was committed, it was the punishment prescribed in article 748 of the Penal Code of 1879, which made the offense a felony or misdemeanor, dependent upon the value. However, as no value is alleged in the indictment, this prosecution cannot be maintained.

### OXSHEER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

**RAPE—INDICTMENT—DUPLICITY—EVIDENCE—RELEVANT—WITNESSES—CROSS-EXAMINATION.**

1. An indictment which charges an assault with intent to rape, and closes with the expression, "by then and there, without the consent of [prosecutrix], attempting, by force, threats, and fraud, to have carnal knowledge of her, the said [prosecutrix]," is not duplicitous.

2. Evidence that there was no strange negro in the county at the time the assault with intent to rape was made was not admissible, even though prosecutrix had stated that it was a negro who assaulted her, and was afterwards unable to identify defendant.

3. Where the state is permitted to prove that a witness had become responsible for defendant's attorney's fee, the witness should be allowed to state on cross-examination why he so became responsible.

Appeal from district court, Nolan county; R. A. Rigland, Special Judge.

Joe Oxsheer was convicted of an assault with intent to rape, and he appeals. Reversed.

Beall & Beall, for appellant. Mann Trice, for the State.

**HENDERSON, J.** Appellant was convicted of an assault with intent to rape, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

The court properly overruled the appellant's motion to quash the indictment. It charges an assault with intent to rape, and the fact that it closed with the expression, "by then and there, without the consent of the said Mrs. Annie Lloyd, attempting, by force, threats, and fraud, to have carnal knowledge of her, the said Mrs. Annie Lloyd," does not make it duplicitous.

The court did not err in admitting the testimony of Mrs. Lloyd, the prosecutrix, to the effect that she thought appellant was work-

ing on the fence. In that connection she stated, according to the explanation of the bill by the court, that appellant was stooping down, as though at work on the fence. Nor was there any error in the court's permitting the witness Earnest Johnson to testify. We think that he manifested sufficient intelligence to understand the nature and obligation of an oath.

Appellant also excepted to the action of the court in permitting evidence by the sheriff that search was made in the county for a strange negro, and that no such negro could be found, and also proof by one Buck Johnson that he was acquainted with all the negroes in the town of Sweetwater, and that strange negroes in town usually stopped at his house, and that he knew of no such strange negro in the county at that time, and that none such had stopped at his house. All this testimony was objected to by the appellant on the grounds that it was incompetent, irrelevant, and did not prove any issue in the case, and was calculated to prejudice the defendant before the jury, etc. We presume that the theory upon which this testimony was admitted on the part of the state was because the prosecutrix had stated that it was a negro who had committed the rape upon her, and that she was subsequently unable to identify appellant, and it was deemed competent for the state to show that there was no strange negro in the county, and that, therefore, it must have been appellant who committed the assault on the prosecutrix. There is no proof in this record that appellant was a strange negro. So far as we are advised, all the negroes in the county were strange negroes to the prosecutrix; and we fail to see how the fact that the sheriff could find no strange negro in the county at the time, or that Buck Johnson had not seen any strange negroes at his house, was competent evidence in this case. Inasmuch as the court admitted this testimony over the defendant's objection, the jury might have been led to believe that this character of negative proof served to fix and identify appellant as the perpetrator of the assault.

We believe that inasmuch as the state was permitted to prove that Jim Trammel, a state's witness, had become responsible for defendant's fee to the attorneys representing him, on cross-examination he should have been permitted to state why he so became responsible. The purpose of the state was, no doubt, to handicap him as a witness, and the defendant had a right to have him make any reasonable explanation. The appellant, in his bill, does not state what he expects to prove by said witness; but the court, in his explanation, states that Trammel told him that he was helping the negro because he had been good to him and his family, and because, from what his wife had told him about the matter, he did not believe that defendant was guilty. As the state was permitted to go into this matter, though the an-

swer of the witness merely involved his belief, we think that the defendant was entitled to this evidence.

We do not believe that there is anything in the motion made by defendant to correct the verdict of the jury, and think that the verdict was sufficiently clear and certain. We have examined the record carefully, and, assuming that the identity of the defendant is sufficiently established, it occurs to us that the proof that he had the specific intent to rape is not as clearly made out as it should be. Perhaps, on another trial of this case, this branch of it may be more fully developed. For the errors discussed the judgment is reversed and the cause remanded.

### SCOTT v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

#### CATTLE THEFT—EVIDENCE—CONFESSIONS.

Proof that defendant sold an animal between 12 and 18 months old, branded "S," without evidence as to its sex or color, does not conduce to show defendant guilty of the theft of an animal described as a red cow, about 2½ years old, branded "S," so as to render admissible, under Code Cr. Proc. 1896, art. 790, a statement made by defendant, without being cautioned as required by statute, that he sold such last-described animal.

Appeal from district court, Bexar county; Robert B. Green, Judge.

John Scott, alias Will Taylor, was convicted of theft, and he appeals. Reversed.

John A. Green, Jr., and Frank Cresswell, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of the theft of a heifer, the property of August Santleben, and appeals. The indictment alleges that the property was taken from Santleben without his consent, etc. The proof under this indictment raised an issue as to whether Santleben was in possession at the time of the taking, or one Schnelder was in possession; and there is some question whether, if Schnelder was in possession, he was the servant of Santleben, the owner. In view of the evidence on this question, we would suggest that another indictment be presented, containing two counts, so as to meet the proof on this phase of the case. The animal stolen is described by its owner as follows: "A red half Jersey and Durham cow about 2½ years old, and branded 'S' on the left shoulder." It appears from the record that Santleben went to the jail to see the defendant, and asked him about his two animals, Santleben having lost two cattle. Defendant said that he had sold one of them to Phil Wellbacher, a butcher, and that, if he (Santleben) would go to Wellbacher, he would there find the bill of sale he had given him. Scott was in jail, and this statement was made without being cautioned as the statute requires. Santleben went to Phil

Wellbacher, and found the bill of sale, which reads as follows: "San Antonio, June 23. Sold to Mr. Phil Wellbacher 1 calf 1 year old, branded on left shoulder 'S.' [Signed] X." Wellbacher testified that he was a butcher, and that he knew defendant, and saw him last June at his place of business; that he bought a red animal, a year or a year and a half old from defendant. Appellant objected to the introduction of the confession made by him in jail. The state, however, insists that, under article 790, Code Cr. Proc. 1895, as defendant had made a statement of a fact or circumstance, found to be true, which conduced to establish his guilt, therefore the confession was admissible, whether the defendant was cautioned or not. This proposition is correct; but was any fact or circumstance stated by appellant found to be true which conduced to establish his guilt? The animal for the theft of which defendant was convicted was 2½ years old; a red cow. The prosecutor does not intimate or claim that he lost any other animal, except a roan yearling. It appears from the statement of facts that the red cow only was branded "S." The prosecutor's recorded brand was —. Strip the case of the confessions of the appellant, would there be any criminative fact found in the bill of sale or in the testimony of Wellbacher? We think not. In fact, if Wellbacher tells the truth, appellant did not sell to him the cow for the theft of which he has been convicted. Defendant sold a yearling, between 12 and 18 months old, bearing the brand "S," and it is not stated whether the animal was a male or female, nor the color. The prosecutor is clear that his animal was a cow, and was 2½ years old. While the bill of sale might have been admissible, not because of the confessions, still, without other testimony showing the identity of the animal, it had no criminative force. If the roan yearling had been branded "S," then it might be insisted by the state that the conviction could be sustained, under the evidence, for the theft of this animal; but, as we understand the statement of facts, the roan animal did not have such brand. We are of opinion that the confessions of the appellant were not admissible; that there was no fact discovered in pursuance thereof tending to establish the guilt of the accused. The judgment is reversed, and the cause remanded.

### GODWIN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

#### MURDER—EVIDENCE OF THREATS BY DEFENDANT.

1. In a prosecution for murder occurring over a game of cards, testimony of threats made by defendant on the previous day to kill somebody, but not directed in any way towards the deceased, are inadmissible.

2. It is no defense to a prosecution for murder,



where defendant was the aggressor, that the deceased engaged voluntarily in the encounter.

Appeal from district court, Callahan county; T. H. Conner, Judge.

Ike Godwin was convicted of murder in the second degree, and appeals. Reversed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for 25 years; hence this appeal.

The homicide appears to have taken place over a game of cards. The game was made up between four young men some time in the morning of the 10th of August, 1897. The names of the parties were Ike Godwin (the defendant), Sam Campbell (the deceased), Ned Merchant, and Eugene Irons. These parties retired to a place in the woods, and played a game of freezeout poker. The defendant put up his watch as his stake, the deceased a colt, Irons a pistol, and Merchant, a horse. The stake of each was valued at five dollars. The pistol and watch were put on the blanket which was spread down for the game, and the horse and colt were not present. Matches were used for chips, each match being worth 50 cents. Irons was first "froze out," and then Merchant; and the game continued between defendant and deceased. Deceased, in the course of the game, won nearly all of the matches. A quarrel ensued, as one of the witnesses says, with reference to the deal. Defendant appears to have claimed the game, and grabbed up the watch, and also the pistol. On demand of the deceased he at length put down the pistol, but still held to the watch. According to the state's evidence, the game then proceeded, and, after they played a while, the defendant made an effort to get the pistol again. Sam Campbell (deceased) reached for it, and got it. Defendant then said to Campbell: "Come with me. I want to tell you something." They both walked out some little distance from the blanket, where they were playing, deceased carrying the pistol in his hand, and stopped facing each other. According to defendant's evidence, just before the homicide Sam Campbell had most of the matches, and he claimed the watch, and told defendant to give it to him. Defendant replied, "You have got your part." Defendant then said: "Come out here. I want to tell you something." Campbell said, "All right, if you will give me a show." Defendant replied, "All right, I will do that." The state's witness to the homicide (Irons) said that the parties stood there, and quarreled a while, and defendant shot deceased three times. "The pistol held by Godwin was pointed towards Campbell when fired. The first shot hit him in the breast; the second in the body, lower down; and the third in the forehead. As soon as the first shot was

fired, Campbell began to fall. The second shot was fired, and struck him about the stomach, as he was falling. He fell on his back, and after he fell defendant then walked up to his side, and pointed his pistol, and shot Campbell in the forehead. All three shots were fired close together. His forehead was powder-burned." This witness states that during the game Campbell sportively reached and got the pistol which had been staked on the game, and fired it at a bottle in his rear; that three shots were fired by defendant at the time of the homicide; that he (witness) then ran home, some one-fourth of a mile, and about the time he reached home he heard a fourth shot. The defendant's witness Merchant states: "That he went to where the parties were confronting each other and quarrelling, and caught hold of defendant, and said, 'This will not do.' Defendant said, 'Stand back,' or he would shoot me. That he then stepped back; and Campbell at this time had his pistol cocked in his hand, near his hip. That he raised it, and pointed it towards defendant, before defendant made any demonstration to use his pistol. That Campbell raised his pistol, and pointed it at the defendant, who knocked it to one side with his right hand, and shot Campbell with his left. That when defendant knocked Campbell's pistol aside it was discharged, and this was the first shot fired; and Godwin then fired two shots in quick succession. Campbell fell upon his back, and after he fell Godwin took a step towards Campbell, and shot him in the forehead. This was the last shot fired, which was about a minute after the other two shots. That Campbell was dead when defendant fired the third shot into his forehead." Other testimony on the part of the state tended to show that the pistol which deceased had was fired only once, which is accounted for by the shot at the bottle during the game of cards. The testimony also tends to show that there were four distinct shots in the body of the deceased; besides those already mentioned, another being through the fleshy part of the deceased's arm, between the elbow and shoulder. After the homicide, defendant fled, and was not apprehended until some three or four weeks subsequent. These are substantially the facts attending the homicide, and have been stated in order that the questions of law may be properly discussed.

On the trial the court admitted testimony offered by the state, showing that on the day and night preceding the homicide defendant had made a number of threats of a general character; that is, not directed towards any particular person. We quote from the bill of exceptions, which was reserved to the admission of this testimony, some of said threats, in order to show their general character: "Hayden Williams testified that he saw defendant in the town of Baird, in Callahan county, about eleven o'clock the night before

the killing. That defendant was drinking, but appeared to know what he was talking about. He took me to a rock pile out in front of Maxwell's saloon, where he had his clothes hid, and took off the rocks, and uncovered his clothes, which were in a seamless sack. He got on his horse, and asked me to hand him his sack of clothes. I did so, and he tied them on behind his saddle, and I went on back to Brown Seay's saloon with him, and we stopped in front of Seay's saloon. He said he was going to leave the country, but was going to kill some damn son of a bitch before he left. Said he was going to kill as good a friend as he had, and go to Devil's river, and come back to court. He had his six-shooter in his hand, and struck witness on the shoulder with it, and remarked for me not to be afraid; that he was not going to shoot anybody right here. I told him to put up his pistol; that he might hurt somebody. He replied that he knew how to handle a gun as well as any man, and was not going to hurt anybody right here." Ida Daniels testified that she saw defendant about 11 o'clock on the night before the killing, and that she heard him say he was going to kill somebody. The state also proved by witness N. P. Scruggs that he saw the defendant early in the night before the killing, and he said he wanted to kill some son of a bitch; that he felt like killing somebody; and wanted to know if Scruggs ever felt that way. In none of these conversations was the name of the deceased mentioned or alluded to. The defendant reserved his bill of exceptions to all of this testimony on the ground that said threats were not pertinent or relevant; that they were not shown to have in any manner referred to deceased, and related to independent and extraneous transactions and occurrences not connected with the homicide, and not in any way pertinent to the issues in the case. It is always competent, as showing motive on the part of the defendant, to prove threats made by him against deceased; and the cases hold that, although the name of the deceased may not have been mentioned by the defendant, yet, if it can be reasonably gathered that the deceased was meant or alluded to, that threats to take his life or do him serious bodily injury are admissible. See *Sparks v. Com.*, 80 Ky. 644, 20 S. W. 167; *State v. King* (Mont.) 24 Pac. 265. Some of the cases hold that general threats not directed to the deceased, made by defendant, are admissible as showing evidence of general malice and purpose to injure or kill some one. See *Brooks v. Com.* (Ky.) 37 S. W. 1043. Said case cites a number of authorities bearing out this proposition, but we have not had access to all the reports. The *Cases of Sparks and King*, supra, do not support the proposition, but it was held in each of said cases, as stated, that the testimony showed that the threats of the defendant had reference to the deceased. *Whitaker v. Com.* (Ky.) 17 S. W. 358, would seem to support the contention.

The court, however, say that: "If this testimony was incompetent, yet its admission would not authorize a reversal, because the accused, through the sympathy of the jury, was only found guilty of manslaughter." *Hopkins v. Com.*, 50 Pa. St. 9, is another case referred to. In that case it does not appear that there was any quarrel or altercation, at the time of the homicide, between the defendant and deceased. The killing appears to have occurred on shipboard, where the defendant and a number of other persons were gathered. The defendant, without any cause assigned, threw a cup of coffee at a negro, missing him, and striking a marine. A contest then ensued between a number of parties standing on the starboard side of the vessel; and in the contest which ensued defendant stabbed one Andrew McMarity in the neck, inflicting a wound from which he died. Testimony was admitted on behalf of the state that the prisoner, some 15 minutes before the occurrence, declared that he would kill somebody before 24 hours. The court, upon this point, uses this language: "To get at the state of the prisoner's mind, and to show that he harbored revengeful and murderous passions, it was competent to prove his threats at or about the time of dealing the deadly blow. It was part of the *res gestæ*. 'Upon an inquiry,' says Mr. Greenleaf (volume 1, § 108), 'as to the state of mind, sentiments or disposition of a person at any particular period, his declarations and conversations are admissible. They are parts of the *res gestæ*.' A drunken brawl between marines and sailors prevailed on shipboard. The prisoner's conduct had been so violent that he had been in irons several hours the day of the killing, and when released his turbulent and quarrelsome conduct was resumed. Less than an hour before the mortal stab was given to McMarity, the prisoner declared that he would kill somebody before twenty-four hours. 'He hallooed it all around the deck,' says a witness. Now, it was of material consequence that the commonwealth, who sought to convict the prisoner of murder in the first degree, should give evidence of a premeditated purpose—a formed design—to kill or to do some great bodily harm, for without malice prepense there could be no conviction of the higher grade of murder. Nor was it necessary that the premeditated malice should have selected its victim. If the jury believed that the prisoner had formed the deliberate design to kill somebody, and in pursuance of that purpose, within an hour after declaring it, did kill McMarity, the commonwealth had a right to insist upon his conviction of murder in the first degree, and that they might thus insist they had a right to prove his declaration an hour before the deed. Blackstone ranks 'antecedent menaces' and 'former grudges' as evidence of malice prepense; and he tells us, moreover, that malice prepense is not so properly spite or malevolence to the deceased in particular as any evil design in

general, the dictate of a wicked, depraved, and malignant heart. The witness said he heard no threats against McMarity, but this made his testimony none the less admissible, for killing anybody in pursuance of the malicious purpose which the general threat evidenced was murder. We conclude, therefore, that there was no error in admitting the evidence contained in the only bill that was sealed." Now, it would appear from this case that the court regarded this declaration as *res gestæ*, and so admissible; or that it was admissible as showing evidence of general malice, and, though the deceased was not singled out, he was within the scope of appellant's malice. And it is believed that all of the authorities that support the proposition that general threats (not pointing to the deceased) are admissible are cases where the threats are evidence of general malignity, and the subsequent killing was embraced within the scope of such malignity. For instance, we have no doubt that, if a person declares that he intends to go upon the street, and kill some person, and straightway goes upon the street, armed with a weapon, and slays an individual, evidence of the previous declaration made would be admissible, both as a part of the *res gestæ* and as showing a malignant disposition towards all persons, which would embrace the person slain. We hold the rule to be that evidence of general threats made by the defendant on trial for murder, when such threats are not shown to have been directed towards the person slain, or to embrace such person, are inadmissible. In *State v. Crabtree* (Mo. Sup.) 20 S. W. 7, it was held that general threats made by the defendant on trial for murder some time before the killing were inadmissible in evidence when defendant and deceased are shown to have been on friendly terms until the day of the homicide. And see *Strange v. State* (decided at present term) 42 S. W. 551.

Now, in the case at bar, it cannot be pretended that the threats of the defendant, made on the night before, were directed towards the deceased. The evidence does not suggest this remotely. On the day of the homicide they appear to have entered into a friendly game of cards, and a sudden altercation ensued, in which defendant slew deceased. The motive therefor was occasioned on account of a difference in regard to the game of cards. Evidently appellant became incensed at deceased because he was winner in the game. We cannot say what effect this illegal testimony may have had upon the jury. Undoubtedly, it was calculated to make them believe that defendant was a dangerous and bad man. It may be that appellant deserved all the punishment he received, and even more, under the facts and circumstances of this case; but the fact that the illegal testimony was admitted, and that this may have operated to the prejudice of the defendant, requires a reversal of this case.

Appellant complains that the court gave a

charge on provoking the difficulty. This is pointed out in the motion for a new trial. According to the testimony of both the state's and the defendant's witnesses, the defendant was the aggressor, and brought on the difficulty; and it is no defense to him that deceased may have engaged voluntarily with him in a rencounter in which deadly weapons were to be used. The charge of the court was rather liberal than otherwise to the defendant in this regard. But for the error of the court in admitting illegal and improper testimony of threats against defendant, the judgment is reversed, and the cause remanded.

### POTEET v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

#### CRIMINAL LAW—CONTEMPORANEOUS THEFT—INSTRUCTION—*RES GESTÆ*.

1. In a prosecution for the theft of a hog, the state showed that the prosecutor and his employé, after hearing shots in the direction of where they had missed two hogs, found the defendant and others in the act of killing one hog, and that the other was subsequently found wounded, about 150 yards from there. *Held*, that there was sufficient evidence of the theft of two hogs for the court to charge the jury on the subject of contemporaneous theft.

2. Where the court omits the word "doubt" from a charge on fraudulent intent in such a manner that, as given, the charge is senseless, but by striking out the word "reasonable" it correctly states the law except as to the finding beyond "a reasonable doubt," the error will be cured by the submission of other instructions that clearly define "reasonable doubt."

3. When defendant and others were caught in the act of killing a hog belonging to the prosecutor, defendant's brother explained that they thought the hog was their father's. In the trial of defendant for stealing the hog he adopted that as his theory of defense. *Held*, that a charge that might be construed so as to restrict the explanations made at the time to what was said by defendant was not error, where the jury were also told that, if the defendant believed he was killing his father's hog, he should be acquitted.

4. A new trial will not be ordered upon the discovery of new evidence which only serves to impeach a witness.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Jim Poteet was convicted of the theft of a hog, and he appeals. Affirmed.

J. T. Bivens and J. M. Eckford, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of a hog, and his punishment assessed at confinement in the penitentiary, for a term of two years; hence this appeal.

Appellant complains that the court admitted testimony, and charged the jury, with reference to a contemporaneous theft of another hog than that charged in the indictment; the grounds of his objection being that there was no evidence of such contemporaneous theft. We have examined the record in this respect,

and, if there ever was a case of contemporaneous theft, it occurs to us that this is such a case. The prosecutor, Rodriguez, was in the habit of driving his hogs up at night from the range, and on the particular evening he and an employé, Manuel Martinez, went to drive the bunch of hogs up, and found only seven instead of nine. After driving the seven home, they immediately returned in search of the missing two, and soon heard shots in the vicinity of where they had found the other hogs. They pursued in the direction of the shots, and found the defendant and his three companions in the act of killing one hog, and the other hog appears to have been wounded, and had got off some little distance, being subsequently found 100 or 150 yards from there. Evidently these hogs had been cut off by these parties from the main bunch, and were driven some distance, and then the attempt made to kill them. They were, in effect, reduced to possession when they were cut off and driven from the bunch, and the theft of the two hogs was one and the same transaction. Proof as to one could not be well made without proof with respect to the other, and the court acted properly in charging the jury in regard thereto. If he had failed to submit this charge, it would have been error, and if excepted to might have reversed the case on appeal.

Appellant complains that in one of the court's charges the word "doubt" is omitted, and he says that the charge fails to make complete sense without the use of this word. The transcript before us supports the contention to the effect that said word "doubt" is omitted, though it may be that this is a mere omission by the clerk in making up the transcript. However, the question of a reasonable doubt appears in connection with the court's charge in other portions sufficiently to guard and protect defendant's rights; and, if we reject from the charge in question the expressions "reasonable doubt" altogether, still there is no cause for complaint by appellant. This is a charge on fraudulent intent, and the instruction of the court, with this expression eliminated, would merely be a charge to the jury that, before they could find defendant guilty, they must believe that the fraudulent intent existed in his mind at the time of the taking. The charge of the court on which they were authorized to convict the defendant requires them to believe all the facts beyond a reasonable doubt, and the court in the final portion of the charge tells the jury, "if they have a reasonable doubt of the guilt of the defendant, they must acquit"; so if, even in the original charge, the word "doubt" is omitted, there could have been no possible injury to the defendant on this account.

Appellant also complains that the court, in submitting the charge on explanation, confined it to an explanation made by the defendant, whereas it is insisted the explanation was made by the brother of the defendant, Babe Poteet, and not by the defendant, and that he was thus cut off from any explanation made by his

brother, and that he was entitled to such explanation as made by his brother, Babe Poteet. We do not believe the jury viewed this charge in this restricted sense; but, as appellant himself was present at the time Babe Poteet stated that they believed the hogs belonged to their father, the jury regarded this explanation as made by appellant himself. But, if this be not correct, the court gave the jury a charge directly based upon the defense of the appellant, to the effect: "If, at the time the hogs were killed, they acted under such belief that they belonged to F. N. Poteet, Sr. [the father of appellant], to acquit him,"—so defendant had the full benefit of the explanation in another form.

There is nothing in appellant's application for a new trial on the ground of newly-discovered evidence. This evidence could hardly be regarded as newly discovered. The witness Rodriguez was on the stand, and was examined as to the identity of the hogs, and how he knew them at the time he discovered the parties in the act of stealing them. Besides, this testimony was merely to impeach the witness Rodriguez, and a new trial is not authorized in order to procure testimony to impeach a witness. We will not discuss the practice with reference to the affidavits appended by the state, contesting the motion for a new trial on the ground of newly-discovered evidence. No error appearing, the judgment is affirmed.

#### HENRY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

##### CRIMINAL LAW—EVIDENCE OF FLIGHT.

1. Testimony of the sheriff that during three years he had writs of capias for the arrest of the defendant, and had made diligent inquiry as to his whereabouts, and had failed to find him, is admissible to show the flight of defendant.

2. In order to render admissible testimony that, after the commission of the offense charged, defendant left the county, it is not necessary to lay a predicate showing that defendant was under bond and failed to appear, or that he had no right to leave the county.

3. Where there are circumstances tending to convict defendant, independent of the testimony of alleged accomplices, it is not error to refuse an instruction that, if the jury believed the witnesses in question were accomplices, they should acquit defendant.

4. A verdict will not be set aside on account of an affidavit of a juror that he was induced to sign the verdict by a promise that the jury, in its verdict, would recommend defendant to executive clemency.

Appeal from district court, Walker county; J. M. Smither, Judge.

Pat Henry, Jr., was convicted of hog theft, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of hog theft, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

In his first bill of exceptions, appellant com-

plaints of the action of the court in permitting the sheriff of Walker county to state that during three years he had in his hands cap-lases for the arrest of the defendant, and had made diligent inquiry as to his whereabouts in that county, and had failed to find him. Several objections were urged to the admission of this testimony, none of which have any merit. This character of testimony is always admissible to show the flight of defendant.

By the second bill of exceptions, he complains that the court permitted the witness Nettle Tillas to state that defendant, after the commission of the offense charged, left Walker county, where the offense was committed. This was objected to because no predicate was laid for the introduction of this character of testimony, by "showing that this defendant was under bond, and failed to appear, or that he had no right to leave the county of Walker." No predicate was necessary to be laid. The mere fact that he left the county just after the commission of this offense, and knew that he was suspected, was predicate sufficient. It was a statement of the fact, predicated upon the charge of theft and subsequent flight. Nor is it necessary that he should be under bond, in order to introduce evidence of his flight. If this were true, the evidence of flight of a defendant could not be admitted at all, if he had not been arrested, and subsequently fled.

In the third bill of exceptions, he complains of the refusal of the court to give the following requested instructions: "You are instructed that if you believe from the evidence that the witnesses Emma Henry, Emma Patrick, and Nettle Tillas were accomplices in the taking of said hog, as the term 'accomplice' has been explained in other parts of this instruction, then you will acquit the defendant; there being no evidence before you corroborating their evidence as to the actual commission of the offense by this defendant." This ruling of the court was correct. The court gave a charge on the question of accomplice testimony, fully and fairly submitting that issue to the jury, and favorable to the defendant. There were circumstances and cogent facts, independent of the testimony of these witnesses, which strongly tended to show that defendant committed the theft,—perhaps sufficiently cogent to have justified a conviction independent of the accomplice testimony.

A motion was made to quash the indictment because it failed to allege the ownership of the hogs, but an inspection of the indictment shows that this motion is without merit. It alleges the ownership appropriately.

By the affidavit of one J. M. Mettawee, it is shown that the verdict in this case was agreed to by him on condition that the jury would recommend the appellant to executive clemency, in its verdict; and it was under this condition, and this alone, that he agreed to said verdict; and the other 11 jurors

agreed, before the verdict was rendered, as an inducement to this affiant, that if the affiant would agree in rendering the verdict against this defendant, a prayer for executive clemency should be made a part of the verdict in the case. He further states, "The said proposition as coming from one of the eleven jurors, and not coming from this affiant; and, without such condition, this affiant would not have agreed to said verdict, but it was on the belief that executive clemency would be extended to the defendant that this affiant agreed to bring in said verdict." In *Montgomery's Case*, 13 Tex. App. 74, the opinion recites that two of the jurymen "agreed to the verdict of guilty because it was agreed and understood by the jury that the defendant could and would, upon a petition of the jury, be pardoned, and that they found him guilty with the understanding that they would all sign such a petition, and that the verdict was a compromise one, resting upon the fact of pardon." In speaking of this question, the court say: "As to the second affidavit, the case of *State v. Wallman* is directly in point; and therein it was said 'that evidence will not be admitted to show that one of the jurors in a murder case only agreed to the verdict of guilty on condition that a petition signed by every member of the jury should be addressed to the governor, asking that the penalty be commuted from death to imprisonment for life,'—citing *State v. Wallman*, 31 La. Ann. 148. See, also, *Railway Co. v. Flicker*, 95 Ind. 181. In *Hendrickson v. State* (Tex. Cr. App.) 23 S. W. 690, "two jurors stated under oath that this agreement was had before the verdict was agreed upon, and that it influenced them in arriving at their verdict. They further said, 'We cannot say that we would ever have agreed to said verdict, except for said agreement.' " In passing upon this the court further said: "How jurors could be induced or influenced to convict a party of an infamous offense, in order to have an opportunity of signing a petition for pardon, is very remarkable, to say the least of it; and how they could be willing to render infamous a fellow citizen, by convicting him of a heinous crime, in order to have the opportunity afforded them of asking the governor to efface that infamy, passes comprehension." We have found no authorities which would justify the court in setting aside a verdict on affidavits of the kind found in this record. Jurors should not be permitted to impeach their verdicts by such statements. The judgment is affirmed.

#### YVARRA v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

CRIMINAL LAW—APPEAL—REVIEW—MATTERS NOT APPARENT OF RECORD—PRESUMPTIONS.

1. Where the charge given is applicable to a state of case provable under the allegations of the indictment, and the record does not contain

a statement of facts, the judgment cannot be disturbed on the ground that the court failed to charge all the law applicable to the case.

2. Where there is no testimony before the court on appeal, it will presume that the verdict and judgment were warranted by the testimony.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Donlate Yvarra was convicted of the theft of cattle, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of the theft of cattle, and his punishment assessed at imprisonment in the penitentiary for two years. There are no assignments of error in the record, and the motion for a new trial suggests: "First, that the court failed to charge all the law applicable to the case; and, second, the verdict is contrary to the law and the evidence." The record does not contain a statement of facts, and the charge as given is applicable to a state of case provable under the allegations contained in the indictment. There being no testimony before us, we will presume that the verdict of the jury and judgment of the court were warranted by the testimony. The judgment is affirmed.

#### SULLIVAN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

##### CRIMINAL LAW—REVIEW ON APPEAL.

An order overruling a motion for a new trial, made on the ground that the verdict is contrary to law and against the evidence, will not be reviewed on appeal, where the record does not contain a bill of exceptions or a statement of facts.

Appeal from Houston county court; A. A. Aldrich, Judge.

James Sullivan was convicted of exhibiting a gaming table and bank, called "Monte," and he appeals. Affirmed.

Mann Trice, for the State.

HURT, P. J. Appellant was convicted for exhibiting, for the purpose of gaming, a gaming table and bank called "Monte," and his punishment assessed at a fine of \$25 and imprisonment for 10 days in the county jail; hence this appeal.

The record does not contain a bill of exceptions or statement of the facts. The motion for a new trial suggests that the verdict of the jury is contrary to the law and against the evidence. This matter cannot be reviewed in the absence of a statement of facts. There is a motion in arrest of judgment attacking the judgment, because there is a variance between the verdict and the judgment entry on said verdict. An inspection of the judgment shows the contrary. These are the questions suggested by appellant for our consideration, and they are without merit so far as this record discloses. The judgment is affirmed.

#### BRITE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

##### CRIMINAL LAW—EXCLUDING WITNESSES—PRINCIPALS—THEFT—HONEST MISTAKE—FRAUDULENT INTENT.

1. The failure in a criminal case to exclude a certain witness under the general rule excluding witnesses must be shown to be prejudicial to the appellant by showing what testimony the witness heard, or it will not be considered.

2. A deputy sheriff who is also a witness in a criminal case may be released by the court from the rule excluding witnesses from the court room during the trial.

3. In a prosecution for cattle stealing, a bill of sale, by which defendant conveyed the stolen animal, whether intended as a mere mortgage or as an absolute conveyance, is admissible as a circumstance to show defendant's control of the animal in question at the time.

4. In a prosecution for cattle stealing, where the evidence is wholly circumstantial, and the defendant may or may not have had assistance in the theft, a charge upon the law of principals "that all parties are principals that act together in the commission of an offense" is not prejudicial when accompanied by an instruction that the defendant must have engaged in taking the animal as a principal.

5. Where the stolen animal showed that it had been ear-cropped recently, and since being stolen, a charge to the effect that recent possession was the only inculpatory evidence in the case was properly refused.

6. Where, in a prosecution for cattle stealing, it seems that the defense of honest mistake was not set up by defendant, but it also appears that, but for certain evidence for the state, the defendant would have set up such defense, and from the record it appears that the defendant intended to raise such defense, but it was rendered unavailing by the evidence of the state, that the court charged upon that theory is not error.

7. Where the court instructs the jury "that, before they could convict the defendant, they must believe that the animal in question was the property of D.," the question whether the animal was the property of D. or the defendant is properly submitted.

8. A charge that, in order that there be a fraudulent intent, the party taking "must know at the time he took the property that it did not belong to him, and that he took it intending to deprive the owner of its value, and to appropriate it to his own use and benefit," sufficiently guards the defendant's rights.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

C. H. Brite was convicted of the theft of cattle, and he appeals. Affirmed.

W. T. Merriwether and John W. Preston, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of theft of cattle, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.



By the first bill of exceptions appellant complains of the action of the court in permitting the state to introduce as a witness one Jesse Cook, the ground of his objection being that the witnesses had been placed under the rule, and that Jesse Cook had not been placed under the rule, but had remained in the court room, and heard the testimony

of other witnesses. The bill discloses that said Cook was a deputy sheriff at the time. It is not shown how many witnesses said Cook may have heard testify before he went on the stand; so we are unable to determine whether or not, even if he had not been a deputy sheriff, he heard any testimony that was suggestive to him in giving his evidence. We think, however, as said witness was a deputy sheriff, it was competent for the court to have released him from the rule; but, as stated, the bill does not show enough to even suggest that any possible injury could have accrued to appellant from the action of the court.

Appellant objected to the introduction of parol testimony of the contents of a bill of sale made by defendant to Avant of eight head of cattle, including the one in controversy. He does not appear to have objected to said instrument, because its loss was not sufficiently accounted for, but simply on the ground that said bill of sale was intended only as a mortgage or security for the money, and was not a final consummation of the trade by which the animal in controversy was sold and delivered, and that same was no part of the trade which was finally consummated between them. We do not consider the objection well taken. The instrument certainly related to the animal in controversy; and, whether it was a mere mortgage or a final bill of sale, it was a circumstance to show appellant's control of the animal in question at that time.

Appellant objected to that part of the charge of the court which instructed the jury as to the law of principals. Said charge is to the effect "that all parties are principals who act together in the commission of an offense." This matter was first presented in a bill of exceptions, and subsequently, on motion for a new trial, appellant elaborated it. The second paragraph of the motion for a new trial objects to said charge, on the ground "that said charge was not applicable to any phase of the case, as the witnesses Harrison and Poteet were not principals, and that said charge could have applied to no one else, and was a charge on the weight of evidence." We fail to see how a charge on principals could have injuriously affected appellant; and the law now is that a charge given must not only be erroneous, but it must be calculated to work some injury to appellant. The evidence in this case was wholly of a circumstantial character, and defendant may or may not have had assistance in taking said head of cattle. If he did, and this is probable, then the charge was proper. If he did not have assistance, then the jury were instructed that, before they could convict him, they must believe that he took the animal or was engaged in the taking as a principal. Nor do we believe the charge could in any wise be considered a charge upon the weight of the testimony.

Appellant contends that the only inculpa-

tory evidence against him was recent possession, and that the court should have aptly and properly charged the law upon this phase of the case. We do not believe this is a case depending alone upon recent possession. It is a rare thing that any case would arise in which there was no other fact save recent possession. The circumstances attending such possession would generally be in proof, and serve to characterize such possession. In this case, besides the fact of possession, there are a number of other circumstances, to wit, the peculiarity in flesh marks of the animal in question, the fact that it had previously been marked with a crop off each ear thus, , and that, when found in possession of the defendant, this mark had been changed thus, , which all the witnesses call an underslope and overbit in the left ear, and a crop and underseven in the right ear; the proof for the state showing that the original mark had been cut out with the change, except the crop off the right ear, which appeared older than the other portions of the mark. There were other circumstances in this case which it is unnecessary to enumerate. So that the case did not depend entirely upon the isolated fact of recent possession, and it was not necessary for the court to charge upon this phase of the case.

Appellant also objected to that portion of the charge presenting a defense of honest mistake. It is true, in looking at the testimony from one point of view, the question of honest mistake might not be considered a defense set up by appellant; but we apprehend that, if this charge had not been given, it would have been urged that it should have been given. There is a great deal of testimony in the record showing the similarity in size, age, and color between the animal claimed by Williams, and which it is alleged appellant took and sold to Avant, and another animal, which appellant claims was the only one he sold to Avant, and which he claims was the calf of the Salzman cow, which he had purchased from Adams; and but for the fact that the state, by its witnesses, showed that the calf claimed by Williams was in the possession of Williams long after the witnesses for the defendant show that the calf of the Salzman cow was driven up by them and necked to another calf in defendant's pasture, there would be some difficulty in determining whether or not these calves were one and the same. If the calf taken by appellant was in fact the calf of Williams, and he took it into possession, believing at the time that it was the calf of the Salzman cow, which resembled the Williams calf in appearance, then he had a good defense, based on honest mistake; and it does appear from the record that he projected this defense, but that it was cut off by the state's evidence, as above stated, which showed that the calf taken was Williams' calf, and that it was taken long after it is alleged and shown by appellant's witnesses that he took the Salzman calf. If the

jury had not believed the state's witnesses to the effect that they saw the Williams calf in Williams' pasture long after appellant claimed to have gotten his calf up, then defendant might have successfully urged that, although the proof showed he had sold Williams' calf to Avant, yet he had made an honest mistake, and believed that it was the calf of the Salzman cow, which was his own, and that he had remarked this calf for his, as it was following his cow, notwithstanding at the time he found it marked in the mark of Williams.

Appellant also complains that the court failed to charge upon the material issue in the case, insisting that the only issue in the case was as to the ownership of the calf in question. He says: "It was a material issue in this case whether or not the animal alleged to have been stolen was the property of the defendant, or the property of D. T. Williams, and the court nowhere in said charge submits this issue to the jury." Now, the court, in its general charge, instructed the jury "that, before they could convict the defendant, they must believe that the animal in question was the property of D. T. Williams," which, of course, implied that, if it was defendant's property, they could not convict him. The court specifically instructed the jury that, in order that there be a fraudulent intent, the party taking "must know at the time when he took the property that it did not belong to him, and that he took it at the time intending to deprive the owner of the value of the same, and to appropriate the same to his own use and benefit." Now, if appellant desired any more specific charge than this on the subject, it occurs to us that he should have asked it. The charge in question, it occurs to us, sufficiently guarded appellant's right in this respect. We have examined the record carefully, and, in our opinion, the evidence justifies the verdict, and the judgment is affirmed.

#### BURT v. STATE.

(Court of Criminal Appeals of Texas. Dec. 2, 1897.)

#### MURDER—EVIDENCE—HYPOTHETICAL QUESTION—INSANITY AS DEFENSE—INSTRUCTIONS.

1. The hypothetical case submitted by the state to an insanity expert need not embrace all the testimony on the subject; defendant, however, having the right to submit a different hypothetical case.

2. On a prosecution for murder of defendant's wife, it being admitted that he killed her, and the defense being insanity, evidence of an exclamation, "I will stand this thing no longer!" heard in their house the evening before the murder, and circumstantially shown to have been made by the wife to defendant, is competent and admissible on behalf of the state.

3. An instruction that, if defendant did with malice aforethought "so kill, you will find him guilty of murder in the first degree," following immediately on the portion of the charge defining murder in the first degree, requires the killing to be as set forth in such preceding portion.

On rehearing. Denied.

For former report, see 40 S. W. 1000.

HURT, P. J. The judgment in this case was affirmed at the Austin term, 1897, of this court (40 S. W. 1000), and the case comes before us now on motion for rehearing by the appellant. In the original opinion we discussed the question as to whether or not expert opinion could be obtained upon a partially stated hypothetical case, this question being discussed with reference to the bill of exceptions in regard to the testimony of Dr. T. D. Wooten. The same subject was presented in a bill of exceptions in regard to the testimony of Dr. Davis. We disposed of the question presented in the bill of exceptions with reference to the testimony of Dr. Davis by reference to what we had said in regard to the bill of exceptions as to Dr. T. D. Wooten's testimony. Counsel for appellant, on motion for rehearing, insists that there is a very material difference in the bills of exception. From the record it appears that Dr. Wooten was introduced by the state, and a hypothetical case submitted to him, and that this question did not include all of the evidence bearing upon the question of sanity. Dr. Wooten answered the question that, in his opinion, defendant was sane. Afterwards the state asked the witness his opinion based upon a hypothetical case embodying all the evidence in the case, upon which the witness expressed the same opinion as upon the state's first question; that is, that appellant was sane. Appellant then put a hypothetical question to the witness based upon his theory of the case, and upon which the witness answered that the defendant was insane. A full opportunity was allowed to get the opinion as to the defendant's sanity based upon any hypothesis to be inferred from any evidence in the case. The objection to this procedure was that the state obtained the witness' opinion upon an incomplete hypothetical case. Let us concede for the argument that the full case, containing all the testimony, offered either by the state or the defendant, must be embraced in the hypothetical case; still, if this was not done, no complaint can be urged by appellant in regard to the testimony of Dr. Wooten, because, after the defendant had submitted his hypothetical case, the witness answered that, in his opinion, the appellant was insane. Upon no ground of reason or common sense could appellant be heard to complain of this matter in the shape presented by this bill. Appellant was permitted to form a hypothetical case, not alone upon his testimony, but upon any and all the testimony introduced upon the trial. When the whole case was put, the witness answered that his opinion was that defendant was sane. When the defendant's case, based upon the testimony offered by him, was put to the witness, he answered that defendant was insane. But it will be observed that the bill shows that



the state submitted the whole case, and upon which the witness answered that defendant was sane. We cannot comprehend how appellant can complain of this. As to the contention of appellant that the opinion was only upon a partial or incomplete statement of the case, we will treat of this subject when we reach the bill of exceptions pertaining to the testimony of Dr. Davis.

It occurs by a bill of exceptions that Dr. Davis was introduced as an expert; that the state submitted a hypothetical case, based upon its testimony bearing upon the question of sanity, and obtained the answer that appellant was sane. The defendant objected, because all the testimony bearing upon the question of sanity was not embraced in the hypothetical case put by the state; but the bill further shows that the defendant then put a hypothetical case to the witness, based upon the assumption that all reasonable inferences to be drawn from his testimony were true, including the fact that defendant, without reason, motive, or cause, killed his wife and children, upon which question the witness answered that, upon such hypothesis, he would say that the defendant was insane; that all of the testimony bearing upon the question of sanity was embraced in the state's hypothetical question and the defendant's hypothetical question combined.

We have presented to us the question discussed in the original opinion, in treating of the bill of exceptions pertaining to the testimony of Dr. Wooten, which is: Can the state submit a hypothetical case which does not include all the testimony bearing upon the question of sanity, and obtain an opinion from the expert; or must the question propounded contain all the evidence bearing upon the question of sanity, whether introduced by the state or the defendant, and whether believed to be true or false by the state? We hold, as we did in the original opinion, that the state can formulate a hypothetical case embracing such facts bearing upon the question of sanity as it deems proper and competent, and obtain the opinion of an expert. We hold that, if the defendant is not satisfied with the hypothetical case submitted by the state, he has the privilege of submitting his case, not only as embraced in his testimony, but upon any and all testimony introduced on the trial. Of course, if the case submitted by the state is unfair and unjust to the appellant, the court will correct this; and if the court fails to do so, and the defendant proposes to submit a case embracing all the facts bearing upon the question, and he is denied this right, error would be patent.

Recurring to the bill of exceptions pertaining to the testimony of Dr. Wooten: If the last proposition be correct, the state was under no obligation, and was not required to submit the full case, but had the right to submit the case which it thought was supported by the testimony, and was not bound to submit a case involving testimony be-

lieved by the state to be false. And we repeat that the disposition of the bill of exceptions as to Dr. Wooten's testimony disposes of the bill of exceptions as to the testimony of Dr. Davis; for, if the state is not bound to embrace all the testimony bearing upon the subject, then it was not required to do so in reference to Dr. Wooten, but, after having done so, appellant had no right to complain.

Now, we have this question: Is it necessary, in submitting a hypothetical case, for the state to include every particle of the evidence bearing upon the question of insanity, in order to obtain a legal answer from the expert? If so, the contention of the appellant in the Davis bill of exceptions is well founded; for that bill shows that the opinion was obtained from the expert upon a hypothetical case that did not embrace the theory of the defense, and did not embrace all the testimony bearing upon the question of sanity. The question therefore is: Must the hypothetical case submitted to the expert include all the testimony bearing upon the question of sanity, in order to obtain a legal and proper answer from the expert? In the original opinion we discussed this very question, and held that it was not necessary. We have seen nothing to change our opinion upon this subject. The authorities are just that way. But it is contended by counsel for appellant that we have settled the law to the contrary in *Webb v. State*, 9 Tex. App. 490. *Leache v. State*, 22 Tex. App. 279, 3 S. W. 539, and in *Williams v. State* (Tex. Cr. App.) 39 S. W. 687.

Now, we assert that the question here discussed has never been presented in any case before either the court of appeals, court of criminal appeals, or the supreme court of this state. Counsel for appellant cites no case decided by the supreme court, but relies upon the cases of *Webb v. State*, *Leache v. State*, and *Williams v. State*, supra. What was the question before the court in *Webb v. State*, supra? It was as to whether or not an expert could give his opinion unless he had heard all the testimony bearing upon the question at issue. It was not a case in which the hypothetical case was submitted to an expert who had not heard the evidence. The question arose in this manner: Dr. Stone, witness for the defendant, heard all the testimony introduced on the trial, and gave as his opinion that he had heard no evidence of the insanity of the accused that could not be explained by other causes, such as indulgence in drink or debauchery. The state, upon cross-examination of Dr. Stone, asked what his opinion was, based upon the testimony of the witness Pool. Dr. Stone answered that from the evidence of Pool alone he would have considered *Webb* insane, and believed the mind of defendant, at the time the particular offense was committed, to be more or less disturbed from some cause, but not to the extent to relieve

him entirely from responsibility. In passing, the court say "that the witness had heard all the testimony in the case, and did not believe the defendant insane. This opinion, founded upon the whole testimony, must have included, and did include, the testimony of the witness Pool. If it did, then how could any injury result to defendant by asking, and that, too, upon cross-examination, the opinion of the witness upon the testimony of Pool alone, we confess we cannot conceive. It would have been otherwise if the expert had not heard and formed his opinion upon the whole case; for in that case the question and answer would have been not only improper, but illegal and inadmissible." Now, it will be observed that in the Webb Case the hypothetical question was not propounded to an expert who had not heard the testimony, but the expert had heard all the evidence. It may be insisted that, if it is necessary for the expert to hear all the testimony before giving an opinion, therefore it is absolutely necessary that the hypothetical case submitted to an expert who did not hear the testimony must embrace all the testimony bearing upon the question of sanity. We are not called upon to pass upon this question; but the reasons for the one rule will not apply to the other rule. Take the most enlightened expert, and let him hear all the testimony; he can arrive at a correct conclusion as to the sanity of the accused; and at the same time, if called upon to state all the facts from which he makes the conclusion, he would most generally fail. The impression from the facts is made upon his mind, without the ability to produce the facts in the statement. But, be this as it may, the question involved in the Webb Case is not the question before us. Now, it is true that Presiding Judge White in that case states that the full case must be submitted, and he asserts that all the authorities support this proposition. We find to the contrary,—that the overwhelming weight of authority supports the proposition "that the state has the right to submit its hypothetical case, and, if the accused is not satisfied with it, he can state his hypothetical case." This proposition is conclusively established by the authorities cited in the original opinion; and, in addition to those, we desire to cite the elaborate opinion in the case of *Coyle v. Com.*, 104 Pa. St. 117. To be more explicit: "Each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence; and, if meagerly presented in the examination on one side, it may be fully presented on the other, the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted." Now, the question presented to us is one in which the state presented its theory of the hypothetical case to the expert. (We are now treating of the bill of exceptions in reference to Dr. Davis'

testimony.) The state had a right to select its theory of the evidence, and to base a hypothetical case upon that state of facts which the state thought to be true. The defendant had a right to submit a hypothetical case upon the state of facts which he believed to be true. Of course, if the statement of a hypothetical case for the state was unfair and unjust to appellant, and objections had been raised, the court would have controlled this matter; but that does not appear in this case. It would be almost impossible for the state to embrace all the testimony introduced in evidence in the hypothetical case, without impressing the jury with the fact that the state believed that all of the evidence and circumstances embraced in the case were in fact true. This would be a great injury to the state. It would be in the nature of a concession of facts which the state proposed to controvert. Nor would it be just to the defendant to require him to embrace all the facts in his statement,—those which tended to show sanity as well as insanity,—when he did not believe the testimony, and in fact proposed to impeach the witnesses swearing to the facts tending to show sanity in some manner, or to show that they were unreasonable and not in fact true. The record shows that a very full statement was made by the state presenting its theory of the facts believed to be true; and the record also shows that the defendant presented his theory of the case. This being so, the expert was in possession of the whole case as effectually as can be presented practically upon a trial of a case.

In the Leache Case, *supra*, the question was in regard to placing the experts under the rule. It appears from the record that the experts were placed under the rule, and did not hear the testimony of the other witnesses. Leache contended that this was reversible error; that he had the right to have the experts present, so that they might hear the testimony in order to give an opinion. Presiding Judge White states "that it was not shown that the hypothetical case presented to the expert was defective in not submitting all the facts essential to an intelligent opinion; nor that the opinion was such as would have been given differently had the evidence been heard directly by these witnesses, and their conclusions drawn from it, and not from the hypothetical statements of it. We cannot perceive that the discretion of the trial judge was abused in the matter to the prejudice of the defendant; that is, that, in placing the experts under the rule, no prejudice therefrom was shown to have resulted to the appellant." That was the only question in judgment. The remarks of Judge White in regard to the rule were not called for or necessary to the disposition of the question raised; but he states, relying upon *Coyle v. Com.*, 104 Pa. St. 117, "that, where the expert has not heard the evidence, each side has the right

to an opinion from the witness upon any hypothesis reasonably consistent with the evidence; and, if meagerly presented in the examination on one side, it may be fully presented on the other, the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted." The question involved in the Leache Case, *supra*, was simply the action of the court in putting the experts under the rule, and all of the observations made by the presiding judge in regard to the rules which control in submitting hypothetical cases to an expert were dicta. But he concedes that each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence. This concession is made in the face of the assertion that all authorities agree that it is inadmissible to permit an expert to give his opinion upon anything short of all the evidence in the case, whether he has personally heard it, or it is stated to him hypothetically.

In the Williams Case, *supra*, the only question before the court was as to the admissibility of the testimony of Dr. Armstrong, an expert, who testified that he had heard but a part of the testimony, but had read the newspaper account of the testimony of the witnesses on the question of insanity on the previous trial of the case. The court thereupon stated that the testimony was the same in the present trial, and permitted the witness, over the objections of appellant, to give an opinion as to the sanity of the defendant. We held in that case that the newspaper report was nothing but hearsay testimony, and that it was not competent for the judge to put such a hypothetical case to the witness. We stated, further, that, if the newspaper statement was eliminated, the witness was not authorized to give his opinion based only on having heard a part of the testimony of the witnesses. So the question here presented was not raised in said case, and what was said by us in referring to the Webb and Leache Cases, *supra*, was not at all necessary to that decision.

We misunderstood the bill of exceptions reserved to the testimony of Carrie Sparks. We thought that the only objection urged to this testimony was that it was not in rebuttal; but, since our attention has been called to the bill in the motion for rehearing, we find that the appellant moved to exclude the evidence upon the grounds, condensely stated, of irrelevancy, that appellant was not shown to have been in the house, and a number of other objections. We therefore have the question as to whether or not, under the circumstances of this case, the evidence of this witness was admissible. When we look to the record, we find that the circumstances strongly tended to show that the appellant was at home. The evidence places Mrs. Burt there, as well as defendant, a short time after the expression was heard. This being the case, we are of opinion that the testimony was admissible, and have no doubt

of its relevancy. It was conceded in the argument of appellant's counsel that defendant killed his wife and two children. About this there is no question. But it is contended that the evidence of this witness bears strongly on the question of sanity. We do not understand it in that way. The testimony shows that Mrs. Burt exclaimed, "I will stand this thing no longer!" To what "thing" she alluded is not disclosed. Whether it was the ill treatment of the husband, or whether it was the insane conduct of the defendant, is not shown. The exclamation may have been made because of the strange and unnatural conduct of an insane man, or might have been induced by the ill treatment of appellant towards his wife. We are left in the dark upon this subject. This exclamation could not have been made by the servant, for she was not at home; and the evidence shows no other female there except Mrs. Burt. Appellant insists, however, that the evidence falls to show that Burt was at home. The witness heard the exclamation after 7 o'clock in the evening. It is shown that defendant was there between 8 and 9 o'clock. The exclamation was made at his home, and the conclusion is reasonable that it was made by his wife to him. Be this as it may, appellant concedes, and the unquestioned facts of the case demonstrate, that he killed his wife and children. We might admit, but we do not, the incompetency of this evidence; and yet no possible injury could have resulted to appellant. It is a strained conclusion that the remark made by the female in the house tended to show the sanity of defendant, for, as before stated, it might have resulted from the insane act of the appellant. If the jury believed, as they had a right to believe, that the exclamation was made by appellant's wife to defendant, clearly the evidence was admissible. If they did not so believe, then no harm resulted to the appellant. If the jury believed that the appellant was insane, or had a doubt about it, they may have concluded that the exclamation was made by the wife, because of some misconduct of her deranged husband, or, if they did not believe he was insane, that the remarks were made because of the ill treatment of the defendant. We are left in a field of speculation, but we cannot perceive, conceding the inadmissibility of the testimony for the argument, how, under the facts of this case, appellant could have been injured; that he killed his wife and children being a conceded fact. Now, it must reasonably appear that the exclamation testified to by the witness Sparks tended to show sanity, and nothing else; and, unless this is made to appear, no injury could have resulted. But we are of opinion that the evidence was admissible, independent of these considerations.

The court instructed the jury upon the subject of express malice as follows: "(8) Express malice, which is absolutely essential to constitute murder in the first degree, exists where one, with sedate, deliberate mind and formed design, unlawfully kills another. (7)

When an unlawful killing is established, the condition of the mind of the party killing, at the time, just before and just after the killing, is an important consideration in determining the grade of the homicide; and, in determining whether murder has been committed with express malice or not, the important questions for a jury to consider are: Do the facts and circumstances in the case at the time of the killing, and before and after that time, having connection with or relation to it, furnish satisfactory evidence of a sedate and deliberate mind, on the part of the person killing, at the time he does the act? And do these facts and circumstances show a formed design to take the life of the person slain, or to inflict on him some serious bodily harm, which, in its necessary and probable consequences, may result in his death? Or do the facts and circumstances in the case show such a general reckless disregard of human life as necessarily includes the formed design against the life of the person slain? If they do, the killing, if it amounts to murder, will be upon express malice. (8) In order to warrant a verdict of murder in the first degree, malice must be shown by the evidence to have existed; that is, the jury must be satisfied from the evidence, beyond a reasonable doubt, that the killing was a consummation of a previously formed design to take the life of the person killed, and that the design to kill was formed deliberately with a sedate mind,—that is, at the time when the mind of the person killing was self-possessed and capable of contemplating the consequences of the act proposed to be done. There is, however, no definite space of time necessary to intervene between the formed design to kill and the actual killing. A single moment of time may be sufficient. All that is required is that the mind be cool and deliberate in forming its purpose, and that the design to kill is formed while the mind is in such calm and sedate condition. (9) When the evidence satisfies the mind of the jury, beyond a reasonable doubt, that the killing was the result of a previously formed design by the defendant to kill deceased, and that the design was formed when the mind was calm and sedate, and capable of contemplating the consequences of the act proposed to be done by him, and such killing is further shown to have been unlawful and done with malice, then the homicide is murder in the first degree, and your verdict should be rendered accordingly. (10) To warrant a conviction of murder in the first degree, the jury must be satisfied by the evidence, beyond a reasonable doubt, that the defendant, before the act, deliberately formed the design with a calm and sedate mind to kill the deceased; that he selected and used the weapon or instrument or means reasonably sufficient to accomplish the death by the mode and manner of its use. The act must not result from a mere sudden, rash, and immediate design, springing from an inconsiderate impulse, passion, or excitement, however unjustifiable and unwarrantable it may be. (11) Now, if you

believe from the evidence, beyond a reasonable doubt, that the defendant, Eugene Burt, in Travis county, state of Texas, on or about July 24, 1896, as charged in the indictment, unlawfully, with malice aforethought, with a sedate and deliberate mind and formed design to kill, did kill Anna M. Burt, by then and there striking, beating, and wounding the said Anna M. Burt upon her head and face with a hatchet and some heavy instrument, thereby fracturing the skull and the bones of the face of said Anna M. Burt, and by then and there tying tightly around the throat and neck of said Anna M. Burt a handkerchief, thereby strangling and suffocating the said Anna M. Burt, and by then and there wrapping around the head and body of said Anna M. Burt a blanket, and securely tying same thereon with rope, and then and there throwing said Anna M. Burt, so wrapped and tied, in a cistern partially filled with water, sufficient to submerge the body of said Anna M. Burt; or if the said defendant did, with malice aforethought, so kill said Anna M. Burt, by either one or by all of the means above enumerated,—you will find the defendant guilty of murder in the first degree, and so state in your verdict, and fix his punishment at death or confinement in the state penitentiary for life, as you may determine and state in your verdict."

Counsel for appellant objects to that portion of the charge which reads as follows: "If the said defendant did, with malice aforethought, so kill said Anna M. Burt, you will find the defendant guilty of murder in the first degree." It is insisted that this charge authorized a verdict of murder in the first degree, upon a state of case which demanded a verdict of murder in the second degree. We do not so understand the charge. It has reference directly to the preceding portions of the charge, which in a remarkably clear and explicit manner define murder in the first degree. No juror with the least degree of intelligence, under the charge given in this case, could conclude that the verdict of murder in the first degree could be rendered unless it was established beyond a reasonable doubt by the evidence that the accused, with a calm mind and formed design, deliberately killed his wife. This portion of the charge has reference to the charge preceding it, and, when it says "so kill," it means, and of necessity means, in the manner and condition of mind as set forth in the preceding portions of the charge. However, there was no objection to the charge; and, this being the case, the rule is that it must have been calculated to injure the rights of the accused. This proposition is supported by any number of cases, the leading case being *Bishop v. State*, 43 Tex. 390. Tested by this rule, was appellant injured? As we said in the original opinion, there is no murder in the second degree in this case. The learned counsel of appellant, in argument, admitted that, if the accused was sane, he was guilty of murder upon express malice. If this be true,—and it is absolutely true,—then no possible injury could have re-

sulted from this charge, if the appellant's construction be correct.

It is insisted by counsel for appellant that, if we affirm this judgment, it will be contrary to law, and contrary to the previous decisions of this court. If contrary to law, this judgment ought not to be affirmed. If contrary to previous decisions, and those decisions are wrong, being correct in all other respects, the judgment ought to be affirmed. It is not contended by counsel that a change of opinion has wrought a legal injury to appellant, in misleading him so as to deprive him of a legal defense. Nothing of this sort is intimated. We have discussed the cases referred to by appellant in which he insists that we have laid down a different rule in regard to the testimony of an expert. We have shown that no case contains the question here raised. We have shown that in the Webb, Leache, and Williams Cases, *supra*, the observations of the court were mere dicta. But concede, for the argument, that this court has changed its opinion (which is not the case); if we are correct now, the appellant has no right to complain, he having been misled in no manner calculated to deprive him of a legal defense. But, as we have before observed, the question in regard to the manner of obtaining the opinion of an expert has never been presented to this court in the shape presented in this case. There has been no change of opinion, but there has been dicta, which is not supported by the authorities. We have given this record a most careful examination, in the light of the consequences of the verdict, and are thoroughly aware of the fate pending over the appellant, and would not hesitate to reverse the judgment if we thought appellant had been deprived of a legal right; but we have found nothing in the record tending remotely to show that appellant has been deprived of a legal right. The evidence is amply sufficient, in fact conclusive of the guilt of the accused; the verdict of the jury is supported beyond all question by the evidence; and we have found nothing in the record authorizing this court to reverse the judgment. The motion for rehearing filed by appellant is overruled, and the judgment affirmed.

(Dec. 15, 1897.)

DAVIDSON, J. I concur in the conclusions reached by the Presiding Judge. As to whether the bill of exceptions in regard to the testimony of the expert witness Dr. Davis is complete, so as to raise the question at issue, I simply quote the qualification of the trial judge to said bill: "The evidence in the case was very voluminous, and in part contradictory. The fact of the killing itself, relied on by the defense as one of its strongest, if not only, ground showing insanity, was one of the disputed facts in the case, provable only by circumstances, and it was impossible to form a hypothetical case assuming all the evidence in the case to be true, because there was no direct evidence of the killing, and said testimony was contradictory in part; and the

court stated to counsel that the state would be allowed to state a hypothetical case based upon the assumption that her testimony was true, and embracing all the evidence for the state, and to ask the opinion of the witness based upon such hypothesis; and that the defendant would be allowed to state a hypothetical case based upon the assumption that his testimony was all true, and on all reasonable inferences to be drawn from such testimony, and to express his opinion based upon such hypothetical case. The state embraced all its testimony in its hypothetical question, and, upon the assumed truth of said question, the witness stated his opinion that defendant was sane. The defendant then put its hypothetical case to witness based on the assumption that all his testimony was true, and based on the assumption that all reasonable inferences to be drawn from his testimony were true, including the fact that defendant, without reason, motive, or cause, killed his wife and children, upon which question witness answered that upon such hypothesis he would say the defendant was insane. All the evidence was embraced and included in the state's hypothetical question and defendant's hypothetical question combined." It will be seen from this statement of the judge that two hypothetical questions were stated,—one based upon the evidence for the state, and the other based upon the evidence for the defendant. The expert witness answered upon the state's hypothetical question that the defendant was sane, and upon the hypothetical question put by the defendant that he was insane. Taking these answers, we are forced to the conclusion that the testimony was not only incongruous and contradictory, but led the mind of the expert to two different conclusions. Under such a state of case, it is evident that a hypothetical case embracing all the facts adduced on the trial in this respect could not be answered by the witness without first having decided in his own mind the credibility of the witnesses testifying to such facts. This, of course, he could not do. The credibility of the witnesses and the weight to be given their testimony in this state is entirely within the province of the jury. Then, we have the question as stated in the opinion of the Presiding Judge sharply presented, because no hypothetical question was put to the witness covering the entire testimony adduced in relation to insanity. The question, then, is as to whether the expert witness can be asked hypothetical questions involving the different theories, without requiring him in one question to pass upon all the testimony adduced. It is conceded by Judge Henderson that, if the testimony is incongruous and contradictory, hypothetical questions can be asked, presenting the different theories, and the witness be required to state his opinion on each. I agree with the Presiding Judge that this can be done in either event, whether the facts are disputed or not. If this were not true, there would be endless confusion and

interminable discussion as to what are the facts, or whether the facts are incongruous or not. That the hypothetical questions may be put to the witnesses in this manner is sustained by the weight of authority, and is the sounder rule. In support of this proposition, I refer to *Shirley v. State* (Tex. Cr. App.) 36 S. W. 267; *Jones, Ev.* § 372, and notes for collated authorities; *Stearns v. Field*, 90 N. Y. 640; *Harnett v. Garvey*, 66 N. Y. 641; *Mercer v. Vose*, 67 N. Y. 56; *Fairchild v. Bascomb*, 35 Vt. 398; *People v. Augsburg*, 97 N. Y. 501; *Guterman v. Steamship Co.*, 83 N. Y. 358; *Coyle v. Com.*, 104 Pa. St. 117; *Pidcock v. Potter*, 68 Pa. St. 342; *State v. Klinger*, 46 Mo. 224; *State v. Hayden*, 51 Vt. 296; *Steph. Dig. Ev.* p. 105, note. Mr. Jones, in his work on Evidence (section 373), thus states the question: "The facts are generally in dispute, and it is sufficient if the question fairly states such facts as the proof of the examiner tends to establish, and fairly presents his claim or theory. It cannot be expected that the interrogatory will include the proofs or theory of the adversary, since this would require a party to assume the truth of that which he generally denies." He is here discussing the practice of putting hypothetical questions. If one side fails to include all the testimony in the hypothetical question, the other may go into the matter fully on cross-examination. This, under all circumstances, will get the matter fairly before the jury; and such a practice is commended by the authorities I have examined on the question. See, also, *Goodwin v. State*, 96 Ind. 550; and there are other cases in Indiana to the same effect.

HENDERSON, J. I agree to the conclusion reached by a majority of the court in this case, but I disagree as to the rule of practice therein laid down with reference to propounding to an expert a hypothetical case. I do not concede, as contended for by counsel for appellant, that the rule has ever heretofore been laid down by this court. The question was more nearly involved in the case of *Webb v. State*, 9 Tex. App. 490, than in either the *Leache Case* or the *Williams Case*; but an examination of even the *Webb Case* fails to disclose that the question was properly before the court. Judge White, however, in rendering the opinion in that case, appears to have so conceived it, and discussed the question, and stated the rule to be that, in propounding a hypothetical question to an expert on the question of insanity, all the evidence developed on the trial should be embraced in the hypothetical question put to a party's expert witness. The opinion of the Presiding Judge discusses the matters involved in said cases, and I will no further refer to them, save to suggest that I cannot understand how counsel for appellant so strenuously insists in his motion for rehearing that he was misled by the decision in the *Williams Case* as to the rule laid down in propound-

ing a hypothetical question to an expert, when the *Williams Case*, at the time the *Burt Case* was tried, had not then been decided by this court. The question as to the proper interrogatory to be propounded to an expert witness was not before the court in the *Williams Case*, and what was said on the subject in that case, on a careful reading, would obviously appear to the legal mind to be merely dicta. Besides, as above stated, the *Burt Case* was tried in the district court of Travis county on the 27th day of November, 1896, while the *Williams Case* was not decided by this court until March 27, 1897; so it is absolutely impossible that counsel could have been at all influenced by anything that was said in the *Williams Case*.

I would here call attention to the case of *Shirley v. State* (Tex. Cr. App.) 36 S. W. 267, decided by this court on the 10th of June, 1896. The opinion in said case would indicate that this very question had come directly before this court in the decision of that case, and the opinion would appear to lay down a different rule than that contended for by appellant. I quote from the opinion as follows: "Upon the trial, counsel for the state submitted to the two physicians, G. B. Beaumont and C. M. Alexander, a hypothetical case. The physicians gave as their opinion that the appellant was not only sane, but that he was feigning insanity. Counsel for appellant objected to this opinion, because the hypothetical case was not full, and did not include the testimony introduced by the appellant tending to show insanity. This objection was not well taken. If not satisfied with the hypothetical case submitted to the doctors by counsel for the state, it was the duty of the counsel for appellant to submit a case made up of all the testimony. Again, the opinion of the doctors was not based upon the testimony that they had heard alone; but they had made examinations of the appellant, had observed his conduct, and the opinion was based upon the evidence delivered by the witnesses and their personal observation of the conduct of the appellant." On an inspection of that record, it will appear, as suggested in the latter part of said opinion, that the experts were examined upon the hypothetical case put, in connection with their personal examination of the appellant and their observation of his conduct. I think it may be said that the question to be propounded to one's expert witness upon a hypothetical case was not fairly involved in the *Shirley Case*.

After an examination of all the authorities which are accessible, I think the true rule on this subject is simply this: that when the issue of insanity is gone into, and testimony is introduced upon that question, and an expert is introduced by a party, and a hypothetical question is propounded by such party to such witness, he should embrace in such hypothetical question all the facts that have been developed in the evidence bearing upon that issue which are not incongruous

and which are not disputed. If any facts are incongruous or are disputed by him, of course he would be authorized to omit such facts; and, on cross-examination, the opposite party could, if he saw fit, in addition to the hypothetical question put by the party introducing the witness, propound a hypothetical case of his own, and add thereto such other facts as may have been omitted by the opposite party, and which might occur to him to be material. Either party should be authorized to propound hypothetical cases embracing the disputed facts; that is, each party would embrace the facts believed by him to be true which may be disputed by his adversary. Such a course seems to me to be fraught with fairness. See *Busw. Insan.* § 263; *Davis v. State*, 35 Ind. 496; *Goodwin v. State*, 96 Ind. 550; *Fairchild v. Bascomb*, 35 Vt. 398; *Hathaway v. Insurance Co.*, 48 Vt. 335; *Steph. Dig. Ev.* p. 105, and note. Authorities can, of course, be found to the contrary, and some of them go to the extent of authorizing a hypothetical question to be presented to an expert embracing only such facts as a party desires to present. See *Coyle v. Com.*, 104 Pa. St. 117, and *Stearns v. Field*, 90 N. Y. 640.

It occurs to me that the rule above stated is not only supported by the best-considered authorities, but that it is logical. All of the facts which are adduced in evidence bearing upon the issue of insanity are a part of the defendant's character in that respect. Certainly, all of the undisputed facts pertain to him, and serve to shed light upon his character with respect to his sanity. Now, if the evidence contained a great many facts indicating eccentricity of character, and a few of these are culled out and put to an expert, he might say that they did not necessarily indicate insanity of the defendant; whereas, if all the eccentric facts are presented to the expert, he might say that they clearly indicate insanity. If, moreover, the record embraces a great number of facts, some indicating sanity and others insanity, and the facts indicating insanity alone are presented to an expert, he might say that the party was insane. On the other hand, if only the facts indicating sanity are submitted to the expert, he might unhesitatingly say that the party was sane; whereas, if all the facts in combination are submitted to the expert in the hypothetical question, he might say that they indicated his sanity or insanity, as the case may be. What I mean to say is this: That when all of the facts in evidence bearing upon the issue of the insanity of the defendant are undisputed, and the expert is adduced by the state to respond to a hypothetical question put, that question should, in common fairness, embrace all the facts. This, in concrete form, alone constitutes his character for sanity or insanity, and the opinion based upon all the facts can alone shed any light upon the question or be of any service to the jury. While I believe this to

be the correct rule, yet it by no means follows that a case ought to be reversed where this method of propounding a hypothetical case has not been followed; and I would not be understood as holding that any case ought to be reversed because a proper hypothetical question is not put in the first instance by a party calling an expert, where full opportunity is afforded the opposite party for cross-examining that witness. Much less would I agree that the opposite party may object to a hypothetical question on the ground that it does not embrace all the facts, and conceal from his adversary, or refuse to state for the benefit of his adversary, such facts as are not embraced in the hypothetical question. In the case at bar, full opportunity was afforded the appellant on cross-examination to put a full case to the expert, or to put any character of hypothetical case arising from the evidence which he saw fit; and I do not believe that he could refuse to avail himself of this opportunity, and then ask a reversal of the case because a full hypothetical case had not been put by the state. Further, I do not believe that the bill of exceptions in this case fairly raises this question. The authorities hold that the bill must be so full and certain in its statements that in and of itself it will disclose all that is necessary to emphasize the supposed error. It must sufficiently set out the proceedings and attending circumstances below to enable the appellate court to know certainly that error was committed. The judge must certify to the truth of the facts upon which the exception is predicated; and the taking of an exception, without the recitation of such facts in the certificate of the judge, will not be remedied by the allegation of the grounds upon which the exception was taken. The bill of exceptions must itself certify the ground, or it must reasonably appear from the bill itself.

With regard to the testimony of the witness Carrie Sparks, I think it sufficiently appears that the exclamation she heard was from the wife of the appellant, and was addressed to him. It was made on the evening of the homicide, about 7 o'clock. The evidence shows that the only inmates in said house were the appellant, his wife, two small children, and the nurse. At that particular time the nurse and children were absent, and there is no testimony suggesting that any one else could have been in the house at the time, save the appellant and his wife. True, the evidence is not positive establishing the fact that it was the voice of the wife addressed to her husband (appellant); but, while it was circumstantial, it was of such a character as to almost certainly exclude the idea that the expression could have been made by any other party than the wife, or to any other person than her husband. The evidence shows positively the absence of the nurse and children from the house at that hour, and presumptively or inferentially th-

presence there at that time of appellant and his wife; and I believe it was admissible for the state to show by the witness Carrie Sparks that, as she passed the residence of appellant, she heard a woman's voice exclaim, in a high tone, as if addressing some one, "I will not stand this any longer!" and this could be used by the state for the purpose of showing motive, and directly as tending to suggest sanity.

With the foregoing observations, I agree with the conclusion reached by the court.

### MARTIN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

#### JURY—QUASHING SPECIAL VENIRE—HOMICIDE—INSTRUCTIONS—MURDER IN FIRST DEGREE—SUFFICIENCY OF EVIDENCE.

1. It was not ground for quashing a special venire that only 42 out of 100 jurors were in attendance, the others being disqualified or excused by the parties, where there was no unfairness, the jury was completed out of the first 56 of 100 talesmen summoned by order of the court, and defendant had three challenges remaining when the jury was completed.

2. Suggestions in a motion for a new trial that the court erred in failing to give certain special and other charges cannot be regarded as bills of exception to the charge, or to the failure of the court to give the special charges requested.

3. On a trial for murder, in which accomplices were witnesses for the state, it was sufficient for the court to define an accomplice, and fully submit to the jury the question whether or not said parties were accomplices, without a direct instruction that they were accomplices.

4. On the trial of one for the murder of O. (a woman), the court charged that certain evidence had been introduced as to the killing of her father and son at the same time and place she was alleged to have been killed; that said testimony was admitted only for the purpose of showing the circumstances of the killing and defendant's connection therewith; and that he was on trial for the murder of O. The evidence as to the killing of the father and son was a part of the res gestæ, and was introduced by the state. *Held*, that the instruction did not deprive defendant of the testimony in regard to the killing of the father and son, which tended to show that certain witnesses for the state were accomplices in the murder of O., where, in another charge, the jury were told what it took to constitute an accomplice, and were properly instructed in regard thereto.

Appeal from district court, Wharton county; T. S. Reese, Judge.

Frank Martin was convicted of murder, and appeals. Affirmed.

Linn & Mitchell and A. D. Sparkman, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death; hence this appeal.

There is only one bill of exceptions in the record, and that is to the refusal of the court to quash the special venire ordered and summoned in the case. It appears from said bill, in connection with the explanation of the court thereto, that the motion

was made on the ground that only 42 out of 100 jurors drawn were in attendance,—that is, that the others, from one cause or another, were disqualified, or had been excused by the parties; and, because of this reduction, appellant claims that he did not have a full venire to select from, and therefore moved to quash. This was no sufficient ground upon which to quash said venire. There is no suggestion of any unfairness. In fact, it appears that the majority of the special veniemen were excused by the appellant himself, as being disqualified to sit in the case. After this list was exhausted, it appears that the court made an order summoning 100 talesmen. These were brought in, and the jury completed out of the first 56 of said list of talesmen; and defendant still had 3 challenges remaining on the completion of the jury. We fail to see any error in this action of the court.

There is no bill of exceptions to the charge of the court, or to the failure of the court to give certain special charges asked by appellant. In the motion for a new trial, however, appellant suggests that the court erred in failing to give special charges numbers 2 and 3 asked by him, and because the court erred in his charge to the jury in failing to instruct them properly that the mere presence of the defendant at the scene of the killing would not render him guilty. These mere suggestions of error in the motion for a new trial cannot be regarded as bills of exception to the charge of the court, or to the failure of the court to give the special charges requested. We will, however, examine the matters complained of, in order to ascertain if the court committed any possible error in this respect.

The first special instruction asked by appellant was a direct instruction to the effect that John Rickard, Gus Colburn, and Emmet Colburn were accomplices. The court defined to the jury what constituted an accomplice, and fully submitted to them the question whether or not said parties were accomplices, and this, we think, was all that was required.

Appellant, in the argument of his counsel, also complains of that portion of the charge of the court as follows: "Certain evidence has been introduced in this case as to the killing of the two Crockers (father and son) at the same time and place the deceased Nancy Jane Crocker is alleged to have been killed. This testimony is admitted only for the purpose of showing the circumstances under which Nancy Jane Crocker was killed (if she was in fact killed), and defendant's connection therewith. Defendant is on trial, charged with the murder of the said Nancy Jane Crocker; and the testimony as to the killing of the other parties is not to be considered for any other purpose than to show the killing of Nancy Jane Crocker, and the circumstances under which the same was done, and the defendant's connection



therewith (if he was connected with it)." The contention, as we understand it, is that by this charge appellant was deprived of the testimony in regard to said killing which tended to show that the witnesses Gus and Emmet Colburn and John Rickard were accomplices in the murder of Nancy Jane Crocker. We do not so understand the charge. The evidence in regard to said killing of E. C. and Wesley Crocker was a part of the *res gestæ*, and was introduced by the state; and the object of the court in said charge was merely to guard the rights of the defendant against the jury considering the homicide of said person for any other purpose than as having a bearing upon the murder of Nancy Jane Crocker, for which the defendant was then on trial. The charge did not deprive the defendant of any proper use of the testimony connected with said other killing which might tend to show that the two Colburns and John Rickard were accomplices; and we do not think the jury could have possibly misunderstood the purpose of the court in this instruction. In another portion of the charge, the jury were informed what it took to constitute an accomplice, and were properly instructed in regard thereto; and, of course, they could look to the whole testimony connected with the killing of Nancy Jane Crocker for the purpose of ascertaining whether or not said witnesses were accomplices.

We think the testimony is ample to sustain the conviction. The testimony of John Rickard, Gus Colburn, and Emmet Colburn shows that Frank Martin, the appellant, was the leader and moving spirit in this atrocious murder; and, if it be conceded that they were each accomplices, still there is ample testimony tending to connect appellant with the murder. Shilling, the deputy sheriff, early on Monday morning, when he was at Henry Colburn's house, saw the defendant Frank Martin drive the two-horse wagon up, and ungear it; said wagon having been used the night before to carry away and conceal the bodies. Henry Colburn, who was in no way connected with this homicide, but who was at home, sick in bed, testified that Frank Martin came to his house on the night when the murder of the Crockers was being committed, and while it was transpiring, and got a cup of coffee. It seems that said witness had already been apprised in some way that Mrs. Nancy Jane Crocker had been shot down upon the prairie while attempting to escape from Emmet Colburn's house, to seek succor for her husband. While defendant was drinking the cup of coffee, something was said about the woman being left on the prairie, and that the wolves would eat her. Defendant said, if he had not minded the wolves off of Day, they would have eaten

him. (It is suggested by counsel for appellant that Day was a friend of defendant, and had previously been killed by Crocker.) Mrs. Will Colburn testified, in effect, to the same incident. She states that some time during the night of the 19th of May, 1895, Frank Martin came to Henry Colburn's house, where she then was, and asked his wife for a cup of coffee, and they talked about the killing of the woman. She asked him if they were going to leave the woman on the prairie. He said, "Yes;" and Mrs. Colburn said, "The wolves would eat her." Defendant said "the wolves would have ate Day up if he had not minded them off." He then left, and witness heard shooting over towards the house late that night, and saw fire blaze up; just looked like the house was on fire; then it would die out. Witness said that she saw this several times. It looked like fireballs being thrown into the house. The testimony of the Colburns and John Rickard showed that balls were made of blankets, and saturated with coal oil, and thrown into the Emmet Colburn house, where old man Crocker and his son were besieged, to burn them out, or to ascertain in what part of the house they were, so that they could shoot them. Pink Scroggins testified that he met Frank Martin that night, about 8 or 9 o'clock, at Henry Colburn's house. The fight had then been in progress for some time. Witness asked him about the trouble going on, and if it could not be stopped. Defendant told him, "No," it could not; and then left.

It is not claimed that any of this testimony came from accomplices, and it tends strongly to show that appellant was connected with the murder of Mrs. Nancy Jane Crocker, whose body, together with that of her husband and little son, was found several days after the homicide, concealed in Seymour's pasture, some seven miles away. No doubt, many grave crimes and heinous murders have been committed in this state, but we undertake to say that none surpass this in atrocity. The details thereof show a blood-curdling tale of horror; and the evidence indisputably connects this defendant with the murder of these three persons; not only so, but shows that he was the leader and master spirit in its perpetration, and demonstrates that, at the time, he was utterly devoid of social duty, and fatally bent on mischief, and that he was instigated throughout by the most diabolical malice that can actuate the human heart. There is no mitigating circumstance in the record that would tend in the least to relieve this crime of murder in the first degree, and the jury properly affixed his penalty at death. There is no error in the record, and the judgment is affirmed.

## SIMNACHER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

## LARCENY—EVIDENCE—INSTRUCTIONS—NEW TRIAL.

1. It is not error, where the theft was sought to be proved by circumstantial evidence, and the court has instructed "that all the facts must be consistent with each other and with the main facts sought to be proved, and inconsistent with any other hypothesis than that of his guilt," to refuse to instruct "that, if they could account for the evidence upon any other reasonable hypothesis than that of the guilt of defendant, they should acquit him."

2. Where, in the trial for theft of cotton and a wagon, the proof showed that accused had more cotton immediately after the theft than before; that the cotton was taken from the field of a neighbor at night, and a wagon was stolen at the same time from the field, and both were taken from near a pecan tree; that the wagon, by its track, was traced to accused's house; that the shoe tracks along the way were identified with muddy shoes of defendant; that the cotton was found in accused's shed room early the morning after the theft, and was damp; that the wagon was traced from accused's house to a creek where it was concealed; that the cotton had pecan leaves among it; that the wagon was filled in the field under the pecan tree; that no pecan trees were shown to exist on accused's lands; and that the cotton lost was nearly the same in amount as the cotton found at accused's,—the cotton found at accused's was sufficiently identified as the cotton which had been stolen, to sustain the verdict of guilty.

3. On trial for theft of certain cotton, pecan leaves among cotton found on accused's place were shown, as tending to identify the cotton as that stolen, which was of the crop of 1896. On a motion for new trial on the ground of newly-discovered evidence, it was alleged that the evidence was to the effect that accused had pecan trees on his place, and that the cotton claimed to be that stolen was of the crop of 1896. *Held*, that these facts having been raised, as to the pecan trees, in the preliminary trial, no diligence was shown to procure the testimony, and the evidence cannot be considered newly discovered.

Appeal from district court, Bastrop county; Ed R. Sinks, Judge.

Action by the state of Texas against Gregor Simmacher. Defendant was convicted of theft, and he appeals. Affirmed.

J. E. B. Laird and J. P. Fowler, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of theft of seed cotton and a wagon, over the value of \$50, and his punishment assessed at three years' confinement in the penitentiary; hence this appeal.

The first error assigned is that the court failed to instruct the jury properly on circumstantial evidence; it being insisted that the court failed to instruct the jury "that, if they could account for the evidence upon any other reasonable hypothesis than that of the guilt of the defendant, they should acquit him." We have examined the charge of the court on circumstantial evidence, and it is in accordance with the approved forms, and distinctly tells the jury "that all the facts must be consistent with each other and with the main facts sought to be proved, and incon-

sistent with any other hypothesis than that of his guilt," etc. There was no occasion for the court to give any further charge on this subject.

Appellant contends that this case should be reversed because the verdict of the jury is not supported by the evidence. We have examined the record carefully, and we must differ with the appellant as to this contention. The evidence, though of a circumstantial character, is very strong, and, to our minds, excludes every reasonable hypothesis consistent with defendant's innocence, and points to his guilt with that certainty which the rule in regard to circumstantial evidence requires. It is true the seed cotton was not positively identified by the prosecutor as his own, but we think it is sufficiently identified by circumstantial evidence. The proof on the part of the state tends to show that appellant had no such quantity of cotton before the alleged theft as was found in his possession immediately after the theft. The cotton was taken from a neighbor's, at night, some two or three miles from where appellant lived, and at the same time a wagon was stolen,—all from the field of the prosecutor. The wagon and cotton were taken from near a pecan tree, and were traced from there directly to appellant's house by the tracks of the wagon, which, on account of certain peculiarities, were identified, and because of the continuity of the tracks; and the parties taking the cotton were identified by their own tracks, which were traced from where the wagon and cotton were taken to the house of appellant. At the house were found certain shoes, in a muddy condition, and with peculiar marks about them, which compared exactly with the tracks found along the route of the wagon. The cotton was found in defendant's shed room early the morning after it was stolen, and it was then damp. The wagon was traced from there, in another direction, to a creek some 2½ miles distant, and was there found, having been taken to pieces and concealed in the creek. The cotton was further identified by certain pecan leaves among it, the wagon having been filled with the cotton in the field, under the pecan tree; and the state's proof showed that appellant had no pecan trees or bushes in the field cultivated by him. And besides the cotton lost by the prosecutor, as to quantity, nearly compared with that found at appellant's. So, in our judgment, the cotton was sufficiently identified as being the cotton of the prosecutor.

We do not think there is anything in appellant's motion for a new trial on the ground of newly-discovered evidence. The only newly-discovered evidence applicable to this case was with reference to appellant's field having some pecan shrubs in it, and that the cotton found on Sunday evening, near a yoke of oxen, was, according to the newly-discovered evidence, not cotton of the crop of 1896, but old cotton, of the crop of 1895. With refer-

once to the pecan shrubs in appellant's field being newly-discovered evidence, we would remark that appellant had a preliminary trial, months before this trial, in which the state developed its case, and evidently the pecan leaves figured in said preliminary trial; also, a co-defendant, Thomas Simnacher, was tried at the same term, and before this defendant was tried; and by reference to the record of that trial, which is referred to in this, it will be seen that appellant introduced a number of witnesses to show that he did have pecan shrubs growing in his field, and yet on this trial he did not introduce any of said witnesses. Unquestionably, he was aware of these circumstances being urged against him by the state, and he was also aware of the fact himself, as it was his own field, if it contained pecan bushes. No diligence whatever is shown on his part to procure any evidence to rebut this circumstance which was being used against him by the state. We cannot regard the evidence as newly discovered. With regard to the seed cotton found Sunday evening in the yard in the vicinity of the yoke of oxen: If it be true that said cotton was not of the crop of 1896, but of the crop of 1895, no one knew that fact better than appellant, and yet no effort whatever was shown on his part to bring proof of this fact before the jury. He was bound to know that the state would make proof with reference to this cotton found in the yard, and it would have been an easy matter for him to have had an examination made of said cotton, and to have shown by witnesses that it was of the crop of 1895; for he knew from whom he got said cotton, and it was his duty then, if the witness was present (and, if we recur to the record in the companion case of Thomas Simnacher, we see that he was), to introduce him as a witness, and prove this, or if he was not then present, and he was taken by surprise at this testimony, it was his duty then to ask a postponement of the case until he could send for this witness. In our opinion, the motion for a new trial on account of the newly-discovered evidence is without merit. There being no errors in the record, the judgment is affirmed.

#### MURRAY v. ALLARD.

(Supreme Court of Tennessee. Nov. 23, 1897.)

**MINES AND MINERALS—PETROLEUM AND NATURAL GAS—ADVERSE POSSESSION—COMMON SOURCE OF TITLE—SEPARATE OWNERSHIP OF SURFACE AND MINERALS.**

1. Petroleum and natural gas are minerals, within the terms of a reservation of "mines, minerals, and metals," in a conveyance of real estate.

2. The common predecessor in title of both complainant and defendant conveyed, in 1853, to one through whom defendant claims, reserving all "mines, minerals, and metals" in and under the land in question. Such grantee and his successors in title, down to defendant, con-

veyed by general warranty deeds, without any such reservation, but the dates of such subsequent deeds do not appear. Complainant acquired by purchase at judicial sale whatever title such common predecessor and his heirs possessed by virtue of such reservation. In a controversy respecting such title, it was agreed that defendant "and those under whom he claims have been in the actual, open, and notorious possession of such land, under color of title, for more than seven years, claiming adversely to the world to the extent of their title papers, which definitely identify the land intended to be conveyed." Held insufficient to show seven years of adverse possession after the deed made by such first grantee to the third person forward, as the expression, "those under whom he claims," includes not only such first grantee, but his grantor as well, under whom complainant also claims.

3. In order to make a holding adverse to one who has reserved or had granted to him the "mines, minerals, and metals" in or under the land held by another, there must appear to have been some denial of his right, or some assertion of a claim inconsistent with his right, which does not necessarily appear where a person uses the land merely for agricultural purposes, as such use is entirely consistent with the right of another to mine under the soil.

Appeal from chancery court, Fentress county; T. J. Fisher, Chancellor.

Agreed case by William T. Murray against James A. Allard, submitted to the chancellor. There was a decree in favor of defendant, which was reversed by the court of chancery appeals, from which judgment defendant appeals, and assigns errors. Affirmed.

L. T. Smith and W. T. Murray, for appellee.

**WILKES, J.** This cause was decided for defendant by the chancellor, and his decree was reversed by the court of chancery appeals, and the cause is now before us on appeal of defendant and assignment of errors.

The very interesting question is presented whether petroleum oil is a mineral or not. It arises upon the construction of a deed which conveyed certain lands, reserving to the grantor "all mines, minerals, and metals in and under the land." Subsequent conveyances were made to third persons without reservation, and the present owners hold under a deed conveying in fee simple, and making no reservation and no reference to "mines, minerals, and metals in and under the land." The chancellor was of opinion that petroleum was not embraced in the term "minerals." The court of chancery appeals reversed this holding in a very exhaustive, elaborate, learned, and able opinion, and cite the dictionaries, legal and otherwise, the encyclopedias, and many works of science, and a large array of legal authorities holding to the same effect, and they state that, after a most exhaustive search, they have been able to find but one case holding a contrary doctrine. We can neither elaborate nor improve upon the holding of the court of chancery appeals, and are content to affirm their holding and adopt their opinion as our own.

It is next said that the present owners are protected in their fee-simple title to the land by the statute of limitations of seven years

The cause was heard upon an agreed statement of facts, and the agreement upon this feature of the case is that defendants, and those under whom they claim, have had the adverse possession of the land for more than seven years. Inasmuch as the complainant's vendor, Rodgers, is one of the parties through whom defendants claim, and the agreed statement of facts does not show how long the land has been held since complainant parted with the title, the facts necessary to sustain the plea are not made out. In addition, it is well settled that one person may own the surface or soil, and another the minerals and mines and metals, and even the water, and there may be different owners for the several different strata under the earth. In order to make a holding adverse to one who has reserved or had granted to him the "mines, minerals, and metals," there must appear to have been some denial of his right or assertion of claim inconsistent with his right. This does not necessarily appear when a party uses the land merely for agricultural purposes, — a use entirely consistent with the right to mine under the soil by another. Upon all the points raised we are of opinion that the court of chancery appeals is correct, and their decree is affirmed, and the opinion of that court, delivered by Judge M. M. NEIL, is appended, and made the opinion also of this court:

"The questions in this case arise from the following agreed state of facts: 'We, William T. Murray, as complainant, and James A. Allard, as defendant, have a controversy over certain rights in the tract of land hereinafter described, which we desire to settle by an agreed case made upon the following agreed state of facts, which case we agree to submit to the chancery court at Jamestown for a decision. In this case the following facts are agreed, to wit: (1) It is agreed that John B. Rodgers, on the 24th day of October, 1853, sold and conveyed to Mathias Wright a certain tract of land in the 13th civil district of Fentress county, Tenn., bounded and described as follows: [Here described],—in which deed said John B. Rodgers reserved to himself, his heirs and assigns, all mines, minerals, and metals in and under said land. Said Wright conveyed said land by general warranty deed, without any reservation of said mines, minerals, and metals, and whatever title said deed communicated, under the facts hereinafter set out, passed to the defendant, James A. Allard, to the portion claimed by him, by regular chain of conveyances from Rodgers through Wright and others, which purported to convey an estate in fee, except the deed from Rodgers to said Wright, which reserves the mineral interest as above stated. And said Allard, and those through whom he claims, have been in the actual, open, and notorious possession of said land, under color of title, for more than seven years, claiming adversely to the world to the extent of their title papers, which definitely identify the land intended to be con-

vayed; but had not been operating, or intending to operate, in any mining business on said land since the date of the deed from John B. Rodgers to Wright; neither has any of his vendors attempted to mine on said land or drill for petroleum oil or natural gas. There is no mineral in, under, or on said land, unless petroleum oil or natural gas is held to be such. That petroleum oil had been discovered in White county, Tenn., and in Wayne county, Ky., or Scott county, Tenn., at what is known as the Martin Beaty well, prior to the deed from John B. Rodgers to Mathias Wright, above referred to. And there are petroleum oil springs in the vicinity of this land which had been discovered at the date of said deed from Rodgers to Wright. (2) That said John B. Rodgers, during his life, and his heirs after his death, have claimed said mines and minerals and metals, including petroleum oil and natural gas, until the same passed out of them, and passed into William T. Murray by judicial sale, who now owns whatever title they owned in said land before said sale. (3) The said William T. Murray, by his agent, went onto said portion of the land last mentioned in said Rodgers' deed, claimed by said Allard, and proposed to drill for petroleum oil and natural gas, and was refused the right to do so by said Allard, who conveyed the same to one Lewis Choate, and warranted the title, the said Allard contending that complainant had no interest in said land—First, because the words "mines, minerals, and metals" do not include petroleum oil and natural gas; second, if they did, the title of said mines, minerals, and metals has long since been barred by the adverse holding under said deeds. (4) Complainant, Murray, contends that petroleum oil and natural gas are included in the words "mines, minerals, and metals," and especially so as there is nothing else for the reservation to operate upon, and that the possession of said Allard, and those through whom he claims, does not extinguish the title of the said mines, minerals, and metals, (1) because the facts stated, which are relied upon to effect the bar of the statute of seven years, are not sufficient to establish the character of adverse holding that would effect a bar of his rights or perfect the title of defendants; (2) because their possession was consistent with the complainant's title; (3) the said Murray contends that no cause of action would accrue in such case until the adverse holder invaded mineral rights, and that the cultivation of the soil was not such invasion, and therefore no statute of limitations runs as to said reservation. And it is further agreed that the Honorable T. J. Fisher, chancellor of the 5th chancery division of the state of Tennessee, may pass upon said facts, and render such decree as the law and the facts may warrant. The chancellor and the supreme court, in case of appeal, will consult any and all scientific works and definitions of the words "petroleum oil" and "natural gas," as well as such legal authorities

as are found, to aid them in the determination of the question upon the state of facts submitted.' Proper affidavit was attached.

"Upon this state of facts the chancellor decreed as follows: 'That the words "mines, minerals, and metals" did not include oil and gas; also that there had been seven-years adverse holding under the deeds purporting to convey an estate in fee, and this vested the defendant with a perfect title in fee, including the title to oil and gas, and that the adverse holding of James A. Allard, and those under whom he claimed, had extinguished the title of John B. Rodgers, claiming under the adverse reservation as to the mines, minerals, and metals. He thereupon dismissed complainant's case, and rendered judgment against Murray for the costs. An appeal was prayed and granted, and errors were assigned as follows: First. The chancellor erred because he did not find, as a matter of law, that the deed from Rodgers to Wright expressly reserved to himself all of the petroleum oil interest in the land conveyed, and that by the subsequent judicial sale Rodgers' title in the same vested in complainant. Second. The court erred because he did not hold, as a matter of fact, viz.: It not appearing at what time Wright sold the land, and consequently it not appearing how much of the time that the land was adversely held was by Wright under his deed from Rodgers, which deed made the reservation, therefore it does not appear as a fact of record that the defendant has held possession of the land for seven years next before this suit was brought, under deed purporting to convey the entire estate in the land. This fact not affirmatively appearing, the defense of the statute of limitations must fail. Third. The court erred because it does not hold that, as a matter of law, the possession of the defendants was consistent with complainant's title, and that, there being a double ownership in the land, no cause of action could accrue in his favor so long as the owner of the surface only exercised his legal rights. The statute of limitations does not begin to run until the mineral rights in the land were invaded.'

"The first question to be determined is whether petroleum oil is included within the language of the reservation of 'mines, minerals and metals.' In the Century Dictionary 'petroleum' is defined: 'An oily substance of great economical importance, especially as a source of light, appearing naturally oozing from crevices in rocks, or floating on the surface of water, and also obtained in very large quantities in various parts of the world by boring into the rock; rock oil.' 'Various opinions have been expressed concerning the origin of petroleum,' says Prof. S. F. Peckham in the American Cyclopaedia. 'Until quite recently all of these theories were based upon the assumption that it had been derived from vegetable or animal organisms. Some have supposed

that it is the product of the decomposition of woody fiber, by which more of the carbon and less of the hydrogen has been evolved than by the decomposition which has produced coal. Again, it has been supposed to be the product of the natural distillation of pyrrbituminous shales and coals. Lesqueureux attributes its origin to the partial decomposition of low forms of marine vegetation. Berthelot has advanced the theory that, by the complex chemical changes at present taking place in the interior of the earth, petroleum is continually set free. It may be assumed that petroleum is a normal or primary production of the decomposition of marine or vegetable organisms, chiefly the former, and that nearly all other varieties of bitumen are products of a subsequent decomposition of petroleum, differing both in kind and degree. The occurrence of petroleum in the lower paleozoic rocks of Pennsylvania and Canada, which contain no traces of land plants, shows that it has not in all cases been derived from terrestrial vegetation, but may have been formed from marine plants or animals,—an opinion further strengthened when we find in the rocks of the tertiary age, in which fossil remains in the higher marine animals occur in abundance, a petroleum comparatively rich in nitrogen.' It is shown, also, in the same authority, that petroleum is procured by a process of mining; that is, by the sinking of wells. It is said that productive wells vary greatly in depth. In some, large supplies have been afforded at 60 and 70 feet, and in others at greater depths, to over 1,000 feet. It is said that most of the oil is obtained from wells over 180 feet deep; that shallow wells, exhausted by pumping, are successfully made to yield again by sinking them deeper; that the oil is found at several zones or oil-producing depths; that the pumps are sunk deeper into the well as the supply goes down. And he continues: 'It is observed that, if the pumping is interrupted for a day, the product obtained when it is renewed will be water which is more or less salt. At some wells the flow of water has continued during several days' pumping before the oil is recovered. This never seems to fail entirely, unless it be from some obstruction arresting the flow, and then recourse is had to sinking deeper or enlarging the bore of the hole. Salt water commonly comes up with the oil, and is separated from it by standing in the vats into which the products are received. The proportion of this oil is very variable, and the quantity of the oil pumped from a single well is far from being regular. Sometimes the oil, when first struck, rushes up with great violence, by reason of the carbonated hydrogen gas that accompanies it. This produces a spouting or flowing well, from some of which the yield has been more than 1,000 barrels a day for a long time; but the quantity gradually diminishes until they cease to be flowing wells, and they are

then pumped. In a few instances the oil has leaped forth with such violence as to be beyond control, and immense quantities have been lost. These fountains of oil have sometimes taken fire, producing terrific conflagrations and presenting scenes of appalling grandeur.'

"Clearly, from this description of the substance, it could not in any sense fall under the terms 'metal' or 'metallic.' The question, then, to be determined, is, does it fall within the term 'mines and minerals'? In 2 Rap. & L. Law Dict. p. 821, it is said: 'In the most general sense of the term, "minerals" are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term, therefore, includes coal, metal ores of all kinds, clay, stone, slate, and caprolites. "Surface" means that part of the land which is capable of being used for agricultural purposes. *Railway Co. v. Checkley*, L. R. 4 Eq. 19; *Hext v. Gill*, 7 Ch. App. 699; *Attorney General v. Tomline*, 5 Ch. Div. 762. A "mine" is a work for the excavation of minerals, by means of pits, shafts, levels, tunnels, etc., as opposed to a "quarry," where the whole excavation is open. While unreserved, minerals form part of the land, and as such are real estate. When severed, they become personal chattels.' In 15 Am. & Eng. Enc. Law, at page 500, the following occurs: "'Mineral" originally signified that which is obtained from a mine; from underground mining, as distinguished from that which is quarries. The term is not limited to metallic substances, but includes salt, coal, paint, stone, and similar substances,'—citing, on the last point, *Hartwell v. Camman*, 10 N. J. Eq. 128. In that the question was whether the mineral stone paint passed under the terms 'mines and minerals.' Upon this question the court in that case says: 'The character of the substance of stone paint, as the witness called it, is given in the bill, and the correctness of the description there given is admitted in the answer and confirmed by the evidence. It is a substance similar in general appearance to red shale; so soft as to be easily cut with a knife when first excavated, but differing in appearance from the surrounding earth. It is found in regular strata or bowlders of different sizes. It hardens when exposed to the air, and when broken up and ground it is used as a paint, and is valuable for that purpose. The manner in which it is procured from the earth, and its particular location below the surface, are particularly described by a witness who was the foreman in carrying on the works. They commenced working in an old shaft which had been used for raising copper ore. As they proceeded with the excavation, the depth of the paint stone was about one foot in eight or ten, perhaps a little more. At the point of the pit opposite to the side at which the excavation was commenced the paint stone was from 18 to

20 feet from the surface of the earth. The work was carried on by making regular mine shafts of timber, one of which was extended about 50 feet in length, and penetrated about twelve feet into the mountain beyond the open pit. Others were made very similar in character. The stratum of paint stone in the largest pit was found to vary from 6 to 15 feet in thickness. The stratum was uniform, increasing in thickness as progress was made into the mountain. It does not crumble like red shale, but comes off in square pieces. It is ground in a mill, and is fit for use as a paint by mixing it with oil. Its value is from \$20 to \$30 per ton. Prof. Doremus is the only scientific witness examined. He says: "It may be called an argillaceous sandstone, alumina and silica being the prominent ingredients. It is not an ore of iron. This comes under the head of argillaceous rocks. I wish to distinguish these classes from ores or metalliferous rocks. The position of this paint material, as it lies in the mountain, is not in veins, but is in strata. The extracting of this material, as I saw it there, would not be called mining." "The analysis," the court continues, "only establishes a fact that it is not a metalliferous ore. If the terms "mines and minerals," used in the deed, could, by any fair construction, be confined to metallic substances, the question involved would be of easy solution; for the metallic property found in this paint stone is so small that, for the purpose of extracting the metal, it is of no value. But I do not think the terms should be confined to the metals or metallic ores. I cannot doubt if a strata of salt, or even a pit of coal, had been found, they would have passed under this grant. Can this stone paint, then, be fairly and naturally embraced in the term "mineral"? It is a body which is destitute of organism, and which naturally exists within the earth. It is below the surface, distinguished from the ordinary earth. It is in strata, and is acquired by ordinary means of mining. Although Prof. Doremus says that it is not in veins, but in strata, and that he would not call the mode of extracting it mining, yet this test of it would exclude salt from the class of minerals; for salt, too, is found in strata, and not in veins, and is obtained by shafts, and by the same mode of operation by which this matter is excavated from the earth. It is valuable for its mineral properties, and, by a cheap and easy process of grinding, is converted into a merchantable article adapted to the mechanical and ornamental arts. It is embraced in the definition given by men of science to the term "mineral." In *Bakewell's Mineralogy*, p. 7, it is said: "The term 'mineral,' in common life, is generally applied to denote substance dug out of the earth or obtained from mining." In *Cleveland's Mineralogy*, p. 1, the definition is given thus: "Minerals are those bodies which are destitute of organism, and which natural-

ly exist within the earth or at its surface." My conclusion is that this paint stone passed by the grant, and that the defendants have the right to excavate and use it, and convert the same to their own use.'

"In a note in the case of *Dunham v. Kirkpatrick*, appearing on page 698, 47 Am. Rep., the following appears: 'Freestone is a mineral, within a reservation in a deed. *Bell v. Wilson*, 1 Ch. App. 308. Coal oil is a mineral production. *Thompson v. Noble*, 3 Pittsb. 201. Petroleum is a mineral, and a part of the realty. *Stoughton's Appeal*, 88 Pa. St. 198. Coal is a mineral. *Henry v. Lowe*, 73 Mo. 86. In *Tucker v. Linger*, 46 Law T. (N. S.) 894, it was held that flint stones turned up by the plow in the course of husbandry were minerals, within a reservation to the lessor of mines and minerals, and quarries of stone, brick earth, and gravel pits. This holding was affirmed by the house of lords. 8 App. Cas. 508. In *Earl of Rosse v. Wainman*, 14 Mees. & W. 859, the court said that the word, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines. And in *Darvill v. Roper*, 3 Drew. 294, it was restricted to such products as are worked by means of mines. More recently, however, in *Hext v. Gill*, 7 Ch. App. 699, the natural meaning of the term was said to be: "Every substance which can be got from underneath the surface of the earth for the purpose of profit." Again, it has been held to include beds of china clay, while, on the other hand, freestone, quarries of limestone, and clay and sand, respectively, have been decided not to be minerals. In *Re Dudley's Settled Estates*, Ch. Div., it was held that a lease of salt works, where the brine was pumped from the earth and was made into salt, was not a lease of minerals.'

"In the case of *Williamson v. Jones* (W. Va.), reported in 19 S. E. 441, the following language is used by Mr. Justice Holt: 'The authorities now very generally—universally, so far as I have examined them—hold petroleum to be a mineral, and as such a part of realty, as timber, coal, or iron ore, except that in proper cases its mobility as a subterranean liquid must be taken into consideration, as in the case of salt water, etc. The courts of the state of Pennsylvania have had many cases, some involving rights of great value, in which the point arose, and have examined the question thoroughly, considering it with great care with reference to its being property where it is found, and its character and nature in general as property. Oil is a mineral, and, being a mineral, is a part of the realty.' *Funk v. Haldeman* (1866) 53 Pa. St. 229, 249. In the case of *Gas Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. 724, the master said: 'Gas is a mineral, and while in situ is a part of the land, and therefore possession of the land is possession of the gas.' After quoting this, the court said:

'This deduction must be made with some qualifications. Gas, it is true, is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights with much more careful consideration of the principles involved than the mere decision. Water is also a mineral, but the decisions in ordinary cases of mining, etc., have never been used as unqualified precedents in regard to flowing, or even percolating, waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferre naturæ*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their fugitive and wandering existence, within the limits of a particular tract, is uncertain, as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. St. 147, 148. They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other lands or come under another's control, the title of the former owner is gone.'

"We have found only one authority opposed to the conclusion that petroleum is a mineral; that is the case before referred to, of *Dunham v. Kirkpatrick*, 101 Pa. St. 36; s. c. 47 Am. Rep. 696. The great weight of authority is not only opposed to that case, but it seems to us to proceed upon false principles. The ground of the decision, as stated in the opinion, is that by the bulk of mankind nothing is considered as mineral except such things as be of metallic nature, such as gold, silver, copper, lead, etc.; that, in the popular estimation, petroleum is not regarded as a mineral substance any more than is animal or vegetable oil; and that it would only be classified as such in the most general and scientific sense. So, in the light of this assumed general view of the bulk of mankind, petroleum was held not to fall within a reservation as to minerals. We think, however, that the true meaning of the word 'mineral,' as well as its meaning among the bulk of mankind, must be determined from dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word 'mineral' applied only to metals. This case seems to be opposed in principle by the later case of *Gill v. Weston*, 110 Pa. St. 313, 1 Atl. 921, where petroleum was held to be a mineral substance in construing the Pennsylvania act of 1855, concerning the mortgaging of terms on mining lands. The court said in that case: 'It is a mineral substance obtained from the earth by the process of mining, and lands from which it is obtained may, with propriety, be called mining lands.' In the light of these authorities, we are bound to hold that petroleum is a mineral, and that it falls within the terms of the reservation in the deed referred to in the foregoing case.

The same is true of natural gas. We are of the opinion that the first assignment of error, therefore, is well taken.

"We are of the opinion, also, that the second assignment of error is well taken. To resolve the point raised by this assignment of error, we must construe the agreed state of facts. From this state of facts it appears that Rodgers conveyed the land, with the mineral reservation, on the 24th day of October, 1853, to Mathias Wright, and that Wright conveyed the land by general warranty deed, without any reservation, to some third party, and then it passed through a series of conveyances to James A. Allard; but the date of the deed made by Wright is not given, nor the date of any other deed, nor how long Allard held after Wright's deed. It thus does not appear from the agreement that there was seven years' adverse possession from the date of the deed of Mathias Wright. The agreement is that Allard, and those under whom he claims, have been in the actual, open, and notorious possession of the land under color of title for more than seven years, claiming adversely to the world to the extent of their title papers, which definitely identify the land intended to be conveyed. Within the expression, 'those under whom he claims,' is not only included Wright, but Rodgers. Therefore it is impossible to say that there was seven years of adverse possession from the deed made by Wright to the third person forward.

"We are of the opinion, also, that the third assignment of error is well taken. In mineral lands the surface, as adapted to cultivation, may be separated from the right to dig under its surface for ore, and one person may hold one of these rights while another holds the other. *Stewart v. Chadwick*, 8 Iowa, 463; *Caldwell v. Fulton*, 31 Pa. St. 475. So the possession of the soil by the owner for the purpose of tillage gives him no possession of the gas under the surface or of the other minerals. *Gas Co. v. De Witt* (Pa. Sup.) 18 Atl. 724; *Coal Co. v. Mellon* (Pa. Sup.) 25 Atl. 597. In this case it is said: 'The mining of coal and other minerals is constantly developing new questions. Formerly, a man who owned the surface owned it to the center of the earth; now the surface of the land may be separated from the strata underneath it, and there may be as many different owners as there are strata. *Lillibridge v. Coal Co.*, 143 Pa. St. 293, 22 Atl. 1035. In the early days of the common law the attention of buyers and sellers, and therefore the attention of the court, was based upon the surface proper, and who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended to the clouds and downward to the center of the earth. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income of it was agriculture. The comparatively recent development of the sciences of geology and mineralogy, and the multiplication of

mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. Tracts that were absolutely valueless, so far as the surface was concerned, have come to be worth many times as much per acre as the best farming lands in the commonwealth because of the rich deposits of coal or iron or oil or gas known to underlie them at various depths. These deposits, however, are sometimes found beneath well-cultivated farms, so that the surface has a large market value apart from the value of deposits of coal or iron, or other minerals, under it. In such cases the owner is rarely able to utilize the lower strata of wealth to which he has title, and for this reason he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for cultivating purposes precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or strata becomes a subject of taxation, of incumbrance, levy, and sale, precisely like the surface.'

The result is that the decree of the chancellor must be reversed, with costs, and a decree entered here affirming the decree of the court of chancery appeals for the complainant in accordance with this opinion.

#### BLEIDORN et al. v. OAKDALE IRON, COAL & TRANSPORTATION CO. et al.

(Court of Chancery Appeals of Tennessee. Oct. 8, 1896.)

##### TAX TITLE—EJECTMENT—ESTOPPEL.

1. A tax sale of land in which there is an estate for life passes only such estate, even though it was created by a foreign will, which was not recorded in the state where the land lay until after the tax title had accrued.

2. Where both parties in ejectment claim title under the same person, they are estopped to dispute his title.

Appeal from chancery court, Morgan county; H. R. Gibson, Chancellor.

Ejectment by Carl F. G. Bleidorn and others against the Oakdale Iron, Coal & Transportation Company and others. Plaintiffs obtained judgment. Defendants appeal. Affirmed.

Lucky & Sanford, for appellants. Washburn & Templeton and Pickle & Turner, for appellees.

BARTON, J. This is an action of ejectment, brought by the heirs and devisees of Louis Bleidorn, deceased. There was a decree below in favor of certain defendants, from which there was no appeal, and the contest here is only between the complainants and defendant the Oakdale Iron Company.



The company, in its answer, denied the title of complainants; pleaded generally not guilty and the statute of limitations; and disclaimed title to all the land sued for, except two tracts, containing 2,340 acres, and the mineral interests in these tracts, containing 484 acres. The defendant demanded a jury, and the cause was tried by a jury on certain issues submitted by the parties, the charge of the court, and the evidence. There were a verdict and decree for complainants, a motion for a new trial overruled, from which the defendant company has appealed.

The complainants' claim of title was as follows: (1) Grant No. 21,880, to Thomas B. Eastland, for 5,000 acres, dated June 29, 1893, based on entry 1,977, dated February 17, 1836; (2) grant, state to Thomas B. Eastland, dated June 30, 1836, based on entry No. 1,978, dated February 17, 1836; (3) deed from Thomas B. Eastland to Henry Wells, for said two 5,000-acre tracts, dated September 1, 1839; (4) deed from Henry Wells to Louis Bleidorn for said two 5,000-acre tracts, dated September 21, 1849; (5) will of Louis Bleidorn, dated April 6, 1852, probated in New York, May 11, 1852, probated in Morgan county, Tenn., March, 7, 1887. By the terms of this will, he devised all his property, after payment of debts and funeral expenses, to his wife during life or widowhood, with remainder, on her decease or marriage, to his children and their heirs, who are the complainants in this suit. The defenses set up and relied on by the defendant under its answer and proof are two: (1) Certain outstanding titles, and (2) a tax title and possession thereunder. Under the first head, the outstanding titles insisted on are as follows: (1) Grant No. 20,664, to Stephen Haight, for 5,000 acres, dated April 11, 1837, entry No. 1,842, June 6, 1836; (2) grant No. 20,662, to Stephen Haight, for 5,000 acres, dated April, 11, 1837, entry No. 2,086, October 30, 1836; (3) grant No. 22,338, to Julian F. Scoot, for 5,000 acres, dated December 28, 1838, entry No. 2,084, October 21, 1836, which entry is claimed to be special; (4) grant No. 26,056, to William Fisher, for 5,000 acres, dated January 29, 1848, entry No. 2,011, dated June 24, 1836, under which it is claimed in argument for defendants that a possession adverse to and destructive of the Bleidorn title or Eastland grants was held. Second, as to the tax title claimed: (1) This was evidenced by a transcript of the proceedings from the circuit court of Morgan county, condemning the two 5,000-acre tracts as the land of Louis Bleidorn, deceased, for taxes for the year 1866, judgment of condemnation March 22, 1867, sale July, 1867; (2) two deeds, from W. R. Williams, tax collector, to Meshack Stephens, one for each of the 5,000-acre tracts, both dated September 23, 1869; (3) deed from Meshack Stephens to the Oakdale Iron, Coal & Transportation Company, dated January 30, 1880, for the two tracts and mineral interests claimed by defendant; (4) possession, open, adverse, and continuous,

under this tax title, from 1867 down to the bringing of the suit, fully proven.

Issues made up and tendered by the parties under the direction of the court were submitted to the jury with charge of the court, and verdict and answer returned by the jury. These issues and answers returned as follows: Complainants' issue: "(1) Were the complainants the owners in fee, when suit was brought, of the lands in controversy? Ans. Yes. (2) Do complainants and defendants claim their respective titles from one common source? Ans. Yes. (3) At the date of the deed from Eastland to Wells, and from Wells to Bleidorn, were either or both the bargainors nonresidents of Tennessee? Ans. Yes. (4) Did complainants take title to lands in dispute as remaindermen, and did they bring suit within seven years from termination of life estate? Ans. Yes." Defendant's issue: "(1) At the beginning of this suit were their outstanding subsisting titles to the land in dispute superior to that of complainants? If so, what title or titles, and how much of land covered by them? Ans. No. [The second issue tendered by defendants was not submitted to the jury, and there is no exception.] (3) Was there a continuous adverse possession for more than seven years under the William Fisher entry, survey, or grant before the death of complainants' testator? Ans. No. (4) At date of deed from Eastland to Wells of land in dispute, was there actual possession, under color of title, adverse to claim of Eastland; and, if so, how much was so held, by whom, and under what titles? Ans. No. (5) At date of deed from Wells to Bleidorn, was there an actual possession, with or without color of title, adverse to claim of Wells and Bleidorn? If so, how much land was so held, and under what title or claim? Ans. One acre, by Bettie Martin. (6) Had the defendant and those under whom it claims, at time this suit was brought, been in actual, continuous, and adverse possession of land in dispute, under a color of title, for more than seven years? Ans. No. (7) Have complainants and those under whom they claim neglected for more than seven years to avail themselves of their alleged title by suit successfully prosecuted? Ans. No." The defendant assigns some seven alleged errors of law, exceptions to the charge of the judge, the results reached by the final decree, and from errors of fact; that there was no evidence to sustain the findings of the jury on the first issue of complainants, and the third, fourth, and sixth issues of defendant.

As to the errors of fact assigned, it is sufficient to say, taking the charge of the chancellor as the correct law of the case, and applying the evidence in the record to the rules thus prescribed, there is ample evidence in the record to sustain the findings of the jury. The facts of the case, as established by these findings, and as we ourselves find them, are as follows: No objection is made to the title papers produced by both parties that were introduced and read before the jury. The complainants'

title papers, dated and probated as above set out, cover the land in controversy, and, there being no other difficulty in the way, vest title in this land in complainants, who are the devisees of Louis Bleidorn, who died in 1852, and whose will, probated in New York, May 11, 1852, and in Morgan county, Tenn., March 7, 1887, devised the life estate in the land to his wife, Caroline Bleidorn, for life or widowhood, with remainder on her decease or marriage to his children, the complainants. Mrs. Bleidorn, the widow, died November 7, 1882, not having married after her husband's death, when, the life estate having terminated, the complainants were vested with the right of possession. This suit was commenced October 30, 1885. The proof also shows that grants Nos. 20,662, 20,664, and 22,338, based on entry No. 2,084, which were superior to complainants', covered the greater portion of the land in dispute, there being only about 500 acres left after excluding land covered by these grants in the boundaries sued for. The proof further shows that the tax title and deeds under which complainants claim cover the land in dispute; and, further, that possession was taken and held of the lands by Meshack Stephens and the Oakdale Iron Company from 1867 to bringing of suit,—open, notorious, and continuous, claiming under this tax title, adverse to all. The deed from Stephens to the Oakdale Iron Company was dated January 30, 1880, and deed from tax collector to Stephens, September 23, 1860. No other possession adverse to the Bleidorn title is shown, except of one acre, by Bettie Martin; and it is uncertain as to what title or grant she held under, though the jury has found that on September 21, 1849, date of deed from Henry Wells to Louis Bleidorn, she held one acre adversely to Bleidorn. We also find, with the jury, that Eastland and Wells were both nonresidents, as was Louis Bleidorn, at date of their respective deeds. There is evidence tending to show that Bettie Martin's possession commenced in 1836, terminated about 1856, and was then abandoned, and was under McEwen or Wiley, under an entry on which no grant is shown to have been made. The evidence does not satisfactorily show that it was under the Fisher grant, No. 23,056. In the light of this evidence, we will now consider the questions of law raised by the assignments of error, as the charge was made in view of this proof, and as applicable thereto. Defendant's counsel contend that the questions in the case are narrowed down to four, which we will consider in the shape and order presented by them.

1. Did the tax title only pass to M. Stephens, purchaser at tax sale, the life estate of Mrs. Bleidorn? It is insisted for defendant that said tax title vested in M. Stephens an estate in fee to the tracts of land sold for taxes. When this case was appealed, and the assignments of error were filed, the question as to whether a purchaser at a tax sale took a fee simple, or only a derivative title, may have been open to question; but since then it has been de-

cided by this court in several cases, and finally settled by the supreme court, that the title taken is only derivative, and this is in accord with older decisions in this and other states. "The purchaser acquires only the interest of the owner of the land in whose name the land is or ought to have been assessed. He takes only such interest as the taxpayer may have, without prejudice to the rights of other parties, such as remainder-men, mortgagees, or other incumbrancers." *City of Nashville v. Cowan*, 10 Lea, 209 et seq. See, also, *Mims v. Mims*, 1 Humph. 425; *Rowan v. Mercer*, 10 Humph. 359, and the cases cited in the 10 Lea case; and also *Stovall v. Austin*, 16 Lea, 700. And such has been the decision of the supreme court in several cases, not reported, during the last year, one case lately decided being that of *Anderson v. Post* (from Hamilton county)—38 S. W. 283.

It is insisted, however, that this cannot be effective in this case, because, it is said, the will of Louis Bleidorn was never probated in Tennessee until 1887 (which is true), and that Louis Bleidorn held under a recorded deed; that when he died, under our statutes of descent and distribution, the title in fee passed to his heirs at law, so far as his creditors and the state of Tennessee were concerned; and that the will of Louis Bleidorn did not take effect until registered here; and our registration statutes are cited, and the case of *Bleidorn v. Mining Co.*, 89 Tenn. 208, 15 S. W. 737, is cited, to the effect that creditors existing or subsequent and bona fide purchasers would not be bound by an unregistered foreign will. We cannot concur in this reasoning as applicable to the facts in this case. It is said in the case referred to, in answer to a similar contention pressed on the court: "This argument is based upon the syllabus in the *Smith and Nelson Case* [13 Lea, 461], wherein such an unregistered foreign will of realty is held to be valid as a muniment of title, 'as between the parties.' This syllabus is no part of the decision, although we may have reason to believe it to have been prepared by the judge who wrote the opinion of this court. This, however, is unimportant, for the limitation put upon the effect of such a will is only one way of stating the effect of an unregistered conveyance, and does not mean that such an instrument would not be valid as between any other than persons claiming under the will of the testator. All persons except creditors, existing or subsequent and bona fide purchasers, or whether parties or not, are bound by an unregistered conveyance." Now, it is held in the case of *City of Nashville v. Cowan*, 10 Lea, 213: "The effect of our statutes and decisions is to make the tax on land a debt of the owner of the land, the debt and lien being treated as other debts and liens;" citing *Mims v. Mims*, 1 Humph. 425, and *Rowan v. Mercer*, 10 Humph. 539. Therefore the debt was against the life tenant, Mrs. Bleidorn, and complainants do not claim under her; and

whether the will was registered or not could not, that we can see, effect this debt against her, as complainants do not claim under her. The statutes of descent and distribution of this state do not vest the title in the heirs, by their very terms, unless the ancestor died intestate. And we know of no case holding that there is such vestiture, or presumption of vestiture, existing, until rebutted or removed by the registration of the will. The ancestor having died, we incline to the opinion that it is a question of fact, which every creditor or purchaser must ascertain for himself at his peril, as to who the heir or devisee is. The creditors meant by the registration law, as to whom papers were void without registration, are creditors of the grantor. *Carson v. Browder*, 2 Lea, 702; *Sanders v. Everett*, 8 Tenn. Ch. 523; *Woods v. Bonner*, 89 Tenn. 417, 18 S. W. 67; *Kinsey v. McDearmon*, 5 Cold. 392. Here Louis Bleidorn was the grantor, and it is not claimed that the state or any one else was a creditor of his. We do not decide whether an innocent purchaser from a child who would be an heir at law of a deceased owner of land in case of intestacy might not take a valid title as against the devisee of an unregistered foreign will, though, as we say, we incline to the opinion that he would not. There are difficulties under either view, and we see no difference, so far as concerns the troubles as to titles that may arise, between the registration of a foreign will and the probate of a domestic. A domestic will, whether probated or not, passes the title to land, and relates back to the death of the testator. But to apply the rule insisted on by defendant in this case would have the effect, in the first place, of vesting, by presumption, contrary to the real facts, the full fee-simple title in the complainants; thus making them liable for a debt which, under the law and the facts, they were not liable for, and then taking from them for this debt, under this system of presumption, their future right, title, and possession, when they were unable, not having the right of possession, to bring a suit to recover possession. We do not think this position can be maintained. There may be difficulties arising out of the holding that a tax sale only passes a derivative title, but the point is too well settled for us to question it.

The next issue propounded by the defendant's counsel is: "Could defendant, claiming under this tax title, set up and rely upon its outstanding titles?" Upon this subject, the chancellor, as applicable to the evidence before the jury, charged the jury that, "where both parties claim under the same person, they are estopped to dispute the title of such person. If, therefore, you find that the defendant traces its title back to Louis Bleidorn, and derives its title from him, then it cannot dispute the validity of his title; and the question then would be whether its claim to the Bleidorn title is superior to that of complainants, and you need not consider the

titles alleged to be superior to Louis Bleidorn's." This, it is insisted, was error; and it is insisted for the defendant that it could set up and show outstanding titles for the purpose of defeating complainants' suit; and, in support of this contention, we are cited to several cases. We think the law in this state is directly to the contrary, and that the charge of the chancellor in this respect was evidently correct. In the case of *Wortham v. Cherry*, 3 Head, 468, it is said: "It is a well-established principle in the action of ejectment that, where both parties claim title under the same third person, it is sufficient to prove the derivation of title from him without proving his title." It is further said: "The defendant derives whatever title he may have under Louis S. Wortham, and is therefore estopped to gainsay his title. In accord with this are also the cases of *Allen v. Moss*, 1 Leg. Rep. 355; *Royston v. Wear*, 3 Head, 8; *Rochell v. Benson*, Meigs, 8; *Perry v. Calhoun*, 8 Humph. 551; *Howard v. Massengale*, 13 Lea, 577. We are cited to the case of *Moss v. Bank*, 7 Baxt. 216, as sustaining the contention of defendant's counsel, but we do not so read this case. In this case it was held that, where the plaintiff and the defendant derived title from a common source, the defendant cannot, for the purpose of defeating complainant, impeach the validity of the title, or the source from whence both derived their title; yet he can show that the plaintiff, by some subsequent act, has parted with his title, and has none at the time the action was brought. The effect of this is not to impeach the common source of title. It may be true, as quoted from 2 Greenl. Ev. § 307, that "the defendant, if not otherwise estopped, may still set up a title paramount to the common source, and derive to himself, or a title under an incumbrance created by the common grantor prior to the title of the plaintiff." In the first of the two instances here put, the defendant would not be claiming under a common source, but under a different title derived to itself, and asserted to be superior; the supposition being that it had discovered the defects of the title under which it had held, and had abandoned, and procured a better title, under which it then claimed. And in the second case, while claiming under a common title, the defendant has gone one step back, and secured the prior or superior conveyance under the common title. It is expressly stated in this case of *Moss v. Bank* that the effort of the defendant was not to impeach the original title, but for the purpose of showing that, at the time the suit was brought, the plaintiff had no title to the premises. In the case of *Kerbough v. Vance*, 6 Baxt. 110, the rule and distinction are well illustrated; for in that case it was held that as to an undivided interest of one-fifth owned by Saml. S. Vance, and by him conveyed to Kerbough, by deed which embraced another contract, the defendants would be estopped, because they occupied the

relation of heirs and privies of Samuel Vance, but as to four-fifths, which the defendants did not claim under Samuel Vance, but as common heirs of their father, they were not estopped. The case of *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, relied on by the defendant's counsel, is also contrary, as we understand it, to their insistence. In that case the defendants were relying upon a different title, which they derived to themselves. It was claimed for the plaintiffs, who had failed to perfect by proof their claim of title, that the defendants were estopped from asserting an advance title against them, their claim being that they were heirs of Robertson and wife, and that Robertson and wife had conveyed a life estate to the grantor of the parties through whom the defendants traced their interests, and that this precluded them from asserting any title as against the right of plaintiffs to the reversion as the heirs of Robertson and wife. The court said: "This possession was assumed upon the notion that a party who receives the deed of a life estate, and all persons taking a subsequent conveyance in fee from him or his grantees or deriving title by devise from such grantees, are estopped to deny that the reversion upon the termination of the life estate is vested in the grantor or his heirs." And it was held that this was not true, but that such defendants could procure the true title, and hold under it. And it was further said in the opinion of the court, to the general statement of the law, that one could protect himself as above stated: "There is this qualification: that a grantee cannot dispute his grantor's title at the time of conveyance, so as to avoid payment of the purchase price of the property, nor can the grantee, in a contest with another, whilst relying solely upon the title conveyed to him, question its validity when set up by the latter. In other words, he cannot assert that the title obtained from his grantor or through him is sufficient for his protection, and not available to his contestant. Where both parties assert title from a common grantor, and no other source, neither can deny that such grantor had a valid title when he executed his conveyance." And this in accordance with sound reason and justice, and is well illustrated, as we think, in this case. The defendant, as a means of protection, sets up and relies upon the Bleidorn title, which it claims to be perfect in itself, both by regularity of the tax proceedings under which it claims, and by reason of seven years' possession, which it claims was under this title, open, notorious, and adverse to all the world, destroying all outstanding titles. Now, can this defendant be permitted to say, after making this claim, and proving conclusively more than seven years' possession under this title, as was done, that its position was false and untrue, both as a matter of fact and a matter of law, and that there were superior outstanding titles? We think not, and are

clearly of the opinion that this objection and assignment of errors is not well taken.

The third question submitted by defendant's counsel is: "Was Bettie Martin's possession held under the Fisher entry?" The jury found that, at the date of the deed of Wells to Bleidorn, there was one acre held by Bettie Martin within the bounds of the Wells deed, as possession adverse to that title; but they failed to find under what grant or title that possession was held, and did not find that it was held under the Fisher entry or grant, as the defendant now contends it was. Our previous holding disposes of this question, as the defendant could not rely upon any such outstanding claim. But, besides this, the evidence does certainly not satisfactorily show that this possession was under the Fisher claim, but we think the weight of the evidence is to the contrary. But, in addition, it was shown that this possession was abandoned as far back as 1856, and that possession has been held under the Bleidorn title adverse to this since 1867. We see no error in the charge of the chancellor, and, as we have held, the findings of the jury in the case, taking the charge to lay down the correct rules of law, are amply supported by the evidence.

The next question propounded by the defendant's counsel is: "Were the three outstanding titles, to wit, grants Nos. 20,662, 20,664, and 22,338, and entry No. 2,084, superior to that of complainants?" It is insisted by the defendant that they were, and that the findings of the jury on this issue would not be binding, because the court charged the jury that the defendant could not dispute the validity of complainants' title. The result reached by us under the head last above considered is conclusive of this question. As we have held, the defendant cannot set up or rely upon such outstanding title. Besides this, it has shown conclusively that, by more than seven years' exclusive, adverse, open, and notorious possession under the Bleidorn titles, all other titles were extinguished; and the jury clearly found that there were no such outstanding titles. The only question that remained in the case was as to whether the possession held under the tax title was adverse to the remainder-men. It was certainly adverse to all others.

On the whole case, we are of the opinion that the complainants have shown in themselves, by the production of their title papers, a good title; that, under the tax sale, Stephens took only a derivative title, being the life estate of Mrs. Bleidorn; that this was terminated by the death of Mrs. Bleidorn, in 1832; and, the suit having been brought on October 30, 1885, that the complainants were not barred by the adverse possession of the defendant; that during the existence of the life estate, the possession held under the Bleidorn title was not, and could not be, adverse to that of the remainder-men, but inured to their benefit and protection. 1 Am. & Eng.

Enc. Law, p. 237; *McCorry v. King*, 3 Humph. 267. And see *Bleidorn v. Mining Co.*, 89 Tenn. 204, 15 S. W. 737. We are therefore of the opinion that the decree of the chancellor is correct, and the same is affirmed, with costs.

NEIL, J., concurs.

Affirmed orally by supreme court, November 10, 1897.

### CATE v. CATE et al.

(Court of Chancery Appeals of Tennessee. Oct. 2, 1897.)

CLAIMS AGAINST DECEDENT'S ESTATE—YEAR'S SUPPORT OF WIDOW—PREFERENCE—CHARGE ON LAND—EXPENSE OF FAMILY MONUMENT—CREDITS ON CLAIMS HELD BY ESTATE.

1. The year's support for a widow should be taken from funds actually on hand or due, and is not a general or preferred charge against the general assets of the estate.

2. The year's allowance to a widow is not chargeable against the real estate of the deceased.

3. An administratrix cannot recover from the estate the costs of a suit by her to determine the right to administer on the estate.

4. A bank certificate of deposit in favor of decedent was properly canceled where it was shown that it was paid by the bank, and that decedent had promised to deliver up the certificate.

5. The amount paid for a monument on the family burying lot is a proper charge against the estate, where it appears that it was ordered at the expense and request of decedent, who approved the contract of purchase, and promised to pay the cost.

6. Credits on a note held by the estate are properly allowed where receipts for the payments were produced, and were proven by the testimony of competent witnesses, to which no exceptions were taken.

Appeal from chancery court, Bradley county; T. M. McConnell, Chancellor.

Bill by M. A. F. Cate against R. J. Cate and another. From the decree rendered, complainant appeals. Affirmed.

Creed F. Bates, for appellant. Mayfield, Son & Aiken, for appellees.

BARTON, J. This bill was filed by the complainant, who was the widow of William Cate, deceased, as his administratrix and in her own right, to transfer the administration of her deceased husband's estate from the county to the chancery court, and to wind it up as an insolvent estate, sell lands to pay debts and to settle all matters, claims, and questions relating to the estate. Various matters of difference between different parties, and especially between her and her stepson, J. R. Cate, were set out, and various parties, and all necessary persons, were made parties defendant. All proper orders, references, and accounts were had, homestead, dower, and exemptions allowed, land sold and sales confirmed, and a general report made, and decree entered settling all matters of difference between all parties.

To some of the reports the widow, the complainant, excepted; to certain parts of some of the decree she excepted, and has prosecuted her appeal, and assigns errors here; and the only points now open in the case are those made in her assignments of error, and will be taken up and considered in their order as made, the pertinent and material facts being stated in connection with each point.

The first complaint is in reference to a year's support, which the chancellor declined to allow her as a preferred claim out of the general assets, including proceeds of land sold. The facts in connection with this matter are that she filed her petition in the court asking to have a year's support set aside on the 4th of February, 1895. Then competent commissioners were appointed for this purpose, who reported that "they had proceeded to discharge the duty assigned them by going to the residence of the widow, where the effects of the estate, or a portion of them, are, and, after considering all the circumstances, the station and situation in life of the widow, her present necessities, and the character of the estate left by the intestate, have selected and set apart for the year's support of said widow the following specific articles of personal property, to wit: We find the estate consists of personal property, notes, and money, and no real estate, and therefore set aside no specific articles of personalty, because there is no personal estate except notes and money. We therefore set apart to the said widow the sum of six hundred dollars in cash, to be paid her personally out of the money now in the hands of the administrator of said estate, or any other property of said estate, all of which is to be her own individual property, and belong to her free from the claims of said estate, its administrator, or any creditor thereof." This report was confirmed by order of the county court, and it was ordered that she might be allowed to retain the \$600 out of money in her hands, and to credit herself therewith as widow, or that it need not be embraced in any inventory made. She not having received anything as administratrix but a note, now in judgment, for about \$239, on one G. B. Hays, said to be doubtful collection, she asked first that this claim for \$600 for a year's support be made a first lien on all the funds realized in this cause, or, if not, that it be allowed as a general claim against the estate, and she be paid a pro rata on same. The chancellor correctly declined to allow either. This has been repeatedly held, and is too well settled for controversy. *Loftis v. Loftis*, 94 Tenn. 240, 28 S. W. 1091; *Mill. & V. Code*, § 3125; *Rice v. Hunt*, 7 Lea, 33. Property set aside must be actually on hand or due. *Mill. & V. Code*, § 3126; *Rice v. Hunt*, 37 Lea, 83; *Turner v. Fisher*, 4 Sneed, 211. It cannot be for so much recovery charged on the estate gener-

ally (same as above, and *Bayless v. Bayless*, 4 Cold. 359; *Rocco v. Cicalla*, 12 Heisk. 508), and is not chargeable on the real estate of the deceased. *Bell v. Hunter*, 3 King's Dig. pars. 5314, 5315.

The second ground of complaint and error assigned is that the chancellor declined to allow a claim reported in her favor by the master against the estate for \$380. This was for money expended by her in a lawsuit with her stepson, J. R. Cate, as to who should administer on the estate of the deceased, William Cate. It would seem that the contest was a warm one, and that she spent the amount claimed, and was successful; but the fight for the administrationship was necessarily a personal one, and not, so far as one can see, for the benefit of the estate in any way, and we know of no principle of law that would justify our allowing it as a proper charge against the estate. The learned and industrious counsel for the widow cited us to no authority, either text-book or decision, sustaining his contention, and we know of none.

The third complaint and error assigned is that the chancellor held that a certificate of deposit which she found among the papers of the decedent on the Bank of Charleston had been paid, and directed its cancellation.

The proof, to our minds, clearly showed it had been paid by the bank, and its cancellation was proper. It was shown by reliable proof that it had been paid, and that deceased, William Cate, had promised to get and deliver the certificate to the bank, but had forgotten and neglected to do so. There was no error in this.

The fourth error assigned is the action of the chancellor in allowing a claim in favor of J. R. Cate for amount paid for monument placed on family lot, the insistency being that the monument was bought by J. R. and Gus Cate, and that this was their debt. The proof shows clearly that, while J. R. and Gus Cate gave directly to the dealer the order for the monument, and agreed to see the bill paid, the monument was ordered and contracted for by J. R. and Gus Cate at the express instance and direction of their father, the decedent, William Cate, who notified and approved the contract after it was made, and who was to pay the bill. J. R. Cate, as a security or guarantor of the debt, paid it. It was a just claim against the estate, and properly allowed by the chancellor.

The fifth error assigned was the action of the chancellor on two credits of \$2,558, and \$17 on a note held by the estate against J. R. Cate. The proof shows clearly that J. R. Cate had made the payment, and was entitled to the credits. It is said it is not proven by legal evidence. Receipts were produced. They are proven by Gus Cate, who was competent, and by J. R. Cate, to whose testimony no exception was taken or reserved in the court below.

No other errors are assigned, and we see

no error in the decree of the chancellor, which will be affirmed, with costs.

WILSON and NEIL, JJ., concur.

CARTER et al. v. STEWART et al.

(Court of Chancery Appeals of Tennessee. Oct. 2, 1897.)

**LIMITATIONS—MENTAL UNSOUNDNESS—DEPOSITIONS—USE IN VARIOUS SUITS.**

1. Such mental unsoundness as would toll limitations was properly not found on evenly-balanced evidence, consisting of depositions and stipulations, where the issue was negatively by disinterested witnesses, and was not raised till property rights were endangered by adverse possession.

2. A deposition taken by defendant in an ejectment suit may be used by him in a suit to restrain its prosecution, where the same issues are raised by a cross bill, though the witness has died in the meantime.

Appeal from chancery court, Knox county; H. B. Lindsay, Chancellor.

Suit by Annette Carter and others against Wesley Stewart and others. From a decree in favor of complainants, defendants appeal. **Affirmed.**

Noble Smithson, for appellants. J. L. Rogers and Green & Shields, for appellees.

WILSON, J. This bill was filed December 8, 1895, to enjoin the prosecution of an ejectment suit instituted in the circuit court of Knox county by the defendants against the complainants or their tenants, to recover two lots and houses in Knoxville, the lots adjoining each other, one fronting on Crozier street, and the other on Marble alley, and to have the right and title to the lots claimed by complainants to be superior to that of the defendants. The bill avers that the complainants had entered their appearance to the ejectment suit in the circuit court, and filed pleas to the declaration, but that their remedy at law was embarrassed; and that, owing to the nature of their defenses, it was a proper case for the chancery court to take jurisdiction, and settle all matters in dispute between the parties. It was conceded in the bill that, upon the face of the records, the defendants had the better legal title; but it was averred that, while the legal title was put in the party from and through whom defendants claimed by inheritance, it was wrongfully so placed, and that it was intended to be put in the party in trust for those through whom by mesne conveyances complainants derive title. It is further averred that complainants, in person and through those under whom they claim, had had open, notorious, exclusive, and adverse possession of the premises, under color of title, for a period of years which perfected the title by the operation of the statute of limitations, and this statute is pleaded and relied on. It is sufficient to say here that the bill averred equitable grounds justify-

ing the chancery court in assuming jurisdiction of the controversy, and it did so, and enjoined the defendants from the further prosecution of their ejectment suit in the circuit court. The defendants answered the bill, and denied the claims of complainants as presented by them, and sought to avoid the effect of the plea of the statute of limitations, by denying—First, that it had run; and, second, by alleging that the deceased ancestor or relative through whom they claimed by inheritance was of unsound mind, and, therefore, that the statute never commenced to run in her lifetime. This answer was filed as a cross bill, in which they asked to be put in possession of the premises, to have an account for rents, and that the claim of complainants be removed as a cloud upon their title. This cross bill was answered, and its material contentions denied. A large volume of proof was adduced by the parties, consisting of some 25 depositions, a large quantity of documentary evidence, a transcript of the ejectment suit, and certain stipulations and agreements of counsel.

The cause was heard by Chancellor Lindsay, August 27, 1897. He held that the complainants were entitled to the relief they sought, and thereupon decreed that complainant Mrs. Annette Carter was the owner in fee and entitled to the Marble alley lot; and that complainants G. M. Phillips and J. L. Drake were the owners in fee and entitled to the lot fronting on Crozier street, described in the pleadings, and perpetually enjoined the further prosecution of the ejectment suit in the circuit court by the defendants. He held that the deed executed June 14, 1869, by James Kennedy and F. Van Uxum to Edward Livingston, conveying both of the lots as one lot, was a cloud upon the title of complainants, and removed the same, and that the statute of limitations commenced running in favor of complainants before the alleged insanity of the ancestor of defendants. He dismissed the cross bill of defendants, and taxed them with all the costs of the cause and the cost of the ejectment suit in the circuit court; the latter costs to be paid as a part of the costs, and paid from his court when certified by the clerk of the circuit court. From this decree the defendants prayed and were granted an appeal to the supreme court, and have assigned errors as follows: (1) Error in admitting as evidence in this case the deposition of one Rhoda Houston, whose deposition was taken in the ejectment suit by complainants here, defendants in the ejectment suit, the said Rhoda having since died; or the deposition of Justin B. Staley, which purported to set out, by questions and answers, what was in the deposition of said Rhoda. Exceptions were renewed at the hearing in respect to the evidence of Rhoda, and the objection to its competency is that the parties and subject-matter of dispute in this case are not the same as existed in the ejectment suit. The exception was overruled

by the chancellor. (2) Error in holding that there was a resulting trust in the premises in favor of the party through and under whom complainants claim. (3) Error in holding that the complainants had title by virtue of the operation of the statute of limitations. (4) Error in holding that the statute began to run in the lifetime of Edward Livingston. The complainants claim title by mesne conveyances from Rhoda Houston, colored. The defendants claim as the heir at law of Fannie Clark, who was an only sister of Edward Livingston, who died intestate.

Certain facts are not seriously in dispute in the record. They are these: June 14, 1869, James Kennedy and F. Van Uxum conveyed by deed the premises in dispute, as one lot, to Edward Livingston, colored. Livingston died August 25, 1874, intestate and without issue, leaving, as his only heirs at law, his sister, Fannie Clark, colored. Fannie Clark died August, 1894, leaving, as her heirs at law, the defendant Wesley Stewart, a son, and two granddaughters, the defendants George Winston and Kattie Clark, all colored people. The premises, pending the life of Livingston, or soon thereafter, were divided into two lots. Livingston never lived on the premises. Complainants' claims are thus proved: Mrs. Carter bought the Marble alley lot from J. H. Keeling and wife, June 24, 1885, taking their deed, which she put of record. Keeling bought from Rhoda Houston, January 24, 1885, taking her deed, which went to record. Rhoda Houston, March 31, 1892, conveyed, by deed, the other lot to Phillips and one Sprankle; and Sprankle conveyed his half interest to Drake, April 2, 1892. Edward Livingston left a wife, Rena Livingston, now dead. Rena Livingston conveyed to Rhoda Houston, December 30, 1884. It seems that, after the death of Edward Livingston, there was a dispute between Rena and Rhoda Houston in respect to the ownership of the premises. It appears that Rhoda insisted that the property was paid for by her husband, Ned Houston, who had died, and that the title to the property was to be taken in Edward Livingston, in trust for her. In view of this dispute between them, Rhoda and Rena, February 28, 1875, executed an instrument in the nature of a partition deed between themselves to the property, which was put of record. This instrument, among other things not necessary to set out, contains the following recitals: "Whereas, a controversy exists between the undersigned, Rhoda Houston and Rena Livingston, as to the right and title to certain real estate in Knoxville, the said Rhoda claiming that said property was purchased and paid for by Edward Houston, her husband, for her sole and separate benefit, and that the title was erroneously made to Edward Livingston individually, when it should have been to her or to the said Livingston as trustee for her use and benefit, and the said Rena Livingston denying the justice of the claim of said Rhoda, and as

serting that she is the rightful owner of said real estate or lot of land; and whereas, each of us have been in actual possession of a certain part of said lot for more than seven years, claiming the same against all the world and adversely to each other; and whereas, we desire to avoid any litigation, and prefer to settle the question between us: Therefore it is mutually agreed that the said Rhoda Houston shall have, hold, and possess 55 feet of that part of said lot which she is now in possession of, and which she has held and possessed as her own for more than seven years, to wit [the instrument then describes what is known as the "Marble Alley Lot," and then set apart the Crozier or eastern lot to Rena Livingston]. This instrument was executed, as stated, February 28, 1879, and was witnessed by Judge O. P. Temple and George W. Levere. It was acknowledged before the county court clerk the same day. Judge Temple states in his deposition that he prepared the instrument; that he was at that time the counsel of Rhoda Houston; but that he knew nothing about the title to this property except what was communicated to him at that time by the parties, and remembers none of the particulars.

In this condition of the title, it became a matter of moment to the complainants to aid their title by the statute of limitations. We think they have effectually done so, unless its operation, in so far as the rights of defendants are concerned, is nullified by the unsoundness of mind of Fannie Clark, under whom defendants claim. The evidence is quite conflicting as to this point. The defendants are quite positive that she was mentally unsound, and was so for a long period before her death, and that especially was this the case after she came near being drowned in a basement room of one of the houses on the premises that she was occupying, by a sudden rise in the creek. It seems that there were several parties in the room at the time of the sudden influx of the rising water, and they give a very vivid description of the event. One witness, Mrs. Wesley Stewart, says she was there, and that she got out by mounting a safe that came floating around in the room, and from that, as a bird, jumped out of the window. Another witness states that another party "sailed" out of the window. The old lady had to be assisted in getting out, and numerous witnesses say that from thence on she was much more affected mentally than she was before. The defendants are quite strong in their proof as to the mental unsoundness of the old lady. She appears to have been over 90 when she died, and several other parties give it as their opinion that the old lady was not capable of understanding matters. One witness, Mr. Pearson, the janitor in the Deaderick Building, is quite certain that she was completely demented. He saw a great deal of her, he says, several times usually a week, extending over a period of several years. His frequent vis-

its there, as he states, were to see Kitty Clark, and engage her as a nurse for a white family in the city. Just why it required so many visits and so many years to see and engage Kitty is not absolutely clear in this record. Other witnesses, apparently quite intelligent, and in no way interested in this suit, say that the old lady was a nice, pleasant, sensible old dorky. They detail the fact of her milking cows for a certain family, waiting on children, and giving them medicine, and doing other acts that indicated the possession of a sound mind; and they say that they never hear her mental soundness questioned until this litigation arose.

We have carefully read all the evidence in the record, and we are content with the conclusion that her mental condition interposed no bar to the operation of the statute. We are further content to hold with the chancellor, under the evidence, that the title of complainants was perfected by the statute of limitations. We do not hold with what seems to have been the opinion of the chancellor, that Rhoda Houston was entitled to this property under any resulting or other trust. In the view of the case we take, the evidence of Staley, incorporating the deposition of Rhoda Houston given in the ejectment suit, does not affect the result reached. We would have reached the conclusion herein expressed without that evidence. We may say, however, that we think the evidence competent. The decree of the chancellor is affirmed, with costs.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, November 3, 1897.

#### LINDELL REAL-ESTATE CO. v. LINDELL et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 7, 1897.)

PARTITION—TITLE—DECREE—PETITION FOR REVIEW—JURISDICTION—EFFECT OF REVIEW—LACHES—LIMITATIONS—MARRIED WOMEN—ESTATE.

1. Rev. St. 1889, §§ 2217, 2220, provide that defendant in an action in which he has not been summoned and has not appeared, but is brought in by publication, and in which an interlocutory judgment has been made final, may, within three years after rendition of such final judgment, appear, have same reviewed, and, for good cause, set aside; but, in order to obtain such review, it devolves upon such defendant to show that the petition on which such judgment was procured is untrue in some material matter, or that he has, and then had, a good defense thereto, which shall be set forth. *Held*, that a petition for review, by one who had been served by publication only, stating that the purported assignee of an interest in certain property sold under an interlocutory judgment of partition, which was afterwards made a final judgment, claimed same under a conveyance from one who held the title thereto in trust for petitioner, which conveyance was a breach of trust, of which breach the assignee at the time had notice, and that said assignee did not take for value, sets forth such an interest in the real estate in question as entitles



the petitioner to a review of the judgment as to the part claimed by the assignee.

2. Rev. St. 1889, §§ 1896, 6864, permitting a married woman to sue and be sued in her own name, the same as a feme sole, do not by implication repeal the part of section 6767 that exempts a married woman from the running of the statute of limitations, since mere ability to sue does not impose an obligation to do so.

3. Nor do said statutes abrogate the common-law rule that a married woman cannot be guilty of laches.

4. Where property has been conveyed to a trustee in trust for a married woman, and *jus disponendi* is conferred on him, she does not own a separate estate therein.

5. Where the transaction has not become obscure by the lapse of time, and no party or witness has died since the cause of action accrued, and no lasting or valuable improvements have been made upon the property in question, and no expense has been incurred by defendant, by reason of the delay in bringing suit, laches will not be imputed to one, under the disability of coverture, who failed for 11 years after the cause of action had accrued to bring an action for an interest in a remainder in real estate, the life tenant of which was still living.

6. Under Rev. St. 1889, §§ 7145, 7148, providing that in partition suits the court shall ascertain and declare the rights, titles, and interests of the parties, and give judgment accordingly, and that, in case parties claim the same portion adversely, the court may determine their rights, the court has jurisdiction to determine questions of title; and hence a judgment against one who has been made defendant in partition suit, and has failed to set up any adverse interest, is a bar to a subsequent suit between the same parties regarding the same subject-matter.

7. Where a final decree in partition is reviewed on petition, such review does not disturb the decree, as to the rights of any co-tenants, except such as are charged by plaintiff in the petition for review with holding adversely to him.

8. Under Rev. St. 1889, § 2224, providing that a judicial sale shall not be affected by setting aside any judgment regularly made, the purchasers at a sale under a decree in partition would be fully protected against any action subsequently taken by parties on a petition for review of the judgment.

9. Under Rev. St. 1889, § 2219, providing that, if a petition to review a judgment making final an interlocutory judgment be not filed within three years after rendition of such final judgment, the same shall stand absolute, such judgment does not become final until after the three years have elapsed; and therefore a party to a partition suit, whose interest is disputed by a petition for review filed in due time, is subject to the jurisdiction of the court, and can be required to make such disposition of the interest in dispute as to the court seems just.

Appeal from St. Louis circuit court.

In a suit by the Lindell Real-Estate Company against *Jemima Lindell* and others, a judgment in partition was rendered. From an order striking out her petition for a review of the judgment, *Ellen Davis*, one of the defendants, appeals. Reversed.

T. J. Rowe and Jos. S. Laurie, for appellant. John D. Davis and Jos. W. Lewis, Jr., for respondents.

ROBINSON, J. On August 30, 1892, a suit between the devisees of *Jesse G. Lindell*, deceased, and their heirs and assigns, for the partition of certain real estate in St. Louis (subject, however, to the life estate of *Jemima Lindell*, the widow of said *Jesse G.*

*Lindell*), was instituted. On February 23, 1893, an interlocutory judgment of partition, defining the respective interests of the parties, and ordering a sale of the property, was rendered. Afterwards the property was sold by a special commissioner, whose report of sale was duly approved, which was followed on May 27, 1893, by final decree. April 1, 1895, the appellant in this proceeding, *Ellen Davis*, a married woman, and one of the defendants in said cause, appeared in court, and filed her petition for review, verified by affidavit, under the provisions of sections 2217 and 2220 of the Revised Statutes of 1889. Mrs. *Davis* is now, and was then, a nonresident, and was not summoned and did not appear to said action, but was brought in by publication. Plaintiff then moved to strike the petition for review from the files, for the following grounds: "(1) The petition does not set forth facts constituting a good defense to the allegations contained in plaintiff's petition. (2) It appears from the facts stated in said petition for review that more than ten years have elapsed since the alleged cause of action accrued, and the action is therefore barred by the statute of limitations. (3) It also appears from the facts stated in said petition for review that the petitioner has been guilty of such laches that she is not entitled to assert any claim to the property described in plaintiff's petition." Which so-called motion is, in effect, a demurrer to the petition, and has been so treated by all the parties. The petition for review is in words and figures following, omitting the caption:

"Now comes your petitioner, *Ellen Davis*, and states to the court: That she was made a party defendant in the above-entitled cause, which was an action instituted in this court on July 30, 1892, by and between the devisees of the late *Jesse G. Lindell*, and their heirs and assigns, for the partition of the real estate therein described, subject to the life estate therein of the said *Jemima Lindell*. That your petitioner, said defendant, was at the institution of said suit, and now is, a nonresident of the state of Missouri, and was not summoned in said action, neither did she appear to said suit, nor was she made a party as a representative of any one who had been summoned or appeared, but was brought in by publication, in accordance with the provisions of the statute relating to nonresident defendants. That, as to her, a default was granted in said cause, and the allegations of the petition taken as confessed; and on the 23d day of February, 1893, an interlocutory judgment of partition and an order for the sale of the property were entered. That said judgment undertook to define the respective interests in and to said real estate of the parties therein designated, and directed that, inasmuch as partition in kind seemed impracticable, a sale of said property be made by a special commissioner then and there ap-

pointed by the court, and that the proceeds of such sale be distributed by said commissioner to the parties mentioned and described, according to their respective interests as defined by said judgment. That on March 23, 1893, said special commissioner made his report of the sale of said property, which was duly approved by the court; and on May 27, 1893, said special commissioner made his final report, showing that the whole amount of the purchase money had been paid to him, and that he had distributed the same (amounting to \$67,089, net) to the parties designated by the court, according to their respective interests. That said report was duly approved on March 27, 1893, and a final judgment in the cause was then and there entered accordingly. The petitioner in said cause alleged that your petitioner (defendant therein) claimed to be entitled to the interest in said property which Jesse G. Lindell, Jr., the nephew or grandnephew of Jesse G. Lindell, deceased, acquired under the will of said testator, but that said interest had, by mesne conveyances, passed to William F. Ferguson, deceased (whose heirs and administrators were made defendants therein), and was owned and held by said estate, subject, however, to whatever right thereto may be finally adjudged in favor of Edward C. Dameron, also defendant therein, under and by virtue of a certain written agreement between William F. Ferguson and one William C. Jamison, concerning which a suit was then pending, on appeal, in the supreme court of Missouri. The judgment or decree of this court so adjudged, and found that your petitioner no longer had any interest in the premises. Said allegations of the petition touching the right, title, and ownership of that interest in said property which said Jesse G. Lindell, Jr., acquired under and by virtue of the will of the late Jesse G. Lindell are untrue; and your petitioner has, and then had, a good defense to such action, whereby it will appear that she is and was entitled to be adjudged the owner of the interest in said property acquired by the said Jesse G. Lindell, Jr., under said will, the particulars of which are more fully set forth as follows:

"Your petitioner states: That she now is, and was prior to the institution of said suit, the wife of George Davis, whom she married in 1868, but that prior to her marriage with him she was the wife of Peter Lindell, a nephew of Jesse G. Lindell, deceased, and that the above-named Jesse G. Lindell, Jr., was her son, born of such marriage. That said son Jesse took under the will of Jesse G. Lindell, deceased, an undivided one thirty-sixth part of all the estate, real and personal, of which said testator died seised, subject, however, to the life estate of Jemima Lindell, widow of testator. That on June 24, 1874, said Jesse G. Lindell, Jr., by his deed of that date, for a valuable consideration, conveyed to William C. Jamison all the right, title, and interest in

and to the estate which he, the said Jesse G. Lindell, had acquired under said will, to have and to hold the same in trust for your petitioner and her heirs forever. Said deed described by metes and bounds the real estate intended to be conveyed, and included the property set forth in the above action for partition. That on June 30, 1874, said Jamison, as her trustee, upon the request of your petitioner, executed a deed of trust, of that date, conveying all said property to George W. Cline, as trustee for Charles Hoyle, to secure the payment of a principal note for \$10,000, dated June 30, 1874, payable three years after date, together with six interest notes, for \$500 each, payable at six, twelve, eighteen, twenty-four, thirty, and thirty-six months after date; all of said notes being signed by your petitioner, and payable to the order of said Hoyle. That afterwards, to wit, on December 23, 1879, said trustee, George W. Cline, in pursuance of the power vested in him under said deed of trust, sold said property at public vendue, and William F. Ferguson, then the owner of said \$10,000 note, became the purchaser, for the sum of \$9,075; and a deed for all of said property was then and there executed to him by said trustee, Cline. That the amount thus realized at such sale was far less than the real value of the property. That said sale was made under and by virtue of an agreement by and between said William C. Jamison, your petitioner's trustee, as aforesaid, and said Ferguson, that said Ferguson 'will hold said property as security for the said \$10,000, and interest thereon from and after January 1st, 1880, at the rate of eight per cent. per annum, payable semiannually, and when said \$10,000 shall be paid, and the interest as aforesaid shall be paid, then the said Ferguson will convey to the said Jamison the said real and personal estate, or to such person as the said Jamison shall direct; that, after the payment of said \$10,000 and interest as aforesaid, the said Jamison shall be the owner and entitled to a conveyance of said property conveyed to said Ferguson by said trustee, Cline, as aforesaid; and that the said Jamison will pay the interest as aforesaid when it becomes due as aforesaid.' That said agreement quoted as above was then and there, to wit, on December 23, 1879, reduced to writing and signed by said parties, and was duly acknowledged and recorded in the recorder's office of the city of St. Louis. A copy of the same is herewith filed. That said agreement thus entered into, although in the name of said Jamison himself, was really made in his capacity as trustee for petitioner, as was well known to said Ferguson; so that said agreement thus inured for the benefit of your petitioner, and said Ferguson thereby held said property in trust for her. That said Jamison, your petitioner's trustee, continued to pay the interest to said Ferguson on said sum of \$10,000, as required by said agreement, until 1884. That on August 6, 1884, said Jamison executed a deed

whereby he conveyed and transferred to Logan D. Dameron, all the right, title, and interest in and to all of said property as the same appeared by the agreement aforesaid by and between said Ferguson and Jamison. That such attempted conveyance by Jamison on his own account of any interest in said property to Dameron was a breach of trust on his part, and said Dameron accepted said deed with full notice that Jamison had no right or interest in said property, under said agreement or otherwise, except as the trustee of your petitioner; and, moreover, said deed to Dameron, although purporting to be for a valuable consideration, to wit, \$1,000 cash, was in fact executed solely to protect or indemnify said Dameron from such pecuniary loss as he might sustain by reason of being surety on certain bonds of Jamison as curator and as administrator, wherein said Jamison was a defaulter; he, the said Jamison, being then wholly insolvent. A copy of said deed is herewith filed. That on April 11, 1891, said Logan D. Dameron executed a deed whereby, for a nominal consideration, he sold and assigned to his son, Edward C. Dameron, all the right, title, and interest to said property as acquired by him under and by virtue of said deed from Jamison to himself. That said deed to Edward C. Dameron was voluntary, and moreover the latter accepted the same with full notice of the rights of your petitioner in and to said property under the agreement aforesaid between the said Jamison and Ferguson. That William F. Ferguson died in 1883, and at the June term, 1891, of the probate court of the city of St. Louis, said Edward C. Dameron, as assignee of the rights of Jamison in and to said property under the agreement aforesaid, instituted a proceeding (to which your petitioner was not a party) to compel the administrator of said Ferguson, Horace Ghiselin, to perform said agreement and execute a deed to him (Dameron) conveying all the property which said Ferguson had acquired under and by virtue of the deed from Cline, trustee, as aforesaid; at the same time tendering to said administrator said sum of \$10,000, with eight per cent. interest to date, in accordance with the conditions of the agreement between Jamison and Ferguson. That in said proceeding a judgment was rendered as prayed, and upon an appeal to the St. Louis circuit court a judgment of like effect was entered. That an appeal was taken to the supreme court, and, said appeal being yet undetermined at the date of the aforesaid decree in partition, this court ordered that the interest acquired by Jesse G. Lindell, Jr., under said will, to-wit, an undivided 1-36 part in the proceeds of the sale of said property, amounting to \$1,863.59, be paid to Horace Ghiselin, administrator of William F. Ferguson, deceased, subject to such right as might be finally adjudged on such appeal in favor of said Edward C. Dameron, which was accordingly done.

"Your petitioner states that, at the time of

the institution of the partition suit herein, there was also instituted in this court, by the same plaintiff, against Jemima Lindell et al., a number of other suits for partition, between the devisees of Jesse G. Lindell, deceased, and their heirs and assigns, of the remaining portions of the real estate of which said testator died seised, to which actions your petitioner, being a nonresident, was made a party defendant by publication only, and entered no appearance therein. In some of said suits, partition in kind being impracticable, the property was sold, and in others there was partition in kind. In each case the judgment defining the rights and interests of the parties was, so far as concerns the undivided 1-36 part acquired by Jesse G. Lindell, Jr., under said will, the counterpart of the judgment herein; giving to the estate of Ferguson an undivided 1-36 part of the property, subject to the right of Dameron, under the agreement aforesaid, as might be finally adjudged upon the determination of the cause then pending on appeal in the supreme court. Your petitioner states that since the date of the decree herein, and the decrees in said other partition suits, said appeal came on to be heard in the supreme court, and the judgment of this court therein was affirmed, whereupon said Ghiselin, as administrator of Ferguson, in pursuance of said final judgment, accounted to said Dameron for the sums which he had thus received in the partition suit wherein there was a sale of the property (said sums aggregating \$18,720.75), and executed to said Dameron a deed for all the property which had been allotted to said estate in the cases where there had been a partition in kind, receiving from said Dameron at the same time about the sum of \$4,500, which, together with the cash proceeds of the sale previously received by said administrator as aforesaid, was taken as in full payment and discharge of the principal and interest which was required by the agreement aforesaid between Jamison and Ferguson to be paid upon the execution of the deed. Your petitioner states that while it is true, as alleged in the petition herein, and likewise in the other partition suits, that the undivided 1-36 interest acquired by Jesse G. Lindell under the said will passed by mesne conveyances to said Ferguson, yet said Ferguson, by reason of the facts aforesaid, held the same in trust for the benefit of your petitioner, and it was your petitioner, and not Dameron, who should have been adjudged entitled to the same upon payment to Ferguson, or his estate, of the sum stipulated in the agreement aforesaid. Your petitioner states that she is satisfied with the partition in this case, and the other cases as well, and will ratify the same (provided, of course, she receives the share or interest allotted to the estate of Ferguson, and transferred to Dameron), and that she is willing to pay whatever sum may be due from her under the aforesaid agreement between her trustee, Jamison, and Ferguson, in order to entitle

her to said property. In consideration of the premises, your petitioner prays that the judgment should be set aside, and that she be allowed to answer the petition of plaintiff within such time as the court may direct."

The statute above referred to provides that the defendant in an action in which he has not been summoned, or shall not have appeared, but is brought in by publication, and in which an interlocutory judgment has been made final, may, within three years after the rendition of such final judgment, appear, and, upon terms, have the same reviewed, and, for good cause, set aside. But, in order to obtain such review, it devolves upon defendant to show that the petition upon which such judgment was procured is untrue in some material matter, or that the party seeking the review has, and then had, a good defense thereto (setting it forth). *Jones v. Driskill*, 94 Mo. 190, 7 S. W. 111; *Irvine v. Leyh*, 102 Mo. 200, 14 S. W. 715, and 16 S. W. 10. The learned counsel for plaintiff insists that the facts stated in the petition for review do not disclose a good defense, in this: that the petition shows that Jamison purchased the property from W. F. Ferguson, who had properly acquired the title at trustee's sale, over which he had no control, under the Cline deed of trust, and seeks to invoke the rule laid down by a long line of authorities, to the effect that a trustee may purchase trust property at a sale brought by a third party, which he had no part in procuring, and over which he could not, and did not, have control. Unfortunately for plaintiff, no such case was presented by the record. The petition for review (which, for the purpose of this case, must be taken as true) states that the sale of the trust property was made in pursuance of an agreement between Jamison and Ferguson for the benefit and protection of Mrs. Davis, whereby her equity of redemption therein was to be extended and kept alive. Such being the case, it was a breach of trust on the part of Jamison to convey her right of redemption to Logan Dameron. In this connection it will be observed that the petition for review specifically charges that neither of the Damerons were purchasers for value. Moreover, said Damerons had actual notice that Jamison had no right or interest in said property except as her trustee. It follows from the facts set forth in the petition that Mrs. Davis had an interest in the real estate in question, and was entitled to share in the proceeds arising from the sale thereof.

The plaintiff further contends that inasmuch as Mrs. Davis' right of action accrued in August, 1884, and her disability as a married woman was removed by the revision of 1889, and her petition not having been filed until March, 1895, 11 years after Jamison had conveyed the property to Dameron, and 6 years after the removal of her disability, the statute of limitations creates a complete bar to a review of the case. This would

doubtless be true, but for section 6767 of the Revised Statutes of 1889, which exempts married women from the statute of limitations, on account of disability of coverture. So we are brought to the direct question whether sections 1996 and 6864 of the Revised Statutes of 1889, granting to married women the right to sue and to be sued alone, without joining their husbands, with the same effect as *femes sole*, repealed by implication so much of the general statute of limitations (section 6767) as applies to the disability of married women. The question is an important one, involving matters of public policy as well as of private right, and has given rise to widely-differing views on the part of both courts and text writers. The authorities which deny that the enabling acts relieving a married woman of the disability of coverture do not operate to repeal by implication, or modify, the exception as to coverture contained in the general statute of limitations before referred to, proceed upon the theory: (1) Mere ability to sue does not impose an obligation to do so; (2) where a married woman can sue, either with or without her husband, failure to do so will not subject her to a plea of the statute of limitations. The authorities maintaining the opposite view meet this argument in this wise: That when the disability is removed the cause for exemption disappears with it, and the exemption itself ceases to exist. On the whole, the former position would seem to be the more reasonable one. It has the support of Wood on Limitation, and the courts of North Carolina, Mississippi, Texas, Oregon, and Ohio; and the same question was directly presented to and passed upon by Division No. 2 of this court in *Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843. But courts of great respectability (notably, those of Illinois, Arkansas, and Maine) hold a contrary doctrine. In speaking of the particular disabilities which postpone the running of the statute of limitations as to married women, 2 Wood, Lim. § 240, p. 579, says: "In those states in which married women are excepted from the operation of the statute, the circumstance that they are by statute clothed with the power of suing and being sued, or even endowed with all the privileges, rights, and liabilities of a *feme sole*, would hardly seem to be sufficient to change the rule, or deprive them of the benefits of the disability, if they choose to avail themselves of it; and the circumstance that the legislature had clothed them with these rights, without making any change in the statute of limitations, with respect to them, indicates an intention on the part of the legislature that they shall still remain within the exception therein contained." These views are supported in *Lattie-Morrison v. Holladay* (Or.) 39 Pac. 1100; *Hurlbut v. Wade*, 40 Ohio St. 603; *Alsop v. Jordan*, 69 Tex. 300, 6 S. W. 831; *Lippard v. Troutman*, 72 N. C. 551; *Campbell v. Crater*, 95 N. C.

156; *North v. James*, 61 Miss. 761. In *Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843, supra, Burgess, J., speaking for the court, uses this language: "It is contended by the defendant that inasmuch as plaintiff, after being abandoned by her husband, had the legal capacity to sue, then the statute of limitations began to run against her, and therefore plaintiff's action was barred by the ten-year statute of limitations. This position would be correct, but for the provision of section 6767 of the Revised Statutes of 1889. The record discloses that at the time plaintiff's cause of action accrued she was a married woman, and, although she might have instituted this suit after the abandonment of her husband, she was still a married woman, and the ten-year statute of limitations was not running against her. \* \* \* Mere ability to sue does not impose an obligation to do so, and for that reason, even though plaintiff could have sued, either with or without her husband, failure to do so during the statutory period did not subject her to a plea of the statute of limitations." This is a clear and emphatic recognition by one division of this court of the doctrine that the right to sue alone, conferred upon a married woman by the revision of 1889, does not operate to repeal by implication the exception made in her favor by section 6767. The whole tenor of our statutes relating to the married woman's acts shows a tendency on the part of the legislature not to abrogate the exception contained in the general statute of limitations. While it is true that by the married woman's acts, as revised in 1889, a married woman in this state has been emancipated, to some extent, from the common-law unity of husband and wife, and now stands upon advanced ground, more in accordance with enlightened thought and justice, yet it must be borne in mind that the statutory enactments before alluded to do not undertake to confer upon a married woman all of the rights and powers of a feme sole. For this reason we are persuaded that the conclusion reached by division No. 2 in *Throckmorton v. Pence*, supra, is both sound and just. Therefore we are inclined, in this case, to adhere to the position taken by Judge Burgess in that. And it may be added that the trend of recent decisions on the subject seems to be in this direction.

Having come to the conclusion that appellant's right is not barred by the statute of limitations, the next inquiry is whether she has been guilty of such laches as to preclude a review of the judgment. The most serious contention of plaintiff is that Mrs. Davis has slept upon her rights for such a length of time that she is precluded by her laches from obtaining the relief sought. Plaintiff urges in this connection that the interest involved is her separate equitable estate, with respect to which, although a married woman, she is subject to the imputation of

laches, just the same as if she was a feme sole. It is conceded by plaintiff that as a general rule a married woman is not subject to the imputation of laches, where her legal and ordinary estate only is involved. On the other hand, counsel for appellant urges with equal ability that, the property in question having been conveyed to William C. Jamison in trust for appellant, it was therefore not a separate estate, and that the same spirit of legislation which protects her from the operation of the statute of limitations also shields her from the imputation of laches. The legal title to the interest in controversy passed to William C. Jamison by the deed from Jesse G. Lindell of June 4, 1874. The *jus dispondendi*, which is the inseparable incident of ownership, was by the terms of the trust deed, it will be observed, expressly reserved and conferred upon her trustee, Jamison. While the rule is settled that courts of equity discountenance laches, and will deny relief where the parties have slept upon their rights for such a length of time as that it would be against good conscience, and operate as a fraud upon the other party, to allow them to be asserted, yet we do not think, under the circumstances disclosed by this appeal, that the right to reopen the case should be denied appellant on account of the delay in asserting her claim. Mere delay or lapse of time, however short of the statutory period, is not, of itself, sufficient to constitute laches. It must further appear that the other party has been injured by such delay. *Spurlock v. Sproule*, 72 Mo. 503. In *Kelly v. Hurt*, 61 Mo. 466, it was held that a mere lapse of time, short of the time fixed by the statute, will not bar a claim to equitable relief, where the right is clear, and there are no countervailing circumstances. There is, however, no definite rule on the subject of laches. Each case must be determined upon its own circumstances. *Bradshaw v. Yates*, 57 Mo. 221. In 12 Am. & Eng. Enc. Law, p. 550, the author says: "Where, from delay, the original transaction has become so obscure, from lapse of time, loss of evidence, or the death of the parties, as to render it difficult, if not impossible, to do justice, plaintiff will, by his laches, be precluded from relief." Again, at page 572, the same author remarks: "If, by delay, it has become doubtful whether the parties can be in a condition to produce the evidence necessary for the fair presentation on their part, or if it appears that they have been deprived of any just advantage which they might have had if the claim had been put forward before it became stale or antiquated, or if they have been put to any hardships which might have been avoided by more prompt proceedings, the court will deal with the remedy as if barred; but, where the delay has not been prejudicial to the party pleading laches, it will not be deemed a bar in the suit in equity, if not barred by the analogy of the statute of lim-

itations." Waiving, for the sake of this discussion, the disability of coverture, and applying these principles to the case at bar, how can it be said that the plaintiff or Dameron has been injured by the delay? It does not appear that any party or witness has died since August, 1884, when appellant's right of action may be said to have accrued; nor has the transaction, with respect to which relief is claimed, become obscure by the lapse of time. So far as this record shows, it does not appear that any valuable or lasting improvements have been made upon the property in question; nor has any expense been incurred by Dameron, unless, perhaps, in the litigation with Ferguson's administrator instituted in 1891,—a proceeding, it will be observed, which was brought about wholly by the failure and neglect of Dameron to make the payments required by the Ferguson agreement from the time of his acquisition of the Jamison interest, in 1884, to 1891, when Ferguson's administrator claimed an abandonment of the agreement, and refused to accept his tender of the amount due on the contract; and during all this time Mrs. Davis was under the disability of coverture. At common law, where a married woman remains under the disability of coverture, she could not be guilty of laches. The same rule which protected her from the statute of limitations shielded her from the imputation of laches. In *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13, it is said that, while the married woman's act "contains a liberal and comprehensive grant of power, it does not purport to grant to a married woman all of the powers of a feme sole." The legislature cannot be presumed to have made any changes beyond what is expressed or clearly implied under statutory provisions. As Mrs. Davis did not own a separate estate in the land in question, and not having the right to contract in respect to the interest in question, neither limitations nor laches could be imputed to her. When the resulting litigation terminated in Dameron's favor, the amount due under the Ferguson-Jamison agreement amounted to about \$23,000, while the amount realized from the sales in the partition suits of Mrs. Davis' interest was \$18,720.75. By paying the comparatively trifling sum of \$4,500, additional thereto, Dameron was enabled to obtain a deed to the interest in question. When Dameron is repaid, as appellant proposes to do, the money he has paid in acquiring the Davis interest, what just complaint can he have at being required to reconvey the interest in question, which originally never cost him a dollar? His position with regard to the interest involved in this litigation is such that the plea of laches merits no consideration whatever. Moreover, there is no possible antagonism between the plaintiff and Mrs. Davis. Plaintiff does not claim the interest or share in question, and it is obviously of no concern

to plaintiff to whom the same may be adjudged to belong. The interest involved in this controversy was a remainder, and the life tenant was living all this time, and held possession of the property. There was no occasion for such prompt action on the part of Mrs. Davis in asserting her rights as might have existed had there been a beneficial or adverse possession of the premises. Under the circumstances connected with this case, we do not think the doctrine of laches should be applied, so as to preclude appellant from opening up the judgment. The partition suit was not commenced until August, 1892. Had Mrs. Davis appeared therein, it could have been claimed that she, then and now a married woman, had forfeited the right to establish her claim to the interest allotted to Dameron, who, it may be observed in passing, had slept upon his rights from 1884 until 1891. If this be true, it necessarily results that she is in no worse situation when she filed her petition for review within the three-years limit by statute. Being a nonresident, and having been served by publication, and not having appeared, the statute gave her the absolute right, if she has a good defense, to come in at any time within three years after judgment, file an answer, and establish the same. From the opinion filed by the trial judge at the time he entered the order striking out appellant's petition for review, showing his reasons for denying a review of the judgment, it seems that he misconceived the law of the case, and proceeded throughout on an erroneous theory; the circuit court holding that "the questions which Mrs. Davis now seeks to have adjudicated were not adjudicated in the partition suit, and hence she is not precluded from asserting them against her trustee in an independent action, notwithstanding the decree." The learned circuit judge also expressed a doubt as to whether the court, in a partition suit, could adjudicate the questions between Mrs. Davis and Dameron. The jurisdiction in partition proceedings is not, as the trial judge seems to indicate, limited merely to the determination of the rights of parties as co-tenants to each other, but questions of title may be determined, where the court has once acquired jurisdiction of the subject-matter, including disputes between different parties claiming the same share, and the claims of parties claiming adversely; providing, of course, all of the parties are before the court. By section 7145 of the Revised Statutes of 1889, it is provided that the court must ascertain and determine the rights and interests of all parties to the proceeding; and, where it shall appear that there are parties claiming the same portion adversely to each other, the court may decide upon such adverse claims. Rev. St. 1889, § 7148. It is the settled practice that adverse and conflicting rights and interests may be settled in the same proceedings for partition of land.

Thompson v. Holden, 117 Mo. 118, 22 S. W. 905; Earl v. Hart, 89 Mo. 263, 1 S. W. 238; Holloway v. Holloway, 97 Mo. 632, 11 S. W. 233; Hamilton v. Armstrong, 120 Mo. 597, 25 S. W. 545. This court has repeatedly held that a judgment in partition, while it does not create any new title, vests in each party to whom the allotment is made the title of all the parties to the suit, and in case of sale the purchaser acquires the title that all of the parties have at the time the suit was instituted. Ketchum v. Christman, 128 Mo. 38, 30 S. W. 313; Holladay v. Langford, 87 Mo. 577. One who is made a party defendant in a partition suit is required to set up any adverse interest which he may have, and, failing to do so, is estopped from setting it up in a subsequent suit between the same parties; the judgment in partition being conclusive as to every right which might have been adjudicated therein. Bobb v. Graham, 89 Mo. 200, 1 S. W. 90; Freeman Co-Ten. § 531.

Appellant's petition for review charges, among other things, that Jesse G. Lindell, being the owner of an undivided  $\frac{1}{32}$  interest in the estate, conveyed the same to Jamison, as trustee for appellant, that the same interest was claimed by Dameron and the Ferguson estate, and that Mrs. Davis also asserted title thereto. Both Dameron and Ferguson's heirs and administrators, and also Mrs. Davis, were made defendants in the partition proceedings, for the express purpose of determining their rights, and securing an adjudication touching the interest involved in this controversy. By the decree, Dameron was vested with the absolute title to the Davis interest, and Mrs. Davis accordingly adjudged to have no right or interest whatever therein. Such judgment would be an absolute bar to Mrs. Davis asserting any claim whatever to the interest or share in question, as the court has already decided upon such adverse claims. The opinion proceeds upon the theory that the agreement between Jamison and Ferguson, and the sale of the trust property thereunder, is a breach of trust on the part of Jamison, and that Mrs. Davis has slept upon her rights for such a length of time as to preclude her from asserting any rights to the property. This assumption is in direct conflict with the averments of the petition for review, which, as before stated, must, for the purpose of this case, be taken as confessed. The circuit court seems to have been influenced, in refusing to open up the judgment, by the fact that the rights of the other cotenants had been adjudicated, the property sold, and the funds distributed. Clearly, such a view is untenable. A review of the judgment does not disturb the decree in partition, as to the rights of any of the cotenants except Dameron. Besides, the purchasers of the property sold are fully protected by the statute (section 2224). If the circuit court had granted the petition for review,

the rights of all the parties to the suit, as ascertained and declared in the judgment, except as to Dameron and Mrs. Davis, would remain unaffected; and the only issue to be determined would have been whether Mrs. Davis or Dameron was entitled to the interest set off to him, and claimed by her. If, at the time of the commencement of the partition suit, Mrs. Davis was entitled to the share or interest in question, the statute (section 2219) guarantees that the status quo shall be preserved for three years after the judgment, and that such judgment shall not become absolute until after the expiration of that period. Upon complying with the statutory provision at any time within the period so limited, the judgment will be opened so as to admit her defense. The judgment does not become absolute until the period for review has elapsed. Dameron is still subject to the jurisdiction of the court, and can be required, upon such terms as may be just, to convey to Mrs. Davis the interest set apart to him. The judgment of the circuit court is reversed, and the cause is remanded, that the facts on the petition for review may be heard and determined upon their merits. All concur.

#### JACOBS v. OMAHA LIFE ASS'N.

(Supreme Court of Missouri, Division No. 1.  
Dec. 7, 1897.)

#### APPEAL—CONSIDERATION OF EVIDENCE—RECORD—JUDGMENT ON PLEADING—ASSUMPTION OF CONTROVERTED FACT—ERROR.

1. In a suit on a life insurance certificate, defendant moved for judgment on the pleadings. According to the record, the motion was sustained, and afterwards the certificate, application, and medical examination were offered in evidence, but excluded. The evidence offered was preserved in the bill of exceptions, and on appeal the parties treated it in argument as a part of the record. *Held*, that the supreme court would also consider it as part of the record on which the lower court acted in passing on defendant's motion.

2. In a suit on a certificate of life insurance, the petition alleged that defendant was a "benevolent corporation." The answer admitted that defendant was a benevolent corporation, the issuance of the certificate, death of the assured, and proof thereof. It set out the general nature of defendant's business, alleging that it was authorized to do business on the assessment plan; that the answers in the application were warranties; and that defendant falsely answered that the only injury or disease which he had suffered was in 1883, when his leg was broken, while the accident occurred in 1893. Replying, plaintiff denied each allegation of new matter, and alleged that the misrepresentation was not material, and was a clerical mistake made by defendant's agent in filling up the application. Under Rev. St. 1889, § 5849, the misrepresentation, unless material, would not invalidate the certificate unless defendant was doing business on the "assessment plan." On the trial, defendant's motion for judgment on the pleadings was sustained on the ground that plaintiff admitted the misrepresentation. *Held* error, since defendant was bound to show that it was doing business on the assessment plan, that fact not having been admitted by plaintiff's allegation that defendant was a benevolent corporation.



Appeal from circuit court, Ray county; E. J. Broadus, Judge.

Suit by Lizzie Jacobs against the Omaha Life Association on a certificate of insurance. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Jas. W. Garner and C. T. Garner, for appellant. Lavelock & Kirkpatrick and T. P. Divilbiss, for respondent.

MACFARLANE, J. This is a suit on a certificate or policy of insurance. The petition, in substance, charges that plaintiff is the widow of Robertson L. Jacobs, deceased, and defendant is a benevolent corporation doing business under the laws of Nebraska; that on the 1st day of June, 1894, in consideration of the payment of \$23.50, and the payment thereafter of \$26.50 quarterly for the period of 15 years, defendant executed and delivered to said Robertson L. Jacobs its five beneficiary certificates, each for the sum of \$1,000, the same constituting a policy of insurance in said association, whereby it promised to pay plaintiff the said sum of \$5,000 within 90 days after proof of the death of the said Robertson L. Jacobs. The petition then charges the death of said Robertson on the 9th day of June, 1906, and proof thereof; that the said insured and plaintiff kept and performed all the conditions contained in said policy and the by-laws of said association; yet defendant neglected and refused to pay said sum. Judgment is demanded for the amount due.

The answer of defendant admits that it is a benevolent corporation under the laws of Nebraska; admits that it issued the certificate of membership; admits the death of Jacobs, and due proof thereof. The answer then avers that it is a benevolent society, and sets out in full article 3 of its charter, which shows the general nature of the business to be that of giving aid to the families of deceased members. It avers that under the laws of Nebraska it is authorized to transact the business of a fraternity on the assessment plan, and is, and at the date of the policy was, authorized to transact business within this state on the assessment plan. The answer then charges that admission of said Jacobs to membership was in consideration of statements, declarations, and warranties contained in his application and medical examination. That by the said application, which is made a part of the contract, the applicant stipulated and warranted that the answers and explanations given to questions propounded to him were full, complete, and true, and that each and every such statement and answer was material to the risk; that the statements were declared to be the exclusive and only basis of the contract, and, if any misrepresentation or fraudulent or untrue answers were made, the agreement and policy of insurance should be void. The answer further charges that in said medical examination the following question was asked: "State particulars of any illness, constitutional disease,

or injury you have had, giving date, duration, and remaining effects, if any?" To which question he made the following answer: "None, except broken leg, March, '83,"—which answer was untrue, the said injury having occurred in March, 1893. And the following further questions were asked: "When did you last consult a physician?" to which he answered, "When leg was broken." "For what did you consult him?" to which he answered, "Above." "Have you consulted, or obtained the advice of, any medical man within the last ten years?" to which he answered, "No," which last answer was untrue. By reason of these false answers defendant charges that the certificate is null and void.

The reply to the answer denies each allegation of new matter contained therein, and states specially that "the application referred to in said answer was not written by the deceased, Robertson L. Jacobs, but by the agent of the defendant, and that the allegation therein that deceased's leg was broken in March, 1883, was a clerical mistake made by the agent of defendant in making out and writing the deceased's application for insurance. Plaintiff states that the same was not material, and did not affect the merits of the risk, or the condition of defendant's soundness of body or condition of health. And plaintiff denies that any of the allegations contained in said answer of defendant contain any material or meritorious matters of legal defense to the just and meritorious cause of action contained in plaintiff's petition in this cause."

When the case was called for trial, the bill of exceptions shows the following proceedings: "Defendant in this cause now moves the court for a judgment on the pleadings as shown [admitted] by the replication filed therein. Which said motion for judgment was by the court sustained. And to the ruling of the court in sustaining said motion the plaintiff then and there excepted and saved her exceptions. On motion for judgment the plaintiff then offered in evidence the certificate or policy of insurance issued by the defendant to Robertson L. Jacobs, the application for said policy, and the medical examination. This evidence was excluded by the court, but is preserved in the bill of exceptions. The application, as well as the declaration and examinations, contains certain stipulations, agreements, and warranties, and the examination, containing the answers to questions as charged in the answer."

The policy of insurance is as follows: "No. 11,177. Omaha Life Association. \$5,000. Age 42. Premium \$26.60. In consideration of the application for this policy of insurance, which is hereby referred to, and made part of this contract, and of the statements made therein, which statements every person accepting or acquiring an interest in this contract adopts as his own and warrants to be full, complete, and true, and of the first premium paid on or before the delivery hereof, the Omaha Life Association does hereby issue to Robertson L. Jacobs, of Richmond, county of Ray, state of



Missouri, its certificates of membership numbered 11,173, 11,174, 11,175, 11,176, 11,177 for the sum of one thousand dollars each, the same constituting a policy of insurance in said Omaha Life Association numbered 11,177 for the sum of five thousand dollars; and upon the consideration aforesaid, and upon the condition of the payment of the sum of twenty-six and sixty one-hundredths dollars, to be paid quarterly on the 1st day of September, December, March, and June of each and every year for the full term of fifteen years, payable at the home office of the association, in the city of Omaha, state of Nebraska, and subject to all the conditions, requirements, and benefits stated on the second and third pages of this policy of insurance, which are hereby referred to and made a part of this contract, there shall be payable to Lizzie C. Jacobs, his wife, if living at such time, otherwise to the legal representatives of said member, the sum of one thousand dollars on each certificate then in force, within ninety days after the first day of the first calendar quarter next ensuing the date of acceptance by the association of satisfactory evidence of the death of said member: provided, that, if the insured shall come to his death before the expiration of five years from the date hereof, then there shall be reserved by the said association, from the face hereof, such a sum as will, if added to the sum of all premiums which will then have been paid by the insured, equal twenty-five per cent. of the face hereof." The judgment was for defendant, and plaintiff appealed.

The proceedings, as disclosed by the bill of exceptions, are unusual. Defendant moved for judgment on the admission in plaintiff's reply that applicant's leg was broken in 1883, when in truth that injury occurred in 1893. According to the record, this motion was sustained, and afterwards the policy of insurance, the application, and the medical examination were offered in evidence, and evidence was also offered tending to prove that the breaking of a leg is not a constitutional injury or disease. This evidence was all excluded. The evidence offered is preserved in the bill of exceptions, and we will treat it, as the parties have treated it in argument, as a part of the record upon which the court acted in passing upon defendant's motion. The question, then, is whether or not the incorrect answer of the applicant in respect to the date of his injury vitiated the policy. Life insurance companies, under the laws of Missouri, are divided into two general classes, one of which is popularly known as "old-line companies," and the other as companies doing business on the "assessment plan." The first is defined, authorized, and regulated by article 2 of chapter 89 of the Revised Statutes; the other by article 3 of the same chapter. In the first class it is provided that "no misrepresentation made in obtaining or securing a policy of insurance, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actual-

ly contributed to the contingency or event on which the policy is to become due and payable." Rev. St. 1889, § 5849. No such provision governs policies issued on the assessment plan. These are, therefore, to be construed by the general law. *Hanford v. Association*, 122 Mo. 50, 28 S. W. 680; *Haynie v. Indemnity Co.* (Mo. Sup.) 41 S. W. 461. If this policy is not on the "assessment plan," then it is governed by the foregoing provisions of the statute, and the incorrect statement of applicant made to the medical examiner in reference to the date of his injury does not avoid the policy unless the breaking of the leg contributed to his death. The petition states that defendant is a "benevolent corporation, organized and doing business under the laws of Nebraska." Defendant, by answer, charges that it is a corporation under the laws of Nebraska, and authorized to transact the business as a fraternity on the assessment plan, and was, at the date of the issuance of the certificate sued on, and now is, "authorized, by the insurance department of the state of Missouri, to transact business within this state on the assessment plan." These allegations were put in issue by the reply. Whether or not defendant is an insurance company on the assessment plan, and therefore not governed by the provisions of the statute declaring the effect of misrepresentations in securing the policy is a fact put in issue by the pleadings, and the burden of proof is upon defendant. The fact that plaintiff calls defendant a "benevolent corporation" is not, we think, an admission that it does business on the assessment plan, or that this contract is under that plan. The statute declares what shall constitute a certificate or policy of insurance on the assessment plan in the following words: "Every contract whereby a benefit is to accrue to a person or persons named therein upon the death or physical disability of a person also named therein, the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan, and the business involving the issuance of such contracts shall be carried on in this state only by duly-organized corporations." Rev. St. 1889, § 5860. A contract of insurance must fall within this definition before it becomes an insurance on the assessment plan. It does not matter under what name it does business, or what appellation may be given it by others. The character of this contract was put in issue by the pleadings, and the legal effect of the admission in the reply that the date of applicant's injury was incorrectly given to the medical examiner may depend upon the finding on this issue. If the contract was not on the assessment plan, then the false date of the injury will not avoid it, unless material to the risk.

An examination of the contract itself,

of the application, which is made a part of it, fails entirely to show that the "benefit is, in any manner or degree, dependent upon the collection of an assessment upon persons holding similar contracts." The contract is conditioned upon the payment of the fixed sum of \$26.60 quarterly. It is said in the Hanford Case, supra: "It is true, the fifteen dollars to be paid and used as an expense fund is a fixed and defined sum paid annually, and is in no sense an assessment. According to the first clause of the seventh condition of the policy the member must make a monthly payment at fixed and defined dates during his life, and the amount to be paid bimonthly is also fixed by the table of rates. Thus far these policies are premium policies, for it does not make these fixed rates, payable at specified dates, assessments, to call them by that name." The fixed quarterly payments required under the contract in question are not even called "assessments." They are, in fact, simply premiums, to be paid quarterly for the period of 15 years, if the insured lives that long. It is true, the contract is made subject to all the conditions, requirements, and benefits stated on the second and third pages of the policy, but neither party has incorporated these in the abstracts furnished us, so we are not informed what they require. The court therefore committed error in rendering judgment for defendant upon the pleadings, assuming that the evidence offered by plaintiff was considered in connection therewith. Whether or not the policy sued on was on the assessment plan was a question of fact which plaintiff had the right to have tried, as the legal effect of the facts pleaded by defendant in avoidance of the contract may have depended upon the decision of that question. In case it should be found, on a trial of that issue, that the contract in question is a policy of insurance on the assessment plan, then the question whether or not the declarations and representations of the insured are warranties must be determined from the contract itself, read in connection with what is referred to and made a part of it, and in the light of all the facts and circumstances. Not having all the evidence properly before us, we will not undertake to pass upon that question. The judgment is reversed, and the cause remanded. All concur.

#### PRESNELL et al. v. HEADLEY.

(Supreme Court of Missouri, Division No. 1.  
Nov. 3, 1897.)

#### DEEDS—CONSTRUCTION—PROPERTY CONVEYED— INTENTION OF GRANTORS.

A trust deed described the land as "beginning at the N. W. corner of section 14, T. 29, range 22; thence running along the western section line 45½ rods; thence running eastwardly 60 rods; thence N. 5½ rods; thence W. 88 rods; thence N. 40 rods, to the north line

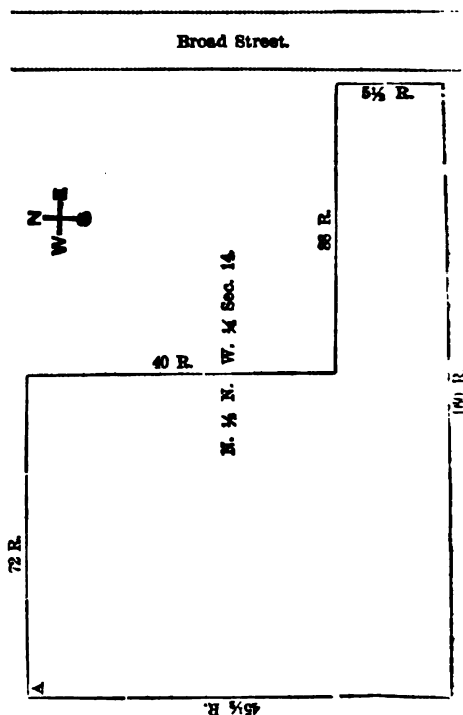
of section 14; thence west 72 rods, to the place of beginning,—containing 23½ acres, more or less." The only land then owned by the grantors in the N. W. ¼ of said section 14 was about 23½ acres, described as being a part of the N. ¼ of the N. W. ¼ of section 14, town 29, range 22, and contained within the following metes and bounds: "Commencing at the northwest corner of said section, and running thence south 45½ rods; thence east 160 rods; thence north 5½ rods; thence west 88 rods; thence north 40 rods; thence west 72 rods, to the place of beginning." Held, that the intention of the grantors to convey the land last described was manifest on the face of the trust deed.

Appeal from circuit court, Greene county: James T. Neville, Judge.

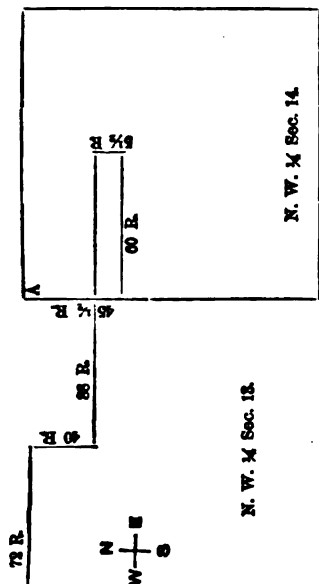
Ejectment by Frank G. Presnell and another against Oscar M. Headley. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Jas. Baker, for appellants. T. J. Delaney, for respondent.

BRACE, J. This is an action in ejectment to recover the possession of certain real estate situate in the city of Springfield, Greene county, Mo., described in the petition as being part of the N. ¼ of the N. W. ¼ of section 14, town 29, range 22, and contained within the following metes and bounds: "Commencing at the northwest corner of said section, and running thence south 45½ rods; thence east 160 rods; thence north 5½ rods; thence west 88 rods; thence north 40 rods; thence west 72 rods, to the place of beginning." The tract thus described is shown by the following diagram, and contains about 23½ acres:



The plaintiffs are the heirs at law of John A. and Mary B. Presnell, and as such claim title to the premises of which the defendant is in possession, claiming title under mesne conveyances from them. On the 9th of July, 1870, the said John A. and Mary B., who were husband and wife, being the owners of the premises, by their deed of trust of that date conveyed to Selby & Jamison, in trust to secure the payment of certain notes therein described, to the St. Louis Mutual Life Insurance Company, "the following described property or real estate situate in the city of Springfield, Greene county, Missouri, to wit: Beginning at the N. W. corner of section 14, T. 29, range 22; thence running along the western section line  $45\frac{1}{2}$  rods; thence running eastwardly 60 rods; thence N.  $5\frac{1}{2}$  rods; thence W. 88 rods; thence N. 40 rods, to the north line of section 14; thence west 72 rods, to the place of beginning,—containing  $23\frac{3}{4}$  acres, more or less." Of which description, literally followed, the following is a diagram:



In 1872 this deed of trust was foreclosed, the trustee's deed containing the same description as in the first trust deed; and the defendant, by mesne conveyances, has acquired whatever title the purchaser at the trustee's sale received. The defendant, in his answer, admitted possession, denied the other allegations of the petition, and pleaded the statute of limitations. The finding and judgment were for the defendant, and the plaintiffs appeal.

The suit was instituted on the 27th day of December, 1894. The defendant purchased and went into possession in 1882. The land was then fenced, and had been in the possession of his grantors for some years prior thereto. It was admitted that the wife, Mary B. Presnell, who held the legal title to

an undivided fourth of the premises at the time of the execution of the deed of trust, died in 1874, and that the husband, John A. Presnell, who held the legal title to the remaining undivided three-fourths of the premises at the time of the execution of the deed of trust, died in 1891; and the court found from the evidence that the defendant and his grantors had held the open, notorious, exclusive, and continuous adverse possession for more than 10 years prior to the death of the said John A. The defendant does not seek a reformation of the deed of trust, but insists that the intention of the grantor to convey the land in suit is manifest on the face of the deed. The trial court sustained this contention, and this ruling presents the decisive question in the case. In *Evans v. Greene*, 21 Mo. 208, it was ruled that while it is not competent, in an action involving the legal title only, to correct a mistake in the deed, yet "if part of the description is inconsistent with other parts, proceeding either from the mistake of the writer or the error of the grantor, and the remaining part is sufficient to designate the land sold, the remedy is afforded by disregarding the false description, and giving effect to the other calls." To the same effect is *West v. Bretelle*, 115 Mo. 653, 22 S. W. 705. In *Hoffman v. Riehl*, 27 Mo. 554, it was held that "where there is a palpable omission in the description of a deed, it may be supplied by construction." In *Gibson v. Bogy*, 28 Mo. 478, that "the intention of the parties, as shown by the entire deed, should govern in its construction. When certain of the words used appear repugnant to the other portions of the deed, and to the general intention of the parties, they should be rejected." In *Jamison v. Fopiano*, 48 Mo. 194, that "although monuments will generally prevail over other calls in a deed, yet if, taking the whole deed together, they are apparently erroneous, they will be disregarded. And a boundary may be rejected when it is clear that it was inadvertently inserted, and that a tract with different boundaries was intended to be conveyed." See, also, *Cooley v. Warren*, 53 Mo. 166, and *Shewalter v. Pirner*, 55 Mo. 218. In *Brown v. Gibson*, 82 Mo. 529, it was held that "each part of the descriptive language in a deed is to be construed with relation to the other parts, and no inflexible rule of interpretation will be allowed to defeat its clear meaning." And in *Deal v. Cooper*, 94 Mo. 62, that "when the deed, applied to the subject-matter, shows a manifest omission in the description, and there are sufficient data furnished by the deed to supply the omission, the omission will be supplied by construction." To the same effect is *Burnett v. McCluey*, 78 Mo. 676: "The modern rule is to give effect to the whole and every part of the instrument, whether it be a will or deed or other contract, to ascertain the general intention, and permit it, if agreeable to law, whether expressed first or last, to overrule the particu-

lar, and to transpose the words whenever it is necessary in order to carry the general intention plainly manifested into effect;" and "where it is obvious that, from the words used, and the general tenor and context of the instrument, certain words, or their substance, has been omitted, such words may be supplied by construction." *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128. And it is well-settled law that, in determining the intention of the grantor as to the boundaries of the land conveyed, the circumstances surrounding the parties, and the situation and condition of the land, will be taken into consideration in construing the deed. 2 Am. & Eng. Enc. Law, 497; *Evans v. Greene*, 21 Mo. 208; *Wolfe v. Dyer*, 95 Mo. 545.

Applying the foregoing principles to the case in hand, it would seem that the ruling of the circuit court ought to be sustained. It appeared from the chain of title given in evidence that at the time of the execution of the deed in question the only land which John A. Preamell and wife owned in the N. W.  $\frac{1}{4}$  of said section 14 was the land described in the petition, and as shown in the first diagram. That description is identical with that contained in the deed, except the length of the second or south line, which, as there given, is 60, instead of 160, rods. It is evident upon the face of the deed that the land intended to be conveyed is in the northwest corner of the N.  $\frac{1}{4}$  of said section; that it is to be inclosed within the boundaries of the six straight lines given in the deed; that the beginning of the first line and the end of the last is to be the same point; that that point is a monumental point,—the N. W.  $\frac{1}{4}$  of said section; that the first and last lines radiating at right angles from that point are established lines, being co-incidental with the west and north lines of said section 14,—the first for a distance of  $45\frac{1}{2}$  rods, and the last for a distance of 72 rods. About these lines there can be no question. It is also evident from the calls of the deed that the first line must be left at a distance of  $45\frac{1}{2}$  rods south of the northwest corner of the section, and the last must be reached at a distance of 72 rods east of that corner, and the latter point must be reached by a line running from a point 40 rods south thereof, which point must be reached by a line running from a point 88 rods east thereof, which point must be reached by a line running from a point  $5\frac{1}{2}$  rods south thereof. This point, according to the courses and distances given in the deed, is necessarily  $45\frac{1}{2}$  rods south of the north line of section 14, and 160 rods east of the point on the west line  $45\frac{1}{2}$  rods south of the northwest corner of said section. Thus we have five of the lines called for in the deed, identical with those of the land sued for, with but one (the second or south) line to be run to perfect the inclosure. To accomplish this purpose, the deed plainly points out where this line must begin, the direction it must take, and where it must end; but if drawn

between those points, as is required by every other call in the deed, and as was manifestly the intention it should be drawn, that line must be 160, instead of 60, rods long, as called for in the deed. A reasonable construction of the deed requires that it should be so drawn, in order that the instrument may not perish, and the manifest intention of the parties, as evidenced thereby, be not defeated by the palpable error of the scrivener in giving the length of that line; and, when so drawn, every call of the deed is satisfied, the required quantity of land is inclosed by the boundaries called for, and the land conveyed is found to be identical with that sued for. This conclusion renders it unnecessary to consider the other questions discussed in the briefs of counsel, raised by the plea of the statute of limitations. The judgment of the circuit court is affirmed. All concur.

#### STEPHENSON v. PARKER STATIONERY CO. et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 7, 1897.)

#### CONFLICTING ATTACHMENTS—DETERMINATION OF CREDITORS' RIGHTS.

A bank obtained an attachment against defendant corporation's property, second to that of plaintiff. Its president stated that it had renewed notes against defendant on the strength of plaintiff's representations that he was going to enhance defendant's capital stock by paying to it a certain sum of money. *Held*, that the bank's contention that plaintiff's lien should be postponed to the extent of such sum could not be determined under Rev. St. 1889, § 570, providing that the court may determine all controversies which may arise between different attachment plaintiffs in relation to the property, and the priority and validity of the different attachments, or may postpone one attachment to another, or make such order as justice may require.

Appeal from St. Louis circuit court; P. R. Flitcraft, Judge.

Action by Lloyd B. Stephenson against the Parker Stationery Company. From an order postponing plaintiff's attachment to the extent of \$4,000, in favor of the Third National Bank of St. Louis, plaintiff appeals. Reversed.

Clopton & Trembley, for appellant. Halner & Rorick, for respondents.

ROBINSON, J. At the suit of the plaintiff, Lloyd B. Stephenson, a writ of attachment was issued against the Parker Stationery Company, a corporation, and all of its goods, effects, and accounts, and evidences of debt, etc., were levied upon by the sheriff. Plaintiff's claim was for \$9,019.28, evidenced by 15 notes and a small account of \$50, for money loaned. Subsequently the Third National Bank of St. Louis filed its action in the same court against the same defendant, on an indebtedness aggregating \$6,174.79, and caused a levy to be made upon the same property levied upon by the plaintiff Stephenson. The property so levied upon was sold by the sher-

iff for the sum of \$7,216. The cost of sale and labor claims allowed amounted to \$481.52, leaving, to apply on the attachment, a balance of \$6,734.48. Afterwards, on the 23d day of January, 1895, the Third National Bank filed, in the case of Lloyd B. Stephenson against the Parker Stationery Company, the following notice, to postpone Stephenson's attachment to the extent of \$4,500, in favor of the bank: "Now comes the Third National Bank of Saint Louis, a corporation duly organized and existing according to law, and represents to this court that heretofore, to wit, on the 31st day of December, 1894, it commenced in this court a certain action against the defendant herein, the Parker Stationery Company, for the recovery of a large amount of money, to wit, \$8,174.79, which action is numbered 172, to the February term, 1895, and in said action caused a writ of attachment to issue, which was duly levied upon the goods, wares, merchandise, and chattels and property of the said defendant; that said levy was made upon the same goods, wares, merchandise, chattels, and property that had prior thereto been attached in this action by this plaintiff, L. B. Stephenson; and the said Third National Bank now moves the court that the court inquire into the priority, validity, good faith, force, and effect of said attachment in this cause, and that such attachment and the lien thereof, to the extent of forty-five hundred dollars (\$4,500.00), be postponed in favor of said Third National Bank, and for grounds of this its motion alleges: (1) That heretofore, to wit, on the 10th day of March, 1894, the said L. B. Stephenson represented to this plaintiff that he (the said Stephenson) was about to become a stockholder in the Parker Stationery Company, and was about to pay into the capital stock of said company the sum of forty-five hundred dollars (\$4,500.00), for which the said corporation would issue to him shares of stock to that amount, and was about to become treasurer of said company. (2) That at the same time said J. A. Parker and F. S. Parker concurred with said Stephenson in the foregoing representations, and likewise represented that said Stephenson was about to become a stockholder, and pay into the capital stock of said Parker Stationery Company the sum of forty-five hundred dollars (\$4,500.00), and become treasurer thereof. (3) That J. A. Parker is, and was at the time aforesaid, president, and F. S. Parker secretary and treasurer, of said corporation, and were the holders and owners of nearly the entire capital stock of said corporation. (4) That said representations were made with the express purpose and intent of obtaining from this plaintiff the loan of a large sum of money, to wit, seventy-six hundred and ninety dollars and twenty-one cents (\$7,690.21). (5) That this plaintiff relied upon such representations, and, in consequence thereof, renewed a certain loan then due from said corporation to the plaintiff, to the amount of sev-

enty-six hundred and ninety dollars and twenty-one cents (\$7,690.21), and received from said corporation the two notes described in the first and second counts of this, plaintiff's amended petition, as evidence of such renewal. (6) That said Stephenson, in fulfillment of said representations, did pay into the capital stock of said corporation the sum of forty-five hundred dollars (\$4,500.00), and become treasurer of said corporation, and remained such until November, 1894. (7) That a large part of the alleged indebtedness of said corporation to said Stephenson, to wit, forty-five hundred dollars (\$4,500.00), consists of this sum so paid into the capital stock of said corporation. (8) That said corporation does not owe said Stephenson the full amount in said Stephenson's petition alleged, but forty-five hundred dollars (\$4,500.00) less than therein alleged. (9) That said Stephenson, with intent to hinder, delay, and defraud this plaintiff and other creditors of said corporation, procured certain promissory notes, payable on demand, to represent said forty-five hundred dollars (\$4,500.00), with the purpose and intent of fraudulently exercising the rights of a creditor of said corporation as to the said forty-five hundred dollars (\$4,500.00)."

On April 8th following, the plaintiff Stephenson obtained judgment against the Parker Stationery Company for the aggregate sum of \$9,969.14; and, the defendant having failed to file a plea in abatement, judgment on the same day was rendered for plaintiff on the attachment. On May 4, 1895, when the bank's motion came up for hearing, the counsel for the plaintiff Stephenson objected to the introduction of any testimony to sustain any but the eighth and ninth specifications of the motion, for the reason that, if true, they would not authorize the postponement of plaintiff's claim, or any part thereof, in favor of the bank. The objection was overruled. No testimony, however, was offered that proved or tended to prove the allegations of specifications 8 and 9 of the motion. Nothing was shown that proved or tended to prove that, as between Stephenson and the stationery company, the claim sued upon, and that was afterwards reduced to judgment, was for more than it should have been, that the stationery company did in fact owe to Stephenson the amount indicated by the judgment; but the bank, by this proceeding, seeks to have postponed Stephenson's prior attachment, to the amount of \$4,500, to its judgment, on account of a conversation that took place just a few days prior to the 10th of March, 1894, between the president of the bank, Stephenson, and one of the Parker brothers, who owned the principal part of the stock of the stationery company, which it is alleged resulted to the detriment of the bank in the collection of its claims, on account of the extension which it was induced to give to the stationery company on its notes that

were then about due. The president of the bank testified that a few days prior to March 10, 1894, Mr. Stephenson and one of the Parker brothers came into his bank, and, while there, Mr. Parker said that the company was in trouble, and would not be able to meet its obligations with the bank when they came due, but that Mr. Stephenson was about to become a stockholder in the company, and would pay into the capital stock of the company the sum of \$4,500, and was to become the secretary thereof, and to take the entire charge of its finances if things could be satisfactorily arranged; that Stephenson practically said the same to him, and did afterwards take charge of the finances of the company, and act as its secretary for several months, and up to within just a short time before the institution of his attachment proceedings against the company; that neither Parker nor Stephenson explained to him from what source Stephenson was to acquire the shares of stock he was to get, for the money that he was to put into the company; that he did not ask, and neither of them explained to him, how the arrangement was to be consummated, but that he supposed that the company was to issue its stock to Stephenson for the money to be advanced by him for the company, and that to the extent of \$4,500 the capital of the company would be increased; and that, on the faith of Stephenson's representations, together with those of Parker, made in Mr. Stephenson's hearing, he, a few days afterwards (on March 10, 1894), consented to the extension of the time of payment of the notes then held by the bank against the stationery company, by canceling the old notes, and taking new ones in their stead, less the sum of \$500 in cash that was to be paid on the date of the adjustment and extension of the notes, and which amount was in fact paid by Mr. Stephenson, acting as the company's business manager. Stephenson admits, in substance, the conversation detailed by the president at the bank, and further says that the Parker brothers, the sole stockholders at that time of the Parker Stationery Company, came to him a short while before his conversation with Mr. Crewes, the president of the intervening plaintiff, and promised that, if he would advance for the stationery company \$3,000 in addition to the loan of \$500 that he had previously made to the company to help them out of their troubles, Joe Parker would convey to him \$12,000 of the face value of the stock of the company, same being just sufficient to give him the controlling interest in the company, and that he was to be elected as the secretary of the company, and have the charge of its finances; that he accepted this offer, was elected secretary of the company, and did take charge of its finances, and advanced to the company all the money that he had promised, and out of it actually paid to the bank \$1,600 on its renewed notes; that, after

advancing to the company this money according to his agreement with the Parkers, he demanded of them the stock which they had agreed to let him have; that, after putting him off from time to time, they finally admitted that the stock was hypothecated, and that it could not be delivered as agreed; that Joe Parker, who represented the larger part of the stock of the company, represented to him that he was negotiating the sale of a patent owned by him, out of which he expected to receive \$10,000 soon, and would then repay him for the money advanced to the company; that while waiting for Parker to make his contemplated sale, and in order to keep the company going, and to meet its obligations, he advanced considerable money to it afterwards, hoping that the Parkers would be able to carry out their part of the agreement with him, but finally, feeling that he would never be able to get his stock, he demanded that the company give to him its notes for all the money that had been advanced for the use and benefit of the company by him, which was done, and that upon them the suit of attachment was based; that the president of the bank, at the time of the conversation detailed by him, asked Stephenson if he would indorse the paper of the stationery company; and that Stephenson told him that he would not, "that he would not make himself personally liable in any way for any debts of the company." The respondent now contends that whatever might have been the agreement between Stephenson and the Parker brothers, or either of them, as to how Stephenson was to get his stock and become a stockholder in the company, and notwithstanding the failure of the Parker brothers, or either of them, to comply with their part of the agreement in transferring to Stephenson the 1,200 shares of stock of the company for the money advanced to the company, for its benefit, as agreed, as to the bank he should not now be held and treated as a creditor of the company, to the amount that he represented to the president of the bank he was to advance to the company, to increase its capital stock. That the withdrawal from the assets of the company by Stephenson, in taking the company's notes for the sum which, under his contract with Parker, he had agreed to and did advance, and of which he had informed the bank, was a fraud upon the right of the bank, that can be determined in this character of proceeding.

The statute under which the bank is proceeding reads: "Where the same property is attached in several actions by different plaintiffs, against the same defendant, the court may settle and determine all controversies which may arise between any of the plaintiffs in relation to the property, and the priority, validity, good faith and effect of the different attachments and may dissolve any attachment partially or wholly, or postpone it to another, or make such order in the premises as right and justice may re-

quire." Rev. St. 1889, § 570. Manifestly, this section of the statute contemplates only that the court, in this summary proceeding, shall determine such controversies as may arise between the different attachment plaintiffs in relation to the property attached and levied upon. The trial court, adopting the view now contended for by the bank, made an order postponing the lien of Stephenson's judgment to the amount of \$4,000 to that of the bank, and ordered the funds in the hands of the sheriff distributed accordingly. To maintain that order upon the facts of this cause, we must assume from the section above set out that the trial court had the power to determine, not only all controversies between the different attachment plaintiffs that might have arisen in regard to the property attached, but all controversies that might arise between different conflicting attachment creditors growing out of the manner of the creation of the debt on which the attachments are based, or that all controversies between the conflicting attachment creditors might be adjusted by the court, and an order made distributing the attached funds as right and justice might require, according to the view of the judge before whom the cases might be pending. The broad language of the section empowering the court to dissolve in this character of a proceeding "any attachment partially or wholly, or postpone it to another, or make such orders in the premises as right and justice may require," must be read and interpreted in the light of the preceding part of the sentence, which clearly qualifies and limits that exercise of power by the court to the determination of controversies touching the priority, validity, good faith, and effect of the different attachments as they relate to the property attached. Clearly, it was never contemplated, in the adoption of that section of the statute, that the court, in this summary proceeding by motion, without the aid of a jury, should adjust and determine all controversies and differences that may have arisen between all the different attachment plaintiffs that may happen to levy upon the same property of a common debtor, and, upon that adjustment and determination, make an order postponing the lien of one's levy to that of another, without regard to the question as to the priority, in point of time, validity, or good faith, of the different attachments. If all the rights and equities of the different attachment plaintiffs among themselves are to be adjusted and determined in this summary procedure, and the court is authorized thereon to make its order postponing the lien of one creditor under his prior attachment to that of another subsequent in time of levy, and, out of the proceeds resulting from the sale and disposition of the attached property, settle and pay off the judgments as right or justice may require, the words of the section, "the court may set-

tle and determine all controversies which may arise between any of the plaintiffs in relation to the property, and the priority, validity, good faith, force, and effect of the different attachments," have no meaning or special significance whatever. If the controversies to be determined are not confined and limited to the questions alone of the priority, validity, good faith, force, and effect of the different attachments as they relate to the property attached, still the words above quoted would be of no service in the section. Nothing short of the most positive and unambiguous language could induce the court to conclude that the legislature ever intended to introduce a practice so utterly at variance with all the rules of procedure under the attachment act as would result if section 570 receives the construction contended for by the respondent. If such a section as thus construed should find its way into our attachment act, all the essential characteristic features thereof would become nullified. If the priority of a first attachment lien can be assailed and postponed to the lien of a subsequent attachment creditor by the method here adopted, upon the mere grounds of equities or rights in favor of the subsequent attacking creditor against the first, upon some contract, agreement, or understanding had between themselves, not growing out of the attachment proceeding, then the cardinal idea of award to the diligent, so manifest in our attachment act, would be stricken out, and the right of priority in fact would become, not a question of time, as generally understood, so much as a question of preponderating equities of plaintiffs among themselves.

Here no question is made as to the priority in time of the Stephenson levy, or to the efficiency and regularity of his attachment proceedings. Here no proof is made that the stationery company did not owe Stephenson the full sum sued for, and afterwards reduced to judgment. Here it was not shown that Stephenson attempted or intended to withdraw from the assets of the stationery company, or from the money in the hands of the sheriff resulting from the sale thereof, more than was sufficient to satisfy his claims; but it is contended by the bank that because Stephenson told its president that he was to become a stockholder of the company, and to put \$4,500 of money into its capital stock, it would be a fraud upon the bank to suffer him to enforce his claims to that amount against the assets of the company now in advance of the bank, and that the court, upon this motion, can make such orders in the premises as right and justice between the plaintiffs may require, postponing the lien of Stephenson's attachment to that of the bank, to the amount that the bank had been damaged by Stephenson's failure to carry out his representation made prior to March 10, 1894, in the presence of its president. In other

words, the court is asked to distribute the funds in the hands of the sheriff, resulting from the sale of the attached property, in disregard of the priority of the levy of the attachments as provided by statutes, but in accordance with its determination of certain right and equities found to exist in favor of the bank against the first attaching plaintiff, growing out of a conversation (or contract, if such it can be called) had between the president of the bank and the plaintiff Stephenson about a matter in no wise relating to the attached property. Section 570 of the statute in contemplation was never intended to confer such enlarged and unwarranted power upon the circuit courts by this summary proceeding. In fact, the section was but a legislative declaration of authority in the court, which, from the necessity of the situation of the parties and the peculiar nature of the case, it had always before possessed and exercised. The common property being in the custody of the law through the seizing of the sheriff (the officer of the court), the question of its proper disposition and distribution by the court followed as a legal necessity, and that, in turn, would necessitate the inquiry as to who first levied, were the proceedings in each case regular, has any one levied and thereby created a lien upon the property to a greater amount than he was entitled, did the grounds for the attachment exist of all who have levied attachments, and such like kindred inquiries that might address themselves to the solution and determination of the question as to how the funds should be properly distributed; but no attempt was made to give to the court the extraordinary and enlarged power of compelling a litigant who voluntarily came into court for one definite purpose, of having adjudged and settled his or her differences with a defendant named in the account sued upon, to have determined by the court alone, without the intervention of a jury, all controversies that might be found to exist between him or her and all others who might happen to hold a claim against the same debtor. If the power of the court was not restricted by the express language of the section to the determination of such controversies as may arise between the different attachment plaintiffs "in relation to the property attached and the priority and validity and good faith of their different levies," but was given the full scope contended for by respondent, then the provision of the section might be met by the constitutional objection that it operated to deny to the plaintiff Stephenson the right to have the differences between the bank and himself, as to the question of the bank's alleged damages growing out of the conversation had by him with its president, determined by a jury.

The levy of Stephenson's attachment, being first in order of time, regular in form, and to secure a valid indebtedness, should

be first satisfied out of the proceeds of the attached property in the hands of the sheriff. The matter of the alleged damages occasioned to the bank by reason of the representations made by Stephenson to its president must be determined in an independent proceeding, instituted for that purpose, when the issues of facts may be passed upon by a jury if desired, but cannot be in this summary proceeding by motion. The judgment of the trial court is reversed. All concur.

BARCLAY, P. J., concurs in the judgment, for the reason that the seventh, eighth, and ninth grounds assigned in the motion of the Third National Bank are not sustained by the evidence, and that the other grounds of said motion are not available to postpone the attachment of Stephenson to that of the bank in the mode by which that object is sought in this case.

#### JONES v. YORE et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 7, 1897.)

#### GUARDIANS AD LITEM—COMPENSATION—HOW MADE —NOTICE—JURISDICTION—COSTS.

1. A court that has appointed a guardian ad litem for minor defendants does not retain jurisdiction of such defendants, so that it can render judgment on a motion for allowance to the guardian for his services, which motion is filed after final judgment in the case, without notice thereof being served on such defendants.

2. Where minor defendants have no guardian, and the court, in order to protect their interests, appoints a guardian ad litem, the court has authority to allow, against the wards, compensation to the guardian ad litem for his services.

3. Under Rev. St. 1889, § 2920, providing that the prevailing party in a civil suit shall recover his costs against the other party, an allowance of compensation to a guardian ad litem could not be taxed as costs in case the infants were the prevailing party.

Appeal from St. Louis circuit court; Daniel Dillon, Judge.

Action by James C. Jones against Clement Yore and others for services rendered as guardian ad litem. From a judgment for plaintiff, defendants appealed to the St. Louis court of appeals, which court transferred the cause to the supreme court. Reversed.

J. D. Johnson, for appellants. B. Schnurmacher, for respondent.

BURGESS, J. This is an action by plaintiff to recover against defendants the sum of \$2,000, which was taxed in his favor by the circuit court of the city of St. Louis for services rendered defendants as their guardian ad litem in a proceeding to contest the validity of the will of Patrick Yore, their deceased grandfather. There was judgment in favor of plaintiff for the sum claimed, from which defendants were granted an appeal to the St. Louis court of appeals, and the cause was by that court transferred to the supreme court, upon the ground of there



being involved a constitutional question. On November 19, 1890, a suit was begun in the circuit court of St. Louis to set aside the will of Patrick Yore, in which his children were plaintiffs, and the defendants herein, his grandchildren, all of whom were minors, were defendants. These defendants were all duly served with process, and thereafter the plaintiff, by an order of court duly entered of record, was appointed to act as their guardian ad litem in the cause. The guardian ad litem filed an answer on behalf of the minors, and on March 4th, of the February term, 1893, of said court, there was a verdict and judgment in favor of defendants sustaining the will. Real property of value of several hundreds of thousands of dollars was involved in that litigation. On March 17, 1893, the plaintiffs in that case filed a motion for a new trial, which was continued until October 2, 1893, when it was withdrawn. While the motion for a new trial was pending and undetermined, to wit, on June 1, 1893, the guardian ad litem (plaintiff here) filed his motion in writing in said cause, in which he moved the court to grant him a reasonable allowance for his services, and for the services of his attorney, William C. Jones, and to tax said allowance as costs in the proceeding, and to declare the same as a lien against the real estate involved in that litigation. At the October term, 1893, to wit, November 18, 1893, the court sustained the motion, and made an order allowing plaintiff the sum of \$2,000 against said minors, and directing that the same, if not otherwise paid, be recovered out of the interest in the real estate belonging to them, and which was involved in the will contest. The minor defendants were not served with notice of the filing of said motion. An appeal from that judgment was taken by said minor defendants to the St. Louis court of appeals, and that court on May 22, 1894, rendered its opinion affirming the judgment of the circuit court as to the allowance of \$2,000 to the guardian ad litem, but reversed that part of the judgment which provided, "if the same be not otherwise paid, that then the same shall be recovered out of the interest of said minor defendants in the following described real estate," and awarding special execution. *Walton v. Yore*, 58 Mo. App. 562. This action is predicated upon the judgment rendered by the circuit court in that case, and which was affirmed by the St. Louis court of appeals. On the trial of the case in hand the facts substantially as herein stated were made to appear. The case was tried by the court, and, at the close of plaintiff's evidence, the defendants asked the court to declare the law to be as follows: "That, under the pleadings and evidence, the plaintiff is not entitled to recover." The court refused to so declare the law, and defendants duly excepted. At the close of all the evidence, defendants asked the court to declare the law to be as follows: "The court declares the

law to be that, under the pleadings and the evidence in the case, the allowance or judgment sued on by plaintiff in this action is void, because the courts rendering the same had no jurisdiction of the persons of defendants against whom it was rendered, or of the subject-matter thereof, in the action in which it was rendered, for the purpose of rendering the same; and the judgment as rendered is contrary to the provisions of section 30, art. 2, of the constitution of Missouri; and that, therefore, a verdict should be found herein in favor of the defendants." This declaration of law was also refused, and defendants duly excepted. On March 5, 1895, the court found the issues joined herein in favor of the plaintiff, and rendered judgment against the defendants for the sum of \$2,146, that being the amount of the judgment sued upon together with accrued interest. Defendants then filed motions for a new trial, and in arrest, which were overruled, and they perfected their appeal.

It is insisted by defendants that the circuit court had no jurisdiction of either the subject-matter of the motion or the persons of the minor defendants, for the purpose of rendering the money judgment which it rendered against them in the will suit; that the effect of the judgment was to deprive them of their property without due process of law, contrary to section 30, art. 2, of the state constitution, and for that reason the judgment was void, and could not lawfully be made the basis of another action; and that the judgment of the court below in this case is likewise violative of the same constitutional provision, and void also. "Due process of law" and "law of the land" are synonymous terms, and mean the same. There are many definitions of "due process of law," which, while differing in the language used, do not differ in their scope and meaning. The better and larger definition of "due process of law," says Chancellor Kent (2 Kent, Comm. 13), "is that it means law in the regular course of administration, through courts of justice." In *Westervelt v. Gregg*, 12 N. Y. 212, it was said: "In judicial proceedings, due process of law requires notice, hearing, and judgment." Mr. Justice Cooley, in his work on *Constitutional Limitations* (6th Ed. p. 491), says: "Individual citizens require protection against judicial action, as well as against legislative; and perhaps the question, what constitutes due process of law? arises as often when judicial action is in question as in any other cases. \* \* \* The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is, first, of the subject-matter; and, second, of the person whose rights are to be passed upon. A court has jurisdiction of any subject-matter if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not

give it authority, the proceeding and judgment will be altogether void, and rights and property cannot be devested by means of them." The same author says (page 431): "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case." 4 Wheat. 518. "By the 'law of the land' is most clearly meant the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." *Clark v. Mitchell*, 64 Mo. 564.

That defendants had no notice of the purpose of plaintiff to ask the trial court to make him an allowance for his services as their guardian ad litem in the will case seems to be conceded by all parties. If, therefore, it was necessary that they should have had such notice the allowance made by the court was void, because of the want of jurisdiction over the persons of defendants. But it seems to be contended by plaintiff that, the court having acquired jurisdiction over defendants in the will contest, it retained that jurisdiction for the purpose of the allowance; that the defendants were the wards of the court, which had the power to act for them in such matter, and whose duty it was to do so. No rule of law is better settled than that, when a court acquires jurisdiction of the parties to a suit it retains that jurisdiction until the case is finally disposed of, and that they are bound to take notice of all proceedings in the cause before final judgment; but, after final judgment, they are not regarded as being before the court, and must have notice. *Roberts v. Improvement Co.*, 126 Mo. 460, 29 S. W. 584; 1 *Freem. Judgm.* (4th Ed.) §§ 142, 143; *Pithian v. Monks*, 43 Mo. 502; *Jauney v. Spedden*, 38 Mo. 395. Now, as has been seen, final judgment had been rendered in the will case before the motion for allowance was filed. The motion for a new trial was not a suspension of the judgment, and the defendants must have had notice of the filing of the motion for allowance unless, because of the fact that they were wards of the court, it was unnecessary, to which we are unable to give assent. "When a judgment or decree is sought creating a personal charge against an infant child, or affecting directly its property rights, notice must be served upon it, for without some notice there is no jurisdiction in such cases." 1 *Elliott, Gen. Prac.* § 246. *Sherwood, J.*, in speaking for the court in *State v. Board of Equalization of Buchanan Co.*, 108 Mo. 235, 18 S. W. 782, said: "There is no principle more elementary or fundamental than that no one can be passed upon, either in his person or estate, without being first given an opportunity to be heard. \* \* \* Even if a statute contain no provision for, or mention of, notice, the law will imply that notice is requisite." See,

also, *Brown v. Weatherby*, 71 Mo. 152; *Wickham v. Page*, 49 Mo. 526; *Laughlin v. Fairbanks*, 8 Mo. 370.

When plaintiff filed his motion, he assumed towards defendants an entirely new and different attitude from that of guardian ad litem. Instead of being the protector and guardian of their interests, he assumed that of adversary. He became, as it were, plaintiff, instead of guardian ad litem. Yet they had no notice of his dual position, or of the change of his status towards them. The allowance was collateral to the will case. It was for a personal judgment against defendant for \$2,000. It cannot be justified upon the ground that it was costs in that case; nor could defendants have been expected to anticipate that such a course would be taken by one who had theretofore occupied towards them the position that plaintiff did. From what has been said, it follows that the allowance was void, for the want of jurisdiction of the defendants.

The next question is as to the power of the trial court to make the allowance if the proper steps had been taken. The power to appoint the guardian ad litem is not questioned, but the power to make him an allowance against his wards for services rendered by him as such guardian is denied. There is no statute in this state conferring upon the circuit courts the power to make an allowance in favor of a guardian ad litem except in cases for the partition of real estate. Then the allowance is to be taxed and paid as other costs in the case. *Rev. St.* 1889, § 7182. So that such an allowance as the one under consideration must depend for its validity upon the inherent or implied power of the court to make it. It was said in *Walton v. Yore*, 58 Mo. App. 562, "that it cannot be seriously controverted that a guardian ad litem, appointed by the court for an infant defendant, is entitled to compensation. If the law were otherwise, the rights of infants would be at the mercy of any one who saw fit to invade them. The statutes, which make provision for the appointment of these officers, imply that they should be compensated, and the proper court to fix their compensation is the one which is the witness of the services. That proposition cannot be gainsaid, and has been universally so decided." *Nagel v. Schilling*, 14 Mo. App. 576, was a suit by attorneys for compensation for services, as such, rendered the guardian ad litem of the infant defendants in another case; and it was ruled that the proper defense of the suit against the infants was a necessary, for which their estates should be held answerable in a proceeding properly conducted for that purpose, and that plaintiffs were entitled to recover for such services, although no allowance had been made by the court therefor. Several states have statutes which authorize their courts to make allowances in favor of guardians ad litem to be paid out of the estates

of infants under similar circumstances. Among them are California, Tennessee, Kentucky, New York, and Texas; and for that reason the decision of the courts of those states which have been cited are not in point here. Nor are the cases of Houck v. Bridwell, 28 Mo. App. 644, Dillon v. Bowles, 77 Mo. 603, and Kelley v. Andrew Co., 43 Mo. 340, in conflict with the Walton and Nagel Cases. The Houck Case decides nothing more than that "one acting as next friend for an infant in litigation has no authority to bind the infant by a contract for attorney's fees." So, in the Dillon Case it was held that a minor heir, who was a party to the suit, although benefited by the result equally with others who were parties thereto, was not bound either at law or in equity to contribute to the payment of the fee of an attorney who had been employed in the case. In the Kelley Case the facts were that Kelley was appointed by the court in which the case was pending to defend a man who was under indictment for murder, and was unable to employ counsel; and, after having defended him, Kelley brought suit against Andrew county, in which the case was tried, for the services rendered by him; and it was held that he could not recover. That case differs from the one in hand in the very important fact that the action was not against the defendant for whom the services were rendered, nor were they rendered at the instance of the county. In this case the defendants were not capable of contracting. They had no guardian, and it was the court's duty, in order that their interest might be protected, to appoint for them a guardian ad litem, by whose skill and ability there was secured to them a large estate, which otherwise might have been lost. The services were not gratuitous, but were by order of court; and, having been thus rendered, the power and authority to allow the guardian ad litem compensation for his services must be implied from the power to appoint, as one of the court's inherent powers. The allowance could not be made, however, upon the theory that it was costs, for the defendants were the prevailing party in the will case, and were entitled to recover their costs (section 2920, Rev. St. 1889), but may be justified and maintained upon the ground that the services were a necessary, in order to protect the interests of defendants, which were at the time of the appointment being jeopardized. In this view of the case, we think it is immaterial whether the allowance was valid or not, as, in any event, the plaintiff will be entitled to recover on another trial whatever he may be able to show his services were reasonably worth. For error in refusing the declarations of law asked by defendants, the judgment is reversed, and the cause remanded.

GANTT, P. J., and SHERWOOD, J., concur.

# CITY OF BROOKFIELD v. TOOHEY.

(Supreme Court of Missouri, Division No. 2.  
Dec. 7, 1897.)

## MUNICIPAL CORPORATIONS — CLASSES — POLICE JUDGES—OCCUPATION TAX—WHAT CONSTITUTES.

1. Under Rev. St. 1889, § 1465, requiring the courts of the state to take judicial cognizance of the organization of cities of the third class, an allegation by a city of such class that it is "a municipal corporation organized under the general laws of this state" is sufficient.

2. The fact that a city of the third class provided by ordinance for the trial of certain offenders before a "police judge," when by Rev. St. 1889, §§ 1562-1564, in force at that time, said officer was designated as "Recorder," is immaterial, and does not affect the jurisdiction of such officer.

3. Under Const. art. 10, § 3, providing that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, an ordinance levying a license tax of 1 per cent. per annum upon the cash value of the stocks of merchants in the city is a property tax, and not an occupation tax; and it is therefore invalid, because it is not uniform upon all the personal property of said city.

Appeal from circuit court, Linn county;  
William Rucker, Judge.

For refusing to pay a license tax levied by the city of Brookfield, Henry Tooev was tried, found guilty, fined, and prosecutes an appeal. Reversed.

A. A. Bailey and Lauder, Johnson & Lauder, for appellant. S. P. Huston and Chas. K. Hart, for respondent.

GANTT, P. J. This action was commenced September 22, 1893, before T. M. Brinkley, who styles himself "Special Police Judge of the City of Brookfield." The case was tried before said Brinkley, November 20, 1893; defendant found guilty, and fined \$10 and costs, from which judgment defendant appealed to the circuit court of Linn county, in which latter court the cause was tried before the judge, without a jury, at the February term, 1895; and defendant was again found guilty, fined \$10 and costs, from which latter judgment this appeal is prosecuted.

The complaint is that on the 15th day of July, 1893, defendant, Henry Tooev, willfully and unlawfully sold goods as a merchant within the corporate limits of said city without first having obtained a "merchant's license" therefor, in violation of sections 1, 2, and 3 of an ordinance passed July 5, 1892. Section 3 of said ordinance is in these words: "Sec. 3. Any person, firm, co-partnership or corporation desiring to take out a license under the provisions of this ordinance, shall first make out, in person or by an authorized agent, a sworn statement, and deliver the same to the city collector, which statement shall contain a true statement of the cash value of the greatest amount of goods, wares and merchandise on hand, or intended to be kept on hand, for sale during the year for which the license is applied for. Upon the

filing of such statement with the city collector, and paying to the city collector one per cent. per annum upon the cash value of the goods, wares and merchandise on hand, or to be kept on hand for the year, as shown by the sworn statement furnished as aforesaid, for the license, it then shall be the duty of the city clerk to issue the license, for which he shall be allowed a fee of fifty cents for issuing the license, to be paid by the licensee."

The following facts were agreed upon: "First, that the plaintiff was and is a city of the third class, under the laws of Missouri; second, that the ordinance under which the complaint herein is made shall be proven by a copy thereof, certified by the city clerk; and the same was duly passed and approved by the properly authorized officers of said city, the validity and force of which ordinance the defendant denies, and here saves the right to make all objections to the same, except to the formal passage thereof; third, the defendant, Henry Tooev, was on the 15th day of July, 1893, a dry-goods merchant, selling and offering for sale goods, wares, and merchandise at his stand, in said city; fourth, that defendant had not at that time taken out a merchant's license, nor filed his affidavit showing the amount of goods on hand, or that he probably would have on hand during said year 1893; fifth, that defendant's said stock of merchandise at said time was of the cash value of thirty-five thousand dollars; sixth, that during said year 1893 the plaintiff city levied and assessed defendant's said stock of goods, in common with all real and personal property in the city of Brookfield, for revenue purposes, the sum of fifty cents on the one hundred dollars valuation, and that the defendant has paid his taxes so levied and assessed, and has paid all taxes levied and assessed against him and his property by the state, county, township, and plaintiff city other than the so-called 'license tax'; seventh, that there were and are seventy-five merchants engaged in business in Brookfield in 1893, to which said license is intended to apply, and that the value of their respective stocks in trade would range in value from two hundred dollars to forty thousand dollars, and that the aggregate cash value of all such stocks in trade was, at the time of filing this complaint, seven hundred thousand dollars."

1. Brief mention only need be made of the technical objection that the complaint was bad because it did not aver the class of municipal corporations to which plaintiff belonged. It was alleged that it was a municipal corporation organized under the general laws of this state. The statutes of this state require all courts to take judicial cognizance of the organization of cities of the third class, to which class Brookfield belongs. Rev. St. 1889, § 1465; Laws, 1893, p. 67, § 1; City of Savannah v. Dickey, 33 Mo. App. 522.

2. At the time of the passage of the ordinance July 5, 1892, the statutes of the state

designated the officer to try offenses against the ordinance of the city as "recorder." Rev. St. 1889, §§ 1552-1554. Afterwards, by the act of April 19, 1893, the charter of cities of the third class was amended so that the officer authorized to try such offenses was designated "police judge." The ordinance of July 5, 1892, was expressly continued in force by the amendment. Acts 1893, p. 67, § 2. The mere fact that in 1892, and prior to the amendment, the city council, in providing for the punishment of those who should violate the ordinance, denominated the judicial officer as "police judge," instead of "recorder," is utterly immaterial. It was unnecessary to name the officer, as the law of the state (the charter of the city) designated the officer before whom such cases should be tried, and his functions remained substantially the same after the amendment as before. The change of the style of the office did not affect the jurisdiction of the officer, whatever his title; neither is there the slightest merit in the criticism that the de facto police judge called himself "Special Police Judge."

3. Counsel rightly concludes that the vital and exceedingly important question presented in this record is the validity of the license tax of 1 per cent. per annum upon the cash value of the goods, wares, and merchandise owned by the defendant as a merchant in said city. It will be observed that the defendant has paid all of his taxes, state, county, and city, up to the constitutional limit, and that no question arises in regard to an election to increase the power of taxation. In a word, can this tax of 1 per cent. upon the cash value of the goods on hand be upheld as an occupation or privilege tax? After a careful investigation of the questions mooted and most ably discussed by counsel, it seems palpable that this is a "property tax," pure and simple. It is an obvious misnomer to call it a "tax upon occupation." While cities of the third class may exact a license tax upon occupations or callings, the tax thus enacted must be upon the privilege itself, and not a plain ad valorem tax upon property as this ordinance levies. We are firmly convinced that this tax cannot be held to be other than a direct tax upon property. It is therefore in direct disobedience of sections 3 and 11 of article 10 of the constitution of Missouri, because it is not uniform upon all the personal property in said city, but levies \$1 upon every \$100 of assessable personal property belonging to a merchant, and exempts all personal property not belonging to a merchant from said tax; and, because having already taxed and collected of the merchants of said city 50 cents on the \$100 valuation for said year, this additional ad valorem tax of 1 per cent. on the same property is in excess of the constitutional limit, and therefore void. Whether the city can divide the merchants of a city into as many classes as their assessments differ in amounts, and denominate each merchant a separate class according to

his valuation, and enact of each a different license tax, as this ordinance evidently proposes, we deem unnecessary to discuss at this time. It is sufficient to say the present tax is so plainly a property tax, and an effort to evade the constitution, that it is illegal and void. The judgment of the circuit court is reversed.

SHERWOOD and BURGESS, JJ., concur.

### STATE v. FRAKER.

(Supreme Court of Missouri, Division No. 2.  
Dec. 7, 1897.)

#### QUASHING INDICTMENT—APPEAL.

An entry in the record sustaining a motion to quash an indictment, but without any further order quashing the indictment, and ordering the prisoner discharged, or ordering him committed to answer another indictment, is not a final judgment, and an appeal will not lie.

Appeal from circuit court, Ray county; E. J. Broadus, Judge.

From an order sustaining a motion to quash an indictment against George W. Fraker the state appeals. Appeal dismissed.

J. L. Farris, Jr., and E. C. Crow, Atty. Gen., for the State. Jas. L. Farris, Sr., A. S. Lyman, John Dougherty, and Lavelock, Kirkpatrick & Divelbiss, for respondent.

GANTT, P. J. This is an appeal from the circuit court of Ray county. The defendant was indicted on the 18th day of October, 1896. On the 18th day of May, 1896, the defendant moved to quash the indictment for various reasons. The cause was regularly continued until the February term, 1897, when the court appointed a prosecuting attorney pro tem. to prosecute the cause, the duly-elected officer having been of counsel for defendant previous to his election. Upon the motion to quash, we find the following record entry: "The motion to quash the indictment filed herein is taken up and submitted to the court, and, the same being seen, heard, and by the court fully understood and maturely considered, said motion to quash is, by the court, sustained." Motions for new trial and in arrest were then filed and overruled, and exceptions duly saved. Thereupon this appeal was taken to this court.

Elaborate briefs have been filed by counsel on both sides, but we are met at the threshold of our investigation with the inquiry whether there was a final judgment in the circuit court, from which an appeal can by law be prosecuted to this court. It is apparent, we think, that nothing approaching a final judgment is to be found in this transcript. There is neither an entry which orders the indictment to be quashed, and the defendant discharged, nor one which adjudges the indictment insufficient, and ordering it quashed, and directing the defendant committed, or bailed to answer to another

indictment. As was said as early as *State v. Pepper*, 7 Mo. 348, "It appears from an inspection of the record that the court simply sustained the demurrer, and made no further order in the cause. The suit is still pending in the circuit court." In *State v. Gregory*, 38 Mo. 502, the appeal was dismissed for failure to enter final judgment upon sustaining the demurrer, and this court pointed out the form of a final judgment to be entered in such cases. Again, in *State v. Mullix*, 53 Mo. 355, this identical question again arose, and it was held that the mere sustaining of a demurrer was not a final judgment. No distinction in principle can be made between the final order necessary upon sustaining a demurrer and one adjudging the indictment bad on motion to quash. In each the order or judgment must be final before an appeal therefrom can be heard by this court. Our jurisdiction is purely appellate in these cases, and we have no right to interfere while the case is still pending in the circuit court. Compelled by the statute to examine the transcript for ourselves, we find there is no final judgment from which this appeal can be prosecuted, and it is ordered dismissed.

SHERWOOD and BURGESS, JJ., concur.

### STATE v. HUNT.

(Supreme Court of Missouri, Division No. 2.  
Dec. 7, 1897.)

#### JURY—COMPETENCY OF JURORS—CRIMINAL LAW— MOTION FOR NEW TRIAL—AMENDMENT— HOMICIDE—INSTRUCTIONS.

1. Jurors who have formed opinions, as to the guilt or innocence of one on trial for crime, from newspaper reports, are not disqualified, where they answer on their voir dire that they can give defendant a fair and impartial trial.

2. A juror named Selby was not disqualified because his last name appeared as Dely on a list of 40 qualified jurors furnished defendant from which he made his challenges, and from which the 12 were selected to try the cause, where no such man as Dely was on the panel, and the error was corrected by the court as soon as discovered, and two hours before defendant was required to pass on the panel.

3. On a trial for murder the court charged that while it devolved on the state to prove willfulness, deliberation, premeditation, and malice aforethought, to convict of murder in the first degree, these need not be proved by direct evidence, but may be deduced from all the facts and circumstances, and if the jury could "satisfactorily and reasonably" infer their existence, from the evidence, it could find defendant guilty of murder in the first degree. *Held* not erroneous, when read in connection with other instructions, by which defendant was given the benefit of any reasonable doubt.

4. One charged with the murder of his daughter left home on the same night. About 3 o'clock the next morning persons who had been searching for him several hours found the horse he had ridden in the road about seven miles from home. Defendant was not found until the following Monday morning, when he returned home. He had remained Sunday night at his son-in-law's, some miles away. *Held*, that the facts, without explanation, justified an instruction on the question of attempted escape, where the

killing was in effect admitted by the plea of insanity, and no other excuse was offered.

5. Under Rev. St. § 4270, providing that a motion for a new trial, in a criminal case, must be filed within four days after verdict, such motion cannot be amended after the four days have expired by alleging an additional cause therefor.

6. A motion for a new trial on the ground of prejudgment of a juror must be supported by the affidavit of both defendant and his counsel.

Appeal from circuit court, Boone county; John A. Hockaday, Judge.

John Hunt, Sr., was convicted of murder in the first degree, and appeals. Affirmed.

Joe A. Cupp and E. M. Bass, for appellant. The Attorney General and Saml. B. Jeffries, for the State.

BURGESS, J. From a conviction of murder in the first degree, for having on the 20th day of August, 1896, shot to death with a pistol his daughter Mattie Ree Hunt, defendant appeals. The homicide was committed in Boone county, where the trial was had at the November term, 1897, of the circuit court of that county. The defense was insanity. The facts were but few, and about as follows: At the time of the homicide the defendant, his wife, and their daughter Mattie Ree Hunt lived on a small piece of property of which defendant was the owner, in Columbia, Mo. He had for some time been wanting to trade the town property for a small tract of land in the country, for the purpose of moving onto it with his family, to which the wife would not consent, and over this and other disagreements they had many quarrels and bitter controversies. Defendant was given to drink and intoxication, and when under the influence of liquor the quarrels between himself and wife were the more frequent. It was shown that he had on divers occasions threatened to take the life of his wife, the deceased, and himself. Defendant had several sons, all of whom lived in the country. On the evening of August 20, 1896, defendant returned home from a visit to one of his sons in the country, and shortly thereafter began quarreling with his wife. At the time of his return his daughter, the deceased, was in town, having gone there to buy some groceries for the family, and upon her return found the defendant and her mother still quarrelling, whereupon deceased said to her mother, "I would not stand it." The defendant at once drew his pistol from his pocket, and shot deceased, from the effects of which she died within three or four days next thereafter. It was shown on the part of defendant that some seven years prior to the homicide defendant had two slight sunstrokes, which affected his mind, but this evidence as to the condition of his mind was contradicted by the state.

The trial was had to a jury, selected from a panel of 40 jurymen, 4 of whom, viz. James Gibbs, William Prather, John Ballenger, and

W. H. H. Maxwell, were challenged for cause, and the name of one Armstead Selby, who was regularly sworn, found to be qualified to sit upon the trial, and accepted, appeared upon the record and list of jurors furnished to the defendant as Armstead Delly, until within two hours of the time in which defendant was required to pass upon the panel and to enter upon his trial, when the court, over the objection of defendant, by entry of record required the clerk of the court to substitute the name of Armstead Selby for that of Armstead Delly. Each of the jurors named, except Selby, answered, upon his examination touching his qualification as a juror, that he had formed and expressed an opinion as to the guilt or innocence of the defendant from newspaper accounts which purported to give a detailed statement of what was supposed to be the facts in regard to the homicide, and that he still entertained that opinion, which would require evidence to remove, but that, notwithstanding such opinion, he could give the defendant as fair and impartial a trial as though he had never formed an opinion or had never heard of the case. The action of the court in overruling defendant's challenges to these jurors is assigned for error, and *State v. Culler*, 82 Mo. 623, and *State v. Taylor*, 134 Mo. 149, 35 S. W. 92, are relied upon as sustaining that contention. But there is a marked distinction between those cases and the one at bar. In the *Culler* Case it was held that a person who had read the evidence with respect to the homicide as originally written, or as printed in a newspaper, and formed an opinion therefrom with respect to the guilt or innocence of the person then on trial, was disqualified from serving as a juror upon the trial of such cause. That case was followed and approved in the case of *State v. Taylor*, 134 Mo. 109, 35 S. W. 92. But in the case in hand the jurors only read newspaper accounts of the homicide, and it is well settled in this state that persons who have formed opinions as to the guilt or innocence of one on trial for crime, from rumor or newspaper reports, are not for that reason disqualified to sit as jurors on the trial of the cause, where they answer upon their *voir dire*, as in this case, that they can give the defendant a fair and impartial trial. *State v. Duffy*, 124 Mo. 1, 27 S. W. 358; *State v. Williamson*, 106 Mo. 162, 17 S. W. 172; *State v. Bryant*, 93 Mo. 273, 6 S. W. 102. There is no pretense that either of these jurors had read the evidence in the case, or that they were otherwise disqualified to sit as jurors than as herein stated. There is no merit in this contention. Nor do we think that there is any merit in the point that the name of Armstead Delly appeared on the list of 40 qualified jurors from which defendant made his challenges, and from which the panel of 12 were to be selected to try the cause, instead of Armstead Selby, which

was in fact the name of the juror. In the case of *Reg. v. Mellor*, 27 Law J. M. Cas. 121, preparatory to the defendant being put upon his trial for murder, the name of A., a juror on the panel, was called, and B., another juror on the same panel, appeared, and by mistake answered to the name of A., and was sworn as a juror. The prisoner was convicted. The fact that B. had answered for A. was not discovered until after the conviction, and upon a case reserved the court said: "The mistake is not a mistake of the man, but only of his name. \* \* \* At the bottom the objection is but this: that the officer of the court, the juryman being present, called and addressed him by a wrong name. Now, it is an old and rational maxim of law that where the party to a transaction, or the subject of a transaction, are either of them actually and corporeally present, the calling of either by a wrong name is immaterial. '*Præsentia corporis tollit errorem nominis*.'" It was one and the same man called by a different and wrong name. The mistake was corrected by the court as soon as discovered, and the name of Selby inserted in place of Delly. Selby had shown himself to be qualified as a juror on his *voir dire*, while no such man as Delly was on the panel. It is impossible to see in what way defendant could have been prejudiced by the mistake in the name, even though he was not present when the correction was made.

But two of the instructions given on behalf of the state are criticised by defendant, the third and fifth. They are as follows: "(3) He who willfully—that is, intentionally—uses upon another, at some vital part, a deadly weapon, such as a loaded pistol, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and, knowing this, must be presumed to intend death, which is the probable consequence of such an act, and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly and from a bad heart. If, therefore, you find and believe from the evidence in this cause that the defendant took the life of Mattie Ree Hunt by shooting her in a vital part with a pistol, with manifest designs to use such weapon upon her, and with sufficient time to deliberate and fully form a conscious purpose to kill her, and without sufficient or just cause or provocation, then such killing is murder in the first degree. And while it devolves upon the state to prove the willfulness, deliberation, premeditation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and if you can satisfactorily and reasonably infer their existence, from all the evidence, you will be warranted in finding the defendant guilty of

murder in the first degree." "(5) The court instructs the jury that where there is evidence introduced as to an attempted escape by the defendant, who has been charged with an offense, to avoid his arrest by the officers of the law, and trial, such attempt to escape, in the absence of qualifying circumstances, raises a presumption of guilt; and, if you find from the evidence in this case that the defendant did attempt to escape to avoid arrest and trial, this is a circumstance to be considered by you, in connection with all the other evidence, to aid you in determining the question of the guilt or innocence of defendant."

The criticism on the third instruction is that it is in conflict with the state's sixth instruction, by which the jury are told "that the state must prove to the satisfaction of the jury, beyond a reasonable doubt, that the defendant committed the crime as charged in the indictment,—that is, that the killing was done willfully, deliberately, premeditatedly, and of malice aforethought,—while by the third instruction the jury are told that these facts need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing, and if they can satisfactorily and reasonably infer their existence, from all the evidence, they will be warranted in finding the defendant guilty of murder in the first degree; that to allow these elements to be satisfactorily and reasonably inferred is in direct conflict with the well-established theory or principle that guilt, as charged, must be proven beyond a reasonable doubt, and that while these several elements may be inferred, from either direct or circumstantial evidence, their existence should be inferred to the satisfaction of the jury beyond a reasonable doubt, and not to their reasonable satisfaction. This instruction was passed without criticism by this court in *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554; and when read in connection with the sixth given on behalf of the state, and the first given upon behalf of the defendant, in which the jury are told that the burden rests upon the state to show defendant's guilt beyond a reasonable doubt, and if it had failed to do so they must acquit, no substantial objection can be urged against it. By the state's sixth, and defendant's first, instruction, he was given the benefit of any reasonable doubt as to his guilt from all the evidence adduced upon the trial, which relieved the state's third instruction of any possible objection that could be urged against it.

The state's fifth instruction is challenged upon the ground that there was no evidence upon which to predicate it. On the night after the shooting defendant left home, and the next morning a searching party, that had been organized after his departure to hunt for him, after searching for him several hours that night, found no trace of him until about 3 o'clock the next morning, when

they found the horse which he had ridden standing in the road with the saddle on and bridle off, about seven miles north of Columbia. The horse had been hitched to the fence, but had slipped the bridle. Defendant was not found until the following Monday morning, when he returned home, where he was shortly thereafter arrested. He had remained Sunday night at his son-in-law's, some miles in the country. These facts, without some explanation on the part of defendant, were, we think, sufficient to justify the instruction, especially when the killing was, in effect, admitted by the plea of insanity, and no other justification or excuse was offered therefor. It could not, in any event, have possibly been hurtful to the defendant, under the circumstances.

We are unable to see wherein the court failed to instruct upon all questions of law involved in the case which were necessary for the information of the jury in giving their verdict, nor has it been suggested by counsel for defendant wherein it failed to so do. On the other hand, the instructions given are clear and explicit, and covered every phase of the case.

Within four days after the rendition of the verdict of the jury in this cause, to wit, February 12, 1897, defendant filed his motion to set aside the verdict and for a new trial, and before the same was disposed of, but more than four days after verdict, to wit, February 18, 1897, defendant filed and asked the court to allow, as an additional or amended ground for a new trial, the following, to wit: "(17) Because the panel of forty men from which the jury was selected, and the final jury selected in the case, and before whom the same was tried, were not legally constituted, in this: that at least one of those who were sworn to try said cause was biased and prejudiced against this defendant, and had expressed his opinion after he had been selected as one of the panel of forty, and prior to his selection as one of the trial jurors, and said juror wholly failed to disclose upon his voir dire examination that he was so biased and prejudiced against the defendant as aforesaid." "State of Missouri, County of Boone—ss.: Joe H. Cupp, attorney for defendant, John Hunt, Sr., upon his oath, says that since the trial and verdict, and the filing of the motion for a new trial in this cause, to wit, about 10 o'clock a. m. of the 18th of February, 1897, he was creditably informed of the facts stated in the seventeenth exception set out as above, and he verily believes the statements therein to be true, and if granted the power of the court, by subpoena and oral examination in open court, he can establish the facts by three or more competent witnesses, who will testify, in substance, that the juror stated to them, and in their presence, that, 'if he and one other of the panel of forty were left on the trial jury, old man Hunt would stand a damned bad show; that he was guilty as

hell, and ought to have his damned neck broke.' Affiant further states that he cannot produce the said affidavits of said witnesses to the above fact because said witnesses, Luther Maupin, La Fayette Hume, Sr., Wm. Hunt, and Paul Venable refuse to give their voluntary affidavits to the foregoing facts. Wherefore affiant prays the court to allow the amendment as above, and that the process of the court be given to establish the facts herein set forth. Joe H. Cupp. Subscribed and sworn to before me this 18th day of February, 1897. W. F. Hodge, Clerk,"—which said amendment the court refused on the 18th day of February, 1897; to which ruling and order of the court the defendant then and there excepted at the time. Thereupon the defendant offered and asked the court to allow him to file said amended ground "No. 17, and the accompanying affidavit," as an independent or supplemental motion for a new trial in said cause, which motion and offer the court refused and overruled; to which refusal and order of the court the defendant then and there excepted at the time. The contention is that the court committed error in refusing to allow defendant to amend his motion for a new trial by alleging an additional cause therefor, or by filing a supplemental motion assigning the same cause. Section 4270, Rev. St. 1889, is as follows: "A motion for a new trial shall be in writing, and must set forth the grounds or causes therefor, and be filed before judgment, and within four days after the return of the verdict or finding of the court, and shall be heard and determined in the same manner as motions for new trial in civil cases." The time prescribed by statute in which a motion for new trial must be filed is within four days after verdict, and leaves no discretion to the court in that regard. It is mandatory, not directory. *Maloney v. Railroad Co.*, 122 Mo. 106, 26 S. W. 702; *City of St. Joseph v. Robison*, 125 Mo. 1, 28 S. W. 166; *Allen v. Brown*, 5 Mo. 323; *Welsh v. City of St. Louis*, 73 Mo. 71; *Bank v. Bennett* (Mo. Sup.) 40 S. W. 97. And it was held in *State v. Walls*, 113 Mo. 42, 20 S. W. 883, and *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461, that a motion for a new trial could not be amended or a supplemental motion filed after the expiration of four days after verdict. If a motion for a new trial can be amended, or a supplemental motion filed, after the expiration of four days after trial, then, for the same reason, it can be done any number of days thereafter, which is contrary to the plain letter of the statute. This point is also untenable. Moreover, the motion for a new trial upon the ground suggested in the proposed amendment, and in the supplemental motion, was not supported by the affidavit of the defendant, which was absolutely essential. It must have been supported by both the affidavit of the defendant and his counsel; nothing less will an-



swer the behests of the law. *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. Burns*, 85 Mo. 47. Finding no error in the record, we affirm the judgment, and direct the sentence announced to be executed.

GANTT, P. J., and SHERWOOD, J., concur.

### HADEN v. SWEPSTON et al.

(Supreme Court of Arkansas. Dec. 11, 1897.)

SURETY ON GUARDIAN'S BOND — LIABILITY FOR RENT AND INTEREST.

1. The probate court discharged a guardian, but afterwards rescinded the order and reappointed him, permitting him to stand on his former bond. *Held*, the surety on such bond is liable only for the property which should have been in his principal's hands at the time of his discharge.

2. Where a guardian was discharged, but there was no order making a disposition of the funds, the surety on the guardian's bond will not be liable for interest on the amount in the guardian's hands which accrued after the discharge.

3. Where a guardian was appointed in 1871, but the real estate of his ward was not turned over to him by the administrator until 1875, he is chargeable only with the rent actually turned over to him, and not with the rental value of the real estate during the time it was in the administrator's hands.

4. Although the judgment on a bill brought in the circuit court to surcharge a settlement confirmed by the probate court is not sustained, yet, where the chancery court obtained jurisdiction, and it would be burdensome to the parties to resort to the original court for enforcement of the judgment of the probate court, a final decree will be entered, on appeal, in the supreme court.

Appeal from circuit court, Crittenden county; Felix G. Taylor, Judge.

Bill by Mary W. Swebston and husband against John W. Guerrant and another. Judgment for plaintiffs, and J. T. Haden, administrator of the estate of the defendant John R. Jenkins, appeals. Judgment modified and affirmed.

W. M. Randolph & Sons, for appellant. Adams & Trimble, for appellees.

BUNN, C. J. This is a bill in the Crittenden circuit court, in chancery, by the appellees, Mary W. Swebston and her husband, W. W. Swebston, against John W. Guerrant, her guardian, and the appellant J. R. Jenkins, one of the sureties on his guardian's bond (the other surety not being sued), to surcharge and falsify the various settlements of said guardian made to and confirmed by the probate court of said county, and for judgment for the balance due said ward, to be shown upon a correction of said accounts. The facts are: On the 7th July, 1871, Mrs. Lydia Jenkins, of St. Francis county, died intestate, leaving surviving her, as her sole heir at law, the said Mary W. Swebston, who was then Mary W. Denton, a child seven years old, and a considerable amount of real and personal property, consisting of a life

insurance policy for \$5,000, and real estate in Crittenden county, and perhaps other property. It appears that, soon after the death of Lydia Jenkins, one Henry Hurlbert was appointed by the probate court of St. Francis county administrator of her estate, and took charge of the same as such; but it does not appear when he ceased to be such, or whether or not he is still such administrator. The record shows, however, that on the 23d day of August, 1875, the probate court of St. Francis county, on the petition and showing of Hurlbert as administrator of the estate of Lydia Jenkins, ordered and directed him to turn over the real estate of said estate (named in the petition, being the real estate involved in this litigation, in so far as its rents and profits are concerned) to the guardian of the said Mary W. Denton, only heir as aforesaid, namely, the said John W. Guerrant. When or how this order was complied with, or whether it was ever complied with formally, does not appear; but, presumably, the parties acted upon and in accordance with it in a reasonable time after it was entered. On the 30th October, 1871, John W. Guerrant was appointed by the probate court of Crittenden county guardian of the said Mary W. Denton, gave bond as such in the sum of \$10,000, with appellant Jenkins and one R. C. Wallace as his sureties, and entered upon the discharge of his duties as such guardian; his ward residing with him until she became of age and married appellant W. W. Swebston, in 1882. Guerrant failed to file an inventory or make a settlement until in 1876; assigning, as his reasons for the delinquency, matters that could only interest the political antiquarian. In 1876, however, he was cited by the probate court to appear and file his statement, which failing to do, he was regularly and formally discharged on the 14th October, 1876; but in January, 1877, he appeared, and asked and obtained leave to file his settlement; and this settlement covered the whole time of his guardianship, and was satisfactory to the probate court, and in due course was confirmed by it. When this settlement was filed the probate court undertook to rescind its order discharging him as guardian, made at its previous October term, and reappointed him; permitting him to stand on his former bond, "as ascertained to be still sufficient," as the expression is in other jurisdictions. This settlement showed a balance in the hands of the guardian amounting to the sum of \$5,160.05. Guerrant, under his new appointment, continued to make his annual settlement with apparent regularity until the institution of this suit, which was on November, 1883. Indeed, he is charged with having filed a final settlement after the institution of this suit. But the record shows that he filed his final settlement on the 10th July, 1882, before the institution of this suit, and about the time his ward arrived at her majority; and this settlement was examined, and ordered to lie over until the July

term, 1883, for exceptions. The record does not state when this order was made. No further order was made. The bill sets up fraud in the guardian's various settlements, in this: that he, for example, in his first settlement, failed to charge himself with interest, as he would have done had he, as required of him, made annual settlements (that is to say, interest upon the balance struck in each annual settlement), but, on the contrary, treating the first five years of his guardianship as one period, he charged only simple interest, thereby cheating and defrauding his ward; also, in this: that he failed to charge himself with the rents of the real estate, alleged to have contained 240 acres of land in cultivation; and in this: that his expense account against his ward for maintenance and education was excessive.

As stated, the surety J. R. Jenkins alone appeals, and we have nothing to do with the case as against the principal, except incidentally, as it may affect the surety; and as Guerrant, the guardian for whom Jenkins was surety, was regularly discharged on the 14th October, 1876, and was not lawfully reappointed again (at least, so as to affect Jenkins in any way), our inquiry is confined mainly, if not altogether, to the acts and doings of the guardian from his appointment as such until his discharge, on the 14th October, 1876. The chancellor properly took this view of the case, and his decree, in a general way, is based upon that theory. The matters and things presented by the bill and answers and the evidence in this cause were referred to a special master by the chancellor; and his report, involving his findings in the matter, was adopted by the court, and a decree rendered, in which the master's findings became the findings of the court, and they will be so referred to in this opinion.

The surety Jenkins, by reason of the discharge of his principal on the 14th October, 1876, was and is only responsible for the funds and other property really in the hands of the guardian at that time, or that should have been in his hands, and for the faithful payment and delivery of the same over to his lawful successor, or his ward, or others entitled, on the orders and directions of the probate court. In this case there seems to have been no lawful guardian after Guerrant was discharged on the 14th October, 1876, and the ward did not arrive at age until about the time of the institution of this suit; and, above all, there does not appear to have been any order of the probate court making a disposition of the funds in the hands of the guardian. The funds, so far as this surety was and is concerned, were still in the hands of his principal,—just where they should have been. Besides, there was no one to loan them out, under the orders of the court or otherwise,—a condition of things for which this surety is in no wise responsible on his bond. It follows, therefore, that the appellant is not liable for interest on the

amount on hand when his principal was discharged, which accrued after that time.

Again, while it is charged that the real estate of Lydia Jenkins came into the possession of Guerrant immediately after his appointment as guardian, yet the charge is made in the face of the record; for that shows that as late as August, 1875, the administrator of Lydia Jenkins was petitioning the court to make an order directing him to deliver possession over to said guardian, as all the debts of her estate had then been paid, and there was no longer a necessity for him to hold said real estate. It is not meant here to say that Guerrant should not be charged with what he received from said administrator for rents of this real estate during the time; for he should have been, and should be now, charged with every cent he received for or on account of his ward from Hurlbert, the administrator,—not only that which came to Hurlbert as rents of the real estate, but from any other source, so that it was the property, in fact, of the ward, and held for her. The two ways of putting this matter, it is readily seen, make a wonderful difference in making up accounts. In the one case he is held liable for the rental value of the land, and in the other for just what he received of the rents collected and paid over by another, lawfully entitled to receive the rents; and he claims to have rendered an account for the sum so received from Hurlbert. Whether the expense account against the ward, during the time we are now considering, was exorbitant or not, we have no means of determining. In fact, the complaint on this score is mostly, if not altogether, applicable to the subsequent accounting of the guardian. They may be, after all, merely matters to be corrected on appeal, only, and not by bill. From the method the master observed in restating the account, it is almost impossible to ascertain just what he would show to have been the balance on the 14th October, 1876, but the chancellor makes it the sum of \$6,120.99. The master allowed interest for and against the guardian from the time debts were and should have been charged, and credits asked, until the date of final decree, November 15, 1894,—a period of from 18 to 23 years. No interest accruing after November 15, 1876, should have been taken into the calculation. The guardian had already charged himself with interest on all sums coming into his hands during the five years covered by his first settlement at the rate of 6 per cent. per annum, amounting in the aggregate to \$985.23, and this had been passed upon by the probate court. Whether the amount was correctly stated in his account, we cannot say. The principal fund was \$5,000 insurance on life of Mrs. Jenkins. There is no reason to say that the probate court was not made acquainted with all the facts concerning this and the other items of debit, so as to be able to determine the proper amount of interest due. If so, it may be

that its judgment in this respect could only be the subject of appeal. However, it is needless to make any ruling on this subject. From the facts in the record, and the view we take of the law applicable thereto, we are unable to see that the findings of the chancellor (deducting amounts growing out of errors of law pertaining thereto) would make the amount for which this surety is liable to be \$6,120.99, as decreed, or any other sum in excess of \$5,160.05. The appellant surety is liable for that much, according to his own showing and the judgment of the probate court (which, in this particular matter, it is not proper to disturb), together with lawful interest from 15th November, 1894, the date of the decree; and while the bill, as against him, is not sustained, yet, as the chancery court obtained jurisdiction of the case, and it would be burdensome to all to resort to the original court for enforcement of this judgment against him, final decree will be entered here. During the pendency of this action, Jenkins died, and the cause was revived in the name of his administrator, J. T. Haden, and judgment was against him as such. The decree of the lower court is modified so as to make the amount \$5,160.05, bearing lawful interest from the 15th day of November, 1894, and with this modification it is affirmed. Appellees will pay the costs of this appeal.



**SARBER et al. v. McCONNELL et al.**  
(Supreme Court of Arkansas. Nov. 27, 1897.)

**APPEAL—WAIVER OF IRREGULARITIES.**

Where a bill was brought to foreclose a mortgage, and the court subsequently set aside a sale under a decree therein, and allowed plaintiff to file a new bill, making different issues from the original bill, and all the parties agreed, any irregularities on the procedure were waived.

Appeal from circuit court, Johnson county; Jeremiah G. Wallace, Judge.

Bill by E. T. McConnell and others against Susan R. Sarber and J. N. Sarber. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

This is a bill to foreclose two mortgages, and appropriate the proceeds to the payment of the debts secured according to priority, as between the debt of the first mortgage, on the one hand, the debts of the second mortgage on the other, and pro rata as between the latter. In October, 1891, J. N. Sarber and wife gave their note to Brown, as guardian, and secured the same by mortgage, with power of sale on certain real estate. In January following, they gave the two notes,—the one to Powell, and the other to E. T. McConnell,—and secured the same by mortgages, with power of sale, on same property as was conveyed in the first mortgage. In December, 1893, McConnell having assigned his debt to Pitzele, the latter, under the power contained in his mortgage, advertised and sold the property, causing the same first

to be appraised; and the same brought \$1,000, which was two-thirds of the appraised value, and Powell became the purchaser. In May, 1895, Brown having transferred his debt to Hamilton, the latter, having caused the property in his (the first) mortgage to be appraised, by virtue of the power therein conferred upon him, sold the property, and became himself the purchaser thereof, for the sum of \$1,500. Deducting his debt from said sum of \$1,500, the purchase price of the land, Hamilton was about to pay over the remainder to J. N. Sarber and wife, when plaintiffs, McConnell, Powell, and Pitzele, brought the bill herein, asking that Hamilton be restrained and enjoined from paying over said balance to the Sarbers, and that he be required to pay the same over to the plaintiffs, as their interest might appear, to the satisfaction of their two debts aforesaid. On the hearing at the May term, upon the complaint of plaintiffs and separate answers of Sarber and Hamilton, the chancellor dissolved the injunction theretofore granted, declared both sales to be nullities, and continued the cause over until the following term, with leave to plaintiffs to file within 60 days their amended bill, asking for a foreclosure of both mortgages and distribution of proceeds of sale, and to defendants, within an additional 30 days, to file answers, and leave to take depositions thereafter, and set the case down for hearing at the next term. The plaintiffs filed their amended complaint, and the record goes on to show that at the next term, all parties appearing by their respective attorneys, the cause was heard upon the amended complaint and answers and exhibits; and a decree of foreclosure of both mortgages was entered, and sale ordered, and the proceeds of the sale, after payment of costs, were directed to be appropriated to the payment of the first mortgage debt, and, secondly, the remainder to be appropriated pro rata to the payment of the two debts secured by the second mortgage; and from this decree the Sarbers appealed to this court.

Samuel R. Allen, for appellants. E. T. McConnell and others, pro se.

BUNN, C. J. (after stating the facts). We do not see why or upon what grounds the court set aside the two mortgage sales, or either of them, as there is nothing in the record to give us any information on the subject. But, without some affirmative showing to the contrary, we must presume in favor of the action of the court in this as in all other matters. The filing of the amended complaint, although it was done by direction of the court as part of the proceedings in the case, was in effect the institution of new suit, since it had for its object the foreclosure of the two mortgages and sale thereunder, whereas the original suit had for its object the retention of funds which were then in the hands of Hamilton, the purchaser at the

sale under the first mortgage, and a distribution of the same to the payment of the mortgage debts secured by the junior mortgage. Furthermore, it does not appear that defendants appeared and answered the amended complaint under the permission of the court aforesaid or otherwise, but that, on the hearing, their original answers were treated as their answers in the new proceeding. But the record shows that the parties all appeared by their attorneys, and these irregularities, if they were such, appear to have been waived, and the cause was suffered to proceed, as stated, to decree. In the decree itself we see no reversible error. It is therefore affirmed.

### NATIONS v. STATE.

(Supreme Court of Arkansas. Nov. 27, 1897.)

#### INCEST—STATUTES—AMENDMENT—EFFECT.

1. Sand. & H. Dig. §§ 1689, 1690, provide that persons marrying, who are "within a degree of consanguinity in which marriages are declared by law to be incestuous or void absolutely, or who shall commit adultery or fornication with each other, shall be deemed guilty of incest." Subsequently to the enactment of this statute, section 4908 was amended so as to render marriages by first cousins incestuous and void. *Held* that, by the amendment, sections 1689 and 1690 were enlarged to include within their scope carnal intercourse between first cousins.

2. Under Const. 1874, art. 5, § 23, providing that no law shall be amended, or the provisions thereof extended, by reference to its title only, it is not necessary to set out the whole act, where the section is amended, even though other sections may be, by implication, modified or extended; and hence Act 1875, amending Sand. & H. Dig. § 4908, is not unconstitutional, since it sets out the amended section in full.

Appeal from circuit court, Franklin county; Jephtha H. Evans, Judge.

Will Nations was convicted of incest, and he appeals. Affirmed.

The appellant, Will Nations, was indicted by the grand jury of the Ozark district, Franklin county, for the crime of incest. The indictment, after proper averments of time, place, etc., alleges that the appellant "did unlawfully, feloniously, and incestuously commit adultery with one Ella Branham, a single and unmarried female person, by then and there feloniously and incestuously having carnal knowledge of her, the said Ella Branham,—he, the said Will Nations, and she, the said Ella Branham, then and there being first cousins, and he, the said Will Nations, then and there being a married man,—against the peace and dignity of the state of Arkansas." Upon this indictment the defendant was tried and convicted, and sentenced to imprisonment in the penitentiary.

Bourland & Tolleson, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

RIDDICK, J. (after stating the facts). The only question we need consider in this case

is whether the laws of this state prohibit and punish adultery committed between first cousins. Our statute provides that persons marrying, who are "within the degrees of consanguinity within which marriages are declared by law to be incestuous or void absolutely, or who shall commit adultery or fornication with each other, shall be deemed guilty of incest." The punishment for such crime is imprisonment in the penitentiary. Sand. & H. Dig. §§ 1689, 1690. At the time this statute was enacted the law prohibited marriages between parents and children, brothers and sisters, uncles and nieces, etc., but did not prohibit the marriage of first cousins. Subsequently, in 1875, the statute was amended so as to include first cousins, and marriages between them were declared to be incestuous and absolutely void. This amendment of the statute brought adultery between first cousins within the scope and meaning of the statute defining and punishing incest, for the two acts must be read together, as parts of the same law. The amendment of the one act by implication extended the provisions of the other, for one statutory provision may be extended and enlarged by another statutory provision. Bish. St. Crimes (2d Ed.) § 128. "While a statute," says a recent writer, "will be construed with reference to a state of facts existing at the time of its passage, yet a statute punishing acts under circumstances depending upon legislative action for their existence will be construed as applicable to subsequent as well as preceding legislative actions, so that a penalty provided for acts committed on election day is applicable to election days provided by subsequent statutes, and a statute providing punishment for embezzlement by public officers will be applicable to an officer whose office is afterwards created, as well as when the office exists at the time of the passage of the statute." 1 McClain, Cr. Law, § 103; State v. Kidd, 74 Ind. 554; State v. Hays, 78 Mo. 600. The fact that marriage between first cousins was not prohibited at the time the statute defining and prohibiting incest was enacted can avail nothing, for the purpose of the statute was to prohibit and punish the illicit sexual intercourse of persons between whom marriage was forbidden by law. It had reference to both prior and subsequent legislation upon the subject of marriage, and its provisions, as we have stated, were extended by such subsequent legislation. That incest between first cousins may be punished under our statute has been already recognized and declared by this court. State v. Fritts, 48 Ark. 66, 2 S. W. 256. Nor can we agree with the contention that the amendatory act of 1875 violated the constitutional requirement that "no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only." Const. 1874, art. 5, § 23. It is true, as before stated, that sections 1689,

1690, 4908, Sand. & H. Dig., must be read together, as if they were parts of the same act; but, in amending one section of an act, it is not necessary to set out the whole act, even though other sections thereof may be, by implication, modified or extended, for the section of the constitution above quoted does not apply to amendments by implication. *City of Little Rock v. Quindley*, 61 Ark. 622, 33 S. W. 1053; *Scales v. State*, 47 Ark. 476, 1 S. W. 769; *Baird v. State*, 52 Ark. 326, 12 S. W. 566. By reference thereto it will be seen that the amendatory act of 1875 does set out the amended section in full, and that was sufficient. Finding no error, the judgment is affirmed.

**WINSTON, Commissioner, et al. v. STONE, Auditor.**

(Court of Appeals of Kentucky. Dec. 11, 1897.)

**COUNTY OFFICERS — COMPENSATION — DEPUTIES — CONSTITUTIONAL LAW.**

1. Ky. St. §§ 1761-1764, relating to salaries of officers and their deputies in counties of 75,000 inhabitants or more, and requiring monthly reports to the auditor, applied to the commissioner and receiver of Jefferson county, it being the only county having that number of inhabitants.

2. Ky. St. § 1762, providing that the judges of the circuit court and county court shall regulate and fix the number and compensation of deputies allowed to certain county officers, and the amount allowed for their office expenses, is not unconstitutional, as a delegation of legislative power.

3. Ky. St. §§ 1761-1764, relating to salaries of officers and their deputies, in counties of 75,000 inhabitants or more, and requiring monthly reports to the auditor, do not violate Const. art. 59, forbidding local or special laws.

Appeal from circuit court, Franklin county.  
"To be officially reported."

Action by G. A. Winston, commissioner, and D. W. Johnson, receiver, of Jefferson county, against S. H. Stone, auditor. Judgment was rendered for defendant, and the plaintiffs appeal. Affirmed.

Dodd & Dodd and W. S. Pryor, for appellants. W. S. Taylor, for appellee.

GUFFY, J. The agreed state of facts in this case was filed in the Franklin circuit court, and read as follows: "Franklin Circuit Court. G. A. Winston, Commissioner of Jefferson County, D. W. Johnson, Receiver, Plaintiffs, vs. S. H. Stone, Auditor, Defendant. It is agreed that S. H. Stone is the auditor of public accounts for the state of Kentucky, and that G. A. Winston is the commissioner of the Jefferson circuit court; that said Winston qualified as such commissioner January 4, 1897. Official copies of the Jefferson circuit court are attached to this agreement. It is admitted that Jefferson county has a population of over 75,000 inhabitants, and, further, it is the only county that at the present has such population. The defendant, Stone, contends that it is plaintiff's duty, on the first day of each month, to send to him, as auditor of public accounts, a statement, subscribed and sworn to by plaintiff, showing the amount of money received or collected by or

for him the preceding month as fees or compensation for official duties, and with such statement send to him (auditor) the amount so collected or received. The auditor further contends that upon the filing of said report, and the payment of said money, that it is then his duty to pay to the said plaintiff a sufficient sum to pay his salary, and the salary of his deputies, and the expenses for the month, the entire sum so paid not to exceed 75% of the amount of fees paid in, and not, in any event, to exceed \$5,000. The plaintiff Winston contends that he is not required by law to make said reports and pay said fees into the treasury, and that the auditor has no legal right to pay to him a sum, as his salary, etc., equal to only 75 per cent. of the amount so paid in. In other words, he contends that article 18, c. 47 (sections 1761-1764, Ky. St.), does not apply to him, and, if it does, it is unconstitutional. It is further admitted that plaintiff D. W. Johnson is the receiver for Jefferson county. Stone makes the same contention as to Johnson that he does as to Winston. That is that article 18 of the Kentucky Statutes applies to said Johnson. Johnson makes the same contention that Winston does, insisting that said law does not apply to him, and, if it does, same is unconstitutional. S. H. Stone says that this controversy is real, and the proceedings in good faith, to determine the rights of the parties, all of which is submitted for judgment." The Franklin circuit court rendered the following judgment: "The court adjudges that article 18, c. 47 (sections 1761-1764), applies to both Winston and Johnson, and that these sections are constitutional. It is therefore adjudged that the said Winston and Johnson pay the cost of this proceeding, and that the auditor may have execution, from which Winston and Johnson each pray an appeal, which is granted."

It is the contention of counsel for appellants that sections 1761 to 1764, inclusive, Ky. St., do not apply to the appellants, or, if they do so apply, that they are inoperative or invalid, because in conflict with the constitution, and operate to impair or deprive the said court of the inherent powers and machinery necessary to its own existence. Sections 1761 to 1764 read as follows:

"Sec. 1761. Officers in Counties with 75,000 Population to Report Fees Collected. The clerk of the circuit court, the clerk of the county court, commissioners, receivers, examiners, and the sheriff of each county having a population of seventy-five thousand or over, shall, after the terms of the present incumbents, respectively, expire, and on the first day of each month, severally send to the auditor of public accounts a statement, subscribed and sworn to by each of them, showing the amount of money received or collected by or for each of them the preceding month as fees or compensation for official duties, and shall, with such statement, send to the auditor the amount so collected.

"Sec. 1762. Salary of Chief Officers.—No

ber of Deputies and Compensation How Fixed. Each of the officers mentioned in the preceding section shall receive an annual salary of five thousand dollars, and the number of deputies allowed to each of said officers, and the compensation to be received by each, except the chief deputy, and the amount, if any, allowed for the necessary expenses of the office, shall be regulated and fixed by an order entered upon the order book of the circuit court and county court, and signed by a majority of the judges of said courts; and a certified copy of said order shall, as soon as entered, be forwarded to the auditor of public accounts, as shall a copy of any subsequent changes made therein.

"Sec. 1763. Salary of Deputies—Maximum Allowed. The salary of the chief deputy of each of said officers shall be two thousand dollars per year, and the salary of each of the other deputies shall be fixed at a reasonable amount, not exceeding fifteen hundred dollars per year.

"Sec. 1764. Salaries—When and How Paid. The salary of each officer, his deputies and expenses of office, shall be paid monthly by the treasurer of the state upon the warrant of the auditor, made payable to the officer. If seventy-five per cent. of the amount paid into the state treasury in any month is not sufficient to pay the salaries and expenses for that month, the deficit may be made up out of the amount paid in in any succeeding month; but in no event shall the amount paid by the auditor to any officer for salaries and expenses exceed seventy-five per cent. of the amount paid into the treasury each month by such officer, during his official term."

It seems perfectly manifest that the sections supra apply to the appellants, and that, unless the acts are unconstitutional, the judgment appealed from should be affirmed. It is, however, contended for appellants that the sections are unconstitutional, first, because of the supposed delegation of legislative power, or at least an unauthorized power, to another tribunal, which in this case has been delegated, so far as any power has been delegated at all, to the circuit court and county court of Jefferson county. It seems to us that the opinion of this court in the case of *Stone v. Wilson*, 39 S. W. 49, conclusively settles that it is not unconstitutional for the legislature to delegate to a judicial tribunal the power to fix the number of deputies, and the salaries in question. In the opinion supra the court said: "The framers of the constitution authorized the legislature to provide for the enforcement of the section of the constitution under consideration, as well as to regulate the fees of the officers; and, this being true, the legislature had the power to do so in a proper and effective manner, and the courts of the county in which the officer resides, or of which he is an officer, has an excellent opportunity to know the number

of deputies needed, and what would be just and proper salaries of such deputies; hence it was eminently proper to confer such power as we find conferred under the sections of the statute referred to."

The contention of appellants that the statute in question is not constitutional, because it applies only to counties having a population in excess of 75,000, and is therefore in violation of section 59 of the present constitution, cannot be sustained. The statute in question applies alike to all counties of the same class, and is therefore not in conflict with section 59 of the constitution. That identical question was considered in the case of *Stone v. Wilson*, herein referred to. In that opinion the court said: "'Local' or 'special' legislation, according to the well-known meaning of the words, applies exclusively to special or particular places, or special and particular persons, and is distinguished from a statute intended to be general in its operation, and that relating to classes of persons or subjects." The same section of the constitution was discussed and considered in *Com. v. E. H. Taylor, Jr., Co. (Ky.)* 41 S. W. 11. The court, in discussing clause 15 of section 59, said: "It is most earnestly insisted, as an objection to the validity of the act in question, that it is a special, local law, conflicting with section 59 of the constitution, which forbids, by clause 15, any law of that character in regulating the assessment and collection of taxes. It cannot be contended that this law applies alone to the appellees, or to Franklin county, or to the Seventh congressional district. It operates upon a multitude of property of like character owned by persons all over the state, and, in our judgment, it is neither local nor special, but general in purpose and detail, and most effective for securing to the state the revenue it seeks to collect." It will be seen from the foregoing that the law under consideration in the last-named case was held not to be in violation of section 59 of the constitution, for the reason that it applied to all property of that class wherever situated; and the principle therein announced is clearly applicable to the case at bar. It may be a fact that Jefferson county is the only county in the state having a population in excess of 75,000, but the statute in question would apply to all counties of that class within the state, and is clearly within the principles announced in the two decisions hereinbefore referred to.

Section 106 of the constitution reads as follows: "The fees of county officers shall be regulated by law. In counties or cities having a population of seventy-five thousand or more, the clerks of the respective courts thereof (except the clerk of the city court), the marshals, the sheriffs and the jailers, shall be paid out of the state treasury, by salary to be fixed by law, the salaries of said officers and of their deputies and necessary office expenses not to exceed seventy-

five per centum of the fees collected by said officers, respectively, and paid into the treasury." Section 107 of the constitution provides that "the general assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district ministerial and executive officers as may, from time to time, be necessary." Section 246 of the constitution reads as follows: "No public officer, except the governor, shall receive more than five thousand dollars per annum, as compensation for official services, independent of the compensation of legally authorized deputies and assistants, which shall be fixed and provided for by law. The general assembly shall provide for the enforcement of this section by suitable penalties, one of which shall be forfeiture of office by any person violating its provisions." The legislature has plenary powers as respects the fees and compensation of all officers, except where its power is restricted by the constitution. It is a well-settled rule of law that the legislature may at any time abolish an office which it has created, and, these offices being created by legislative authority, the incumbents are entitled to only such fees as the legislature may provide, subject only to such constitutional inhibitions as may be found in the organic law. We find no provision in the constitution, either expressly or by implication, that denies to the legislature the right to fix the fees of the appellants; but we do find in section 246 of the constitution an express provision that no officer, except the governor, shall receive more than \$5,000 per annum for his services; and in said section it is, in substance, provided, that the legislature shall provide for the enforcement of the provision of this section. It is of no importance whether the appellants are county officers or not. They can only collect by law such fees as the legislature prescribes or authorizes them to receive; and the fact that section 106 provides that the fees of county officers shall be regulated by law cannot be held to mean that the fees of other officers cannot be regulated by law. In fact, it has always been a well-settled rule of law that no officer can charge or collect any fees except such as were authorized by statute.

It is suggested by counsel for appellants that in certain cases the court may allow the commissioner, for reports and services rendered under order of court, such fees as the court may prescribe by rule or otherwise, and that, if one-fourth of every such allowance is to go to the state as a royalty or "take-out," that fact will necessarily enter as a material element into every such allowance or taxation of costs, and would be an unequal and unjust burden imposed upon litigants of Jefferson county, for the purpose of replenishing the treasury; and it is suggested that the constitution does not empower the legislative department to impose

any such embargo upon the judicial department and litigants of Jefferson county. It seems to us that the duty of the court in all cases would be simply to allow a fair compensation for the services rendered, without regard to whether the officer or the state was entitled to the compensation so allowed.

It is also suggested by appellants that more than one-fifth of the entire revenue of the state is derived from Jefferson county, and in like proportion is the litigation carried on in said county. If that be true, the reasonable inference is that the fees of appellants would be more than equal to one-fifth of the fees of all other such officers in the state; and inasmuch as under the present law these appellants cannot receive more than \$5,000 salary, if the court should consider what portion of the fees the officers would in fact receive, and be influenced by such considerations as is suggested by appellants, the result would probably be that the compensation allowed for such work would be fixed at a very low rate, for the reason that the officer would receive no part of same in excess of \$5,000 per annum; and thus the litigants of Jefferson county would be greatly benefited by the statute in question, instead of injured. But, be this as it may, we think the statute in question is valid, and it must be upheld. The question as to whether it is the most convenient or equitable statute that might be enacted is a question for legislative consideration, and not for judicial determination. For the reasons indicated, the judgment of the court below is affirmed.

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**COMMONWEALTH v. F. S. ASHBROOK CO.**  
(Court of Appeals of Kentucky. Nov. 23, 1897.)

CRIMINAL LAW—TIME FOR FILING TRANSCRIPT.

Judgment rendered February 27, 1897; transcript filed April 29, 1897. Held not within the 60 days prescribed by the Criminal Code, and appeal dismissed.

Appeal from circuit court, Harrison county.  
"Not to be officially reported."

Indictment against the F. S. Ashbrook Company dismissed, and the commonwealth appeals. Appeal dismissed.

W. S. Taylor, Atty. Gen., for the Commonwealth. Blanton & Berry, for appellee.

**DU RELLE, J.** In this case the judgment below was rendered on February 27, 1897. The record was filed in the clerk's office April 29, 1897. Counting both days, 62 days had elapsed, and this court has no jurisdiction of the appeal. *Wood v. Com.*, 11 Bush, 220. The appeal is dismissed.

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**COMMONWEALTH v. G. W. TAYLOR CO.**  
(Court of Appeals of Kentucky. Nov. 23, 1897.)

CRIMINAL LAW—TIME FOR FILING TRANSCRIPT—INDICTMENT FOR NUISANCE—LIMITATION—CONTINUATION OF FORMER PROSECUTION.

1. A transcript lodged April 29, 1897, on appeal from a judgment rendered March 1, 1897,

is within the 60 days prescribed by Cr. Code, § 348, counting the day on which the judgment was rendered as the first day, as must be done.

2. An indictment returned November 14, 1896, charging that defendant maintained a nuisance "on the — day of May, 1895, \* \* \* and divers other days theretofore and thereafter, to wit, at least 300, before and after said date," is not good, as it is not alleged, and does not otherwise appear, that the offense was committed within a year before the finding of the indictment.

3. An indictment cannot be regarded as a continuation of a former prosecution, so as to avoid the statute of limitations, where it alleges that it is for the same offense charged in a certain other indictment, and resubmitted to the grand jury; there being no allegation of a dismissal of the former indictment, or any showing that it was for an offense committed within the statutory period.

Appeal from circuit court, Harrison county. "Not to be officially reported."

An indictment against the G. W. Taylor Company for a nuisance was dismissed, and the commonwealth appeals. Affirmed.

W. S. Taylor, Atty. Gen., for the Commonwealth. Blanton & Berry, for appellee.

DU RELLE, J. An indictment for a nuisance was returned against appellee November 14, 1896; the indictment stating that "the charge herein alleged is the same offense charged in indictment No. 1,051, lately pending in this hon. court, and resubmitted to this grand jury at the November term of said court." A demurrer was filed to the indictment, a plea of not guilty, and a plea of former acquittal. The commonwealth demurred to the plea of former acquittal. The demurrer was overruled, the plea adjudged a bar to the prosecution, and the indictment dismissed. The judgment was rendered March 1, 1897, and the record filed in the clerk's office of this court April 29, 1897. It is urged on behalf of appellee that the sixtieth day after the rendition of the judgment, counting the day of such rendition as the first of the 60 days, is too late for the filing of the record, and that this court, therefore, has not jurisdiction of the appeal. We do not concur in this view. Under the rule laid down in *Wood v. Com.*, 11 Bush, 220, the day on which the judgment was entered must be counted as the first of the 60 days within which the record must, under section 348 of the Criminal Code, be lodged in the clerk's office of this court. But we see no reason why the record is not lodged in time, if lodged upon the sixtieth day, counting the day on which the judgment was rendered as the first day.

It is unnecessary to pass upon the sufficiency of the plea of former acquittal, or upon the question whether the record is complete; for the demurrer to the indictment should, in our opinion, have been sustained. It charges that the appellee maintained a nuisance "on the — day of May, 1895, in the county and state aforesaid, and before the finding of this indictment, and divers other

days theretofore and thereafter, to wit, at least 300, before and after said date. \* \* \* This language would ordinarily import that a part of the 300 days was before, and a part after, the date mentioned; and applying the rule of *fortius contra proferentem*, as heretofore laid down in *Com. v. T. J. Megibben Co.*, 40 S. W. 694, and *Newport News, etc., Co. v. Com.*, 14 Ky. Law Rep. 197, and *Tully v. Com.*, 13 Bush, 153, the offense may have been committed, under this averment, more than a year before the indictment was returned, and the indictment does not clearly show on its face that the prosecution should be regarded as a continuation of a former prosecution, so as to avoid the statute of limitations; for it does not allege a dismissal of the former indictment, nor show that the former indictment was for an offense committed within the statutory period. We are therefore of the opinion that the demurrer to the indictment should have been sustained; and as the action of the court overruling the demurrer to the plea of former acquittal, and dismissing the indictment, produced the same result, the judgment is affirmed, without passing upon the sufficiency of the plea.

#### COMMONWEALTH v. C. B. COOK CO.

(Court of Appeals of Kentucky. Nov. 23, 1897.)  
INDICTMENT—LIMITATION—PLEA OF FORMER ACQUITTAL.

1. An indictment for a misdemeanor need not allege that the offense was committed within 12 months before the finding of the indictment, if the date alleged shows that it was committed within that time.

2. A plea that a demurrer was sustained to a former indictment for the same offense, and the indictment dismissed, is not good, as a plea of former acquittal, unless it be further pleaded that the indictment contained matter which was a legal defense or bar.

Appeal from circuit court, Harrison county. "To be officially reported."

An indictment against the C. B. Cook Company for a nuisance was dismissed, and the commonwealth appeals. Reversed.

W. S. Taylor, Atty. Gen., for the Commonwealth. Blanton & Berry, for appellee.

DU RELLE, J. The facts in this case are the same as those in the case of *Com. v. G. W. Taylor Co.* (this day decided) 43 S. W. 390, except that the offense of keeping, maintaining, suffering, and permitting a nuisance is alleged in the indictment to have been committed "on the — day of February, 1896, and before the finding of this indictment." It is objected to the sufficiency of this indictment that there is no averment that the offense was committed within 12 months before the finding of the indictment. This court has recently held, in the case of *Stamper v. Com.* (Oct. 15, 1897) 42 S. W. 915, that the averment mentioned was unnecessary, providing the date alleged for the com-



mission of the offense was within 12 months before the finding of the indictment. It was therefore not necessary to the sufficiency of the indictment to make averments showing that this indictment was a continuation of a previous prosecution not barred by the statute. The question therefore arises, whether the plea of former acquittal is sufficient. That plea simply avers that upon a former indictment for the same offense a judgment was rendered reciting that the defendant had demurred to the indictment; that the demurrer had been sustained, and the indictment dismissed; and that the indictment now under consideration was found upon the same facts, and for the same offense, charged in the one to which the demurrer had been sustained. We do not think this is a sufficient plea in bar. The pleadings permitted to a defendant in a criminal proceeding are a demurrer, a plea of guilty, a plea of not guilty, and a plea of former acquittal or conviction. Cr. Code, §§ 161-165. A plea that a demurrer had been sustained to a former indictment for the same offense is not a plea of former acquittal, unless it be further pleaded that the indictment contains matter which was a legal defense or bar to the indictment. This does not appear in this case. The original indictment is not copied into, or made a part of, the plea in bar. The demurrer to the plea in bar should therefore have been sustained; and the case is reversed, with directions to set aside the judgment dismissing the indictment, and for further proceedings consistent with this opinion.

#### EXCHANGE BANK OF KENTUCKY v. GILLISPIE'S ASSIGNEE.

(Court of Appeals of Kentucky. Nov. 24, 1897.)

#### ATTACHMENT—LIEN PRIOR TO LEVY—ASSIGNMENTS FOR CREDITORS.

Under Civ. Code, § 212, providing that "an attachment binds the defendant's property in the county which might be seized under the execution against him from the time of the delivery of the order to the sheriff, in the same manner as an execution would bind it; and the lien of the plaintiff is completed upon any property or demand of the defendant by executing the order upon it"; and Ky. St. § 1660, providing that "an execution binds the estate of the defendant from the time it is delivered to the proper officer to execute,"—the lien, when completed by levy, relates back to the time when the writ was placed in the officer's hands, and is entitled to priority over an intervening assignment for the benefit of creditors.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by J. G. Gillispie's assignee against the Exchange Bank of Kentucky. From an order sustaining a demurrer to defendant's answer, it appeals. Reversed.

A. B. White, for appellant. H. R. Prewitt, for appellee.

PAYNTER, J. J. C. Gillispie was unable to pay his debts, and on July 25, 1893, at 4 43 S.W.—26

o'clock and 45 minutes a. m., acknowledged and filed for record a deed of assignment of his property for the benefit of his creditors. The Exchange Bank of Kentucky was one of his creditors, and on July 24, 1893, brought suit in the Montgomery circuit court on its debt against J. C. Gillispie, and obtained orders of attachment. On July 25, 1893, at 3 o'clock and 30 minutes a. m., the order of attachment was placed in the hands of the sheriff of Bourbon county, to be levied on a certain tract of land which belonged to J. C. Gillispie; and, at 8 o'clock and 55 minutes a. m. of that day, it was levied on the land. The attachment was sustained. The sole question in this case is whether the attachment created the lien upon the land superior to the rights of the creditors for whose benefit the assignment was made. The assignee simply takes whatever interest in the assigned estate was possessed by his assignor. If valid liens exist upon the property of the assignor, the court, in the settlement of the trust estate, must respect such liens, as they cannot be destroyed without the consent of or by some act of the holders thereof. The order of attachment was regularly placed in the hands of the proper officer to be executed.

Section 212, Civ. Code Prac., reads as follows: "An attachment binds the defendant's property, in the county, which might be seized under an execution against him, from the time of the delivery of the order to the sheriff, in the same manner as an execution would bind it; and the lien of the plaintiff is completed upon any property or demand of the defendant by executing the order upon it in the manner directed in this article." By the plain language of this section, the defendant's property is bound in the same manner as an execution would bind it, from the time of the delivery of the order of attachment to the sheriff. By section 1660, Ky. St., an execution binds the estate of the defendant from the time it is delivered to the proper officer to execute. In other words, a lien is created on the property when the execution is placed in the hands of the proper officer to execute; likewise is an order of attachment. Several cases could be cited to show that an execution creates a lien upon the defendant's property when it is placed in the hands of the proper officer to be executed. The court has held in some cases that an execution did not create a lien from the time it was placed in the hands of the officer, because the plaintiff had directed the officer not to execute it. The latter question arose in *Blakley's Assignee v. Smith* (Ky.) 26 S. W. 584. It appeared in that case that the order of attachment was placed in the hands of the officer, with the directions not to execute it until further orders. Following the line of decision with reference to the effect of such directions as to executions, the court held that the attachment did not create a lien upon the property until the officer had been directed to execute it. The court in that case, in eff-

holds, but for the direction not to execute, the order of attachment would have created a lien upon the property from the time it was placed in the hands of the officer.

Counsel for the appellee invites the attention of the court to the latter clause of section 212, Civ. Code Prac., wherein it is said that the lien is completed by executing the order in the manner required by the article of the Code in which this section appears. Of course, if the order of attachment was returned without being levied, it might be said that the plaintiff had not completed his right to a lien upon the estate of the defendant. However, when the levy has been made as in this case, the lien attached, when the order was placed in the hands of the officer to execute. While it says that the lien is complete when the order is executed, still the effect of the order was to bind the property for the payment of the debt from the time the order was placed in the hands of the officer. The court erred in sustaining the demurrer to the answer of the appellant. The judgment is reversed, with directions that the court set aside the order sustaining the demurrer, and for proceedings consistent with this opinion.

#### LYNN v. HALL.

(Court of Appeals of Kentucky. Oct. 9, 1897.)

CONSTRUCTION OF WILL—AFTER-BORN CHILDREN INCLUDED BY DEVISE.

1. Under a will devising land to P., the wife of testator's son, "and her children," children born to P. by testator's son, after testator's death, take per capita with those born before his death.

2. As it appears from the will that testator's son was then living, and it does not appear that he has since died, he is presumed to be the father of children born to P. since testator's death.

Appeal from circuit court, Pulaski county.  
"To be officially reported."

Action by John Hall against Henry Shadoan, Milton G. Lynn, and others. Judgment for plaintiff, and Milton G. Lynn appeals. Reversed.

O. H. Waddle and G. W. Shadoan, for appellant.

PAYNTER, J. On the 9th of July, 1866, James Lynn made his will. On the 14th of August, 1868, it was probated in the Pulaski county court. The clause in his will disposing of his estate is as follows: "I give to my daughter-in-law, Polly Jane Lynn, and her children, wife of my son Joseph Lynn, my tract of land on Clifty creek, Pulaski county, Kentucky, containing one hundred acres, sold and deeded to me by John Lay, the same on which I now live, in consideration for the love and affection I have for her and in consideration of her kindness to me heretofore. I have heretofore given to and made such provisions for my other children as I am able to do for them. I require of her to see

that I am buried in a decent and Christian-like manner after my death." It will be observed that he devised to Polly Jane Lynn, wife of his son Joseph Lynn, and her children, a certain tract of land. It appears from the language used in the will that his son James was then living, and, as it does not appear in the record that he has since died, presumably he is the father of the three children hereafter named who were born after the death of the testator. At the death of the testator, Polly Jane Lynn had five children. Afterwards there were born to her three children, one of whom was the appellant, Milton G. Lynn. The court below interpreted the will so as to give the land to the mother and the five children who were living at the death of the testator. If the three children born after the death of the testator are entitled to anything, they did not acquire it by inheritance or by any provision of the statute, as the father was living at the death of the testator, and he was excluded by the terms of the will, like the other children, from participating in his estate. Nor would they any way have taken by inheritance anything from the grandfather's estate, as their father was living at the death of the testator. So whatever rights the children have in the land is by virtue of the will of their grandfather. There is nothing in the record which indicates the testator had any reason for or desire to exclude the children which might be born to Polly Jane Lynn after his death from taking an interest in the land. They were as much objects of his bounty and solicitude as those who were in esse at the time of his death. There being nothing in the will showing any intention to exclude such children from participation in the estate devised, we are of the opinion that the children who were born after the death of the testator take per capita with those who were born previous to the death of the testator. In *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330, it appeared that the testator willed certain property interests to his grandchildren. The question arose as to whether the grandchildren who were born after the death of the testator participated in the estate devised. The court held that they did not, except those born within the period of gestation, because the will manifested a purpose to exclude them from participation. It is inferentially determined in that case, had no intention been manifested by the provisions of the will to exclude them, the children born after the period of gestation would have taken the same as those who were living at the testator's death. In *Webb v. Holmes*, 3 B. Mon. 404, the property was deeded to a mother for life, and the remainder to her children. The court held that those of her children who were born after the deed acquired the same interests in the property as those who were born before. The judgment is reversed for proceedings consistent with this opinion.

**FENCK & SCHMIDT LUMBER CO. v.  
MEHLER et al.<sup>1</sup>**

(Court of Appeals of Kentucky. Oct. 26, 1897.)

**MECHANICS' LIENS—LABOR PERFORMED FOR SUB-  
CONTRACTOR—PRIORITY OVER ATTACHMENT.**

Under Ky. St. § 2467, providing that, if the labor performed or materials furnished shall not be performed or furnished by contract with the owner, but for a contractor or subcontractor, no lien shall attach for the same "unless notice in writing be given to the owner that a lien will be claimed," the lien, if notice be given within 60 days, relates back, as expressly provided as to the lien of the principal contractor, and takes precedence of intervening liens.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Action by Mehler & Eckstenkemper against Henry Hollkamp and others. Judgment for plaintiffs, and the Fenck & Schmidt Lumber Company, defendant, appeals. Affirmed.

Charles G. Hulsewede, for appellant. Lewis N. Dembitz, for appellees.

LEWIS, C. J. Chapter 79, Ky. St., the title of which is "Liens," governs this case, and, according to section 2463, being part thereof, "a person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement, in any manner, of real estate by contract with, or by the written consent of, the owner, shall have a lien thereon, and upon the land upon which said improvements shall have been made, or on any interest such owner has in the same, to secure the amount thereof with costs; and said lien on the lands or improvements shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of the materials; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials." But it is provided by section 2467 that, if the labor performed or materials furnished shall not be performed or furnished by contract with the owner, but for a contractor or subcontractor, no lien shall attach for the same unless notice in writing be given to the owner that a lien will be claimed; and in such case it shall be the duty of the owner, if he, at the time of receiving such notice, is indebted to the contractor or subcontractor to withhold a sufficient amount to satisfy the claim of the party so notifying him, provided his indebtedness be enough to pay the same. The notice required by that section was intended to protect the owner, who might, without it, and in ignorance of the claim of a subcontractor or material man, pay the whole amount due to the principal contractor. Nevertheless such lien, though not actually attaching so as to bind the owner until the required notice is given, has a potential existence, even as to him, and, if asserted within 60 days, like the

lien of the principal contractor, relates back, and takes effect from the time of the commencement of the labor or the furnishing of the materials, so as to exclude and take precedence of any other lien created in the meantime. The notice was given by the material man in this case before the owner had fully paid the principal contractor, and while he was still indebted to him. Indeed, the owner does not contest his right. Nor is it contended that the lien has been dissolved by failure of the appellee to file its claim in the clerk's office within 60 days, as provided in section 2468. But the question presented is simply whether appellant, a general creditor of the principal contractor, has, by attachment, acquired a lien upon the fund in the owner's hands of the amount due to the principal contractor, superior to that of appellee, who furnished materials in erection of the house. We think not, and the judgment is affirmed.

**CITY OF MAYSVILLE v. WOOD et al.**

(Court of Appeals of Kentucky. Nov. 19, 1897.)

**DEDICATION—FOR RELIGIOUS PURPOSES—CITY AS  
TRUSTEE.**

1. Where on a plot there are three squares set apart, designated "Public Square," "Seminary Square," and "Meeting-House Square," the two latter with but an alley between them, and situated several blocks from the former, the dedication of the "Meeting-House Square" will be held to be for religious purposes.

2. A municipal corporation cannot hold land in trust for religious purposes.

Appeal from circuit court, Mason county.

"To be officially reported."

Action by the city of Maysville against George T. Wood and others. Judgment for defendants. Plaintiff appeals. Affirmed.

J. N. Kehoe and W. H. Wadsworth, for appellant. E. L. Worthington, for appellees.

WHITE, J. This action was begun in the circuit court of Mason county by the appellant, the city of Maysville, against the appellees, George T. Wood and others, by which the appellant sought to adjudge a sale by the court's commissioner, made under an ex parte proceeding on behalf of appellees, Woods and others, declared void, and a nullity, and to enjoin said appellees from in any way interfering with a certain lot of ground in the said city of Maysville, and also sought to perpetuate said ground for the purposes for which same had been dedicated years before. The petition states that in the year 1818 one Samuel January owned the land in that part of the city of Maysville, and laid same off into streets and alleys and lots, and sold lots according to said plat, and had same recorded. The place was then called "Limestone," but was not an incorporated town. On this plat there is a lot of ground—the land here in contest—marked "Meeting-House Square." This ground was never sold, and has never been

<sup>1</sup> For opinion on rehearing, see 43 S. W. 766.

built upon. Some time after the year 1818 the said town of Limestone was incorporated as East Maysville, and in 1853 the trustees of said town of East Maysville, by a regular deed of conveyance, executed and acknowledged, deeded or undertook to convey to Shackelford, Anderson, and Spencer, as trustees for the Christian or Reformed Baptist Church, and to their successors in office, this said ground known as "Meeting-House Square," providing that said trustees should take possession of same, and inclose and improve same in conformity to the true spirit and intention of the original donor; the said deed reciting that, as the said Samuel January and his wife and eight out of their nine children were or had been members of the Christian or Reformed Baptist Church, his charity—this lot—should be occupied by the church of which he and family were members. This deed was duly recorded in the clerk's office of Mason county. The petition also alleges that afterwards the said town of East Maysville became a part of the city of Maysville, and was such part at the filing of said petition. The petition states that at the September term, 1891, the appellees Woods, Williams, and Hall, acting as trustees of the religious denomination known as the "Maysville Christian Church," by an ex parte proceeding sought and obtained a decree of the circuit court of Mason county directing a sale of this lot known as "Meeting-House Square," and that under said decree the same was sold, and was bought by appellees Kackley and Trexel; that on the day of sale the said purchasers were notified of the fact that this appellant objected to the sale, and would contest the title of the purchaser; and that, on the report of sale being filed in said ex parte proceeding, this appellant appeared, and offered to file exceptions to the confirmation of the sale, but the court refused to permit same to be filed; and that appellant now brings this suit, and asks that said sale be declared void, and that said lot of land be declared a dedication from said Samuel January to the use of the public to be used for the sole and only purpose of erecting thereon a house or houses of religious worship, which the petition alleges was the object and intention of said donor. The circuit court sustained a demurrer to this petition, and appellant, by leave, amended, and in the amendment the only change made is that it is alleged that said lot of land was by the said Samuel January dedicated to the public for use as a place of public resort or meetings of any and all legal character, and that the appellant had expended large sums of money on the streets adjacent to said property in grading and beautifying same. To this amendment, and the petition as amended, the court sustained a demurrer, and, appellant declining to plead further, the petition was dismissed, and from that action of the court this appeal is prosecuted.

The sole question to be determined on this

appeal is, did the petition of appellant, or the same as amended, present a cause of action in appellant? If that question be determined in the affirmative, the judgment of the circuit court should be reversed. In the amended petition filed the only change made from the original is the allegation that the city of Maysville had improved the streets around this "Meeting-House Square," and the allegation that in the dedication made by Samuel January the said donor intended "that said dedication was made for public meeting purposes generally, and intended as a place of public resort, where the public generally had a right to and could meet and transact any and all matters affecting the public generally." This amendment only states the conclusion of the pleader as to the intention of the donor, as he therein pleads the dedication by the express words of the plat, and makes same a part thereof. It seems to us that this conclusion is not warranted by the plat, which is the only evidence of the dedication. On this plat there are three squares set apart, called respectively "Public Square," "Seminary Square," and "Meeting-House Square." The two latter are situated adjacent, with an alley only between. The public square was some squares away, and it seems to us that the only meaning that could be attached to the words "Meeting-House Square" is that given to same in the original petition; i. e. "for religious purposes, and with a view of making it a place of religious instruction and worship." Now, this being the true meaning and intention of the donor in making the dedication, can the appellant, the city of Maysville, maintain this action? The question is not whether a lot may be dedicated for a church lot or for religious purposes,—for it is now well settled that it can,—but whether a lot dedicated for religious or church purposes can be under the control of the municipal government, or whether the municipality can hold the title as trustee for the public so as to maintain an action for its preservation. In Dill. Mun. Corp. § 573, the principle is stated, thus: "Municipal corporations cannot, for the same reasons applicable to ordinary corporations aggregate, hold lands in trust for any object or matter foreign to the purpose for which they are created, and in which they have no interest." To this principle we assent, and hold that municipal corporations cannot hold land in trust for religious purposes. It is clear that since the establishment of this government it has always been the intention of its citizens to entirely separate church and state. In all our constitutions such an intention is clearly expressed, and in the light of this history it is manifest that at no time was any municipal corporation ever organized in this state with any power or authority in matters affecting religious worship. We have said that land may be dedicated for church or religious purposes, but in no event can this dedication be to a municipal corporation as trustee. The duty

of the corporation in regard to church property or religious worship is to guaranty the citizen his property or religious rights, and the free enjoyment of same. As the appellant, the city of Maysville, has no right of property in the lot in question,—all of which appears from the petition,—we are of opinion that the court did not err in sustaining the demurrers, and in dismissing the action, and the same is affirmed.

### BRASHEARS v. VENTERS et al.

(Court of Appeals of Kentucky. Nov. 19, 1897.)

#### APPEAL—CERTIFICATE TO TRANSCRIPT—SUFFICIENCY—DISMISSAL.

1. Under Civ. Code, § 737, subsec. 12, providing that, at the close of the transcript, the clerk shall certify that it contains a "true and complete" copy of the record, a certificate that it is a copy, "in substance," of the record, is insufficient.

2. An appeal will be dismissed where appellant fails to file brief 20 days before the date of submission, as required by the rules.

Appeal from circuit court, Letcher county.

"Not to be officially reported."

Action between Robert O. Brashears and G. M. Venters and others. From the judgment, Brashears appeals. Dismissed.

R. O. Brashears, in pro. per. John L. Scott & Son, for appellees.

WHITE, J. The record in this case is very imperfect, there appearing many irregularities,—seeming statements of what happened, instead of a copy of the record. The certificate of the clerk to the same reads: " \* \* \* Do hereby certify that the foregoing is a true copy, in substance, of the records in this office, made in the action," etc. Subsection 12 of section 737 of the Civil Code provides: "At the close of the transcript, the clerk shall certify, in substance, that it contains a true and complete copy of the record, or of such parts thereof as he may be required to copy, according to the truth," etc. But in the certificate here the clerk certifies that the transcript is a copy, "in substance," of the record. We don't feel authorized to try a case on a transcript which, in the opinion of the clerk, is "in substance" a true copy of the record. The Code provides for a true copy of the record. Such does not appear in this case. The record is condemned. Appellant has totally disregarded rule 3 of this court, and has failed to file brief 20 days before the date of submission. In view of these several defects, the appeal is dismissed.

### GOUGH v. CLIFTON LAND CO.

(Court of Appeals of Kentucky. Nov. 19, 1897.)

#### WILLS—CONSTRUCTION—VESTED REMAINDERS.

A clause of a will provided that the portions of the estate devised to childless sisters, if they died before testator, should go to other brothers and sisters; and by another clause such portions were given only for the lives of the childless sisters, and at their death were to be

divided among the brothers and sisters having children. *Held*, that such brothers and sisters took a vested interest in remainder in said portions.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Action by the Clifton Land Company against R. W. Gough. From a judgment for plaintiff, defendant appeals. Affirmed.

Morton V. Joyes, for appellant. W. A. Kinney and James P. Gregory, for appellee.

LEWIS, C. J. Appellee, a corporation, brought this action to recover the past-due purchase price of 19 acres of land sold to appellant; and the only question raised in the answer, to which a general demurrer was by the lower court sustained, is whether it is able to make a good title. The immediate vendor of appellee was H. P. Speed, devisee of his father, James Speed, who was one of the brothers and devisees of Joshua F. Speed, whose title is conceded. By allotment and deed of partition, made in accordance with the will of Joshua F. Speed, Mary L. Speed, one of his sisters and devisees, acquired a life estate in the parcel of land in question, and at her death in another division it was allotted and conveyed to James Speed. Therefore, if he took under the will of his brother an undivided interest in remainder vested in the real property devised to Mary L. Speed for life, appellee has and can make to appellant a good title. The only portions of that will necessary to consider are clauses 8 and 10, as follows: "Should any of my childless sisters die before I do, then their portions of my estate shall be equally divided between my other brothers and sisters. Should any of my said brothers and sisters who have children die before I do, then their children shall take the portion of my estate to which their parents would have been entitled to under this will. And in case my sister Peachy W. Peay should die before I do, then that portion of my estate which would go to her son, George W. Peay, shall go to his children by his wife, Ella E., who is now residing in Louisville." "The shares of my estate given to my sisters Mary L. Speed, Eliza J. Speed, and Lucy F. Breckinridge are given only to such of them as survive me, and then only for their respective lives, they each being childless, and to remain in the hands of my executor or executors in trust, each sister to have the income of profit from her share paid to her as she may need it. At the death of each of said three sisters who may survive me, the share of my estate so held in trust for her shall be divided among my brothers and sisters having children, the children of any who may be dead taking the shares that their parents would take, except in the case of George W. Peay, whose portion shall go as provided in the eighth clause of this will." In the case of *Kean v. Tilford*, 81 Ky. 600, construction of the two clauses of Joshua F. Speed's will

was incidentally, and we think necessarily, involved; and, though the subject was not extensively discussed, it was expressly decided that the interest of the brothers and sisters of the testator, including James Speed, took a vested interest in remainder of the portion of his estate devised for life to the three childless sisters. We think the decision in that case, based upon the well-established rule that "the present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder," controls this case. Judgment affirmed.

### WALKER et al. v. DAVIS et al.

(Court of Appeals of Kentucky. Nov. 24, 1897.)

INSOLVENT MORTGAGOR—PRESUMPTIONS—PREFERENTIAL ACT—GENERAL ASSIGNMENT FOR CREDITORS.

1. Where the mortgagor, as a man of fair judgment, must have known that he was insolvent when he executed a mortgage to secure an existing debt, the presumption is that the act was designed to be preferential.

2. At the time a mortgage was executed to secure an existing debt, the mortgagor knew that his property would not cover his liabilities if put on the market, but trusted to the future for favorable conditions which would enable him to tide over his affairs. His hopes were not realized, and the mortgage, if sustained, would have resulted in preferring the mortgagee, to the exclusion of other creditors. *Held*, that the mortgage was within Act 1856, providing that a preferential act in contemplation of insolvency should operate as an assignment of all nonexempt property for the benefit of creditors.

Appeal from circuit court, Mason county.

"Not to be officially reported."

Action by the firm of Walker & Sengstak against James Davis and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

W. H. Wadsworth and O'Hara & Rouse, for appellants. E. L. Worthington and Garrett S. Wall, for appellee Davis' administrator. A. M. Cochran, for appellees Feltman & Power.

PAYNTER, J. The question in this case is whether the mortgage which James Davis executed September 25, 1890, for \$16,229.92, to the appellants, Walker & Sengstak, was a preferential act in contemplation of insolvency. The mortgage was executed to secure a pre-existing debt. On the 1st of October, following the execution of the mortgage, Davis made an assignment for the benefit of all his creditors. This court has uniformly held, in construing the statute of 1856—First, that the act must be in contemplation of insolvency; second, that it was designed to prefer one or more creditors, to the exclusion, in whole or part, of others. *Hampton v. Morris*, 2 Metc. (Ky.) 336. The opinions of this court delivered since the 2 Metc. case have, without exception, as far as we are aware, followed the doctrine enunciated in that case. This court has held that a design to prefer will be inferred from a pay-

ment to a creditor by an insolvent debtor. *Talboot v. Ewalt* (Ky.) 7 S. W. 630. It was ruled in *Grimes v. Grimes*, 86 Ky. 511, 6 S. W. 333, that when an insolvent debtor makes a transfer or payment to one of his creditors, with a knowledge that he is insolvent, the design to prefer will be presumed, and the act of the debtor will operate as an assignment for the benefit of all his creditors, unless the circumstances of the transaction show that there was no motive to prefer. The circumstances attending the act claimed to be preferential may repel the presumption that the debtor's design was to prefer one creditor to the exclusion of others. To the same effect are the cases of *Heldrich v. Silva*, 89 Ky. 427, 12 S. W. 770; *McAfee v. Bland* (Ky.) 11 S. W. 439; and *Hoffman v. Brunga*, 83 Ky. 400. There is but one conclusion to be reached from this record, and that is that Davis was insolvent when he executed the mortgage to Walker & Sengstak; and, crediting Davis as being a man of fair judgment, he could not have failed to know at that time that he was insolvent. From the fact that he was insolvent, and must have known it, the presumption follows that the execution of the mortgage to Walker & Sengstak was to prefer them, to the exclusion of his other creditors.

The only question remaining is whether the circumstances attending the execution of the mortgage to Walker & Sengstak repel the presumption that the act was designed to be preferential. This must always be determined by the peculiar facts of each case. In *Talboot v. Ewalt*, supra, *Levis v. Zinn*, 93 Ky. 628, 20 S. W. 1099, and *McClure v. Clark* (Ky.) 24 S. W. 434, the court held that the acts of the debtors were not preferential, under the statute. In *Grimes v. Grimes*, supra, *McKee v. Scobee*, 80 Ky. 124, and *Baker v. Kinnaird*, 94 Ky. 5, 21 S. W. 237, the court held that the acts of which complaints were made were preferential, and operated as assignments of the debtors' property for the benefit of their creditors. An examination of the cases that we have cited shows that each case turned upon the particular facts surrounding the transaction. At and before the time the mortgage was executed, Davis' creditors were pressing him for a settlement of their claims. He owed several thousand dollars more than his property would pay if it were placed upon the market. Walker & Sengstak had threatened to sue him unless he either paid his debt, or secured it by mortgage. Davis knew the danger to his business affairs if he were sued upon a claim so large as that of the mortgagees. He knew that his tobacco, upon which he relied for money to meet the demands of his urgent creditors, was worth but little at that time, compared to its previous price. Davis testified that he did not have sufficient property at the time the mortgage was executed to pay his liabilities, if it was put upon the market. He was asked why he gave the mortgage. His answer was, "Well, I was in hopes that

times would get better, and I could sell the tobacco for more money, and I could make some shift to hedge over." Davis' testimony clearly shows that he was trusting to the future for favorable conditions to arise which would enable him to pay his liabilities, but necessarily knew, if his hopes were not realized, that the giving of the mortgage to the appellants would result in their being preferred, to the exclusion, in part, of his other creditors. His purpose was to tide over his financial difficulties, with the bare hope that conditions would change, and thus enable him to meet his liabilities, which alone would prevent the mortgage from operating as a preferential act. Knowing as he did that his act would result in preferring the appellants, to the exclusion, in part, of his other creditors, unless the hoped-for conditions arose, it must be held that his act was preferential, under the statute, and operated as an assignment of all of his property not exempt from execution, for the benefit of his creditors. The hope that Davis may have had that a favorable turn might come, that would avert the threatened financial ruin, does not change the quality and the effect of the act. While the facts of the case are somewhat different from those of *Hoffman v. Brungs*, still we think that case sustains the conclusion we have reached in this one. The judgment is affirmed.

#### BANK OF KENTUCKY v. BONNIE et al.

(Court of Appeals of Kentucky. Dec. 2, 1897.)

**BANKS—STOCKHOLDER AS DEBTOR—CHARTER LIEN—HYPOTHECATION OF STOCK TO THIRD PERSON—SUBSEQUENT DISCOUNTS BY BANK—PRIORITY OF LIENS.**

1. A bank charter provided that the shares of capital stock should be personal estate, and transferable, but that the corporation should hold a lien on the shares of any stockholder "who may be indebted to it," and the stock should not be transferred until such debt was paid. A stockholder was indebted to the bank, but afterwards made a note to another creditor, and pledged the stock as collateral security. The debtor became insolvent, and, to give a third creditor the advantage of its charter lien, the bank gratuitously advised such creditor to have the notes held by him discounted by the bank, knowing of the prior hypothecation of the stock. Held that, as against the notes discounted by the bank after the hypothecation of the stock, the pledgee had a prior lien on the stock.

2. Within the charter, the stockholder was indebted to the bank, though only an indorser of a note on which the bank had not proceeded against the maker.

Appeal from circuit court, Jefferson county.  
"To be officially reported."

Action by the Bank of Commerce against the New Albany Rail-Mill Company and others, and the Bank of Kentucky, which in its answer made a cross petition against C. W. De Pauw and Bonnie Bros. From a judgment in favor of plaintiff, enforcing a prior lien against certain bank stock held by the Bank of Kentucky as collateral security, the Bank of Kentucky appeals. Reversed.

Humphrey & Davie, for appellant. Helm & Bruce and Dodd & Dodd, for appellees.

LEWIS, C. J. This action was brought by Bank of Commerce, of Louisville, Ky., against New Albany Rail-Mill Company, the Premier Steel Company, C. W. De Pauw, the Union Trust Company of Indianapolis, assignee of C. W. De Pauw, all nonresidents, and the Bank of Kentucky, to enforce a lien and subject collaterals to pay three promissory notes. The first, for \$10,000, was March 25, 1893, by the New Albany Rail-Mill Company, executed and made negotiable and payable four months after date at the New Albany Bank, to C. W. De Pauw or order, who indorsed and had it discounted by the Bank of Commerce. The second and third, each for \$10,000, were April 20, 1893, at Indianapolis, Ind., by the Premier Steel Company, executed and made negotiable and payable at the New Albany National Bank, one 30, the other 90, days after date, to C. W. De Pauw or order; by him indorsed to Bonnie Bros., a firm doing business in Louisville; and, as alleged, indorsed by them, and discounted by the Bank of Commerce. There was in the lower court no contest about any collaterals except 90 shares of capital stock of the Bank of Commerce, owned by C. W. De Pauw, and supposed to be worth about \$15,000, upon which it asserted and was adjudged to have a superior lien for the three debts. In the answer of the Bank of Kentucky, made a cross petition against C. W. De Pauw and Bonnie Bros., these promissory notes, executed to and held by it, are set up, and the same bank stock asked to be applied to pay amount due of them. The first, for \$10,000, dated January 18, 1893, payable four months after date, and the second, for \$15,000, dated April 22, 1893, payable 30 days after date, were executed jointly by the Premier Steel Company and C. W. De Pauw. The third, for \$25,177.90, was, June 29, 1893, executed by C. W. De Pauw alone; and it contains a recital that there were deposited with the Bank of Kentucky, as collateral security for the two notes first mentioned, said 90 shares of the Bank of Commerce stock, 50 shares of the Indianapolis National Bank stock, and 20 bonds of the De Pauw Plate-Glass Company. But, though that note comprises the sum of principal and accumulated interest of the other two, they were retained; and, though the 90 shares of bank stock were stipulated to be then deposited as security for the third note, the answer contains an averment, supported by evidence, that a certificate of that stock duly issued had in fact been previously assigned and delivered by De Pauw to the Bank of Kentucky, as security for the two preceding notes.

Whatever lien the Bank of Commerce may have upon shares of its capital stock owned by a debtor is purely statutory, and exists in virtue of section 6 of its charter, as follows: "The shares of capital stock shall be personal

estate and transferable on books of the corporation according to its by-laws. But the corporation shall hold a lien on the shares of any stockholder who may be indebted to it. Such shares shall not be transferred without the consent of the president and directors until such debt shall be paid, or discharged." The note for \$10,000, executed March 25, 1893, by New Albany Rail-Mill Company to De Pauw, appears to have been indorsed by him directly to, and discounted in due course of business by, the Bank of Commerce, before the Bank of Kentucky had acquired, by transfer of the certificate from him, any lien upon or claim to the 90 shares of stock. And as the paper is, by the law of Indiana, where it was executed and presumed indorsed, placed upon footing of bills of exchange, and according to the doctrine of *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775, to be so treated by courts of this state, De Pauw became, when he indorsed, and it was discounted by the Bank of Commerce, indebted to that bank, in the meaning of the section quoted, and liable to suit on the note, even without previous abortive proceeding against the maker of it. In our opinion, therefore, the Bank of Commerce certainly has prior right in the present action to subject so much of said bank stock as may be required to pay that note. So, the question left for determination is whether the residue of proceeds of the 90 shares of bank stock, if any, shall be applied towards paying the two notes indorsed by Bonnie Bros. to the Bank of Commerce, or the debts of the Bank of Kentucky.

The certificate of stock was transferred by De Pauw to the Bank of Kentucky, Saturday, May 6, 1893, as security for the two notes, of \$10,000 and \$15,000, executed by the Premier Mill Company and himself. But the two notes, for \$10,000 each, executed by the Premier Steel Company to De Pauw, and indorsed by him to Bonnie Bros., were not discounted by the Bank of Commerce until Monday, May 8, 1893. Nevertheless, if the latter transaction was bona fide, occurred in due course of business, and was for the benefit of the Bank of Commerce, its lien, we think, covers also the other two notes. But the Bank of Kentucky acquired, by transfer to it of the certificate, an equitable interest in or claim to the bank stock, which then prevailed against that of any other creditor of De Pauw, except the Bank of Commerce, and was subordinate to its lien only while the first mentioned note remained unpaid; and such right was not impaired by notice given by De Pauw at time of the transfer of his indebtedness to the Bank of Commerce. Therefore, if the two notes held by Bonnie Bros. were subsequently discounted by the Bank of Commerce for the purpose of giving them the benefit of its charter lien, and resulting advantage or preference over another creditor of De Pauw, or innocent purchaser of the stock, which they could not have otherwise obtained, then the transaction was an un-

lawful use of the charter lien, gratuitously and only for special purposes given by the legislature. The rule applicable here is thus stated in *Cook, Stock & S.* § 529: "The right of a corporation to a lien on the stock of its shareholders as security for the payment of their debts to the corporation is a right to be enforced only by the corporation, and exclusively for its own benefit. Accordingly, it is held that the corporation cannot become the assignee of the claim of some third person against one of its shareholders in order to enforce payment of that claim for the benefit of the third person by a recourse to the corporate lien on the shareholders' stock." Two cases are cited in support of the text: *White's Bank of Buffalo v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601, and *Bank v. Smalley*, 2 Cow. 770, one of them being essentially like this case. But, if there was no authority to support it, we should not hesitate to adopt and apply the doctrine stated, because it is not only just, but accords with the intent and meaning of the statute, which conferred upon the Bank of Commerce the right of lien to be legitimately used for its own benefit and protection, not to wrong or overreach others.

That the two notes held by Bonnie Bros. were discounted by the Bank of Commerce, if at all, for their benefit, and not its own, and the president of that bank at the time knew or had reasonable grounds to believe the 90 shares of stock had already gone into hands of an innocent purchaser or another creditor of De Pauw, are facts fully established by the evidence. It appears that De Pauw was president of the Indiana Rail-Mill Company, the Premier Steel Company, and other corporations in Indiana, and that they, as well as himself, were in a falling financial condition, and all subsequently failed. With a view to protect his creditors as far as practicable, he transferred the 90 shares of stock, and, on the same day, transferred collaterals to Bonnie Bros. supposed to be sufficient to cover their debts, though they proved to be worthless. He deposited no collaterals with the Bank of Commerce, because the debt it then had against him was amply secured by lien on the bank stock. On the day of the transfer of the stock to the Bank of Kentucky, De Pauw informed its president that the Premier Steel Company would probably, and in fact did, go into the hands of a receiver, and addressed a letter containing same information to the president of the Bank of Commerce, which was, however, not received until next day. But, as soon as it was received, the president, though it was Sunday, hastened to give Bonnie Bros. the information, and advise them to have the two notes they held discounted by the Bank of Commerce, so they could get benefit of its charter lien, which was done next day (Monday). Bonnie Bros. did not then need the money arising from discount of the notes, nor did they apply to the Bank of Commerce to have it done; for they at the time had on de-



posit with that bank \$20,000, or more, and, instead of being borrowers, were lenders, of money, the two notes held by them being for money previously loaned to De Pauw. Nor is it pretended that the president of the Bank of Commerce had any other reason for suggesting, or they any for adopting, the scheme of going through the form of discounting the two notes, except thereby they might get an undue advantage of another creditor or purchaser which they then did not have nor could obtain without aid of the Bank of Commerce. And that the president knew and had reason to believe injury would be thereby done to another is apparent from the fact that, before transferring the stock to the Bank of Kentucky, De Pauw had offered it for sale to others, including the president of the Bank of Commerce himself. The effort to favor Bonnie Bros., customers and depositors of the Bank of Commerce, in the manner attempted, may have appeared to the president proper and allowable, but, in a legal aspect, it cannot be commended or sanctioned; for if, with the intent to benefit a particular customer or depositor, the president of a bank may pervert the intended and legitimate use of its charter lien, to the wrong and injury of others, there is no reason why he may not just as well prostitute it for money consideration. The lower court erred in denying the right of the Bank of Kentucky to the residue of the proceeds of the 90 shares of stock left after satisfying the note held by the Bank of Commerce on April 6th, when the transfer of the certificate was made by De Pauw; and the judgment is reversed for proceedings in accordance with this opinion.

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MOORE v. LAWSON et al.

BIRD et al. v. SAME.

(Court of Appeals of Kentucky. Dec. 2, 1897.)

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 42 S. W. 1136.

PAYNTER, J. Counsel claims in the petition for rehearing that the deputy sheriff, Lawson, bought the \$400 claim between the time it was allowed, at the October term, 1888, and the 1st of January, 1889, when Moore was inducted into office. Counsel submits a question to the court, which is as follows: "Now, if it was purchased by J. L. Lawson before he was Moore's deputy, Moore ought not to be entitled to any credit for it on the idea that it was purchased with his money." There are two answers to the question. The first is that, if the plaintiff, G. W. Lawson, had ever acquired any title to the claim of \$400, then the deputy extinguished it when he paid the plaintiff the \$1,000 out of the revenues for which Moore had to account; second, if the plaintiff never had any interest in the claim, then he is not entitled to recover

on it. When J. L. Lawson purchased the claim from Rains, he was acting as deputy for the sheriff, whose term expired when Moore's began. If it be true that J. L. Lawson bought this claim before Moore became sheriff, and while he was acting as deputy for the previous sheriff, it was in violation of the statute, and he could not maintain an action on it. However, no doubt Moore will gladly give him credit for it in any settlement which he and his deputy may make.

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AMERICAN HARROW CO. v. TWEDDLE.

(Court of Appeals of Kentucky. Dec. 2, 1897.)

BURDEN OF PROOF—NOTE OBTAINED BY FRAUD—QUESTION FOR JURY.

1. In an action on a note, where defendant admitted its execution, and pleaded that it was induced by false representations of plaintiff's agents, the burden was on defendant to make out his defense.

2. Where defendant in an action on a note pleaded that its execution was induced by the false representations, and the evidence strongly supported the answer, a peremptory instruction was properly refused.

Appeal from circuit court, Livingston county.

"Not to be officially reported."

Action by the American Harrow Company against John W. Tweddle on a note. From a judgment for defendant, plaintiff appeals. Affirmed.

John K. Hendrick and William Marble, for appellant. W. I. Clarke and Bush & Worten, for appellee.

HAZELRIGG, J. Appellee sought to defeat recovery on the note sued on by appellant, a company engaged in manufacturing and selling harrows, by pleading and attempting to prove that its execution had been induced by the false and fraudulent representations of appellant's salesman. He admitted the execution of the note, and the court therefore properly placed the burden on him of making out his defense. The motion for a peremptory instruction was also properly overruled, as the evidence on behalf of the defendant conducted strongly to support the averments of his answer,—so much so, indeed, that at the conclusion of the trial the jury found for the defendant. The instructions asked for by appellant were either given in substance, or were foreign to the issues presented by the pleadings. The jury was fully and properly instructed, and its finding is not flagrantly against the evidence. Judgment affirmed.

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DAVIDSON et al. v. COMBS.

(Court of Appeals of Kentucky. Dec. 3, 1897.)

QUIETING TITLE—INSUFFICIENT EVIDENCE—PROCEEDINGS ON REVERSAL OF JUDGMENT.

In an action to quiet title, defendant assumed that plaintiff was bound to show a clear title. Deeming that plaintiff had not done this, defendant declined to introduce any evidence, ex-

cept certain deeds. Plaintiff had judgment, and defendant appealed. *Held* that, plaintiff's evidence being insufficient to sustain the judgment, the cause would be remanded on reversal, and both parties be allowed, in further proceedings, to introduce additional evidence.

Appeal from circuit court, Knott county.

"Not to be officially reported."

Action by Delphia Combs against Edward Davidson and others. From a judgment in favor of plaintiff, defendant Davidson appeals. Reversed.

W. W. Baker and J. J. C. Bach, for appellant.

GUFFY, J. This action was instituted by the appellee against the appellant and others. It was alleged in the petition that the plaintiff was the owner of a large body of land (describing same), and that the defendants were wrongfully and unlawfully entering upon said land, and cutting, or about to cut and remove, valuable timber therefrom; and an injunction was asked, and obtained, restraining defendants from so doing. By an amended petition, some others were made parties, and in the amended petition it was alleged that plaintiff was in the possession of said land; and, in addition to the injunction prayed for, she prayed that her title to the land be quieted. After issues made, and proof taken, the court rendered a judgment quieting plaintiff's title, and enjoined defendants from entering upon said land, and cutting or removing timber therefrom. It may be remarked that the answer denied plaintiff's title, and set up title in appellant,—composed of, perhaps, two boundaries or more. Plaintiff seems to claim title commencing with Esau Hammons, who, it is alleged, conveyed to C. L. Combs. That deed refers to two patents, giving the dates thereof, issued to said Hammons for land in Perry county. It is claimed that all the children of said C. L. Combs conveyed said land to Washington Combs, and that G. W. Combs, by his last will and testament, devised same to this appellee. There is also some attempt to show that appellee became invested with the claim of one Walker to some portion of the land. It is insisted for appellant that this court cannot presume that the patent to Hammons for land in Perry county covers the land in controversy. In other words, the court cannot presume that Knott county was stricken from Perry county, and that the Hammons land was in that part of Perry county that was taken off of said Knott county. It is further contended that there is no evidence, and that the court is not authorized to assume, that G. W. Combs, appellee's vendor or deviser, is the same person called "Washington Combs," who is Hammons' alleged vendee. Other contentions are also urged, not necessary now to mention.

Appellant assumed that the plaintiff must show a clear title to the land, in order to succeed; and, not having done so, he de-

clined to introduce any proof, and submitted the case upon plaintiff's testimony, except that some deeds were filed for land to which appellant claimed title; and he contends that his ownership of at least one boundary named in his title papers was not denied by plaintiff. Appellee has filed no brief. It seems to us that the paper title and proof introduced by appellee is too vague and uncertain to sustain the judgment rendered in the court below. The judgment is therefore reversed, and the cause remanded, but upon the return of the case the plaintiff may proceed to produce such other proof in support of her cause of action as she may desire to do, and the defendant may make such further defense as he can lawfully do. Cause remanded for further proceedings consistent with this opinion.

#### HARDIGEN'S ADM'RS v. SIMKINS.

(Court of Appeals of Kentucky. Dec. 3, 1897.)

APPEAL—REVIEW—OBJECTIONS WAIVED.

Where it does not appear on appeal that any motion was made by defendant to require plaintiff to elect as to which cause of action he would prosecute, or that any objection was made on account of misjoinder of causes of action, neither of such questions is available in the court of appeals.

Appeal from circuit court, Livingston county.

"Not to be officially reported."

Action by W. M. Simkins against D. C. Hardigen's administrators. From a judgment for plaintiff, defendants appeal. Affirmed.

J. H. Linley, J. K. Hendrick, and Wm. Marble, for appellants. J. C. Hodge and C. C. Grassham, for appellee.

GUFFY, J. The appellee instituted this action in the Livingston circuit court against the appellants, seeking to obtain judgment for the sum of \$226.56, balance due, as alleged, upon an account for various items furnished by appellee to decedent, Hardigen. It is charged in the petition that Hardigen expressly promised to pay the same, and that defendant promised and agreed to pay same, which promise was made on the — day of —, and at divers times before said date and after. The substance of the answer is that defendants had not sufficient knowledge or information to form a belief as to whether or not the labor was performed or the articles furnished, or whether said Hardigen ever agreed or promised to pay same or any part thereof, and also pleaded the statute of limitations as to all the items that were furnished more than five years and six months before the filing of the petition. The reply denied that more than five years had elapsed between the date of each or any of the respective claims named in the account of plaintiff, and pleaded the promise of Hardigen to pay same within less than five years from the time of

furnishing the articles or rendering the services. A jury trial resulted in a verdict and judgment in favor of appellee, and, appellants' motion for a new trial having been overruled, they have appealed. It is insisted by counsel for appellants that different causes of action are improperly joined in the petition. It is also insisted that the court erred in giving instructions from 1 to 5, inclusive, and erred as to the admission and rejection of testimony. It is also insisted that the court erred in refusing to allow the amended answer to be filed. It does not appear that any motion was made to require plaintiff to elect as to which cause of action he would prosecute, or any objection made on account of the misjoinder of the causes of action; hence neither of those questions is available in this court. Nor do we think that any error prejudicial to the substantial rights of appellants was committed as to the admission or rejection of evidence. Considering the time and circumstances under which the amended answer was offered to be filed, and considering the averments therein, we do not think the court erred in refusing to allow the same to be filed, nor do we think the court erred in the giving of instructions. The evidence is sufficient to sustain the verdict of the jury, and, perceiving no error prejudicial to the substantial rights of appellants, the judgment is affirmed, with damages.

#### WEBB v. FLUTY.

(Court of Appeals of Kentucky. Dec. 1, 1897.)  
PAROL SALE OF LAND—RESCISSION—RECOVERY OF PRICE.

Where a parol sale of land was rescinded, and the vendee while in possession took timber of the value of the price he had paid, the vendor was entitled to the land without a return of the price paid.

Appeal from circuit court, Estill county.  
"Not to be officially reported."

Ejectment by Catherine Fluty against W. J. Webb. From a judgment for plaintiff, defendant appeals. Affirmed.

Riddell & Riddell, for appellant.

WHITE, J. This action was begun in ejectment by appellee in the Estill circuit court. Appellant filed an answer admitting the legal title to be as alleged, but alleged a parol purchase and sale from appellee in 1873, and a payment of the purchase price, and alleged that no deed had ever been made, and asked for a specific performance by deed, or, in the alternative, a rescission of the parol contract on equitable terms. This parol sale was denied. The case was transferred to equity, and proof taken by deposition, and the chancellor on the trial adjudged that there was a parol sale and possession given; that the same cannot now be enforced, appellee being a married woman when the sale was made; and adjudged a rescission of the sale.

The court found that appellant had taken timber from the land of the value of the payment made by him, and dismissed his counterclaim; gave the appellee the land, and a writ of possession therefor, without any incumbrance; and from this judgment the appellant has appealed to this court. From a careful reading of the proof we are of opinion that the conclusion of the chancellor is correct. The timber taken from time to time is fully of the value of the purchase price paid. Finding no error, the judgment is affirmed.

#### BRUNER v. TOWN OF STANTON.

(Court of Appeals of Kentucky. Dec. 14, 1897.)

##### PAYMENT—MISTAKE OF LAW.

Money paid a municipality through a mistaken belief that an ordinance under which it was paid was valid may be recovered back.

Appeal from circuit court, Powell county.  
"To be officially reported."

Action by J. B. Bruner against the town of Stanton to recover back money paid under an invalid ordinance. From a demurrer to the petition, plaintiff appealed. Reversed.

C. B. Hancock, for appellant. Atkinson & Spencer and O. A. Lyle, for appellee.

HAZELRIGG, J. In June, 1891, appellant procured a state license to sell spirituous, vinous, and malt liquors in the town of Stanton, and was about to commence business, when the trustees of the town for the first time adopted an ordinance requiring a license fee of \$250 to be paid the town before such business could be carried on. Admittedly, the trustees under the town charter then in force, or in virtue of any general law, were without authority to impose such a tax, or any license tax, on such business. But they, as well as the appellant, were of the belief they had such authority, and confessedly the board, in imposing the tax, and the appellant, in paying it, as he did do, acted in good faith under the mistaken belief that the ordinance was valid and enforceable. The sole question here is, may the appellant, under these circumstances, recover the money back from the town? Clearly, if he had paid it with full knowledge of all the facts, or with notice that the ordinance was invalid, he could not recover. In such event, he could, as said in *City of Louisville v. Anderson*, 79 Ky. 344, have "refused to pay the money, or could have tested the validity of the ordinance, without subjecting himself to a penalty, or could have at least refrained from selling his liquor or goods." He had no such notice, however, and had the right to assume, as he did assume, that the town trustees but exercised their lawful authority when they passed the ordinance, and were about to enforce the collection of the tax imposed. As said in the case quoted: "He is not presumed to know more than those who constitute the legislative and ex-

ecutive departments of the government under which he lives, whether state or municipal." It has been held that, even where the licensee knew the tax imposed was illegal, and paid it, yet, if there were circumstances of oppression connected with the transaction, the money beyond the amount authorized to be collected might be recovered. *Bruner v. Clay City* (Ky.) 38 S. W. 1062. In *Fechelmer v. City of Louisville*, 84 Ky. 306, 2 S. W. 65, an ordinance "to license sample dealers" was declared to be invalid, and money paid by such dealers "under a mistaken belief as to the validity of the ordinance, and because they had no practical mode at the time of the demand for resisting its payment," was directed to be paid back by the city. In *Trustees of Town of Stanford v. Hite*, 2 Ky. Law Rep. 386, it was held that, "where a party has paid money to the trustees of a town for any privilege, and the ordinance imposing the burden is void, he is entitled to recover back the amount thus paid, if paid under the belief that the burden was lawfully imposed." The general rule is well settled, and is alike applicable to transactions between an individual and a municipality as between individuals alone, that where money has been paid through a clear and palpable mistake of law or fact essentially affecting the right of the parties, which in law, honor, or conscience was not due and payable, and which ought not to be retained by the party to whom it is paid, it may be recovered back. *City of Covington v. Powell*, 2 Metc. (Ky.) 228; *City of Louisville v. Henning*, 1 Bush, 381. We think the demurrer to the petition should therefore have been overruled, though under the second paragraph no recovery can be had, because at the time the money is alleged to have been paid, namely, June 5, 1893, the town authorities were authorized to enforce the collection complained of. Judgment reversed for proceedings consistent with this opinion.

### JONES et al. v. JONES.

(Court of Appeals of Kentucky. Dec. 14, 1897.)

WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEASED — TRIAL — INSTRUCTIONS — GIFT — QUESTION FOR JURY.

1. In an action against administrators for possession of notes payable to deceased, which plaintiff alleged were given him by deceased the day before her death, and afterwards taken from him by defendants, it was error to permit plaintiff to testify as to statements made by him to one of defendants, when the latter demanded possession of said notes, as to what occurred between him and deceased at the time of the alleged gift and delivery thereof, under Civ. Code, § 606, subsec. 2, which prohibited plaintiff testifying directly to said transactions with deceased.

2. And it was error to permit plaintiff's daughters to detail alleged conversations between him and one of defendants, in which plaintiff repeated alleged conversations between him and deceased at the time of the alleged gift.

3. In an action against administrators for possession of notes payable to deceased, and not indorsed or assigned, which plaintiff alleged were given him by deceased, the court charged that, if deceased delivered the notes to plaintiff with the purpose of giving them to him, the jury should find plaintiff to be the owner of them, "even though they were not assigned in writing." *Held*, that the addition of the quoted words was objectionable, as calling attention to a special and material fact in a way calculated to make the impression on the jury that it was of no consequence.

4. It was improper to instruct that the mere declarations of deceased of her purpose to give plaintiff her property, or any part of it, would not vest him with any right or interest in the notes, unless the deceased delivered the notes to him for the purpose of giving them to him.

5. In view of evidence of declarations by deceased of her intention to make provision for plaintiff, and of the fact that he was found in possession of the notes, the question of gift was for the jury.

Appeal from circuit court, Clark county.

"To be officially reported."

Action by William Jones, Jr., against William Jones and others, administrators of the estate of Mary J. Jones, deceased. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

J. M. Benton and Beckner & Jarett, for appellants. Hathaway & Cardwell, for appellee.

BURNAM, J. Mary A. Jones died intestate and unmarried on the 9th day of July, 1895, leaving as her heirs at law two brothers and a number of nephews and nieces. Among the latter was the appellee, William Jones, Jr. Appellants qualified as her administrators, and this suit at law was instituted by appellee against them, alleging that he was the owner and in the possession of two promissory notes payable to Mary A. Jones, one of them being for \$1,200, due by L. P. & I. C. Skinner, and the other for \$225, due by John Jones; that they had been given to him by the payee on the 8th day of July, 1895 (which was the day immediately preceding her death); that he had accepted the gift, and had held possession of the notes until they were taken from him, without right, by the appellants, on the 15th day of July, 1895; and that they had refused to surrender or return the possession thereof to him, and claiming damages. Appellants answered, denying that appellee was the owner of either of the notes mentioned in the petition, or that they had, without right, taken possession of same, or that the payee therein, Mary A. Jones, had ever given or delivered the notes in question to appellee, to be held as his property, or had delivered them to him at all; and alleged that the notes belonged to and constituted a part of the estate of Mary A. Jones, deceased, never having been disposed of in any way by her previous to her death. The issue being tried, the jury found the appellee to be the owner of the notes in question, and judgment was rendered accordingly, and from that judgment appellants prosecute this appeal, alleging numerous errors on the part of the

court at the trial of the case in allowing incompetent testimony on behalf of appellee to go before the jury. Most of these objections are not well taken, and we will consider only those which appear to be material and prejudicial to appellants. The appellee was permitted to detail in his examination in chief statements which he claimed to have made to his father, one of the administrators of decedent, and one of the appellants here, at the time demand was made upon him for the possession of the notes in contest, in which he recited how he had acquired possession of the notes, and what occurred between him and his dead aunt at the time of the alleged gift and delivery thereof; and two of the daughters of appellee, Olive and Pearl Jones, were permitted, while they were being examined in chief as witnesses for appellee, to detail the alleged conversation between appellee and his father, which they claimed to have heard, and in which he undertook to repeat conversations had with his aunt at the time the alleged gift was made by her, and transactions had with her at that time, and also statements made by appellee with regard thereto to his family, in the absence of any of the appellants. This testimony, and its probable effect upon the jury, can be best understood by quoting the parts specially objected to. While appellee was on the witness stand, and being examined in chief as to what occurred at the time the demand was made upon him for the possession of the notes in question, he was asked by his attorney this question: "What answer did you make him?" to which witness responded: "I told him that I would not give them up; that they were mine; that aunt had given them to me, and that I would not give them up,"—which question and answer were excepted to. The witness was then asked, "Did you tell him how you got the notes?" and he answered, "Yes." His counsel then said, "State what you said about it," which was excepted to, objection overruled, and witness permitted to respond: "I told him that aunt had given me the notes; that she told me to look over some papers there, and see what there was; that I looked over them, and found Mr. Skinner's note, and my father's note, and a note for \$150, with the name torn off; that I told her the note was no good with the name torn off, and that she said, 'No, the note was no good with the name torn off.'" These questions and answers were excepted to at the time, and the exceptions overruled. The testimony of the witness Olive Jones, which was specially objected to, is as follows: She was permitted to testify on her examination in chief that she heard her father say to her grandfather, one of the administrators, and one of the appellants here: "I have some notes Aunt Mary Jones gave me. I guess you thought she left me out, but Aunt Mary never forgot me." And the witness Pearl Jones, during her examination in chief, was asked the question:

"When did you see the notes? Was it before or after the death of the intestate?" and she replied: "She gave them to Pap July 8th. She died July 9th." Appellants objected to this answer, and moved the court to exclude it from the jury, which motion was overruled. And further along this witness was asked, "How did you happen to see them?" She responded, "He took them out, and said that they were the notes Aunt Mary had given him," and that this conversation occurred at her father's supper table, on the evening of July 8th, at which no one was present but the family, consisting of herself, brothers, and sisters. The question which was in issue and which was to be determined by the jury was whether Mary Jones had given the notes in question to appellee at the time and under the circumstances alleged. It appears from the testimony of appellee that these notes had never been indorsed by the payee therein, and that nobody was present at the time of the alleged gift and delivery thereof to him except himself and his wife; and, as the wife was not competent to testify for her husband, and the husband, under the provisions of subsection 2, § 606, of the Civil Code, was made incompetent to testify directly concerning any verbal statements of, or any transactions with, his deceased benefactor, there was no witness competent to testify directly as to what occurred between appellee and the decedent at this alleged interview; and these facts had, therefore, necessarily to be determined largely by circumstantial evidence; and any testimony which tends to establish the alleged gift at this interview is of vital importance to the litigants in the determination of this question, and it is manifest that it was the duty of the trial judge to exercise the greatest care to prevent incompetent testimony which bore on these facts from getting before the jury. At common law, litigants were not permitted to testify at all on the trial of actions in which they were personally interested. This rule of the common law was changed by statute, but in making this change the legislature were exceedingly careful to make exceptions to the general rule, and it was declared that "no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, \* \* \* one who is \* \* \* dead when the testimony is offered to be given, except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted." Civ. Code, § 606, subsec. 2. Similar restrictions upon the testimony of living witnesses against the estates of deceased persons are found in the statute laws of most of the states, and the purpose and intention of this exclusionary rule is that the surviving party to the transaction in issue shall not have the unfair advantage of giving his ver-

sion of the matter, when the other and adverse party is prevented by death from being heard to contradict or to explain it. See *Card v. Card*, 39 N. Y. 317. And this view has been sustained by adjudications of this court. In the case of *Harpending's Ex'r's v. Daniel*, 80 Ky. 449, it was said: "The design of the section was to place parties to an action, or those interested therein, on an equal footing when their rights were being passed upon. To permit a party interested to testify concerning a transaction with one who is dead, and not present to testify at the same time and in the same manner, would give an advantage in many ways to the living not tolerated by the letter or spirit of the Civil Code, or consonant with justice and equality." The language of the Code is sweeping and imperative, and admits of no exceptions other than those pointed out in the statute itself. By the admission of the testimony in question appellee was permitted indirectly to get before the jury his statement of what transpired at the time of the alleged gift and delivery of the notes sued for; in other words, while he was admittedly incompetent to testify directly as to these transactions, yet it was held that he was competent to testify to what he had said in regard to those transactions on another occasion to one of the parties defendant. It cannot be contended that the administrator to whom these statements were made had any personal knowledge thereof, or could have denied the statements of appellee. If a party asserting a claim against the estate of one who is dead can voluntarily detail the facts of such alleged gift to a third person who happens to be a party to the action, and then, upon the trial, be permitted, on his examination in chief, and to support his claim, to detail such conversation on the witness stand, the provision of the Code referred to becomes of no value; as by indirection he gets these transactions before the jury as effectually as if he had been permitted to testify thereto directly. It was perhaps competent for appellee to have testified that at the time demand was made upon him for the possession of the notes he refused to deliver the possession thereof, because he owned them under a gift from decedent; but the jury should have been carefully admonished that even this statement was only permitted for the purpose of explaining his possession, and was not to be considered as any evidence of the fact of the alleged gift or the justness of appellee's claim to the notes in contest. The testimony of the daughters detailed above is a palpable evasion and violation of the section of the Code under consideration. They were permitted to testify as to statements made to them by their father, who was present in court, and who was not competent, under the law, to state the facts himself.

Appellants also objected to the first instruc-

tion, which reads as follows: "If the jury believe from the evidence that Mary Jones, during her lifetime, delivered the notes in controversy to the plaintiff with the purpose and intent of giving them to him, they should find the plaintiff to be the owner of them, even though they were not assigned in writing." It seems to us that the whole law of this case was substantially given in this instruction, without the addition of the words, "even though they were not assigned in writing," for, while it cannot be contended that an assignment in writing was necessary to transfer the title to the notes in question, yet the fact that they had no such indorsement on them was one which the jury had a right to consider in arriving at a conclusion. Especially is this true since the mere naked possession by appellee of these notes payable to decedent is not prima facie evidence of ownership against the personal representative of the payee therein. See *Gano v. McCarthy's Adm'r*, 79 Ky. 409; *Bradford v. Ross*, 3 Bibb, 238; *Bell v. Morehead*, 3 A. K. Marsh. 158; and *Daniel*, Neg. Inst. § 812. The addition of these words to the instruction is objectionable, because the court thus singled out and called attention to a special and material fact in the case, and in a way that was calculated to make the impression upon the jury that it was of no consequence, and was wholly unnecessary. And for the same reason we think the court erred in the second instruction, in telling the jury that the mere declarations of decedent of her purpose to give plaintiff her property, or any portion of it, would not vest him with any right or interest in the notes unless they believed from the evidence that Mary Jones delivered the notes to the plaintiff for the purpose and intent of giving them to him. This testimony as to declarations made by decedent of her intention to provide for appellee was competent under the facts of this case, and ought to have been allowed to go to the jury without any expression of opinion on the part of the court as to the degree of weight or credit that should be given them.

It is contended by counsel for appellants that it was the duty of the court to have given a peremptory instruction to find for the defendants on the trial of the case, as there was no direct evidence of the gift, and that the mere possession by plaintiff of the notes was not sufficient to make out a prima facie case in his behalf. But, in view of the testimony from highly respectable witnesses concerning the declarations made by decedent of her intention to make provision for appellee, coupled with the fact that he was found in possession of this property, we think the case was properly submitted to the jury. But, for the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent herewith.

**HARTING'S EX'RS v. CITY OF LEXINGTON.**

(Court of Appeals of Kentucky. Dec. 14, 1897.)

**PLACE OF TAXATION—PERSONAL PROPERTY.**

Deposits in bank to the credit of testator's estate, consisting of estate given by him to his wife for life, and of unused income therefrom, are taxable where the widow lives.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action between William Harting's executors and the city of Lexington. Judgment for the city. The executors appeal. Affirmed.

Thomas H. Hines and Falconer & Falconer, for appellants.

PAYNTER, J. William Harting, residing in the city of Lexington, died testate in 1887. He appointed Jane Harting, his widow, executrix, and her brother H. F. Hellenmeyer executor, of his will. He directed his debts to be paid. By the second clause of his will he devised all of his estate to his wife, Jane Harting, during her natural life, except that, in the event of her marriage, she was then to have only what the law allowed her as his widow. At her death or marriage the estate was to go to his children. The debts of the estate were paid soon after the will was probated. The widow has transacted some of the business connected with the management of the estate, but she has principally relied upon Hellenmeyer and his advice to control and manage the estate. Part of the notes, bonds, etc., of the estate have been on deposit in a bank in Lexington, and the balance with the trust company. Moneys collected have been deposited in bank to the credit of the estate of William Harting, and drawn out by the personal representatives named, principally upon the checks of Hellenmeyer. Hellenmeyer lives outside the corporate limits of the city of Lexington. It is therefore claimed that the situs of the intangible personal estate is his residence, and that that part of the estate is not liable for municipal tax. Counsel for appellant argues the case as if Hellenmeyer were a trustee of the estate, and the sole one. Jane Harting lives in the city of Lexington, and has never married. The income of the estate has been invested, together with the estate except that used by the widow, and all treated by her as the estate which her husband left. Under the will of her husband, she is entitled to the use of the entire estate during her life or widowhood. She has a life estate in the property which her husband devised, and, if she elected to claim the income from the estate, she would be entitled to it. The one who holds the estate for life is required to pay the tax upon the estate so held. She certainly would be liable for municipal taxes on all the estate which her husband devised. We can see no reason why, if the estate under the will was held in trust, the situs of the in-

tangible personal estate should be where Hellenmeyer resides any more than where the executrix resides. Were the estate so held, in view of the fact that one of the trustees lives in Lexington, and that trustee being a beneficiary, we are of the opinion that the situs of the intangible personal estate is Lexington. However, the municipality of Lexington is interested in making every species of property situated within the corporate limits, liable to taxation under the constitution, bear its full share of the burdens of city government. It has a right to insist that Mrs. Harting, who holds the estate during life, shall pay taxes on it. Of course, while, strictly speaking, the property should be taxed in her name for the reason we have given, yet we can see no objection to the estate being listed for taxation by the personal representatives, if the widow desires in that way to control and manage the estate, as the result is the same to the city. The judgment is affirmed.

**SLOAN et al. v. THORNTON.**

(Court of Appeals of Kentucky. Dec. 14, 1897.)

**WILLS—CONSTRUCTION—DESIGNATION OF DEVISEES AND LEGATEES.**

A clause of the will of an unmarried woman provided, "To the children of my late uncle, W., deceased, their names, number, or place of residence being unknown to me, I bequeath the sum of \$3,000, to be divided equally between them, share and share alike." *Held*, that "children" did not mean living children, merely, but included children of W.'s deceased children, under Ky. St. § 4841, providing that if a devisee or legatee die before the testator, or is dead at the making of the will, leaving issue who survive testator, such issue shall take the estate devised as the devisee would have done if he had survived testator.

Appeal from circuit court, Fayette county.

"To be officially reported."

Action by Elizabeth Sloan and others against R. A. Thornton, executor, for the construction of a will. From the decree, Elizabeth Sloan and others appeal. Reversed.

Geo. S. Shanklin, for appellants. Falconer & Falconer, for appellee.

BURNAM, J. Harriet Woods died, unmarried and without issue, having previously made and published her last will and testament; and the question upon this appeal is the construction to be given to the word "children," in the fourth clause of the will, which clause reads as follows: "Fourth. To the children of my late uncle, John Woods, deceased, their names, number, or place of residence being unknown to me, I bequeath the sum of \$3,000, to be divided equally between them, share and share alike; but, if none of said children should be living at the time of my death, then this legacy shall fall into, and become a part of, my residuary estate, and pass accordingly." It appears

from the testimony in the case that decedent had few relations, and led a singularly isolated life. The devisees under the second and third clauses of her will were related to her on her mother's side. On her father's side, she had no relatives, except the descendants of her late uncle, John Woods, who, previous to her death, had resided in the state of Louisiana, and whose living descendants at the date of the execution of the will consisted of one son, William Woods, and the children of a dead son, John Woods, Jr., and the children of a dead daughter, Mrs. Fisher. Subsequently to the probate of the will, William Woods died, leaving a will in which he devised all of his interest in the estate of his cousin Harriet Woods to his widow, Matilda Ann Woods; and his widow, as devisee, contends that the word "children," as used by Harriet Woods, should be construed to mean "living children," and that the entire legacy belongs to her. Appellants, who are the children of the dead son and daughter of John Woods, deceased, contend that the word "children," as used by the testatrix, was intended to, and did, embrace the descendants of dead children, along with the living children, and that they are entitled to share in the legacy, *per stirpes*, with the appellee, Matilda Ann Woods.

The meaning of the word "children," and words of like import, occurring in wills, under the common-law rule of construction, is admirably stated in the case of *Phillips' Devisees v. Beall*, 9 Dana, 1, in which it was held that "the term 'children,' in a devise, will not embrace grandchildren, unless there is something indicating that the testator intended to include them"; and this rule of construction was uniformly followed by this court until it was changed by statutory regulation. But even at common law, where the whole context of the will showed that the testator intended to extend the meaning of the word so as to include issue or descendants, courts so construed the word as to effectuate the purpose and intention of the testator. In this case the first sentence of the clause in question is, "To the children of my late uncle, John Woods, deceased," as a class,—not to particular children, or living children, but simply "to the children." And in the same sentence she adds, "their names, number, or place of residence being unknown to me"; and from these words it is apparent that she had no acquaintance with the children of her uncle to whom she made these bequests, and no attachment for them individually, and her intention was to make provision for the descendants of her uncle, on account of their consanguinity, and because they were the natural objects of her bounty. There was no reason why she should have selected one, to the exclusion of the others. In the next paragraph of this clause she bequeaths this sum, "to be divided equally between them, share and share alike"; plainly manifesting by these words a purpose that

all of the children or heirs of her deceased uncle should share equally in the provision made for them,—the word "children" being used by her as synonymous with the word "heirs." The last paragraph of the clause provides that, "if none of said children should be living at the time of my death, then this legacy shall fall into, and become a part of, my residuary estate, and pass accordingly." As the conditions upon which this paragraph of the clause was to take effect did not exist at the time of the death of the testatrix, these words have no vitality, and should not be allowed in any way to affect the construction of the first part of the clause, which makes a complete bequest of the fund named therein. It is insisted by counsel for appellee that the words "living at the time of my death" were intended by the testatrix to, and do, qualify the word "children," as used in the first part of the clause; that, if John Woods had left no children living at the time of the death of the testatrix, the whole legacy would have lapsed, and become a part of the fund disposed of in the residuary clause of the will; and that the devise was, in effect, to the children of John Woods living at the death of the testatrix. But the construction contended for does violence to the usual and ordinary signification which attaches to the words in question, and, in view of the whole context of the clause, would tend to defeat the purpose of testatrix to make provision for the descendants of her uncle. It is, however, unnecessary for us to speculate as to the meaning and effect of the word "children," as used in the clause in question, under the common-law rule of construction, as we think the rule of construction provided by section 4841 of the Kentucky Statutes seems to be conclusive thereof. That section reads as follows: "If a devisee or legatee die before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed as the devisee or legatee would have done if he had survived the testator, unless a different disposition is made or required by the will." The effect of this statute, and the change made by it in the common-law rule of construction of the words "children," has been so ably and exhaustively discussed in the cases of *Renaker v. Lemon*, 1 Duv. 212, *Dunlap v. Shreve's Ex'rs*, 2 Duv. 334, and *Chenault's Guardian v. Chenault's Ex'rs*, 88 Ky. 83, 11 S. W. 424, as to dispense with any discussion of them at this time. These cases completely reverse the common-law rule of construction, as laid down in *Phillips' Devisees v. Beall*, *supra*, and hold that the term "children," used in a devise, embraces grandchildren, "unless a different disposition is required by the will." In the case of *Dunlap v. Shreve's Ex'rs*, *supra*, in construing the words of the statute, "a devise to children embraces grandchildren when there are no children," the court says: "This is declara-



tory, affirmative, and peremptory. It declares the common-law doctrine, and peremptorily affirms, when there are no children, a devise to children as a class must necessarily embrace grandchildren; but it does not say that when there are both living children, and issue, also, of dead children, a simple devise to unnamed children, as a class, should never embrace the issue of dead children, and any such construction would conflict with the animate spirit and practical purpose of the statutory law on the subject of lapse and survivorship, and also with the spirit of a will indicating that the testator meant all the descendants of dead children." And this has been the rule of construction ever since. In the case of *Chenault's Guardian v. Chenault's Ex'rs*, the language of the will was, "The remainder of my estate I desire to be equally divided between the children of my brothers and sisters;" and the court, after a careful review of all the decisions of this court, both under the common-law and the statutory rule of construction, held that "the descendants of those children of the testator's brothers and sisters who were dead at the death of the testator, whether they died before or after the will was executed, were entitled to the respective shares of the estate which their several ancestors would have taken if alive"; expressly overruling the case of *Sheets v. Grubbs' Ex'r*, 4 Metc. (Ky.) 339, which conflicted with the statutory rule as interpreted in *Dunlap v. Shreve's Ex'rs*; and we are of the opinion that the proper construction of the fourth clause of the will of the testatrix in this case requires that the fund devised to the children of her uncle John Woods should be divided equally between the appellants and appellee, per stirpes. Wherefore the judgment is reversed, and the cause remanded for proceedings consistent herewith.

#### BRASHEARS et al. v. WEBB.

(Court of Appeals of Kentucky. Nov. 20, 1897.)

##### ATTACHMENT—BOND TO DISCHARGE.

Bond given by defendant in attachment to satisfy and perform the judgment "on the proceedings of the attachment in this case" does not allow of recovery thereon till judgment adverse to defendant on the attachment branch of the case, and is distinguished by the qualifying words from the bond on which Code, § 221, authorizes discharge of the attachment.

Appeal from circuit court, Letcher county.  
"Not to be officially reported."

Action by B. M. Webb against Robert O. Brashears and another. Judgment for plaintiff. Defendants appeal. Reversed.

John L. Scott & Son, W. J. Hendrick, Knott & Edelen, for appellants. Wm. H. Holt, for appellee.

BURNAM, J. In February, 1887, appellee sued appellant Brashears, and sued out a general attachment against his property, and, by

indorsement on the process, attempted to attach, in the hands of one Venters, money due by him to Brashears. After the service of this process on Venters, Brashears executed, with the appellant Combs as surety, before the clerk of the Letcher circuit court, a bond in these words: "We, R. O. Brashears, as principal, and Shade Combs, as surety, hereby bind ourselves to satisfy and perform the judgment of the court on the proceedings of the attachment in this case. Feb. 23, 1887. R. O. Brashears. S. Combs." This bond was indorsed and approved February 23, 1887, by R. B. Bently, C. L. C. C. At the November term, 1890, appellee obtained a personal judgment against appellant Brashears in his suit, and execution issued on the judgment, and was returned "No property found." This suit was then instituted on the bond, the petition averring the pendency of the former suit, the issue of the attachment thereon, the execution of the bond and its covenant, the obtaining of the personal judgment, and the amount thereof, and the return of "No property found," to which defendant Combs filed demurrer, which was overruled. He then tendered his answer, in which he averred that the garnishee, Venters, was not indebted to Brashears in his individual capacity at the date of the suing out and service of the garnishment upon him in any sum whatever; that there had been no determination or judgment by the court on the attachment branch thereof; and that this branch of the case had been abandoned by appellee. He further avers that the only fund in the hands of Venters at the date of the attachment and garnishment, in which Brashears had any interest, consisted of taxes due the state, which had been collected by Venters as deputy sheriff for the appellant Brashears, who was the sheriff of the county, and which was not liable for his individual debts; that, by the express terms of the bond, he covenanted to perform the judgment of the court only in so far as it might sustain the attachment branch thereof; and that he did not undertake or bind himself to pay any judgment which might be rendered against Brashears individually on the claim sued on.

The question submitted for determination by this court is whether the bond sued on is, in substance, the bond authorized by section 221 of the Civil Code, to secure the discharge of an attachment which has been levied upon the property of a defendant, or whether the addition of the words "on the proceedings of the attachment in this case" materially qualified and limited the liability of the security thereon. The bond as executed is not the statutory bond at all, and is not authorized by any provision of the Code; and while it is, perhaps, a valid and enforceable common-law obligation, the limitation of liability to "proceedings on the attachment" part of the case is a material and important one, and clearly distinguishes it from the bond provided for by section 221 of the Code; and no recovery

can be had thereon until there has been a trial and judgment upon the attachment branch of the case determining whether the garnishee, at the date of the service of the attachment, actually held in his hands any fund which could have been subjected to the payment of plaintiff's demand against appellant Brashers. The liability of a security cannot be enlarged beyond the plain terms of his obligation. The petition of appellee was defective, in that it failed to allege that the court had rendered any judgment on the attachment branch of the case, and the demurrer of the defendant Combs thereto should have been sustained; and, for the same reason, the demurrer to the answer of defendant Combs should have been overruled. For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent herewith.

### DUGAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 18, 1897.)

HOMICIDE—EVIDENCE—REBUTTAL—CONFESSIONS—ADMISSIBILITY AND WEIGHT—EXPERT TESTIMONY—WITNESSES—IMPEACHMENT—HARMLESS ERROR.

1. In a murder case, a witness for the commonwealth testified as to the place where the shooting was done. The location of such place was fully established by other evidence. Defense called a witness to prove that said witness of commonwealth had told a different story regarding the location of such place. *Held*, that defendant was not prejudiced by the commonwealth's proving by its said witness statements made by defendant's witness, when same did not tend to establish guilt of accused.

2. There is no reversible error in refusing to permit defendant to impeach a witness of the commonwealth, when the facts sworn to by such witness are amply sustained by the testimony of other witnesses.

3. Where the commonwealth had established that defendant had used a 44-caliber revolver, and defendant introduced evidence that the bullet by which deceased was killed weighed less than a 44-caliber bullet, under Cr. Code, § 224, providing that, after defendant has closed, the commonwealth may offer rebutting evidence, it was proper for the commonwealth to show that a bullet fired through bones and tissues would lose in weight.

4. On the question whether a bullet fired into a human body will lose weight in passing through bones and tissues, the opinion of a physician, based on experience and on knowledge acquired from the study of medical works, was properly admitted.

5. Defendant, after his arrest for murder, confessed, to the officer and others, to having fired the shot, and attempted to justify. At the trial, objection was made by defendant to the introduction of evidence as to this confession, on the ground that, while he was shooting at another man at the time deceased was killed, he was induced to make the confession through fear of the friends of the man at whom he claimed to have fired the shot. *Held* that, in the absence of evidence that defendant was influenced in his statements by fear of those friends, the confession was admissible.

6. The court is the judge of the admissibility of confessions as evidence.

7. Where the corpus delicti has been abundantly established, it is not necessary, under Cr. Code, § 240, providing that a confession not

made in open court will not warrant a conviction unless accompanied with other proof that the offense was committed, for the court to instruct as to the effect of a confession out of court, which had been introduced in evidence.

Appeal from circuit court, Knox county.

"To be officially reported."

John Dugan was found guilty of manslaughter, and he appeals. Affirmed.

James D. Black and G. W. Saulsberry, for appellant. Jas. H. Tinsley and W. S. Taylor, for the Commonwealth.

PAYNTER, J. The appellant, John Dugan, was indicted for the murder of John C. Colson. He was found guilty of manslaughter, and sentenced to the penitentiary for 21 years. On June 1, 1897, between 7 and 8 o'clock p. m., Colson was shot and killed in the city of Middlesboro. The testimony in the case is too voluminous to be given here. According to the testimony offered by the commonwealth, Dugan shot and killed Colson. Dugan and William Miller had some trouble in front of what is known as the "Colson Block." Colson was the peacemaker. He disarmed Dugan, by taking from him, in a friendly way, his revolver. The parties separated. Dugan went to his house, procured a 44 Remington, and in a few minutes returned to a place near where the difficulty and separation had taken place. There was a vacant lot adjoining the Colson Block. On this lot Miller and Colson had hitched their horses. Dugan left Cumberland avenue, on which this lot faces, and went to within a few feet of where Colson and Miller were unhitching their horses. Colson had unhitched his horse, and turned, facing Dugan. It was light enough for Dugan to have recognized Colson and Miller. Dugan shot Colson, and immediately fired at Miller. Herman Wiensien, who did business on the opposite side of the street, testified that he saw a man holding a pistol; that there was a flash; that then a man said, "Oh, he shot me;" that then another shot was fired, and Colson walked to the avenue, and then up a stairway leading to the second floor of his block, where, in a few minutes, he expired; that Dugan immediately came upon the sidewalk, holding a pistol in his hand. This witness also testified that the person who did the shooting had on a light suit of clothes, as Dugan appeared to have been dressed. A colored girl who lived at Dugan's house testified that she saw some one present a pistol while standing at the place where the commonwealth claims that Dugan stood when the shot was fired that killed Colson. This girl was standing in the yard back of Dugan's house. Without repeating here what Dugan said, it is sufficient to say that Dugan admitted to several persons that he had shot Colson. There is proof in the record tending to show that Dugan had an ill feeling towards Colson. Numerous witnesses testified that only two shots were fired on the occasion when Colson was killed. Du-

gan testified that he fired two shots at William Miller; that Miller was attempting to take his life; that he fired the shots in self-defense. Dugan seeks to sustain his claim that Miller fired at him by attempting to prove that the second report was louder than the first; and he claims that that is to be accounted for because Miller fired at about the same time that he (Dugan) fired the second shot. There is no escape from the conclusion, after carefully reading this record, that Dugan purposely shot and killed Colson. We do not entertain the slightest doubt of his guilt. Numerous errors are assigned for a reversal of the case. We will briefly consider some of them:

It is claimed that the court erred in allowing the chief of police and his deputy to testify as to what Dugan did when the chief of police approached him while he was under arrest, in charge of the deputy. Counsel contends that the court permitted the commonwealth to prove that Dugan attempted to draw his pistol on the chief of police and his deputy. After the arrest, the deputy allowed Dugan to retain his pistol until the chief of police appeared on the scene. Neither of these officers testified that Dugan drew his pistol on them. They say that, when the chief of police came up, Dugan had the pistol in his bosom or pants; that he went to draw it, and the chief of police asked him to give it to him. It does not appear from the testimony that Dugan was drawing it in a hostile manner, or resisted the effort to take the pistol; and we are unable to see how the facts with reference to the surrender of the pistol, as given by the officers, did or could have prejudiced the defendant in the slightest degree.

Emma White was introduced by the commonwealth in chief, and testified that she was standing in Dugan's back yard when the shots were fired; that she saw a man raise a pistol to fire, but she did not know who it was, as she threw her apron over her face, so that she could not see the firing. She said that the party who did it stood near the pavement. The defendant, ostensibly to impeach the testimony of Emma White, introduced Mrs. Whitaker. She testified that the White girl told her a few mornings after Colson was killed that she saw a man shoot a pistol near the rear of the Colson Block. In view of the testimony of the defendant and the commonwealth as to the location of the parties when the firing took place, this testimony was unimportant, as all admitted that the shooting took place in the vacant lot between the Colson Building and the paling fence. Besides, it was an effort to make substantive testimony for the defendant by contradicting Emma White, which is not permissible. In view of this fact, the testimony of Mrs. Whitaker as to what Emma White said was so unimportant that the defendant could not have been prejudiced by the action of the commonwealth in proving by

Emma White certain statements made to her by Mrs. Whitaker. The statements which Emma White claims that Mrs. Whitaker made to her did not in the slightest degree tend to establish the guilt of the accused.

It is contended that the court erred in refusing to compel Bosworth to answer questions with reference to an alleged corrupt and dishonorable transaction at a certain election, of which he was one of the officers. Bosworth testified that Dugan said, in the city hall, that Colson had slapped him in the face, and took his pistol away from him, and added, "You know me well enough to know that I would kill any ~~s~~ — of a — that would treat me that way." This was the important testimony which Bosworth gave. A number of witnesses had testified substantially to the same facts. Dugan admitted that he had made various admissions, inculpatory in their character, but claimed that he did it through fear of Miller and his friends. It may be assumed that the court erred in refusing to allow Bosworth to answer the questions, and the defendant to prove the truthfulness of his avowal that he could show that Bosworth was guilty of misconduct in the election. Still, Dugan was not prejudiced by it, because several other witnesses had testified substantially to the same facts to which Bosworth had given testimony. Besides, Dugan, on his examination as a witness, substantially admitted that he had made the inculpatory statements.

It appeared in the testimony that the pistol from which Dugan fired the shots was a 44 Remington. The proof tended to show that the ball of a 44 cartridge would weigh, before it is shot, 200 grains, and that the ball, in the same condition as when removed from the body, weighed only 176 grains. Dr. Robinson said that the ball passed through the collar bone and the shoulder blade, and that the effect of a ball's passing through such bones would be to reduce its weight. He did not give an opinion as to what the loss would be. The defendant offered testimony to show that balls which had been shot from a 44 cartridge into soft wood, and into earth, and some other substances, not bone, would lose a certain number of grains, but much less than 24 grains. In rebuttal, the commonwealth introduced Dr. Caldwell, who gave an opinion, from his experience and knowledge, that a ball fired into the body, passing through tissue and bones, would be reduced in weight; and he also gave an opinion, from knowledge which he had acquired from the study of medical works, that a ball fired into the skull (which is about the same thickness as the collar bone) would be reduced in weight from 3 to 50 grains. It is contended that it was erroneous for the court to admit this testimony—First, because it was not offered properly in rebuttal; second, because he was not competent to give an opinion as an expert. Under section 224, Cr. Code, after the defendant has closed, the commonwealth may offer

rebutting evidence, and for a good reason, and in furtherance of justice, may be permitted to offer evidence upon her original case. We think that this testimony was properly offered in rebuttal. The defendant had introduced evidence by which it was attempted to show that the ball which was taken from the body of Colson was not a 44. Then the commonwealth offered Dr. Caldwell, as an expert, to show that a ball might be reduced even more than 24 grains by passing through bones and tissues of the human body. Experts acquire knowledge through actual experience, and by their study of certain subjects. They in that manner qualify themselves to give opinions on subjects of which they have such special knowledge, and it is competent for them to do so, within certain limitations. We think that Dr. Caldwell's experience, and the knowledge which he had acquired by the study of books relating to his profession and the subject under investigation, rendered him competent to give an opinion as to the effect on a ball which passed through bones and tissues of the human body.

It is contended that the confessions or admissions of the defendant were made under such circumstances as rendered them involuntary. The rule is well established that confessions induced by the promises, threats, and advice of the prosecutor, or officer having the prisoner in charge, or of any one having authority over him, or the prosecution itself, or a private person in the presence of one whose acquiescence may be presumed, will be deemed voluntary, and will be inadmissible as evidence. *Young v. Com.*, 8 Bush, 366. This is a well-settled rule. The testimony shows that none of the causes stated existed for rejecting the testimony, but it is claimed that the confessions were made because the defendant was afraid of one William Miller and his friends; that he was afraid to state the facts with reference to the shooting as he claimed them to exist; that they would have implicated Miller, and thus imperiled the life of the defendant. Although the defendant claimed on the trial of this case that Miller attempted to shoot him, and he shot in self-defense, and that if he shot Colson, it went wide of the mark, because he was shooting at Miller, yet, at the time of the admissions which the commonwealth proved, he never intimated that he shot at Miller. He admitted to the officer in charge that he had shot Colson. He did this before Miller had appeared on the scene. After the shooting he went so far as to give the reasons for shooting Colson, and the testimony strongly tends to prove that the first shot which was fired was the fatal one, and Dugan admits that he fired it, although contending that he fired it at Miller. It is wholly inexplicable to us why Dugan was afraid to admit on the night of the arrest that he had shot at Miller, as he did not hit Miller, and as he contends it was done in self-defense, yet was willing to

admit that he had purposely killed an influential citizen, and sought to mitigate or justify his act. The testimony in the record shows that there was great excitement in the town, resulting from the killing of Colson, but not the slightest evidence tending to prove that the excited condition of the people influenced Dugan to make the admissions. We think the court properly permitted the evidence of the confessions or admissions to go to the jury. The jury heard all the evidence relating to the circumstances under which they were made, and they were the judges as to the weight which should be given them.

It is contended that the court should have given the jury instructions which would, in effect, have allowed the jury to determine whether it was proper for them to consider the admissibility of the confessions as evidence. This court has uniformly held that the court is the judge as to the admissibility of the confessions as evidence. We deem it unnecessary to cite authority on this question, as the rule we have stated has always been recognized by this court as the correct one.

Section 240, Cr. Code, reads as follows: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed." It is contended that the court erred in not giving the jury an instruction on the subject as to the effect of a confession not made in open court. In the case of *Cunningham v. Com.*, 9 Bush, 149, it was ruled that, besides proof of any confession a defendant may have made of his guilt, unless made in open court, there must, to warrant a conviction, be other evidence conducing to prove him guilty of the offense alleged to have been committed by him. The language of section 240 does not admit of such an interpretation. *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387, accords with this view. In that case the court said, "If the confession is accompanied with proof that such an offense was committed (i. e. with proof of the corpus delicti), it will warrant a conviction." The court in that case also held, in effect, that section 240 was a legislative declaration of a rule that had previously existed. *Wigginton v. Com.*, 92 Ky. 282, 17 S. W. 634, reaffirmed the interpretation which had been made of section 240 in the *Patterson Case*. These cases gave an entirely different meaning to section 240 from that which had been given by the court in the *Cunningham Case*. While the court did not in these cases, in terms, overrule the *Cunningham Case*, yet in effect they did so. We adhere to the doctrine of the *Patterson* and *Wigginton Cases*, and overrule the *Cunningham Case*. We do not say that a case may not arise in which it would be proper for the court to tell the jury the effect of extrajudicial confessions. But we are of the opinion that in this case it was not necessary to do so. The corpus delicti was abundantly proven, as shown by the facts

that we have heretofore given, independent of the confessions or admissions of the defendant out of court; hence it was unnecessary for the court to give the instruction in question. This view is in accord with *Bush v. Com. (Ky.)* 17 S. W. 330.

We are of the opinion that no errors of law occurred at the trial which prejudiced the substantial rights of the defendant. The judgment is affirmed.

# MOSS et al. v. RILEY et al.

(Court of Appeals of Kentucky. Oct. 13, 1907.)

## SCHOOLS AND SCHOOL DISTRICTS—ELECTION OF TRUSTEES—VIVA VOCE VOTING.

Const. Ky. § 155, provides that the provisions of preceding sections, requiring that elections by the people shall be by secret official ballot, "shall not apply to the election of school trustees and other common school district elections. Said elections shall be regulated by the general assembly except as otherwise provided for in this constitution." Ky. St. § 1446, part of the general election law, provides that "in all elections hereafter held in this state on any subject which may by law be submitted to a vote of the people, and for all or any state, district, county, or municipal offices except school trustees and other common school district elections, the voting shall be by secret official ballot." Ky. St. § 4434,—part of the common-school law,—provides that the vote in electing school trustees shall be taken viva voce, and that "the qualified voters of the district shall be electors, and any widow having a child between six and twenty years or any widow or spinster having a ward" may vote. Ky. St. § 3588,—part of the charter of cities of the fourth class,—provides that the public schools shall be under the control of a board of education, consisting of two trustees from each ward, to be elected at the general November election "by the qualified voters of the city at large." Ky. St. § 3606, provides that "any city of the fourth class in which said system of public schools shall be established and maintained shall constitute one common school district." Held that, as there is nothing in the charter prescribing the secret ballot in the election of the members of the board of education, the voting should be viva voce, and those who are qualified to vote under the general school law may vote.

Appeal from circuit court, Bell county.

"To be officially reported."

Action by M. J. Moss and others against O. V. Riley and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

D. B. Logan, for appellants. Wm. Low, for appellees.

HAZELRIGG, J. The sole question presented on this appeal is whether the members of the board of education of Pineville, a city of the fourth class, are electible by a viva voce vote or by secret ballot. Beginning with section 145, and ending with section 154, under the head of "Suffrage and Elections," the constitution prescribes the qualifications of voters and a scheme of registration, and requires (section 147) that all elections by the people should be by secret official ballot. Other provisions contain limitations on the number of elections, and fix the hours be-

tween which they were to be held. The filling of vacancies by election or appointment were also provided for. Then follows section 155, namely: "The provisions of section 145 to 154 inclusive shall not apply to the elections of school trustees and other common school district elections. Said elections shall be regulated by the general assembly except as otherwise provided for in this constitution." Pursuant to these sections the general assembly passed a general election law, providing, among other things, that "in all elections hereafter held in this state on any subject which may by law be submitted to a vote of the people, and for all or any state, district, county or municipal offices except school trustees and other common school district elections, the voting shall be by secret official ballot, printed and distributed as hereafter provided, and no other ballots shall be used." Ky. St. § 1446. Then follow sections providing for the appointment of election officers, the form of official ballots, and directing generally as to the conduct of the election, and the manner of counting the ballots. So far we find no plan for the election of school trustees. But in section 4434, Ky. St., found in the general law regulating common schools, we find a statute providing that: "Each school district shall be under the control of three trustees. The vote in electing the trustee shall be taken viva voce, and the election shall be held at the school house, and if no school house be in the district, at such convenient places as the trustee may select, from one o'clock to six o'clock in the afternoon on the 1st Saturday in June each year, and at this election the qualified voters of the district shall be electors and any widow having a child between six and twenty years or any widow or spinster having a ward, etc., may also vote." This law was enacted at the session of the general assembly which adopted the charter governing the cities of the fourth class, the two laws being adopted within a few days of each other. The charter provisions on this subject are as follows:

"There may be maintained a system of public school, at which all the children residing in the city between the ages of six and twenty years may be taught at the public expense. Said school shall be under the control of a board to be styled 'Board of Education,' consisting of two trustees from each ward of the city to be elected at the general November election in 1893, by the qualified voters of the city at large. They shall meet and qualify on the first Monday in January after their election. The trustees so elected shall hold their offices one half for two years and one half for four years as shall be determined by lot at the first regular meeting after the election. And at the general election, every two years thereafter, there shall be elected by the qualified voters of the city at large, one trustee from each ward in the city in which the terms of his predecessor in office will then expire. Said trustees shall possess the same

qualifications as are required for a councilman. Said board of education shall continue, and it is hereby declared, a body politic and corporate, under the name and style of 'Board of Education' with perpetual succession, and by that name may contract and be contracted with, sue and be sued, have and use a corporate seal, the same to renew or alter at pleasure; may purchase, receive, hold, lease, sell and dispose of real and personal estate for public school purposes. The control and management of the public schools of the city and property and funds thereunto belonging, shall be, and is hereby, vested in said board, subject to the provisions of this law," etc. Ky. St. § 3588.

Section 3606, Ky. St.: "Any city of the fourth class, in which said system of public schools shall be established and maintained, shall constitute one common school district and a superintendent of public instruction shall pay every year out of the common school fund of the state to the white board of education, the same amount per capita for each white child of pupil age in said district, and to the colored board of education the same amount per capita for each colored child of pupil age in said district, as he shall pay to each child of pupil age in other school districts."

These seem to be the only provisions affecting the question under consideration. From the sections of the constitution quoted, it is clear that the framers of that instrument did not intend to require a secret ballot in the election of trustees of common schools, or in any election in common-school districts; and it seems equally clear that this did not prohibit the general assembly from adopting such a system. The question was left to the general assembly. While this is true, the intention of the framers of the organic law, as well as that of the general assembly, in adopting the general election law, would seem to be against the policy of adopting the secret ballot in the election of such trustees. This is, however, an implication merely, and as, in direct terms, the question is left to the general assembly, we do not doubt the power of the latter body to control the method of such elections, at any rate by general law. And we are of the opinion, as there is nothing in the charter prescribing the secret ballot in the election of trustees or the members of the board of education, the legislature intended to leave the matter where it was left by the constitution and by the general law. This view of the question requires the election to be held by viva voce system. In express terms the election is to be at the November election, the regular officers of which must provide therefor, and at which the qualified voters of the city may participate. We regard it immaterial that the trustees are designated the "Board of Education." They perform the duties of trustees, and the election is only held in a common-school district under the express provision of section 3606,

Ky. St. We are in doubt as to the meaning of the clause, "qualified voters of the city," but, in view of the general law conferring the right of suffrage on widows, etc., in such elections, we are inclined to hold the words to mean those of the city who are qualified to vote under the general school law. The judgment below is in accord with these views, and is therefore affirmed.

#### MUTUAL SAVINGS & LOAN ASS'N v. OWINGS.

(Court of Appeals of Kentucky. Nov. 20, 1897.)  
BUILDING AND LOAN ASSOCIATIONS—Rights or Assignees of Stock—Usury.

1. Defendant, who owned 16 shares of stock in plaintiff association, desiring to obtain a loan from plaintiff, purchased from other stockholders 24 additional shares, paying to them the calls thereon up to the date of her purchase, and these shares were transferred to her on the books of the company in due course of business. *Held*, that defendant is entitled to credit for the dues paid on the 24 shares as if she had originally subscribed for them, and paid to the association the dues thereon.

2. A borrower is liable only for the amount of the loan with legal interest, provisions of the charter allowing any greater interest being invalid.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by the Mutual Savings & Loan Association against Sallie R. Owings to recover the amount of a loan and enforce a mortgage lien. Judgment for defendant on her counterclaim, and plaintiff appeals. *Affirmed*.

R. A. Mitchell and Thos. Turner, for appellant. E. C. O'Rear, for appellee.

BURNAM, J. Appellant alleges that it is a corporation created under the provisions of chapter 56 of the General Statutes; that in July, 1884, it loaned to the appellee \$4,000, to be repaid in installments, and to secure the payment of which she executed a mortgage on real estate; that at the date of the loan appellee was the owner of 40 shares of the capital stock of the association; and her account with the association is thus stated by appellant:

To Loan.....	\$4,000 00
Interest.....	1,160 00
Fines.....	126 00
Check returned.....	40 00
	<b>\$5,326 00</b>
By Cash dues.....	\$ 910 00
Cash and int. in advance.....	1,875 00
Cash.....	1,740 12
Int. allowed by Ass'n.....	440 00
Amt. due Ass'n.....	370 87
	<b>\$5,326 00</b>
To bal., June 1, 1899.....	<b>\$370 87</b>

—For which judgment is prayed.

Appellee resisted payment—First, on the ground that at the time of her subscription to the capital stock of the company and the making of the contract she was a married woman, and relies on her coverture; and, second, that the debt had been satisfied in full before the

institution of the suit. She alleges that previous to the loan, on July 31, 1884, she had paid to appellant \$910 on her subscription to the capital stock of the company, for which she claims she was entitled to credit; that she received only \$2,125 in actual cash, the balance, \$1,875, being reserved by the company as the sum that would be due by her for interest and dues up to November, 1886, leaving due to the association as of that date only the sum of \$1,215; that subsequently thereto she had paid on the debt \$1,740.13, and that she had overpaid appellant \$530. And she further pleaded that the item of \$136, which constituted a part of the alleged balance due appellant, was made up by fines incurred by failure to pay the alleged balance, and was usurious; and she pleaded and relied on the statute in bar of recovery of same, and made her answer a counterclaim, and prayed judgment against appellant for \$370, the amount which she alleges she overpaid it. The chancellor in his judgment deducted the \$910, with the accumulated interest thereon, amounting to \$950.95, from the amount of the loan at the date thereof; and also credited appellee with the \$1,875 retained by the company as of that date; and found that appellee was indebted to appellant, after these deductions, in the sum of \$1,174.05; and charged her interest at 6 per cent. thereon from the date of the loan until paid, crediting her with the various sums which made up the \$1,740.13, with interest thereon; and found that appellee had overpaid appellant \$289.61, for which she was given judgment on her counterclaim,—in effect holding that all appellant was entitled to recover was the amount loaned, with the legal interest thereon, which is in accord with adjudications of this court passing upon similar transactions and construing similar provisions of the charters of building and loan associations. See *Association v. Johnson*, 88 Ky. 191, 10 S. W. 787, and authorities there cited. Appellant contends that appellee originally subscribed for only 16 shares of the stock of the company, and that she had paid upon this original subscription for stock weekly installments of 25 cents on each share, which amounted, on July 30, 1884, to the sum of \$364; that about that time, being desirous of borrowing \$4,000 from appellant, she purchased 24 other shares from parties who had subscribed therefor, and paid the calls thereon up to the date of such purchase; and that, as appellee did not pay any calls upon these 24 shares of stock prior to her purchase thereof, in 1884, she is not entitled to recover or have credit on this obligation for any part of these dues paid by her vendors prior to their transfer to her,—the argument being that, so far as these 24 shares are concerned, she could not acquire any rights to dues previously paid, except such as were enjoyed by her vendors, and that the court had by its judgment, in effect, annulled valid contracts with other persons who were competent to contract. It may be remarked that there are no

pleadings in the case which definitely and distinctly raise the issue argued by counsel; but, even if this defense were properly set up in the pleadings, it could not avail appellant herein, as there is no pretense that the certificates for these 24 shares of stock were not acquired by the appellee, and the title thereto transferred to her on the books of the company, in due course of business and with the consent of appellant. And having so acquired this stock, she was vested with the title to all the accumulations which belonged to same as fully as though she had originally subscribed for them and paid the dues thereon; and her rights and liabilities to the company, so far as this stock is concerned, are identical with those of the 16 shares of stock originally purchased by her. The judgment contains no error prejudicial to the rights of appellant, and is therefore affirmed.

GLOBE TOBACCO WAREHOUSE CO et al.  
v. LEACH.

(Court of Appeals of Kentucky. Nov. 19, 1897.)

WAREHOUSEMEN—LIABILITY ON BOND—ILLEGALITY OF TRANSACTION.

1. A tobacco warehouse company executed bond, with sureties, undertaking to pay to all consignors of tobacco the proceeds thereof, the bond reciting that the company had become a member of the tobacco exchange, and had thereby become bound to execute such a bond. *Held*, that the obligors cannot avoid liability to a consignor of tobacco on the ground that the tobacco exchange was illegal, as being a combination in restraint of trade.

2. The suspension of the principal in the bond from membership in the tobacco exchange does not release the sureties from liability to a consignor of tobacco unless such consignor, or at least the public, had notice of such suspension.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by W. A. Leach against the Globe Tobacco Warehouse Company and others on a bond. Judgment for plaintiff, and defendants appeal. Affirmed.

Stone & Sudduth, for appellants. Carroll & Hagan, for appellee.

WHITE, J. This action was brought by the appellee, W. A. Leach, against appellants, the Globe Tobacco Warehouse Company, Theodore Alexander & Co., and R. H. Sousley, on a bond executed to the Louisville Leaf Tobacco Exchange, by the said Globe Tobacco Warehouse Company, with Alexander & Co. and Sousley as sureties, by which action it is sought to recover the proceeds of the sale of certain tobacco shipped by appellee, Leach, and sold by the Globe Tobacco Warehouse Company, and for which it failed to account. The Louisville Leaf Tobacco Exchange was made a party plaintiff in the action, but is only a nominal party, having no direct interest. The allegations of the petition are that in 1892 the Globe Tobacco Warehouse Company, a corporation regularly and duly or-

ganized to engage in the business of public warehouseman of tobacco in the city of Louisville, Ky., having become a member of the Louisville Leaf Tobacco Exchange, and being required by the rules and by-laws of said exchange to execute a bond, did so, with said Alexander & Co. and Souseley as sureties, in the penal sum of \$5,000. The preamble and conditions, in so far as are necessary to the determination of this case, are: "Whereas, said principals are engaged in the business of tobacco warehousemen in the city of Louisville, Ky., carrying on what is known as the 'Globe Tobacco Warehouse,' and have become members of the Louisville Leaf Tobacco Exchange, and, by so becoming, have become bound to execute a bond of this tenor: Now, if said principals \* \* \* shall well and truly pay over to all consignors of tobacco the proceeds thereof which may be due them, then this obligation shall be void; otherwise, in full force and effect. \* \* \* It is further understood that the following classes of persons shall have benefit under this bond, and the right to use the name of the Louisville Leaf Tobacco Exchange in suits upon it, to wit: \* \* \* (3) Any person who has or may consign to said warehouse tobacco for storage or sale," signed, etc. The petition then alleges that appellee, Leach, had in 1894 consigned to said Globe Tobacco Warehouse certain tobacco, which was by them sold for and on his account, realizing a net balance due him of \$155.49, which sum was still unpaid by said Globe Tobacco Warehouse, and hence he pleaded a breach of the covenant and conditions of the bond, and asked to recover that sum from the sureties. The answer of Alexander & Co. and of Souseley, sureties, admitted all the facts as stated in the petition, and pleaded, in avoidance of recovery: That the bond given was executed on condition that said Globe Tobacco Warehouse Company might be admitted to, and remain a member of, the Louisville Leaf Tobacco Exchange, and that this was the sole and only consideration for same; and that at a meeting of the Louisville Leaf Tobacco Exchange held November 1, 1892, the following resolution was passed by that body: "Resolved, that the Globe Tobacco Warehouse Company be suspended from membership in the exchange so long as Mr. J. R. Crawford is an officer of said warehouse." That at the time of the adoption of this resolution, and afterwards, said J. R. Crawford was an officer of said company, and, by reason of said resolution, the Globe Tobacco Warehouse Company ceased to be a member of said exchange, and unable to enjoy its benefits and privileges; and that thereupon the consideration for the bond totally failed, and said bond became null and void for all purposes subsequent to said date, November 1, 1892; and that then and there these sureties were released from their suretyship. And they also further alleged that the acts complained of in the petition were all done subsequent to said

date, November 1, 1892, and they therefore denied any obligation to the appellee, Leach, for any sum in any behalf. Afterwards the appellants amended their answer, and, by way of amendment, pleaded that the corporation known as the Louisville Leaf Tobacco Exchange was organized and conducted for an unlawful purpose, was in fact a trust or combination organized for the purpose of creating a monopoly and of stifling just competition, and said corporation is void and contrary to the statute law of Kentucky, and, this being true, that it had no right or authority to take the bond of said Globe Tobacco Warehouse Company, and that the consideration for said bond is vicious and contrary to public policy. Then appellants denied that they were indebted to said Leach in the sum of \$155.49, or any sum. There was a second amended answer filed, which alleged that the tobacco of Leach was shipped, if at all, after the 1st day of November, 1892, and while said J. R. Crawford was an officer of said warehouse company, and that the failure to pay by said warehouse company, if at all, was while said J. R. Crawford was president of said company. To each and all of these answers and amendments the court sustained demurrers, excepting, of course, that paragraph that contained a denial of the shipment and sale and of the indebtedness. Then, by agreement of parties, a jury was waived, and the law and facts submitted to the court for trial. Upon the trial it was agreed, in writing, that appellee, Leach, if sworn, would testify and prove that the Globe Tobacco Warehouse Company sold tobacco for him to a net amount due him of \$155.49, which said warehouse company received, but failed to pay him, and that that written statement was to be his testimony; and the court filed his conclusions of law and facts, and rendered judgment for the plaintiff, Leach, for the full amount claimed. Appellants' reasons and motion for new trial having been filed and overruled, they have appealed to this court.

The plea of appellants that the Louisville Leaf Tobacco Exchange was a trust or a combination of persons or companies, and was in itself illegal, and engaged in combinations in restraint of trade, and that, therefore, the bond executed to it by appellants is illegal and void, it seems to us, is not available to these sureties in an action by a consignor of tobacco to the warehouse company for sale. To permit such defense would permit a party to do a wrong, and, when an innocent third party is injured, to plead his own wrong as a defense. From the answer presenting the business of the exchange, we have serious doubts whether its business was unlawful; but, if it be, the appellants can derive no benefit in this action from that. In the several answers and amendments, the appellants pleaded that the Globe Tobacco Warehouse Company was suspended from the leaf tobacco exchange so long as Crawford was con-



nected with the house. But it is not pleaded that by the by-laws of the exchange, or as any condition in the bond, a suspension from the exchange would release the bond, and that upon reinstatement a new bond would have to be given; nor is it pleaded that at the date of the shipment by appellee, Leach, the Globe Company was not then a member of the exchange, or even that it had not been reinstated; but it is only alleged that Crawford was still its president. It may be that, after the order of suspension, the charges were investigated, and Crawford exonerated, and the Globe Company reinstated. However, we see no reason why an order of suspension merely would of itself release the sureties, without the fact of such suspension and the consequent release of the sureties having been brought to the notice of Leach, or at least of the public by some sort of notice. As the case appears, the appellee, Leach, consigned to the Globe Company his tobacco for sale, and that company sold same, and failed to account to him for the proceeds; and this is one of the things the appellants undertook to secure would be done, and it seems to us that there is no reason presented which either in law or good conscience would release appellants from this obligation. Finding no error, the judgment of the circuit court is affirmed.

#### ABOHOSH v. BUCK et al.

(Court of Appeals of Kentucky. Nov. 18, 1897.)

WRONGFUL ATTACHMENT — DAMAGES — INSTRUCTIONS—HARMLESS ERROR.

1. In an action for maliciously, and without probable cause, suing out an attachment, the plaintiff cannot recover attorney's fees and expenses in defending the attachment, without proof of malice and want of probable cause.

2. In an action for maliciously, and without probable cause, suing out an attachment, where there is no allegation or testimony as to damage resulting from injured feelings, the failure of the court to instruct on that question is not error.

3. In an action for maliciously, and without probable cause, suing out an attachment, where the jury finds that the attachment was not obtained maliciously and without probable cause, and that the plaintiff is not entitled to recover, the failure of the court to instruct on the question of damage from injured feelings is without prejudice.

Appeal from circuit court, Warren county.  
"Not to be officially reported."

Action by A. Abohosh against Buck & Perkins. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

W. E. Garth, for appellant. Byron Renfrew, for appellees.

PAYNTER, J. The attachment which the appellees obtained against the property of the appellant, A. Abohosh, was discharged; and this action is for maliciously, and without probable cause, suing out the attachment. The plaintiff seeks to recover special damages, such as attorney's fees for defending the attachment, etc., and also for

loss of credit and business reputation. Under the instructions of the court, before the jury could find for the appellant they were required to believe that the attachment had been sued out maliciously and without probable cause. It is insisted that the plaintiff was entitled to recover the special damages alleged, such as attorney's fees, expenses, etc., without being required to show that the attachment was obtained maliciously and without probable cause. It is undoubtedly true that, had the suit been upon the attachment bond, a recovery could have been had for such damages as were covered by its terms, without the plaintiff being required to show that the attachment was obtained through malice and without probable cause. The mere fact that some of the items of damage were covered by the provisions of the attachment bond cannot change the character of the action, or avoid the necessity of proof ordinarily required in such an action. In *Mitchell v. Mattingly*, 1 Metc. (Ky.) 237, the petition did not allege malice and the want of probable cause. It alleged that the attachment was obtained without good cause. Plaintiff sought to recover in that action for injury to character and credit. The court decided that there could be no recovery for injury to credit or character, because of the want of necessary allegations; but, in effect, it held that, under the allegations of the petition, there could be a recovery for such damages as the terms of the attachment bond embraced. However, the court in that case, in discussing the question, said, "To maintain the present action on the ground that the attachment was maliciously prosecuted, the plaintiff must allege and prove both malice on the part of the defendant, and the want of probable cause for suing out the attachment." This language clearly shows that the court was of the opinion that, had the necessary allegations been made to have constituted an action for maliciously and without probable cause suing out the attachment, it would have been essential to have shown malice and want of probable cause; hence embracing items of damages which might have been recovered in an action on the attachment bond does not relieve the plaintiff from the necessity of showing facts essential to be shown in an action for maliciously, etc., suing out the attachment. In *Hall v. Forman*, 82 Ky. 505, it was ruled that where a party had brought his action for maliciously suing out an attachment, and recovered, it would bar an action on the attachment bond. This view was taken upon the idea that a recovery of general damages embraced the entire amount which the plaintiff was entitled to recover, and that but one action could be maintained for the wrongful act of suing out the attachment. This case does not hold that in such an action the plaintiff would have been relieved of the necessity of showing malice and want of probable cause in order to have recovered

such damages as might have been recovered on the bond.

It is insisted that the court erred in not embracing in the instructions the injury to "feelings." There are two answers to this contention: First, the plaintiff, in alleging general damages, chose to specify only injury to the "credit, trade, and business reputation," and, in offering testimony on general damages, confined it to the items mentioned. The second answer is that as the jury found that the attachment was not obtained maliciously and without probable cause, and that the plaintiff was not entitled to recover, it follows that he was not prejudiced by the failure to include in the instructions the question of damages resulting from injured feelings. The instruction defining "probable cause" does not contain language which we entirely approve, yet we do not think it was misleading to the jury. The judgment is affirmed.

#### CHRISTMAN v. CHESS et al.

(Court of Appeals of Kentucky. Nov. 16, 1897.)

##### APPEALABLE ORDERS.

1. An order refusing to set aside an order made at the term at which verdict is rendered, and granting a new trial, is not appealable.

2. An order granting a new trial, having been made at the term at which verdict is rendered, an order refusing to enter judgment on the verdict is not appealable.

Appeal from circuit court, Jefferson county.

"To be officially reported."

Action by Jacob Christman against Chess, Wymond & Co. to recover damages for personal injuries. The court set aside the verdict for plaintiff, and granted a new trial. The plaintiff's motion to set aside the order granting a new trial, and his motion for judgment on the verdict, were overruled. Plaintiff appeals. Dismissed.

Simrall, Bodley & Doolan and B. F. Washer, for appellant. Kohn, Baird & Spindle, for appellees.

PAYNTER, J. This is an action to recover damages for personal injury. On January 8, 1896, the case was tried, and the jury rendered a verdict of \$1,000 for the plaintiff, Christman. The defendants, immediately on the rendition of the verdict, moved the court for a judgment notwithstanding the verdict. No motion was made or grounds for a new trial filed in the case. The court took time on the defendants' motion, and on the 8th of February, during the term of court at which the case was tried, overruled the defendants' motion, and on its own motion granted a new trial, for the reason, as given in court's opinion, the verdict was not sustained by the evidence. The plaintiff moved to set aside the order granting a new trial, and moved that the court

render a judgment on the verdict. The court overruled these motions. It would be useless expenditure of time to engage in a discussion to show that this court has only appellate jurisdiction in cases where final judgments or orders have been rendered. If there was not a final judgment or order in this case, it follows that this court has no jurisdiction of the appeal. While it may be said that it might save the expense of trials hereafter to dispose of the question as to the right of the court to grant a new trial, and the question as to whether the court should have rendered a judgment notwithstanding the verdict, yet a sufficient answer is made by saying that this court can only hear appeals from final judgments or orders. In *Helm v. Short*, 7 Bush, 624, the court said: "Blackstone (3 Bl. Comm. 497) defines final judgments to be such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy sued for." In the case of *Railroad Co. v. Punnett*, 15 B. Mon. 48, this court holds that a final order "either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order after the expiration of the term to place the parties in their original position." Both of these definitions were quoted with terms of approval by the court in the subsequent case of *Turner v. Browder*, 18 B. Mon. 826, and they may be accepted as correct expositions of the terms "final orders and judgments." The court did not render the judgment on either the motion of the defendants or plaintiff. There has been no final order or judgment in this case. The order refusing to set aside the order granting a new trial and the order refusing to enter judgment on the verdict are not final orders. Counsel for appellant rely upon the case of *Lime Co. v. Kerr*, 78 Ky. 12, to sustain the right of appeal in this case. In that case there had been a judgment upon the verdict. After the term at which the judgment was rendered had expired, the court made the order granting a new trial. This court held that the order was void, and therefore, upon the court's refusal to set it aside, an appeal would lie. The facts were entirely different in that case from what they are in the present case. Whether the court should have granted a new trial without grounds being filed, it is not necessary for us to decide on this appeal. Assuming the court should not have granted a new trial without a motion being entered, and grounds filed therefor, the action of the court was not void, but erroneous. The order was made at the term at which the verdict was rendered, and before any judgment had been entered upon the verdict. Should this case, after final judgment, be appealed to this court, then the court will have the power to review the action of the court in

overruling the plaintiff's motion for a judgment notwithstanding the verdict, and in granting a new trial. The appeal and cross appeal are dismissed.

### BRASHEARS v. FRAZIER.

(Court of Appeals of Kentucky. Nov. 19, 1897.)  
INSANE PERSON—LIABILITY OF COMMITTEE—SET-OFF.

1. A committee for an idiot is not liable on orders given for necessities purchased for the idiot by its parents.

2. Where it appears that a committee for an idiot has sufficient funds, he is liable for necessities furnished the idiot by a former committee.

3. In an action by a former committee for an idiot, against his successor, to recover for necessities furnished before his removal, the latter cannot set off a judgment against the former for an individual debt.

Appeal from circuit court, Letcher county.  
"To be officially reported."

Action by Robert O. Brashears against James H. Frazier. Judgment was rendered for plaintiff for a part of his claim, but, as to the balance, his petition was dismissed on demurrer. Plaintiff appeals, and defendant obtains a cross appeal. Affirmed.

Robert O. Brashears, in pro. per. D. D. Fields, Dishman & Hays, and John L. Scott & Son, for appellee.

GUFFY, J. The first, second, third, and fourth paragraphs of the petition in this action allege, in substance, that prior to May, 1891, appellant was committee for an idiot, Julia Belcher, and that prior to May, 1891, he had furnished necessities for the care of said idiot to the sum of \$37.50, and at the May term, 1891, of the Letcher circuit court, the appellee, Frazier, procured, without authority of law, the removal of appellant as committee and obtained an order of court appointing himself committee, and collected \$37.50, which should have been paid to the plaintiff herein. The fifth, sixth, seventh, and eighth paragraphs of the amended petition sought to recover sundry sums of the defendant on account of orders given by parents of sundry idiots, claiming that the orders directed payment to be made to the appellant. The court sustained a demurrer to the fifth, sixth, seventh, and eighth paragraphs of the amended petition, and, plaintiff failing to amend further, the claims set up in said paragraphs were dismissed. The answer of the appellee denied that appellant had furnished the \$37.50 claimed for the benefit of said Julia Belcher, but pleaded, however, as a set-off, a judgment and return of "No property found" against appellant for a sum larger than the \$37.50 claimed by appellant. The appellant, by reply, denied that the judgment was just, or that he owed the sum for which the judgment was rendered. The action was finally submitted to the court, without a jury, and without the intro-

duction of any testimony; and the court rendered judgment in favor of appellant against the appellee for \$37.50, and plaintiff prosecutes an appeal from the judgment dismissing his claim as heretofore stated, and appellee has obtained a cross appeal as to the judgment of \$37.50.

It is manifest to us that the demurrer was properly sustained to the paragraphs aforesaid. Frazier having been appointed committee for the idiots named, it was his province to see to the purchase of necessities, or of supplying, to the extent of the funds he might receive, the necessities of said idiots. This is not a suit to remove Frazier, nor to reinstate appellant; hence the question of the propriety of the removal is not before us. But it appears from the pleadings that the \$37.50 due at the May term, 1891, of the Letcher circuit court, was properly due and payable to appellant, and it also appears that appellee in fact received that sum. The defense attempted to be made to the judgment pleaded by appellee is insufficient. The \$37.50 was due to appellant in his fiducial capacity, and, as a matter of law, should be applied for the benefit of the idiot for whom he was committee; and, upon his failure to properly apply said sum, his security would be liable. The effect, therefore, would be to make his sureties on his fiducial bond liable for his individual debts, if we should hold that the judgment pleaded by appellee constituted a valid defense to the claim of appellant. It is manifest that such ruling would be contrary to law and public policy, and injurious to both idiot and securities. For the reason indicated, the judgment on the original and cross appeals is affirmed.

### SUN LIFE INS. CO. OF AMERICA v. BEVAN.

(Court of Appeals of Kentucky. Nov. 17, 1897.)  
INSURANCE—CONTRACT BETWEEN COMPANY AND AGENT—BURDEN OF PROOF.

Where an agent agreed to repay to the company the amount of policies lapsing within a certain time after the termination of his agency, the burden was on the company pleading such agreement, by way of counterclaim to an action by the agent to recover a deposit, to show what policies had lapsed within that time, and their amounts.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Action by George R. Bevan against the Sun Life Insurance Company of America to recover a cash deposit. Judgment for plaintiff, and defendant appeals. Affirmed.

J. L. Clemmons, for appellant. J. M. Chat-  
terson, for appellee.

WHITE, J. This action was brought by the appellee, Bevan, in the Jefferson circuit court, against appellant, Sun Life Insurance Company, to recover a cash deposit of \$125, claimed to have been made by appellee while acting as agent for the appellant. The ap-

pellant denied the deposit of \$125, or of any sum, and pleaded an offset and counterclaim against appellee on a settlement of accounts as agent, and claimed judgment over against appellee of \$141. The case was transferred to equity, and referred to the master commissioner for a settlement of the accounts between appellant and appellee. Before this commissioner the depositions of the secretary and superintendent of the appellant were the only depositions taken. The said commissioner reported a statement of the account to be, viz.:

The Sun Life Insurance Company, to George R. Bevan, Dr.

To amount reserved under first engagement .....	\$ 5 25
To amount reserved under second engagement .....	18 95
To amount reserved under third engagement .....	36 75

Total amount reserved.....	\$60 95
Less amount cash unpaid.....	5 30

Total amount due plaintiff..... \$55 65

The Sun Life Insurance Company, to George R. Bevan, Cr.

July 1. By amount due company on second contract.....	\$ 30 70
Nov. 13. By amount due company on third contract .....	110 30

Total amount due company.....	\$141 00
Less amount due Bevan.....	55 65

Leaving balance due company..... \$ 85 35

To this report of the commissioner the appellee filed exceptions calling the court's attention to an omission of the commissioner to charge the company with an item of \$10.50 admitted by the testimony of the secretary, and also excepted to the conclusion of the commissioner in charging appellee with the two items amounting to \$141, and the appellant moved to confirm the report as made, and on the trial of these exceptions the court rendered judgment for the appellee for the sum of \$85.90, and dismissed appellant's counterclaim, and, after motion for new trial was made and overruled, this appeal is prosecuted.

In arriving at the amount of the judgment rendered for appellee, the circuit court evidently took the basis of the amounts admitted by the secretary of appellant as having been withheld from appellee out of salary earned, and declined to allow appellant anything on its counterclaim. This contract of employment is very lengthy, covering eight closely typewritten pages, and to us is not very clear as to what are the liabilities of either party; but, if it be conceded that the contention of appellant be the true one,—that the agent agrees to repay to the company fifteen times the amount of the lapsed policies during five weeks after his resignation or discharge or a transfer of his business,—still it is its duty to plead and prove the fact of these lapsed policies, and their amounts. After these policies had passed out of the hands of an agent,

how could he know what ones had lapsed in five weeks thereafter? The record of all this is presumably in the possession of appellant, and, as used in this record, there is no proof that any single policy lapsed, or the amount that was due thereon for the week, and therefore nothing on which to base a claim or to sustain a counterclaim. The proof before the commissioner only shows that the appellant withheld appellee's salary to the extent of \$85.95, and that he was charged with lapsed policies. If the court is to render judgment, the court should be furnished with the facts. The burden being on appellant to show that it was entitled to charge appellee the sums claimed, and having failed to do so, in our opinion the court properly refused to allow any sum on the counterclaim. Finding no error, the judgment of the circuit court is affirmed.

#### BRADSHAW v. JONES.

(Court of Appeals of Kentucky. Nov. 23, 1897.)

##### EJECTMENT—LEASE FOR LIFE—JUDGMENT.

When the proof in ejectment shows that the tenant is in possession under an oral contract to take care of a bastard child of the landlord for the rent of the house during her life, and that the child has been taken from her after 10 years, and she has been paid nothing for caring for the child, a finding for the tenant that she be allowed \$250, over and above the rental value of the house, for caring for the child, on receipt of which she shall surrender possession, is not error.

Appeal from circuit court, Powell county.  
"Not to be officially reported."

Action by J. H. Bradshaw against Nancy Jones. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Atkinson & Spencer and Holt & Holt, for appellant. C. B. Hancock, for appellee.

WHITE, J. This action was begun as in ejectment by the appellant, J. H. Bradshaw, against Nancy Jones, appellee, in the Powell circuit court, for a certain house and lot then occupied by appellee. The answer filed to this petition admitted the title to be in appellant, but pleaded that in the year 1871 the appellant and appellee made a contract by which appellee agreed to care for and board a bastard son of appellant, in consideration that appellee was to have this place for her life; that under this contract, which was oral, the appellee was placed in possession of the house and lot, and also took charge of the son, and took care of him for about 10 years, when appellant took said boy away from appellee, and sent him to the institute for the feeble minded; that under this contract appellee had remained in possession ever since, and claimed that by the contract she was entitled to same for her natural life. Appellee pleaded, however, that, if she was not entitled to hold the house and lot under this contract, then she asked the court to allow her to recover a reasonable compensation for the care

of said boy for the time she kept him, and for a lien on the house and lot to pay same. She alleged said services were reasonably worth \$3,000. To this answer a demurrer was filed, and overruled. A reply filed denies the contract as alleged, but says that in 1871 there was a written contract made between appellant and appellee, and same is filed. By this written contract appellee agreed to keep the boy for one year from its date, for the consideration of the use and occupancy of the premises during that time. Appellant pleaded that that contract was renewed from year to year, so long as the child remained with appellee, and that this was the only contract, in terms, ever made; that since the child was taken away the appellee had been a tenant at sufferance, and had refused to vacate. Upon the issue thus presented proof was taken by deposition, and the case tried by the chancellor, who, upon final hearing, adjudged that there was a contract as contended by appellee, and that it was oral and unenforceable specifically, but that appellee was entitled, upon rescission, to recover \$250 for the care and attention given the boy, over and above the rents received; and that, upon payment of that sum in 30 days by appellant and the costs of the case, he could have a writ of possession for the premises; but that, to secure the payment of that sum, the appellee was entitled to a lien on the premises described; and adjudged that the same be sold to satisfy the said lien, if not paid in 30 days. From that judgment this appeal is prosecuted.

From the proof in the case, which we have carefully read, we are of opinion that the oral contract contended for by appellee was entered into; and we are also of opinion, from the proof, that the services of appellee in caring for this feeble-minded child of appellant was worth, up to the time it was taken out of her charge, fully \$2,000, which was greatly in excess of any reasonable rental for the house and lot; and as appellant saw proper to permit appellee to remain in the house from that time, and did not pay her anything for the services rendered, and as the court below, in its judgment, did not allow any interest, except from the day of its rendition, the claim of rents by appellant, after the child was taken away, cannot be considered. In our opinion, the judgment of the circuit court is as favorable to the appellant as he ought to expect, under the proof, and, finding no error therein prejudicial to appellant, the same is affirmed

#### HALL v. HALL.

(Court of Appeals of Kentucky. Nov. 24, 1897.)

#### DIVORCE—RESIDENCE.

In an action by a wife against her husband for divorce, under the statute, on the ground that she and defendant have lived separately and

apart, without any cohabitation, for five consecutive years next before the commencement of the action, in the meaning of the statute, the habitation of the wife, as contradistinguished from her legal domicile with her husband, should be regarded as her residence, for the purpose of conferring jurisdiction.

Appeal from circuit court, Fayette county.  
"To be officially reported."

Action by Sallie Hall against George Hall for divorce. Judgment for defendant, from which plaintiff appeals. Reversed.

J. G. Woolfolk, for appellant.

PAYNTER, J. The parties to this action were married in Woodford county, Ky., in 1884, and shortly thereafter moved to California, where they resided until 1890, when the plaintiff, Sallie Hall, returned to Kentucky, where her family lived, but left her husband in California, where he then and now resides. She seems to have abandoned her husband, and returned to Kentucky to make it her residence, where she has since continuously resided. The ground which she alleges for a divorce from the bonds of matrimony is that she and the defendant have lived separately and apart, without any cohabitation, for five consecutive years next before the commencement of the action. Her actual residence is in Kentucky, and the grounds for a divorce are abundantly proven. The court dismissed the petition, but the reasons therefor do not appear. It is certain that the ground for divorce occurred and existed in this state, as she does not ask for a divorce on grounds other than the one stated. In *Becket v. Becket*, 17 B. Mon. 372, it appeared that the parties were married in Ireland, and the husband abandoned the wife and emigrated to America. Two grounds for a divorce were alleged,—abandonment, and living separately and apart for five consecutive years without cohabitation. The divorce was refused, as the abandonment occurred in Ireland, and when the parties were not residents of the state. The other ground was not held sufficient, because the plaintiff had not lived in the state during the time the separation continued; but the court said, "According to the statute, the living separately and apart, without cohabitation, for the space of five consecutive years next before the application for a divorce, entitles either party who has been during that time a resident of this state to a divorce, whether in fault or not." This case is an authority to sustain the plaintiff's right to a divorce. It does not appear in that case that the husband was a resident of Kentucky, but it appears that the last time that the wife had seen him was in the state of Indiana. The court below must have concluded that the state of California was, "in judgment of law," the domicile of the plaintiff, because the husband was domiciled in that state. This would seem to be the proper view, according to *Maguire v. M*

guire, 7 Dana, 187. In that case the husband was domiciled in another state, and the wife, who brought the suit, was found not to have become permanently, or in good faith, a resident of this state. In *Tipton v. Tipton*, 87 Ky. 246, 8 S. W. 440, it was held that the provision of the Code which required a plaintiff in an action for divorce to allege and prove a residence in the state for one year before the commencement of the action means that he shall allege and prove an actual residence. In *Perzel v. Perzel*, 91 Ky. 634, 15 S. W. 658, the husband was never domiciled in Kentucky; neither did he ever have an actual residence in this state. It seems to have been in New York until he departed for France, when the wife came to Kentucky to live with her mother. The court held that her residence was in Kentucky. If the domicile of a husband is to fix the residence of the wife, in the meaning of the statute, it would seem that Mrs. Perzel's residence was not in Kentucky, because the husband did not, nor had he ever, lived in the state. While it may appear that the court attached some importance to the fact that the husband had departed from the place of his domicile to France, still the case was necessarily decided for Mrs. Perzel because she had been an actual resident of the state for the time required by the statute. The plaintiff did not come to Kentucky to establish a residence in order to maintain an action for divorce, but did so with a view of becoming permanently a resident of the state. She has shown that she is an actual resident of the state, and has become so in good faith; and, in our opinion, that is all that the statute required of her, in order to maintain an action for divorce. In the meaning of the statute, the habitation of the wife, as contradistinguished from her legal domicile with her husband, should be regarded as her residence. The judgment is reversed, for proceedings consistent with this opinion.

#### HAMILTON et al. v. WILLIAMS.

(Court of Appeals of Kentucky. Nov. 24, 1897.)

##### ACTION—MISJOINDER OF CAUSES.

Where, in an action for damages for wrongful seizure and sale of property, brought by several parties plaintiff as joint owners, one of the plaintiffs, on an execution against whom the property was sold, sets up as a cause of action that his interest therein is exempt from forced sale, and the others only set up their joint interest in the property, there is not a misjoinder of causes of action.

Appeal from circuit court, Estill county.

"Not to be officially reported."

Action by Clint Hamilton, Alice Hamilton, and Granville Hamilton against W. T. B. Williams. From an order sustaining defendant's demurrer, and dismissing plaintiffs' petition, plaintiffs appeal. Reversed.

Grant E. Lilly, for appellants. J. B. White, for appellee.

PAYNTER, J. A special demurrer was sustained to the petition, and it was dismissed. The appellee, Williams, had an execution issued against the property of the appellant Clint Hamilton. It was levied upon 11 head of cattle, and they were sold under the execution as his property. This action was brought by Clint, Alice, and Granville Hamilton for the alleged wrongful seizure and sale of the cattle. It is alleged that they were the owners of the cattle; that Clint was the owner of 24-168; Alice, 74-168; and Granville Hamilton, 70-168,—thereof. From the averments of the petition, Clint Hamilton was a bona fide housekeeper, with a family, and entitled to certain exempt property; and, from the facts alleged, the interest which he had in the cattle was exempt from sale under the execution. The court seems to have labored under the impression that there were defective parties plaintiff to the action, and for that reason sustained the demurrer. It is argued by counsel for the appellee that there were two causes of action alleged in the petition, and therefore a misjoinder of causes of action. He seems to be of the impression that because Clint Hamilton alleged that he was the owner of an interest in the cattle, and that he was entitled to it as exempt property, and as the other plaintiffs simply alleged that they were the owners of the interest named, therefore they set up separate and distinct causes of action. From the averments of the petition, the cattle were owned by the plaintiffs jointly. If the defendant wrongfully had seized and sold the entire lot of cattle, then he was liable to the owners of them for such damages as they sustained by reason of their seizure and sale. If parties jointly own personal property, they can sue and recover the possession of it, if it is wrongfully detained by another. If one should seize such personal property and convert it to his own use, then the joint owners are entitled to maintain an action sounding in damages against the wrongdoer. The joint cause of action results from the wrongful act which injures them jointly. The allegations which are made with reference to Clint Hamilton's right to his interest in the property as exempt from seizure and sale under the execution do not show that he had only a separate and distinct interest in the cattle, but they simply show, if the allegations be true, that the plaintiff in the execution had no right to sell it under the execution. The effect of the allegations is to show the wrongful act as to his interest in the property. The mere fact that his interest in the property was exempt did not in any degree alter his status as joint owner. If it were exempt, then the plaintiff in the execution had no right to have it sold. His right to maintain the action to recover damages for the wrongful seizure and sale of the property was as perfect as are the rights of his co-plaintiffs against whom there was no execution. Clint Hamilton has the same right, under the allegations of the peti-

tion, to maintain his action for damages, as he would have had, had the property been seized and sold under an execution against somebody else's property. We are of the opinion that the plaintiffs had the right, under the allegations of the petition, to join in an action to recover the alleged damages. The judgment is reversed for proceedings consistent with this opinion.

### LOUISVILLE & N. R. CO. v. DALTON.

(Court of Appeals of Kentucky. Nov. 24, 1897.)

#### FIRES SET BY LOCOMOTIVES.

1. In an action for damages from fire caused by sparks from an engine, the jury was properly instructed to find for plaintiff if the engine and train were managed by defendant's employees in such negligent manner that sparks escaped therefrom and ignited the building, even though the engine was at the time provided with the most approved screen or spark arrester known to science and in practical use, and was in good order and properly adjusted.

2. In an action for damages from fire caused within the limits of a city, by sparks from a locomotive, an ordinance of the city regulating the speed of trains therein is inadmissible to show that the speed of the train exceeded the lawful rate.

Appeal from circuit court, Christian county. "To be officially reported."

Action by H. M. Dalton against the Louisville & Nashville Railroad Company. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Joe. McCarroll, for appellant. Petree & Downer, for appellee.

HAZELRIGG, J. The chief instruction to the jury presents the nature of the case before us on this appeal. It, in substance, told them that if the plaintiff's building and its contents were set on fire by sparks from the company's engine, and that the engine at the time was not provided with the best and most approved screen or spark arrester known to science and in practical use, the same being in good order and properly adjusted, they were to find for the plaintiff; and they were to so find, even if such screen and spark arrester were attached to the engine and in proper condition, if they further believed that the engine and train were handled and managed by defendant's employees in such a negligent manner as that sparks escaped therefrom and ignited the building. From the proof it is clearly inferable that the building was fired by sparks from the company's engine, but it is also clear, from the uncontradicted proof, that the engine, in conformity with the requirements of our statute (section 782, Ky. St.), was furnished at the time with the best and most approved screen and spark arrester in practical use, and that these appliances were in perfect order; notwithstanding which sparks escaped, as it is shown they will sometimes do in spite of all effort to prevent it. Under these

circumstances, this court has held, and likewise the courts of every state where the liability of the company is not made absolute by statute, that railroad companies are not required to provide appliances that will effectually and certainly, under every condition, prevent the escape of sparks of fire from the chimneys of their locomotives, but only to provide and use the best and most effectual preventive known to science, so as to prevent, as far as possible, injury being done. Railroad Co. v. Barrow, 89 Ky. 638, 20 S. W. 165; Railroad Co. v. Taylor, 92 Ky. 55, 17 S. W. 198; Railroad Co. v. Mitchell, 29 S. W. 500. Before liability can be fastened on the company for want of proper screens on its engines, or because of their defective condition, there must be some evidence to show such want or defective condition, such as that an unusual quantity of live sparks were being emitted while the train was going at an ordinary rate of speed, or that the same engine started several successive fires on the same trip, or the like. In the case before us there is no evidence or circumstance of this character to rebut the testimony of a number of witnesses for the company, who testify as to the perfect condition of the appliances after a thorough examination immediately after the fire. In the absence of evidence to the contrary, the jury was not at liberty to reject the evidence of these witnesses, and this branch of the case may therefore be regarded as having been concluded by the proof.

However, whether there was negligent management of the engine and train at the time of the fire is a disputed question. There was a big grade in front of the building consumed, and the proof of the plaintiff was directed towards showing that the sparks escaped because, in switching, a heavy train was being kicked up grade at the rate of some 25 miles per hour within the city limits, instead of which the cars should have been pushed up more slowly; that the engine "labored hard," and increased its speed rapidly, to give a momentum to the cars kicked in on the switch and up the grade, so they would roll on over, etc. The company's witnesses testified that there was nothing unusual in this, and the operator of the engine was entirely prudent, under the circumstances. The question as to "whether or not a company is guilty of negligence in managing and operating its locomotives is, as a rule, but not always, a question of fact to be determined by a jury." 3 Elliott, R. R. § 1225. Here there is no doubt but that the jury is to decide this question under proper instructions, and after hearing such competent proof as may be offered.

The instruction on the point involved was clearly right, and we are brought to the single serious question in the case: Over the protest of the company, the plaintiff was allowed to read as evidence to the jury an ordinance of the city of Hopkinsville denoun-

cing as unlawful the running of a train, within the city limits, at more than six miles per hour. Counsel for appellee say they "are in some doubt as to whether the reading of the ordinance to the jury was proper," but insist that the company's substantial rights were not thereby prejudiced. But this can hardly be. The jury were properly told that, if the management and operation of the engine and train were in a negligent manner, the law was for the plaintiff. By this ordinance the law was announced to them that running the engine at a greater rate of speed than six miles an hour was unlawful. This was an instruction to the effect that, if the running was at such greater rate, the company was at fault and in the wrong, and conclusively so, because in violation of the law read to them; and all this, without regard to whether or not the fact of negligence had been established by any evidence. If the ordinance ought not to have been read, we think it was misleading to have read it, and prejudicial to the appellant.

The question, however, recurs, was the ordinance admissible as testimony? In the superior court in *Railroad Co. v. Beam*, 10 Ky. Law Rep. 682 (Bowden, J.), it was held that "an ordinance of the town regulating the speed of trains passing through it could not render negligent a course of conduct which was not in fact negligent, and was therefore not competent evidence." And the same court in *Railroad Co. v. Gartnell*, 10 Ky. Law Rep. 777 (Barbour, J.), said: "In the action against a railroad company to recover for an injury to the plaintiff by the alleged negligence of the company in running one of its trains, an ordinance of the town in which the injury occurred, limiting the rate of speed of trains through the town to six miles an hour, was not competent evidence." In a Wisconsin case (*Martin v. Railroad Co.*, 23 Wis. 437) the company was held liable for losses occasioned by trains moving at a greater rate of speed than the statute prescribed, and right of recovery was said to be authorized in that case by reason of this act, without regard to other acts of negligence. But in a later case in that court recovery was denied for loss occasioned by fire, although the train was running at an unlawful rate, to wit, over six miles an hour, because there was no other evidence that the undue speed increased the danger of fire. *Brusberg v. Railway Co.*, 50 Wis. 231, 6 N. W. 821. And so in *Bennett v. Railway Co.* (Tex. Civ. App.) 32 S. W. 834, it was held admissible to show that the company's trains usually ran past the place where the fire originated at a greater rate of speed than allowed by ordinance, but it was said: "The fact that they were so run does not render the company liable for damages done by fire, unless it appears that the fire would not have occurred but for such unlawful speed." And, after admitting in that case the ordinance as proof, the court instructed the jury, in substance,

that although they might believe the trains ran more than four miles an hour, and in violation of the city ordinance, still they could not find for the plaintiff for that reason, unless the running at such greater rate of speed, if any, was the cause of the engines of the company emitting sparks, and that the fire would not have occurred if the engines had been run at a less rate of speed. It would seem, therefore, that in the very instances when such ordinances have been held admissible the entire force of them has been destroyed by instructions, in effect, requiring the jury to find support for the verdict, if it is to be against the company, on some other ground of negligence than the speed defined in the ordinance; and, if this be true, it would seem clear that the introduction of the ordinance could serve no purpose save almost necessarily to mislead the jury. Without attempting to harmonize these apparently conflicting authorities, the true rule seems to us to be that announced by the superior court. There can be no recovery of damages in this state against railroad companies in cases of this kind, except because of negligence. This is a question of fact to be established by proof. Negligence cannot be fastened on the carrier by some local police regulation. Punishment may be imposed for violation of such ordinances, but in civil suits there are well-defined methods of establishing the facts which authorize a recovery, and we cannot depart from these methods without doing violence to well-settled principles. There seems to have been no other error in the trial of the case, but, for the error indicated, the judgment is reversed for a new trial on principles consistent with this opinion.

#### NOEL v. HAYS et al.

(Court of Appeals of Kentucky. Nov. 24, 1897.)  
VENDOR'S LIEN—RELEASE—EVIDENCE—BURDEN OF PROOF.

Plaintiff sued to foreclose a vendor's lien upon a lot upon which, after the creation of the lien, defendant had built a valuable house under a contract with the vendee whereby he was to have one-half the property. One witness testified that plaintiff agreed to release his lien on defendant's half interest in consideration of defendant's building the house, which plaintiff denied. *Held*, equal credit being given to plaintiff and the witness, defendant must fail, as the burden was upon him.

Appeal from circuit court, Bell county.  
"Not to be officially reported."

Suit by N. B. Hays against H. T. Noel and others to foreclose a vendor's lien. From a judgment for plaintiff, defendant Noel appeals. Affirmed.

Thomas H. Hines, for appellant. Weller & Hays and Chapman & Sampson, for appellee.

HAZELRIGG, J. Appellee, Hays, was the owner of a house and lot in Middlesboro, which he sold and conveyed to McDowell &



West, retaining a lien for certain unpaid purchase money. Afterwards the house burned, and by an arrangement between McDowell & West and appellant, Noel, the latter erected a valuable house on the lot, with the understanding that he was to own one-half the property, and McDowell & West the other half. Hays subsequently brought suit for his purchase money, and, learning of Noel's alleged interest, made him a party defendant. The defense was then interposed that Hays had agreed to release his lien on Noel's one-half interest in the property, in consideration that Noel build the house in accordance with his contract with McDowell & West. The only proof offered to this effect is the deposition of West, and this is emphatically denied by Hays. The contention of appellant is very improbable but, if equal credit be given the testimony of Hays and West, the burden being on the appellant, he must fail. The chancellor so decided, and the judgment is affirmed.

#### LEWIS v. SCHMIDT.

(Court of Appeals of Kentucky. Nov. 24, 1897.)

MUNICIPAL IMPROVEMENTS—TURNPIKES—LIABILITY OF ABUTTING PROPERTY.

Acts 1883-84, vol. 2, p. 445, § 5, relating to the power of the city of Covington to construct sewers along "its" streets, etc., and to assess abutting property for the cost thereof, does not deprive the city of the right to make such assessment on property abutting a street under the control of a turnpike company, which has assented to the improvement.

Appeal from circuit court, Kenton county.  
"Not to be officially reported."

Action between R. B. Lewis and Conrad Schmidt to enforce an assessment lien. From the judgment rendered, R. B. Lewis appeals. Affirmed.

W. H. Mackoy, for appellant. Orlando P. Schmidt, for appellee.

HAZELRIGG, J. In attempting to enforce an assessment lien for sewer improvement on the property of certain abutting owners, the appellee, a contractor with the city of Covington, was met with the defense that the highway improved under the ordinance belonged to, and was under the control of, the Covington & Lexington Turnpike-Road Company, and was therefore not one of the streets or highways of the city of Covington, within the meaning of the charter provisions (Acts 1883-84, vol. 2, p. 445), under which the improvement and assessment were sought to be made. These provisions, so far as they need be set out, are as follows: "Sec. 5. The council of said city shall have the power to construct sewers along its streets, alleys, lanes, highways, market spaces, public landing, and common, and to assess the cost and expense of constructing the same to an amount not exceeding the sum of one dollar per front foot of the abutting property upon the lands and lots bounding or abutting upon said

streets, alleys," etc., "in or along which the same shall pass." The argument is that, "if regard be had to the natural and obvious meaning of the word 'its' in the section in question, it is evident that the power of the city is confined to property upon streets, etc., which it owned or controlled." It seems to us, however, that by the use of the word were meant only such streets, alleys, highways, etc., as were within the limits of the city. The city does not ordinarily own any of its streets or highways, but it has control over all of them within the limits fixed by law. This turnpike is a street of the city known as "Pike Street," and is within the taxing district designated by the ordinance for the sewer improvement. The turnpike company is not complaining, and in fact consents to the entry on the street or highway for the purposes of the ordinance, which includes its consent for all necessary attachments with the sewer by abutting owners, if consent were necessary. We perceive no reason why the owners of property situated within the taxing district designated by the ordinance, and abutting on this highway or street, are not liable to the assessment. Judgment affirmed.

#### SIX et al. v. PRICE.

(Court of Appeals of Kentucky. Dec. 4, 1897.)

BILLS AND NOTES—NEGLECT TO SIGN MAKER—LIABILITY OF ASSIGNOR TO ASSIGNEE—PLEADING.

1. A vendee of land paid for it as recited in the deed, thus: "One hundred dollars in hand paid, the receipt herein acknowledged, the balance in two land notes. \* \* \* When these notes are collected first party is to pay second fifteen dollars out of them." The holder of the notes brought suit to declare a lien on the land sold, to subject it to the payment of the uncollected portion of the land notes, after foreclosing them, but without first obtaining a personal judgment against their maker. Held, that the holder of the notes could not maintain an action against the assignor without first exhausting all his remedies upon the notes.

2. Where a note falls due in September, 1892, and execution was not issued thereon until December, 1894, there is such a lack of diligence as will deprive the holder of the note of his remedy against his assignor.

3. When a petition in an action on land notes by the assignee against the assignor of them shows that the plaintiff assignee at one time was not the owner of the notes, and does not show how he became reinvested with the title thereto, the petition does not contain facts sufficient to constitute a cause of action.

Appeal from circuit court, Harrison county.

"Not to be officially reported."

Action to declare and enforce lien on land by U. F. Price against Cynthia Six and others. From a judgment overruling a general demurrer to the petition, the defendants appeal. Reversed.

W. S. Hardin, for appellants. M. C. Swinford, for appellee.

LEWIS, C. J. Appellee, September, 1890, sold and conveyed to appellant a parcel of

land containing about 16 acres, in consideration of \$425, to be paid, as recited in the deed, thus: "One hundred dollars in hand paid, the receipt herein acknowledged, the balance in two land notes on Isaac H. Eaton, dated September 22, 1890. When these notes are collected first party is to pay second fifteen dollars out of them." August, 1895, appellee brought this action, stating that in a suit by John G. Montgomery against Eaton to satisfy the two notes due September 22, 1891, and 1892, the land upon which there existed a lien in favor of appellant was sold, but failed to bring enough for that purpose by \$168.50, to pay which and interest he asks the 16 acres sold. After a general demurrer to the petition, which was overruled, appellant filed answer averring that the two notes were taken by appellee as so much cash for the 16 acres conveyed to her by him, and denying that there was retained in the deed any lien thereon to secure payment of the two notes. We need not decide whether, according to proper construction of the deed, the two notes were taken by the vendor as absolute payments pro tanto of the purchase price, and without right of recourse against her; for, if bound at all for residue of the notes unsatisfied by sale of Eaton's land, she is so by reason of an implied contract as assignor, and that involved a concomitant obligation upon him as assignee to prosecute with reasonable diligence all his remedies, legal and equitable, against the debtor. And it is not enough that the lien on the land of Eaton was enforced, and judicial sale of it obtained; but, in order to enable appellee to recover of appellant the residue of the two notes unsatisfied, he must allege and show that a personal judgment was also obtained, and an execution duly issued, and returned nulla bona. *Chambers v. Keene*, 1 Metc. (Ky.) 289; *Coleman v. Tully*, 7 Bush, 72. There is no distinct averment that a personal judgment was obtained or sought, but it may be presumed from the fact that, as alleged, an execution was November 30, 1894, issued and returned, "No property found." The second of the two notes fell due in September, 1892. Indeed, the judgment for sale of the land of Eaton was, according to statement of the petition, rendered as early as December, 1892. Consequently delay until November, 1894, before an execution was issued, shows such lack of diligence as to deprive wholly appellee of any recourse against appellant. The action against Eaton, it appears, was instituted by J. G. Montgomery, who is made a defendant to this action, and it must be assumed that the two notes were assigned to him by appellee. But it is not stated in the petition how or whether at all he became divested of his interest in the notes, and appellee became invested with right of recourse against appellant. The petition does not contain facts sufficient to constitute a cause of ac-

tion, and for error of the lower court in overruling the demurrer to it the judgment is reversed, and case remanded for proceedings consistent with this opinion.

#### SWEENEY v. COOK.

(Court of Appeals of Kentucky. Dec. 4, 1897.)

SCHOOL DISTRICTS—TREASURER—EVIDENCE OF APPOINTMENT.

Defendant was appointed treasurer and collector of a school district, by the trustees thereof. He complied with Ky. St. § 4443, requiring a treasurer so selected to execute a bond to the trustees, with sureties, for the faithful performance of his duties; and the bond was approved by the county judge, and he entered upon the performance of his duties. The appointment was not recorded in any book kept for the purpose by the trustees. *Held*, that section 4438, requiring the superintendent of public instruction to furnish the chairman of each board of trustees with a record book, did not make the entry in such book of the appointment of a treasurer so essential that no other evidence than the record entry could afford proof of such appointment, and parol evidence was hence admissible to show the appointment.

Appeal from circuit court, Warren county.

"Not to be officially reported."

Action by T. J. Sweeney against J. S. Cook. From a judgment for defendant, plaintiff appeals. Affirmed.

Wilkins & Bradburn and Edward W. Hines, for appellant. Thomas W. Thomas, for appellee.

LEWIS, C. J. Appellant brought this action to recover of appellee damages for, forcibly and without authority, taking from his possession, and selling at public outcry, one horse, his property. Appellee, in his answer, admits the taking, but states in justification that it was done by him as treasurer and collector of common-school district No. 80 of Warren county, to which place he had been legally appointed by the trustees thereof for the purpose of collecting a tax duly fixed and apportioned by said trustees to provide means for repairing the school-house building, and obtaining a necessary supply of water for the use of the pupils attending the school; that, though a resident of said district, liable to said assessment, and a receipt was tendered him, appellant refused to pay his portion of said tax; that thereupon, and for the purpose of enforcing the collection of the tax, he levied upon and sold the horse. It satisfactorily appears that the trustees duly and legally assessed and apportioned the taxation for the purposes mentioned, under the order of the county superintendent in writing, as required by the statute, and that appellant was both able and liable to pay the tax apportioned to him. The only material question in this case is whether appellee was legally appointed the treasurer and collector of that district, or, rather, whether there was produced on the trial competent evidence of that fact. That the trustees did actually appoint appellee is

established by parol evidence, if it be competent for that purpose; but it does not appear that the appointment was ever recorded by the trustees in a book kept by them, if they did keep a book for such purpose. It does, however, appear that appellee, as required in such cases by section 4443, Ky. St., did, before entering upon the discharge of his duties as treasurer, execute bond to the board of trustees, with sufficient sureties, for the faithful performance of his duties, which bond was approved by the county judge of said county. Although the superintendent of public instruction, by section 4438, Ky. St., is required, from time to time, as needed, through the county superintendents, to furnish the chairman of each board of trustees with a "trustees' record book," and the entry in that book of the appointment of a treasurer, among other things, may have been contemplated by the legislature, still we do not think that the statute was intended to be so mandatory as to render such entry indispensable to the validity of the appointment, especially when the bond required to be executed affords indisputable evidence of the fact; for when actual appointment satisfactorily appears, as it does in this case, to have been made, and security for the faithful discharge of the duties of the office is afforded by a bond duly executed and approved by the proper authority, all the essential and material requirements are complied with. In our opinion, appellee is, and should be treated as, treasurer de jure of said common-school district; and the act complained of, as this record stands, was lawful. Judgment affirmed.

ROBINSON v. REDD'S ADM'R et al.  
(Court of Appeals of Kentucky. Dec. 4, 1897.)  
WITNESSES—COMPETENCY—MARRIAGE—SOLEMNIZATION.

1. A plaintiff is not a competent witness against an administrator to show that he advanced money to the widow to apply on a mortgage upon decedent's land.

2. All marriages not solemnized or contracted in presence of an authorized person or society are, under the Revised Statutes, void.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action by McCagin Robinson against Simon Redd's administrator and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. W. Schooler, for appellant.

BURNAM, J. The appellant in this action alleges that Simon Redd died in July, 1891, the owner of a house and lot, leaving, surviving him, a widow and one child; that, during the lifetime of decedent, he had mortgaged the property to secure a debt of \$150; that subsequent to his death, at the instance of the widow and heir, he had advanced, for their use and accommodation, \$110.32, in dis-

charge of the incumbrance; that afterwards both the widow and child died intestate and without issue, and this suit was instituted to subject the property to the payment of the money so advanced by him.

Appellant's claim was resisted by the administrator and heirs at law of the decedent, Simon Redd, upon the ground that Redd had never been legally married to the woman claiming to be his widow, and that neither she nor her child had any legal right to request appellant to advance money for the use of the estate; and they further deny that he had advanced any money. There is no competent testimony in the case which conduces to show that appellant advanced any money for the use of the estate, or the amount thereof, as his own testimony on this point is incompetent, even if it were distinct and definite. Nor is there any competent evidence to show that decedent, Redd, was ever married to the person claiming to be his widow, as the testimony on this point is entirely confined to evidence of cohabitation and recognition. Previous to the adoption of the Revised Statutes, evidence of this character was competent to establish marriage under the common law in a civil suit (see *Donnelly v. Donnelly's Heirs*, 8 B. Mon. 116); but, since the adoption of the Revised Statutes, there can be no such thing as legal marriage by cohabitation and recognition alone. All marriages not solemnized or contracted in the presence of an authorized person or society are absolutely void. See *Estill v. Rogers*, 1 Bush, 62. The judgment is affirmed.

LUDLOW & C. COAL CO. v. CITY OF LUDLOW et al.

(Court of Appeals of Kentucky. Dec. 3, 1897.)

INJUNCTION—COLLECTION OF LICENSE FEES.

The collection of license fees by a city, under an ordinance imposing a fine for nonpayment thereof, will not be restrained where the authority of the ordinance is not questioned, but only its application to complainant, and it appears that only one proceeding has been commenced against plaintiff for the imposition of a fine, and other proceedings are only threatened.

Appeal from circuit court, Kenton county.

"To be officially reported."

Action by the Ludlow & Cincinnati Coal Company against the city of Ludlow and others. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Harvey Myers, for appellant. Walter T. Ritchie, for appellees.

DU RELLE, J. Appellant's petition, to which a demurrer was sustained, alleges that the appellant was engaged in the coal business in Ludlow, and for the purpose of delivering coal to its customers, and for no other purpose, owned and used certain carts and vehicles; that the city of Ludlow, and its police judge and marshal, had required appellant to pay license fees on said carts

and vehicles, under authority of an ordinance of the city providing that the owner of all vehicles used for hire upon the streets and other public ways of the city shall pay annual license fees, and providing that persons failing or refusing to take out licenses therein provided for should be subject to a fine of not less than \$1, nor more than \$50, and costs. The appellant further alleged in its petition that the appellees "threatened to and have instituted proceedings against it in the police court of said city to compel the payment of said license fees \* \* \*, and threatened to institute further proceedings against it, and threatened to cause further fines to be assessed against it each day it refuses to take out a license under said ordinance, and it says its business is thereby interfered with, and will be injured and destroyed." The prayer is for a perpetual injunction to restrain the appellees from collecting such license fees. It will be observed that the injunction is not prayed until such time, only, as the validity of the ordinance can be determined. Indeed, there is no question made as to the perfect validity of the ordinance, the only question being that the police court of Ludlow has erroneously applied the ordinance to the vehicles of appellant. Nor does it appear from the petition that more than one proceeding has been instituted against it for the imposition of a fine, but merely that other proceedings are threatened. In the case of *Shinkle v. City of Covington*, 88 Ky. 420 (a case which presents a somewhat extreme application of the power of a court of equity to interfere with proceedings of subordinate tribunals by injunction), an injunction was held to be the proper remedy to prevent the city from repeatedly prosecuting a citizen for violating a city ordinance prohibiting any person from holding possession of streets or commons of the city when the plaintiff asserted title to the premises in controversy; the relief being allowed until the disputed question of title could be determined. In that case some 12 or 15 separate prosecutions had been instituted, and the relief granted was only until the title to the property in dispute could be ascertained. In this case the averments of the petition cannot be construed as setting up the institution of more than one prosecution, and the relief sought is, in effect, a revision by this court of the judicial determination by the police court of Ludlow upon the question whether the ordinance of that city applied to the vehicles of appellant. We cannot see that the case at bar comes within the rule laid down in that case. Nor is it a case within the rule in *Brown v. Trustees*, 11 Bush, 435, in which case the rule was laid down in the language used by the supreme court in *Ewing v. City of St. Louis*, 5 Wall. 413: "With the proceedings and determinations of inferior boards, or tribunals of special jurisdiction, courts of equity will not interfere, unless it should

become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence." In this case there is no pretense that the ordinance is invalid upon any ground. It does not sufficiently appear from the petition that the equitable remedy by injunction is necessary to prevent a multiplicity of suits. The general doctrine is that "equity ought not, except for the clearest reasons, to interfere with the speedy and ordinary collection of municipal or other public revenues." *Dill Mun. Corp.* (3d Ed.) § 923. In *High, Inj.* (3d Ed.) § 1244, it is said: "It necessarily follows from the doctrines as above stated and illustrated that, when municipal ordinances have been enacted by the proper authority, proceedings on the part of municipal officers for their enforcement, as by suits, arrests, or fines, will not be enjoined merely because of the alleged illegality of the ordinances, or for the purpose of awaiting a determination of the question of their validity, when the person aggrieved may have a full and adequate remedy at law." Courts of equity should with extreme caution apply the remedy of injunction against municipal officers acting under authority of a valid ordinance, and especially so in a case like this, where the remedy at law appears to be ample. By section 3519, Ky. St., in reference to cities of the fourth class, provision is made for appeals from the judgment of the police court in all cases where the fine is more than \$20; and, as the amount of the fine in the proceeding alleged in the petition in this case is not averred, it is presumptively more than \$20. It does not appear from the petition that the legal remedy for the alleged error of judgment complained of has been invoked. We conclude, therefore, that as the facts presented do not constitute a ground for relief in equity, the circuit court did not err in dismissing the petition. Judgment affirmed.

#### WINN v. CARTER DRY-GOODS CO.

(Court of Appeals of Kentucky. Dec. 4, 1897.)  
ACTION AGAINST CORPORATION—VENUE—QUASHING SUMMONS—APPEALABLE ORDER.

1. Under Civ. Code, § 72, authorizing an action for tort to be brought against a corporation in the county in which the tort was committed, an action for maliciously, and without probable cause, instituting a suit against plaintiff, may be brought in the county where such suit was instituted.

2. The quashing of the summons and return thereon is not a judgment or final order from which an appeal will lie.

Appeal from circuit court, Estill county.  
"To be officially reported."

Action by James Winn against the Carter Dry-Goods Company for maliciously, and without probable cause, instituting a civil ac-

tion against plaintiff. The summons was quashed on defendant's motion, and plaintiff appeals. Dismissed.

Grant E. Lilly, for appellant. White & Smith, for appellee.

BURNAM, J. This suit was instituted by appellant, in the Estill circuit court, against appellee, alleging that he was engaged in the mercantile business in Estill county; that defendant, on the 23d day of September, 1895, while he was so engaged, filed a suit against him in the Estill circuit court, in which it maliciously, and without probable cause, alleged that he had sold and conveyed, and was about to sell and convey, his property, with the fraudulent intent to cheat, hinder, and delay his creditors, and to prevent the collection of their demands, and sued out a general attachment against the property of appellant. Appellant charges that each and all of these statements were untrue, and were known by the appellee to be untrue at the time of the making thereof; that, upon the trial of the attachment in the Estill circuit court, it was discharged; and that the suit was begun, and all the proceedings thereunder were had, in Estill county, and the injury complained of occurred in that county. He also alleges that appellee is a corporation created under the laws of the state of Kentucky. On this petition, a summons was issued, directed to the sheriff of Jefferson county, and was by him executed on appellee by delivering a copy of the summons to J. C. Bethel, president of the defendant company; he being the chief officer found in the county at the time. Upon the return of this summons the defendant corporation entered its appearance, as it alleges, for the sole purpose of moving the court to quash the summons, and the return thereon, executed on its president, because it was executed in Jefferson county by the sheriff of Jefferson county, —contending that the court could not take jurisdiction of the defendant, under the service; and the court sustained this motion, and quashed the summons and return thereon, to which appellant excepts, and prosecutes this appeal.

Two legal questions arise upon the appeal: First, did the Estill circuit court acquire jurisdiction by the service of the summons issued from the office of the clerk of the Estill circuit court, and served by the sheriff of Jefferson county upon the president of the corporation, in Jefferson county? Section 72 of the Civil Code provides: "Excepting the actions mentioned in sections 62 to 66, both inclusive, and in sections 68, 70, 71, 73, 75, and 77, an action against a corporation which has an office or place of business in this state, or a chief officer or agent residing in this state, must be brought in the county in which such office or place of business is situated, or in which such officer or agent resides; or, if it be upon a contract, in the above-named coun-

ty, or in the county in which the contract is made or to be performed; or, if it be for a tort, in the first-named county, or the county in which the tort is committed." Manifestly, the purpose of section 72 of the Code is to authorize actions against corporations that have committed wrongful acts, for which an action will lie, in the county in which such tort was committed; and, by the service of the process in this action on the president of the company in Jefferson county, the Estill circuit court acquired jurisdiction, and it was consequently error on the part of the trial judge to quash the summons and return thereon. But this court has no jurisdiction to entertain appeals prosecuted from orders of circuit courts which are not final in their character; and a final order is one that either terminates the action itself, or decides some matter litigated by the parties, or operates to divest some right, in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original condition. See *Helm v. Short*, 7 Bush, 625, and *Turner v. Browder*, 18 B. Mon. 826. We do not think the quashal of the summons directed to the sheriff of Jefferson county, and the return thereon by the sheriff, was a judgment or final order from which an appeal will lie (see *Wearen v. Smith*, 80 Ky. 216), as it does not finally determine any of the rights of appellant growing out of his alleged tort; and for this reason this court has no jurisdiction of the appeal, and it is therefore dismissed.

#### TIMMONS v. CENTER.

(Court of Appeals of Kentucky. Dec. 4, 1897.)

DEED WHEN MORTGAGE—ACCOUNTING BETWEEN PARTIES.

1. Plaintiff applied to defendant for a loan, and offered as security a mortgage on land; but the latter suggested an absolute deed, with authority to remove timber, agreeing to reconvey on repayment of the money, whereupon plaintiff executed the deed, and defendant made a written contract to reconvey within 12 months on repayment of the price. Plaintiff failed to redeem within the time, and defendant executed another contract to reconvey on payment of the contract price, with interest, within 17 months, provided defendant could not sell the land to some one else; but, if he could, he should have the right to do so, by first giving plaintiff notice. Another contract extending the time was afterwards made, providing that, if plaintiff was not able to redeem, defendant would give her the mineral right on the land. Afterwards defendant wrote plaintiff that, if he could raise, "say, \$1,050 by the time you was to, you can have the land," and, if the logs cut amount to more than the balance, "I will pay you the difference of one dollar a thousand feet." Plaintiff continuously resided on the land, and defendant exercised no acts of ownership other than to cut and remove timber. *Held*, that the deed was, in effect, a mortgage.

2. A grantee under a deed given as security for a debt, who has, with the consent of the grantor, sold portions of the land, and cut and removed timber therefrom, is properly chargeable with the value of the timber removed, and the amount realized from the sales of land, at the date of the transactions; and where, in trying to make sales

of land to the best advantage, he was compelled to accept, in payment, live stock and labor at a higher rate than its fair cash value, he is properly chargeable with only the fair cash value of the land at the date of the sale; and, where a sale of land was made at a price fixed by the grantor, he is chargeable with only the amount so fixed.

Appeal from circuit court, Wolfe county.  
"Not to be officially reported."

Action by R. T. Timmons against G. T. Center to have an absolute deed declared a mortgage, and for an accounting. From the judgment for defendant as to the amount of plaintiff's credits, plaintiff appeals, and defendant prosecutes a cross appeal. Affirmed.

J. B. White, for appellant. Holt & Holt, for appellee.

BURNAM, J. Appellant, being indebted in the sum of \$1,365, and with a view of raising money to pay same, applied to appellee for a loan of that amount, and proposed to indemnify him against loss by executing to him a mortgage upon a large tract of land in Wolfe county. This proposition was declined by appellee, but he suggested that if appellant would execute to him an absolute deed to the land, and authorize him to remove the timber therefrom, he would give to her a defeasance, agreeing to reconvey the land when his money had been repaid. This agreement was consummated by the execution on the part of appellant of the deed, and, at the same time, appellee executed his written obligation to appellant, by which he bound himself to reconvey the property to her at any time within 12 months from the 7th day of October, 1889, provided that within that time she should repay to him the purchase price,—\$1,365. Appellant having failed to redeem the land within the time prescribed, appellee, on the 4th day of October, 1890, executed to her another written obligation, in which he agreed that if she would pay to him the contract price of the land, with interest, at any time within 17 months from that date, that he would reconvey the land to her, provided he could not sell it to some one else; but, if he could sell the land to any one else, he should have the right to do so by first giving her notice. On November 11, 1891, he executed to her another obligation, extending the time for the redemption of the land until February 11, 1892, further providing that, if she was not able to redeem it at that time, he would give her the mineral right on the land; and on February 24, 1892, appellee addressed a letter to appellant, in which he stated: "I have not had time to measure up the balance of the logs. If you can raise, say, \$1,050 by the time you was to, you can have the land; and I will reserve the pine and poplar timber, and will have the logs measured when the balance of the timber is cut. If it amounts to more than the balance, I will pay you the difference of a dollar a thousand feet." Appellant remained in pos-

session of the entire tract of land, but appellee proceeded to cut and remove timber therefrom; and, according to his own testimony, by November, 1890, he had taken therefrom 250,000 feet; in 1893, 123,312 feet; in 1894, something over 60,000 feet; and, after the institution of this suit, from 25,000 to 40,000 feet more,—having taken in all about 473,000 feet of timber off the land. The proof in the case shows that on the 8th day of July, 1892, appellee, at the instance and request of appellant, sold and conveyed 100 acres of this land to Hooker & Hazelton, for which he received in cash the sum of \$300. Appellee testifies that this sale was negotiated, and the terms agreed on with the vendees by his grantor, the appellant herein; that on the 15th day of March, 1893, he sold and conveyed about 100 acres of the land to one S. B. Center; and that in the same year he sold 30 acres of the land to one L. M. Brown, and 13 acres to James Tolson. Appellant, during all this time, continued to reside upon and occupy the property, and had full notice of all these sales, and was consulted with reference to them; and appellee exercised no rights of ownership over the land except to cut and remove the timber therefrom.

Under this proof, there is no escape from the conclusion that, at the date of the transaction, it was the intention of the parties that appellee should take the deed to the land only as security for the return of the money he had advanced to appellant, and that it was, in effect, a mortgage; and no agreement between the parties that the conveyance should become absolute upon certain conditions broken can affect the right of appellant to redeem same. Appellant is entitled to have returned to her the residue of the tract of land which remains after appellee has been reimbursed the full amount of his debt, with interest. The evidence conduces to show that appellee endeavored to realize the amount due him out of the mortgaged property to the best advantage; and as it appears that in some instances, when making sales of portions of the land, he was compelled to accept in payment therefor live stock and labor at a higher rate than its fair cash value, the court properly held that he should only be required to account for the fair cash value of the land disposed of at the time of the alienation thereof, and that he should be required to credit both the value of the timber removed from the land and the money realized from the sale of portions thereof on the obligation to appellant at the date of these transactions.

An examination of the report of the master commissioner disclosed the fact that appellee has been charged with each of these tracts of land at their cash value at the date of the sale, and the proof supports the valuation fixed upon them by the commissioner; and appellee should only have been charged

with the sum of \$300 for the tract of land sold to Hooker & Hazelton, as it appears from the testimony of appellant that she insisted upon this sale being made, because, as she testifies, Hooker & Hazelton had agreed to give her an indefinite time to refund the \$300 to them, and she desired to release the claim of appellee on that boundary. The judgment appealed from gives plaintiff the benefit of the credits to which he is entitled, at the proper dates thereof; and a calculation of plaintiff's debt, allowing him interest at 6 per cent., and applying credits for land and timber at the dates appellee realized thereon, and also refunding to appellee the taxes which he has paid out on the land, demonstrates that the balance of \$250 found due him is substantially correct, and that appellant has not been prejudiced by the judgment appealed from. For the reasons given, the judgment is affirmed, both on the original and cross appeal.

**LOUISVILLE & N. R. CO. v. DONALDSON.**  
(Court of Appeals of Kentucky. Dec. 3, 1897.)

**CARRIERS—VALIDITY OF TICKET—EVIDENCE—IN-  
SULTS TO PASSENGER—LIABILITY OF COM-  
PANY—PUNITIVE DAMAGES.**

1. In an action against a railroad company to recover for the taking up and destruction by a conductor of plaintiff's ticket, and compelling him to pay cash fare, where there is a conflict of evidence as to whether the ticket was a good one or one that had expired, the fact that the conductor destroyed it raises the presumption that it was good, since it was his duty, in any event, to turn it in to the auditor of the road.

2. In an action against a railroad company to recover for taking up and destroying plaintiff's ticket, and compelling him to pay cash fare, and for abusive language by the conductor, the fact that the offensive words were not spoken at the time of taking up the ticket and demanding cash fare, but a few minutes afterwards, when change was given, is immaterial, as it was part of the same transaction, and took place while the conductor was discharging his official duty.

3. The words, "You are a pretty thing,—trying to beat your way," spoken by a conductor to a passenger, imply a charge of attempted fraud.

4. Where, in action against a railroad company to recover for injuries caused by abusive language, the petition alleges that plaintiff was injured in his feelings and suffered mortification by reason of such language, and the testimony of plaintiff and other witnesses states facts from which the jury are authorized to infer he did suffer mortification and humiliation of mind, punitive damages are recoverable, even though plaintiff did not state he was humiliated or mortified.

5. Where the award of punitive damages is not necessarily the result of passion or prejudice, the verdict will not be disturbed.

Appeal from circuit court, Knox county.

"Not to be officially reported."

Action by J. Hop Donaldson against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wilson & Rawlings and J. W. Alcorn, for appellant. Golden & Powers, for appellee.

**DU RELLE, J.** The appellee recovered a judgment for \$500 for the alleged taking up and destruction by appellant's conductor of a 20-trip family ticket, between Corbin and Gray; for requiring appellee to pay a cash fare of 20 cents; and for injury to his feelings, caused by saying, "You are a pretty thing,—trying to beat your way." There was conflict of evidence as to whether the book of coupon tickets tendered by appellee in payment of his fare was a 20-trip family ticket, still good for passage, or a 48-trip school ticket, good only for the month for which it was issued, and which had expired. The weight of testimony is conceded to be that the ticket was a 20-trip one, still in force; and the conductor, by destroying the ticket, which it was his duty in any event to turn in to the auditor of the road, has raised the presumption that, if preserved, the ticket in question would have supported the appellee's claim.

The instructions given appear to us to correctly state the law applicable to the case. It is true that the offensive language charged was not spoken at the time the cash fare was demanded, but when change was given to appellee, some minutes later. This, however, was a part of the same transaction, and took place while the conductor was in the discharge of his duty, and acting as an official of the appellant.

Nor can we agree with the contention of appellant's counsel that the fact that the appellee, in giving his testimony, did not state that he was humiliated or suffered mortification because of the language which he says was used by the conductor, and which, in our view, clearly implied a charge of attempted fraud, precluded the trial court from giving an instruction as to punitive damages. The injury to his feelings and the mortification which he suffered were alleged in the petition, and in his testimony and the testimony of other witnesses produced by him were stated facts from which the jury were authorized to infer that he did suffer mortification and humiliation of mind; and upon this statement of facts, which it appears the jury believed to be true, it was proper for the court to give the instruction.

The sole remaining question is whether the damages awarded were excessive. Upon this point, while this court, upon the evidence presented by the record, might have given a different finding, we see no sufficient reason to disturb the finding of the jury, for we cannot see that the punitive damages awarded by reason of the insulting charge alleged to have been made were necessarily the result of passion or prejudice. Judgment affirmed.

**MARCOFFSKY v. FRANKS et al.**

(Court of Appeals of Kentucky. Dec. 3, 1897.)

**APPEAL—REVIEW OF CHANCELLOR'S DECISION.**

In a suit to have a mortgage declared fraudulent and void as against creditors of the mortgagor, where the only evidence of fraud is the mortgagor's own testimony, which is contradicted in many material respects, a decree of the chancellor for plaintiffs will be reversed.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Suit by Joseph Marcoffsky against Samuel Franks and others. Judgment was rendered for the defendants, and the plaintiff appeals. Reversed.

Tyler & Apperson, for appellant. H. M. Woodford and Courtland P. Chenault, for appellees.

**GUFFY, J.** Samuel Franks was a merchant in Mt. Sterling, Ky., at and prior to May, 1893. In June, 1893, a number of the appellees instituted suits in the Montgomery circuit court against said Franks, seeking judgments, and obtained attachments, which were levied upon his stock of goods; and during that year, and shortly after the first levy, other parties filed similar suits and obtained attachments, which were also levied; and shortly after the levy of some of the earlier attachments appellant caused an execution to be issued from the Fayette circuit court against Franks, which was also levied upon said goods. On the 23d of August, 1893, the appellant instituted suit in the Montgomery circuit court against said Franks to recover judgment on a \$1,000 note executed May 30, 1893, and to enforce his mortgage lien upon the stock of goods or the proceeds thereof, which it seems had theretofore been attached and sold under order of court, which money was being held subject to further orders of the court. This suit was finally consolidated with the suits of the other creditors of said Franks. The attaching creditors finally denied the execution of the note and mortgage, or at least charged that they were without any consideration, and made for the purpose of cheating and defrauding the creditors of said Franks; and finally, by proper amendments and orders, they were allowed to charge that appellant was a silent or dormant partner of Franks in the mercantile business at and before the time the debts sued on were incurred or created; and said creditors asked for a personal judgment against appellant, and also asked that his said mortgage be adjudged fraudulent and void, as well as the judgment and execution in the Fayette circuit court. The issues were all finally made up and proof taken, and upon final submission the court below sustained the attachments of the attaching creditors, and adjudged that the mortgage dated May 30, 1893, by defendant Samuel Franks to Joseph Marcoffsky, and sued on by said Marcoffsky in his petition, and consolidated herewith, and

filed August 23, 1893, and recorded in Mortgage Book No. 8, p. 450, in the Montgomery county court clerk's office, is fraudulent and without consideration, and, as to the creditors of defendant Franks suing and attaching herein, is declared to be void. It is also adjudged that the judgment in favor of Marcoffsky against said Franks for \$1,000, rendered by the Fayette circuit court, and execution of which was levied upon the property of defendant Franks sought to be subjected herein, was without consideration, and a fraud upon the creditors of said Franks suing or attaching herein; and it was further adjudged that the said Marcoffsky take and recover nothing against the defendant Samuel Franks herein. Judgments were also rendered against the appellant, Joseph Marcoffsky, in favor of the attaching appellees herein, for the several sums claimed by them in their petitions. The court also overruled all the exceptions filed to depositions by each party. To reverse the judgments aforesaid this appeal is prosecuted.

The statements of Franks made to Woodford in the absence of appellant were not evidence as against appellant. The letter filed purporting to have been written by J. J. Cornwellson should have been excluded, as it was wholly incompetent, and was doubtless prejudicial to the appellant. The other errors, if any, as to exceptions, need not be noticed.

It will be seen that there is no evidence at all to support the allegations of fraud as to the execution of the mortgage relied on by appellant, except the testimony of Franks; nor is there any evidence to sustain the claim that appellant was a partner with Franks in the mercantile business, except the testimony of Franks, and he is contradicted in many material respects by other testimony, as well as by his pleadings in the action, filed and sworn to by him before the attempt was made to hold appellant as his partner. It seems to us that it would be manifestly unfair and unjust to hold that the mortgage in question was fraudulent, and that the appellant was a partner with Franks, upon the unsupported testimony of Franks, who is vitally interested in procuring the judgment complained of, and especially so when his testimony is contradicted in many essential respects.

The contention of appellees that this court will not reverse the judgment of the chancellor upon a question of fact, unless it is flagrantly against the evidence, is not the rule of this court. It may be proper to consider such finding as entitled to some weight upon an appeal, but the well-established rule of this court is that it will consider the testimony, and reverse, if, in the judgment of this court, the evidence sustains the contention of the appellant. For the reasons indicated the judgments of the court below appealed from are reversed, and the cause remanded, with directions to render judgment in appellant's favor against Franks for the amount of the \$1,000 note mentioned in the mortgage, and



to adjudge to him a prior lien upon the proceeds of the attached property, for the mortgage debt, and also to set aside so much of the judgment adjudging the judgment obtained in the Fayette circuit court to be void or fraudulent; but the attachments levied upon the property in question before the levy of the execution in appellant's favor have a superior lien to any execution lien claimed by appellant. Cause remanded for proceedings consistent with this opinion.

#### LOUISVILLE & N. R. CO. v. KIRBY.

(Court of Appeals of Kentucky. Dec. 8, 1897.)

APPEAL—REVIEW—ERROR WAIVED—TRIAL—TAKING CASE FROM JURY.

Where, in an action for killing a horse valued at \$125, the answer admitted the killing, but denied the damage as alleged, and the court decided that the burden of proof was on plaintiff, and defendant excepted, and afterwards admitted the value of the horse as alleged, and defendant was adjudged the burden of proof, and introduced its evidence first, and closed the argument, an exception to the ruling adjudging plaintiff the burden was waived.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by S. B. Kirby against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. W. Metcalf, J. W. Alcorn, and Wm. Lindsay, for appellant. D. B. Logan and W. H. Holt, for appellee.

WHITE, J. On July 9, 1893, the train of appellant, on the Cumberland Valley branch, killed two horses of appellee. This action was to recover their value, brought in the Bell circuit court. The damage claimed for the two horses was \$125. The answer admitted the killing by appellant, but denied the damage to be as alleged, \$125. On the trial before the jury, after the case had been stated, both parties asked the court to adjudge to them the burden of proof. The record shows that the court decided that the burden was on plaintiff (appellee). The attorney for the defendant (appellant), after reserving exceptions to this ruling, announced that, for the purpose of the trial, it was admitted that the horses killed were of the value of \$125, the amount claimed. Thereupon the court adjudged to appellant the burden of proof. On the trial the only witness introduced on the subject of value of the two horses was appellee, Kirby, who testified that one of the horses was worth \$65 and the other \$80. Appellant offered no testimony as to the value of the horses. The jury returned a verdict for appellee for the sum claimed, \$125, upon which judgment was entered, and, after motions and reasons for new trial had been filed and overruled, this appeal is prosecuted.

Appellant complains of the ruling of the court on the question of the burden of proof.

It appears that on the trial it was allowed to introduce its evidence first, and close the argument to the jury. There is an exception to the ruling of the court in adjudging appellee the burden, but that cannot avail here, for the appellee did not introduce his evidence first and did not conclude the argument. Appellant was not compelled to admit the value of the horses. It might have reserved its exceptions to the ruling of the court in adjudging the burden to appellee, and then that question would have come within the rule as laid down in the case of Railroad Co. v. Brown, 13 Bush, 475. However, it appears that appellant voluntarily admitted the value of the horses to be \$125, as claimed, and on the trial appellant at no time offered to prove by any witness, or did it suggest to the court that it could prove by any witness, that the two horses were of less value than \$125. The court properly overruled appellant's motion for peremptory instruction, which was asked at the close of its testimony, and before appellee had offered any evidence. We are of opinion that the evidence sustains the verdict of the jury. Finding no error prejudicial to appellant, the judgment is affirmed, with damages.

#### WADE et al. v. DEAN.

(Court of Appeals of Kentucky. Dec. 4, 1897.)

WILLS—CONSTRUCTION—LEGACIES—DEBTS.

Where testator, having assets exceeding his indebtedness, directed that his debts should be paid, and made a legacy to a brother in language that did not import an intention that the legacy was to be a payment of a debt which he owed him, it was not an extinguishment of the debt.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by Eliza Wade and others against Ellis Dean. From a judgment for defendant, plaintiffs appeal. Affirmed.

A. T. Wood, for appellants. Tyler & Aperson, for appellee.

PAYNTER, J. The purpose of this action was to surcharge the settlements made by Ellis Dean, as the executor of Stephen Dean, in the Montgomery county court. Without going into any detail as to the various items questioned in the petition and exceptions to the commissioner's report, it is sufficient to say, in our judgment, that the appellants wholly failed to show any errors in the settlement which the executor made that were not corrected by the judgment of the court. There is no proof whatever offered on the Conway and Shore items, or on the claim allowed Ellis Dean against the estate for the board of the decedent. The appellants claim that the executor should be charged with the interest on the proceeds of the tobacco which he sold. The executor testifies that, soon after he received the money, he paid it

to the creditors of the estate and the devisees to whom it was going under the will. He stands uncontradicted upon this question. We do not think the cases of *Weir v. Weir's Adm'r*, 3 B. Mon. 645, and *Cloud v. Clinkinbeard*, 8 B. Mon. 397, are applicable to this case. We do not desire to review these cases with the view of giving all the reasons why they are not applicable to the question raised, that the bequest to Ellis Dean must be treated as the payment of the debt which the testator owed him. Suffice to say that there is at least one reason why the doctrine of the last-named case does not apply to the facts of this one. There was a direction in the will that the debts of the testator should be paid, and such provision of the will must be treated as a direction to pay whatever just debt he may have owed Ellis Dean. The testator seems to have had sufficient estate to enable him to be both just and generous, and, as the language of the will does not import an intention that the legacy is to be a payment of the debt which he owed his brother Ellis, it must be regarded as a donation to him. The judgment is affirmed.

#### LANE et al. v. TRADERS' DEPOSIT BANK OF MT. STERLING.

(Court of Appeals of Kentucky. Dec. 2, 1897.)

MARRIED WOMAN—CONTRACTS OF SURETYSHIP—MORTGAGE—CONSTRUCTION.

1. A judgment of the circuit court conferring on a married woman the rights and powers of a feme sole does not authorize her to make a contract of suretyship.

2. A recital in a mortgage that the second party "has simultaneously herewith loaned to the first parties the sum of \* \* \*, evidenced by the promissory note of said first parties: Now, to secure the prompt payment of same, the said first parties \* \* \* hereby mortgage and convey the following tract of land \* \* \*," is prima facie evidence that the loan was made to both mortgagors jointly.

Appeal from circuit court, Bath county.

"Not to be officially reported."

Action by Traders' Deposit Bank of Mt. Sterling against Crit O. Lane and George Lane. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Tyler & Apperson, for appellants. T. J. Bigstaff, for appellee.

BURNAM, J. Appellee instituted this suit against appellants upon this obligation: "\$648.00. Mt. Sterling, Ky., February 24, 1886. Twelve months after date we, or either of us, promise to pay to the order of the Traders' Deposit Bank of Mt. Sterling, Ky., six hundred and forty-eight dollars, at their office in Mt. Sterling, for value received, with interest from maturity at the rate of — per cent. Crit & Geo. Lane. Crit Lane,"—asking a personal judgment, and alleging that appellant Crit Lane and her husband had executed a mortgage to secure the payment thereof on a tract of 15 acres of land, and also sought the enforcement of the lien

by a sale of the property, or much thereof as might be necessary to satisfy the debt sued on. The mortgage was filed as an exhibit with the petition, and contains the following recital: "This indenture made this 24th day of February, 1886, between George Lane and his wife, Crit Lane, of the first part, and the Traders' Deposit Bank of Mt. Sterling, Ky., of the second part, witnesseth: That the second party, the said Traders' Deposit Bank, has simultaneously herewith loaned to the first parties the sum of \$648, due twelve months after date, with ten per cent. interest thereon until paid, evidenced by the promissory note of said first parties: Now, to secure the prompt payment of same, the said first parties, George and Crit Lane, hereby mortgage and convey the following tract of land," etc. The appellant Crit Lane, who was the wife of George Lane, filed an answer to this petition, alleging that she was only the security of her deceased husband, George Lane, upon the note sued on; further alleging that the land mortgaged to secure the payment of the note was her individual general estate, and that her husband had no interest therein, pleading that after the maturity of the note plaintiff had, without her knowledge or consent, in consideration of the payment by her husband of interest thereon in advance, granted him indulgence, and pleading release thereby. The deed evidencing title to the property showed it to be in appellant and her deceased husband jointly. No proof, except the exhibits referred to, was filed in the record, and the court gave appellee judgment for the debt sued on, and adjudged a sale of the mortgaged property to satisfy it. Appellant thereupon prosecuted an appeal to this court from the judgment, and it was reversed because the record disclosed that appellant was a married woman, and that there was no averment or proof establishing a state of case in which she could be made liable for the debt, and also because the judgment of sale failed to direct a division of the land, and that the part allotted to her husband be first sold; but holding "that appellant was not responsible as surety to her husband by reason of the execution of the mortgage to secure the husband's debt, but that it is a pledge to secure the payment only, and the right of an ordinary security could not be alleged as a defense." Upon the return of the case to the lower court appellant offered an amended answer, by the first paragraph of which she set out that the mortgaged property belonged to her individually, and by the second paragraph she alleged that at the September term, 1873, of the Bath circuit court, she had been vested with all the powers of a feme sole, to use, enjoy, sell, and convey her property, and also with the power to make contracts, sue and be sued, as a feme sole, trade in her own name, and to dispose of her property by will or deed; and she further stated that by a mistake of

her attorney in drafting her answer, and through inadvertence on her part, she was made to say that she was only the surety on the note of George Lane sued on, when, as a matter of fact, she should have stated that she did not execute the note sued on at all, alone or in connection with George Lane, but further alleging that she executed the mortgage upon the 15 acres of land to plaintiff only as surety of George Lane upon the debt, and withdrew so much of her original answer as set up the fact that she was a security on the note,—seeking by this pleading to bring herself within the rule applicable to ordinary sureties in order to avail herself of her plea of release by indulgence to the principal. The affirmative allegations of this answer were denied by the reply, and the case was again submitted for judgment. The court rendered a personal judgment against her for the amount sued for, and also a judgment enforcing the mortgage lien upon the tract of land, and from that judgment this appeal is prosecuted.

The judgment of the Bath circuit court, conferring upon appellant the rights and powers of a feme sole, does not authorize her to make herself liable as surety, and, as held by this court in the case of *Bidwell v. Robinson*, 79 Ky. 29, conferred upon her no power to contract so as to make herself liable as surety of her husband or any one else; and, so far as her liability as surety upon the obligation sued on is concerned, her status is not changed in any wise by the judgment giving her the powers of a feme sole. But in this action she is not sued as a surety at all. She is sued as a principal,—as a member of the trading firm of "Crit & George Lane"; and, while it is true that she denies the existence of such a firm, and alleges that she was never in any degree interested in such a firm, or authorized the signing of such alleged firm name to the obligation sued on, this allegation is denied, and upon the submission of the cause the only evidence bearing upon the question is the mortgage itself, which distinctly recites that the money for which the obligation sued on was executed was loaned to both George Lane and his wife, *Ort Lane*; and it also distinctly sets out that "the first parties, George and Crit Lane," mortgaged the land in question. We think the recital of the mortgage is *prima facie* evidence in support of appellee's contention that the money was loaned to appellant in connection with her husband, and there can be no doubt about the competency of these recitals as evidence, as it has been often approved by this court, beginning with the case of *Trumbo v. Curtright*, 1 A. K. Marsh. 582, and followed by numerous decisions since, and is also recognized by *Best* in his work on *Evidence*, p. 980, and 1 *Greenl. Ev.* §§ 23-26. Of course this *prima facie* evidence could have been rebutted by parol proof contradicting these recitals, but the record contains no evidence

of this sort. The allegations of the second paragraph of the amended answer, and the exhibits accompanying same, supply both the averments and proof necessary to support the personal judgment complained of, and are corroborative of appellee's contention that appellant signed the obligation sued on as principal. Perceiving no error prejudicial to the rights of appellant, the judgment is affirmed.

#### LOUISVILLE & N. R. CO. v. CATRON.

(Court of Appeals of Kentucky. Dec. 1, 1897.)

##### CARRIERS—CARS FOR COLORED PERSONS.

Ky. St. § 801, excepting officers in charge of prisoners from the provisions of the separate coach law, creates an exception in favor of the officer only, and a negro prisoner in the custody of a white officer may be compelled to ride in the car provided for colored persons.

Appeal from circuit court, Knox county.

"To be officially reported."

Action by John H. Catron against the Louisville & Nashville Railroad Company. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Wilson & Rawlings and J. W. Alcorn, for appellant. James D. Black and Tinsley & Faulkner, for appellee.

**WHITE, J.** This action was begun in the Knox circuit court by the appellee against appellant for damages. The cause of complaint and damages alleged by plaintiff are that in June, 1894, appellee was the sheriff of Knox county; that, as such officer, he at that time had a prisoner in his charge,—a negro lunatic; that the appellee had, by proper orders and judgment of a court of competent jurisdiction, been directed to take the negro lunatic to the asylum at Lexington, Ky.; that, while executing this order and judgment, appellee bought two first-class tickets (one for himself, and one for the lunatic) from *Barboursville* to *Winchester*, over appellant's road; that, from *Barboursville* to *Livingston*, appellee and his prisoner occupied the smoking car for white persons, but that from *Livingston*, where he changed trains, to *Richmond*, appellee was compelled by the conductor in charge of the train to ride with the prisoner in the coach set apart for colored persons exclusively, as, by the laws of Kentucky, he was required to do. For this alleged injury and insult he claimed judgment in damages. To this petition the appellant answered after a demurrer to same had been overruled. This answer is a general and special denial of all the facts alleged, except that appellee was the sheriff in charge of a prisoner, and bought the two tickets, as alleged. It denied that appellee was compelled to ride in the colored coach, or requested so to do, by any officer or agent of appellant. The is-

sue thus presented was tried before a jury, and they returned a verdict for appellee for \$1,250, and judgment was rendered thereon; and, after appellant's motion for new trial had been overruled, it appealed to this court.

The decision of this case requires a construction of the separate coach law; being the act of May 24, 1892, and embraced by sections 795 to 801 of the Kentucky Statutes. Section 795 reads, so far as applicable: "Any railroad or corporation \* \* \* are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach, within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words, in plain letters, indicating the race for which it is set apart." Section 796 provides that railroad companies shall make no difference or discrimination in the coaches set apart for white and colored passengers. Section 797 provides a penalty against railroads, in the sum of from \$500 to \$1,500, for each failure. Section 798 gives the circuit courts jurisdiction of the offenses. Section 799 provides: "The conductors or managers on all railroads shall have power and are hereby required to assign to each white or colored passenger his or her respective car or coach or compartment, or should any passenger refuse to occupy the car, coach or compartment, to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off the train. And for such refusal and putting off the train neither the manager, conductor, nor railroad company shall be liable for damages in any court." Section 800: "That any conductor or manager on any railroad who shall fail or refuse to carry out the provisions of section 799 shall upon conviction be fined not less than fifty nor more than one hundred dollars for each offense." Section 801: "The provisions of this act shall not apply to employes of railroads or persons employed as nurses, or officers in charge of prisoners."

The precise question to be here determined is the effect of the clause in section 801 reading, "The provisions of this act shall not apply to \* \* \* officers in charge of prisoners." The evident intention of the legislature in the enactment of this law was to separate the two races in their travel on the railroads throughout the state, as is likewise the policy in the schools, and at the same time providing that colored passengers should have equal rights. But it was recognized that to make this separation of the races absolute, and in all cases, would be

impracticable, as to the railroad employes. If the white man must keep out of the colored coach, and the colored man keep out of the white coach, in all cases, there would be two sets of trainmen on one train. So the exception was made in behalf of the employes. They may, of course, go in either coach. Again, recognizing the necessity in a great many cases that persons traveling should be accompanied by a nurse, this nurse was included in the excepting clause. The law not applying to the nurse, she may go with her charge. This was, of course, done in order that the child or invalid might have the services of the nurse on the journey. This nurse can occupy the car assigned to her race, or to the one of the child or invalid. But there is a third class of persons who are also excepted from the provisions of the act, viz. "officers in charge of prisoners." The exception is not to the prisoner, but to the officer; and being connected in the same sentence with the exception in favor of the employes and of nurses, we conclude that the same rule applies to the officer in charge of a prisoner. He may occupy either car. He may occupy the car assigned to his race, or he may occupy the car of the race of the prisoner, but the prisoner must in all cases occupy the car assigned to his race. The exception is not made to the prisoner, or for his benefit, but to the officer, that he may accompany the prisoner and detain him. The testimony of the appellee himself on the trial, as presented by this record, shows that there was no indignity offered him, except that he was told that the negro lunatic must ride in the colored coach, and that the conductor told appellee that he could leave the negro lunatic in the colored car, and sit himself in the white car, and leave the door between the two compartments open, so that he could guard the prisoner. This the appellee declined to do, for the reason that he feared that the negro would jump out of the window, and appellee refused to be separated from his prisoner. We are of opinion that under the law the conductor was compelled to assign the negro lunatic to the car set apart for colored persons, and, if appellee refused to separate from his prisoner, he had a right to ride in that car, or he had a right to occupy the other car, as the conductor informed him he could do. It seems to us that the conductor did only as the law provided that he should do, and, in our opinion, these acts did not render appellant liable; and it therefore follows that, as by appellee's own showing he was not entitled to recover, the peremptory instruction should have been given, to find for defendant. Wherefore the judgment is reversed and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

## CHESAPEAKE &amp; O. RY. CO. v. COMMON-WEALTH.

(Court of Appeals of Kentucky. Dec. 1, 1897.)  
RAILROAD COMPANIES—FAILURE TO GIVE SIGNALS  
AT CROSSINGS—INDICTMENT.

Ky. St. § 786, requires railroad locomotive bells to be rung and whistles sounded, outside of cities, 50 rods from the place where the railroad crosses upon the same level any highway or crossing at which a signboard is required to be maintained. Section 773 provides that the highway or crossing at which a signboard shall be maintained is a "public highway." *Held*, that an indictment against a railroad company for failure to comply with section 786 substantially averred that the railroad was crossed at the place described by a public highway, where it alleged that defendant's railroad crossed a public highway at C. Station, and particularly described the highway as a road leading from what was known as a certain state road, and known as the "Public County Road No. 32."

Appeal from circuit court, Shelby county.  
"Not to be officially reported."

The Chesapeake & Ohio Railway Company was convicted of failure to give signals at a certain crossing, as required by Ky. St. § 786, and appeals. Affirmed.

John T. Shelby and P. J. Foree, for appellant. W. S. Taylor, for the Commonwealth.

LEWIS, C. J. Appellant was indicted and convicted for the offense of refusing to comply with requirement of section 786, Ky. St., as follows: "Every company shall provide each locomotive engine passing upon its road with a bell of ordinary size and steam whistle, and such bell shall be rung or whistle sounded, outside of incorporated cities and towns, at a distance of at least fifty rods from the place where the road crosses upon the same level any highway or crossing, at which a signboard is required to be maintained; and such bell shall be rung or whistle sounded continuously or alternatively until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require." The highway or crossing at which a signboard is required to be maintained is, as provided by section 773, a "public highway." A demurrer to the indictment was filed in the lower court, and insisted upon in this court, as the only ground of reversal, because, as argued, it does not contain an affirmative or substantive averment that the particular highway or road, at the crossing of which, by the railroad, appellant's servants are charged with failing to ring the bell or sound the whistle, as required, was in fact a "public highway." The offense being directly and certainly enough charged, the particular circumstances of the offense must be set forth in such manner as to accomplish these purposes: First, to show jurisdiction of the court; second, to describe and identify the offense, that a verdict and judgment founded upon it may be available as a plea in bar to a subsequent prosecution; third, to apprise defendant of the particular accusation on which he is to be tried. It is not contended

that the two first requirements are not complied with. Nor do we think there is a failure to sufficiently state the character of the highway in such terms as to amount to a substantial averment that the railroad was crossed at the place described by a public highway. It is distinctly stated that appellant's railroad crossed a public highway at Conner's Station; and in a subsequent part of the indictment that highway is more particularly described as a road leading from what is known as the "State Road" to Louisville Southern Park, and known as the "Public County Road No. 32," etc. It was not necessary to state when and by what authority the public highway was established, it being sufficient to state the fact (which we think was substantially done) that the place where the offense of omission occurred was a crossing at grade of appellant's railroad, and a "public highway." Judgment affirmed.

## BUCKNER et al. v. DAVIS.

(Court of Appeals of Kentucky. Nov. 30, 1897.)

## MORTGAGES—RECORD—PRIORITY.

Under Gen. St. c. 24, § 11, providing that mortgages shall take effect in the order that they shall be "lodged for record," a mortgage left with the proper officer, with directions to record it, but, by oversight, not recorded until several years afterwards, and after the recording of a subsequent mortgage, takes precedence over the latter, though it appears that the officer, who was indebted to the mortgagee, and between whom there were mutual accounts, assumed to pay the tax thereon, in accordance with the usual plan theretofore pursued between them.

Appeal from circuit court, Livingston county.

"Not to be officially reported."

Action between J. M. Buckner and others and C. B. Davis, involving the priority of certain mortgages. From the judgment rendered, J. M. Buckner appeals. Affirmed.

Chas. H. Webb and John K. Hendrick, for appellant. Bush & Worten, and W. D. Green, for appellees.

HAZELRIGG, J. Which of two mortgages is to be given the preference, is the sole question presented on this appeal. The mortgage of appellee Davis was executed and acknowledged before the clerk at the Livingston county court (the land being situated in that county) on September 14, 1877, but, though left with the clerk, was not recorded until July 11, 1881. The other (or Buckner) mortgage was executed and acknowledged properly in McCracken county on November 7, 1877, and sent at once to the proper office in Livingston county, where, on the 10th of November, 1877, it was duly recorded. The statute controlling the question involved (Gen. St. Ky. c. 24) is as follows: "Sec. 11. All bona fide deeds of trust or mortgage shall take effect in the order that the same shall be legally acknowledged or proved and lodg-

ed for record." It is the contention of appellee Davis that, while his mortgage was not recorded until in 1881, it was legally acknowledged and lodged for record within a few days after its execution. The proof shows that the clerk was indebted to Davis at the time he left the mortgage with him, and for this reason alone Davis did not pay any money to him for the tax thereon. The clerk, however, assumed to pay the tax to the state, and so testifies; but he failed to record the instrument, by oversight, though directed to do so by Davis. It is shown that Davis and the clerk had mutual accounts with each other, and the plan pursued as to the mortgage in question was the usual one with them, and in accordance with their agreement. We think the Davis mortgage was legally lodged for record, within the meaning of the statute, and is entitled to preference over the subsequently executed mortgage to Buckner. Under this view of the subject, it becomes unnecessary to notice the contention of appellee that in any event Buckner had actual notice of the prior mortgage before he acquired any right under his mortgage. Judgment affirmed.

#### LYONS v. STRATTON.

(Court of Appeals of Kentucky. Dec. 1, 1897.)

##### SLANDER—WORDS ACTIONABLE PER SE.

Where the reasonable and well-understood meaning of the words alleged to have been spoken amount to a statement that plaintiff, an unmarried woman, was unchaste, the words are actionable per se.

Appeal from circuit court, Hancock county.

"To be officially reported."

Action by Laura Lyons against H. F. Stratton. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

Eugene C. Vance, for appellant. Murray & Duncan, for appellee.

GUFFY, J. This is an appeal from the Hancock circuit court, from a judgment rendered in the suit of the appellant against the appellee. It seems to be conceded that the original petition was defective, and the question for decision is as to the sufficiency of the amended petition, to which a demurrer was sustained, and the action dismissed, from which judgment appellant prosecutes this appeal.

Said amended petition reads as follows: "The said plaintiff, Laura Lyons, amends her petition herein, and states that she is an unmarried female, 16 years of age, and was, up until the grievances hereinafter complained of, a person of good repute for chastity in the neighborhood where she resides. That in said neighborhood, to speak of and concerning an unmarried female the words, 'She is set up for the winter,' has a local and provincial meaning, and implies, means, and is generally understood that the person thus spoken of is in a family way, and with child, and has com-

mitted fornication. And to speak of and concerning such said female, in said neighborhood that 'she is or will be knocked up,' implies, means, and is generally understood that person thus spoken of is in a family way, with child, and has been guilty of the crime of fornication. That well knowing the premises, and wickedly intending to injure the plaintiff, the said defendant did, in said neighborhood, on the — day of —, 1894, within one year before the filing of this action, in a certain discourse which defendant had, of and concerning the said Laura, and concerning her said character for chastity in the presence and hearing of divers persons, falsely and maliciously did speak and publish the following false and defamatory words, that is to say: 'She (meaning said Laura) set up for the winter;' 'She (meaning said Laura) had been told, if she did not let Terry alone, she (meaning said Laura) would be knocked up, and I (meaning said defendant) had been expecting it for some time,'—mean thereby to charge and he was so understood mean by the persons who heard him speak the said words that she (said Laura) was in a family way and with child, and that she had and had been guilty of the crime of fornication." Second paragraph: "Said plaintiff, further cause of action against said defendant states that she is an unmarried female, 16 years of age, and, up until the happening of the grievances hereinafter complained of, was of good repute for chastity in the neighborhood where she resides. That, in said neighborhood and in the neighborhood where the words hereinafter set out were spoken, the local or provincial meaning is attached to the words 'got her belly up' when spoken of concerning an unmarried female, and that the words so spoken imply, mean, and are generally understood by those who thus hear the words spoken that the person thus spoken of is in a family way, and with child, and has committed the crime of fornication. That the defendant, well knowing the premises, and intending to wickedly injure the plaintiff, in a certain discourse, defendant, on the — day of —, 1894, and less than one year before the commencement of this action, had of and concerning the said Laura, and of and concerning her reputation for chastity, in the presence and hearing of divers persons, falsely and maliciously did speak and publish the following false and defamatory words, that is to say: 'Laura Lyons sent for George Spencer, and got some condurms; and, if she (meaning plaintiff) hadn't got her belly up, she (meaning plaintiff) will have it if she don't watch herself, thereby charging and intending to charge, and he was so understood by the persons who heard him speak at the time, that the said Laura and would be in a family way, and with child, and had committed the crime of fornication.' Third paragraph: "Further complaining, plaintiff states that she is an unmarried female, 16 years of age. That in the neighborhood where she resides, and where the w-

were spoken as set out hereinafter, the words 'got her belly up,' when spoken of an unmarried female, have a provincial and local meaning, and mean that the person thus spoken of is in a family way with child, and, by reason thereof, has committed the crime of fornication; and that the words 'I 'sposz,' spoken in said localities, mean, by reason of said local and provincial meaning and custom, 'I suppose so.' That, well knowing the premises, and wickedly intending to injure the said plaintiff, the said defendant did, on the — day of November, 1894, in a certain discourse which he then had of and concerning the said plaintiff, and of and concerning her character for chastity, in the presence and hearing of divers persons, falsely and maliciously did speak and publish the following false and defamatory words, that is to say: 'Laura Lyons (meaning plaintiff) sent for George Spencer, and he got some condiums; and, if Laura (meaning plaintiff) hain't got her belly up, she will have it if she don't watch.' And in a subsequent discourse which defendant had with the same persons to whom he spoke the words last set out, on the — day of —, 1894, of and concerning the said plaintiff, and of and concerning her character for chastity, and of and in continuance of said last set-out discourse, said defendant, in the presence and hearing of the said divers persons, did falsely and maliciously speak and publish the following false and defamatory words, that is to say: 'You know what I was telling you about Laura Lyons (meaning plaintiff, and referring to the said defamatory words first set out in this paragraph). Well, I 'sposz it's so,'—meaning thereby to charge, and he was so understood to charge and mean by the persons who heard him speak the words, that the said Laura Lyons had committed fornication, and was then in a family way, and with child. Whereby the said plaintiff has been injured in her good name and reputation, and, by reason of said injuries, has been damaged in the full sum of one thousand dollars, for which plaintiff demands judgment, and for all general and proper relief."

It is said in section 133, Townsh. Sland. & L.: "Language is always to be regarded with reference to what has been its effect, actual or presumed, and the sense is to be arrived at with the help of the cause and occasion of its publication. The court or the jury is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language in question, according to its natural and popular construction. \* \* \* "The law cannot be evaded by any of the artful and disguised modes in which men attempt to conceal the libelous or slanderous meanings; and the fact of language being ungrammatical, or such as is not usually found in any dictionary, will not suffice to prevent the law taking cognizance of such language or of meaning it properly conveys." In note 3 on page 178 it is said: "Words calculated to induce the hearers to suspect that plaintiff was guilty of the crime alleged are ac-

tionable. It is not necessary that the words in terms should charge a crime. If such is the necessary inference, taking the words altogether and in their popular meaning, they are actionable." In note 1, p. 179, in *Com. v. Childs*, 13 Pick. 193, it is said by Shaw, Chief Justice: "The court will regard the use of fictitious names and disguises in a libel in the sense that they are commonly understood. If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import; and the sense in which it was intended is to be gathered from the context, and from all the facts and circumstances under which it was used."

It seems to us that upon authority, as well as the known meaning of the words charged in the amended petition to have been spoken by the appellee, the reasonable and well-understood effect of the words alleged to have been spoken clearly amounted to the statement that the plaintiff had been guilty of the offense of fornication, and that the same are actionable per se, and especially so as explained by the colloquium in the pleading. The words charged to have been spoken by the appellee, it seems to us, could have no reasonable meaning, except the intent to charge that the plaintiff was unchaste. It therefore results that the court erred in sustaining the demurrer to the amended petition. The judgment appealed from is therefore reversed, and the cause remanded, with directions to overrule the demurrer, and for proceedings consistent with this opinion.

#### STEPHENS v. SPRADLIN.

(Court of Appeals of Kentucky. Nov. 30, 1897.)  
VENDOR AND PURCHASER — LIEN FOR PURCHASE PRICE.

Land belonging to the state was conveyed by title bond, the grantor agreeing to furnish a good deed or procure a patent to the vendee. The vendee, before receiving the patent, traded the land for other lands to parties who procured the patents therefor direct from the commonwealth. *Held*, that the original vendor's lien for purchase price did not follow the original vendee, so that a creditor of the original vendor could subject the land received in trade by the vendee to the payment of his claim.

Appeal from circuit court, Elliott county.  
"Not to be officially reported."

Suit by H. J. Spradlin to subject the land of Isaac Stephens to the payment of a debt owing plaintiff by defendant's vendor. From a judgment awarding plaintiff a lien, the defendant appeals. Reversed.

J. B. Hannah, for appellant. Thos. D. Theobald, for appellee.

PAYNTER, J. On December 19, 1887, T. T. Mobley and Bettie, his wife, executed and delivered to the appellant, Isaac Stephens, a title bond for a boundary of land supposed to contain 100 acres. The consideration was \$100, about \$10 of which was paid, and for the balance a note was executed payable Oc-

tober 16, 1888. On a return of nulla bona the appellee, Spradlin, instituted this suit, and sought to subject enough of the amount supposed to be due from Stephens to Mobley for the purchase money of the land to the payment of his debt. Mobley, by the terms of the title bond, was to make a good deed to Stephens or procure a grant from the state to him for the land. It appears that Mobley did not have any title to the land or possession of it, nor did he ever attempt to procure a title thereto. Stephens testifies that he never took possession of any part of it under his purchase, and upon this question he is not contradicted. At the time Stephens made the contract with Mobley he was living on land belonging to one Ferguson, and had it rented for the ensuing year. Bryant Fannin purchased of Ferguson the land upon which Stephens was living and desired the possession of it. In order to get it he told Stephens to take possession of a certain part of his land, which Stephens did, Fannin at the time representing that Mobley had no title to the land which he had contracted to Stephens. Subsequently Fannin told Stephens to keep the parcel of land upon which he had moved, and that he (Fannin) would take a certain part of the land which Mobley had attempted to sell Stephens. Fannin took possession of a part of the Mobley tract, and procured a patent from the commonwealth therefor. Fannin, and those claiming under him, have been in the actual possession of the land since about 1888, claiming it as their own. It is not clear that the land was unappropriated at the time of the transaction. H. B. Weddington made arrangements by which Stephens was placed in possession of a certain parcel of land adjoining the piece which he had obtained from Fannin, in consideration of which Weddington was to have a portion of the Mobley tract. Weddington took possession of it, and a grant was obtained from the commonwealth therefor, and he and his vendee have been in the actual possession of it, claiming it as their own, since the exchange, which seems to have been made in the year 1888. The boundary which Stephens obtained from Fannin contained 34 acres, and the boundary which he obtained from Weddington contained 40 acres. Weddington says he thinks there was a writing between himself, Stephens, and Mobley relating to the exchange. If such writing did exist, it is not made a part of the record, nor was there any attempt made to prove its contents. The court adjudged Spradlin a lien for the amount of his debt, interest, and costs on the parcels of land which Stephens obtained from Weddington and Fannin, and ordered them sold to satisfy the lien so adjudged. The question for review is whether the court erred in adjudging a lien for Spradlin's debt on the tracts of land mentioned. There is no evidence in the record which tends to prove that Stephens ever agreed there should be a lien upon the tracts of land which he obtained

from Weddington and Fannin, for the amount which he had agreed to pay Mobley. The evidence conduces to prove that the Mobley tract of land was of much greater value than the tracts which Stephens had obtained from Fannin and Weddington. When land is sold, and payments of the purchase money are deferred, a lien therefor attaches by operation of law. When conveyed by title bond, it is not necessary to say that a lien is reserved for the purchase money in order to give the vendor a lien for deferred payments; when it is conveyed by deed, it is not necessary to state in the deed that a lien is reserved, but the vendor may have one if it is stated in the deed what part of the consideration remains unpaid. If Stephens owed Mobley, it was not for the purchase of the tracts of land which he had obtained from Weddington and Fannin. There was but one way by which Stephens could give Mobley a lien upon the land which he got from Weddington and Stephens, and that was by contract, and none seems to have been made. It might be assumed (but it is not necessary to decide that question) that Mobley's title to the land which he sold Stephens was perfected by the possession of Weddington and his vendee, and Fannin and those who claim under him, and the grants which they obtained from the commonwealth, still Mobley would not have a lien upon the 34 and 40 acre tracts for what Stephens might owe him. If Mobley had no lien on these tracts, it follows that Spradlin could not acquire one; he could only acquire by his equity proceeding such rights as Mobley possessed. If A. buys land from B. upon which B. retains a lien for purchase money, and A. trades the land thus purchased of B. to D. for other lands, the effects of the transaction would not be to give B. a lien for his purchase money on the land which A. acquired from D. The judgment is for proceedings consistent with this opinion.

#### JERNIGAN v. CITY OF MADISONVILLE et al.

(Court of Appeals of Kentucky. Dec. 1, 1897.)

##### CONSTITUTIONAL LAW—JUDICIAL POWERS.

Ky. St. §§ 3661, 3662, so far as they attempt to authorize circuit courts to assign or transfer a town or city from one class to another, violates Const. § 156, wherein such power is granted to the legislature alone.

Appeal from circuit court, Hopkins county.

"To be officially reported."

Action by W. H. Jernigan against the city of Madisonville and others to restrain defendants from exercising the powers conferred on cities of the fourth class. A writ of prohibition was refused, and plaintiff's petition was dismissed. Plaintiff appeals. Reversed.

O. J. Waddle, for appellant. Gordon & Gordon, for appellees.



GUFFY, J. It appears from this record that the circuit court of Hopkins county entered an order and judgment transferring the city of Madisonville from cities of the fifth class to cities of the fourth class, and afterwards the appellant instituted this action in the Hopkins circuit court against the said city, H. H. Holman, mayor, and other officers thereof, seeking to enjoin and restrain said defendants from exercising, or attempting to exercise, the privileges and powers conferred by law upon cities of the fourth class. The defendants pleaded and relied upon the said orders and judgment of the circuit court transferring said city to the fourth class, to which answer the plaintiff demurred, which demurrer was overruled by the court, and the court refused to grant the writ of prohibition or order of injunction, and dismissed the petition, and from that judgment this appeal is prosecuted.

The sole question presented for decision is as to the constitutionality of the act empowering the circuit courts to make such transfers or assignments from one class to another class. Section 156 of the constitution reads as follows: "The cities and towns of this commonwealth, for the purpose of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a population of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class towns with a population of less than one thousand. The general assembly shall assign the cities and towns of the commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding federal census in so doing; but no city or town shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor. The general assembly, by general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the general assembly after

the organization of said town or city." Sections 3661, 3662, Ky. St., provide, in substance, that when the population of any city or town, as ascertained by the last federal census, or by the census taken pursuant to an ordinance of said town, authorizes it to be placed in a class other than that in which it is, the authorities of such a town may enact an ordinance setting forth the population of the town, and may file a petition in the circuit clerk's office declaring the facts, and, upon the proper steps being taken, and evidence furnished to the circuit court of the county, said court may enter a judgment assigning such town to the class to which it belongs as appears from the petition and exhibits, and thereafter such town may be governed by and under the general laws relating to the class to which it has been assigned. It is conceded that the transfer or assignment under consideration was made pursuant to and in accordance with the provisions of the sections supra. We therefore deem it unnecessary to copy the sections in full. It will be seen from the provisions of section 156 of the constitution that the cities and towns of the commonwealth shall be divided into six classes, and the classification is determined by the population of such town. The population of each class is fixed by the constitution. It will be further seen that the general assembly is required to assign the cities and towns of the commonwealth to the classes to which they respectively belong, and change assignments made as the population may increase or decrease. It will be seen that the power and duty of assigning towns to the different classes, and changing such assignments, is conferred alone upon the legislature; and no grant of power is given the legislature to delegate the power to make such change or assignment to any tribunal. It will be further seen that the power is given to the legislature to provide for the creation or organization of new towns, yet the legislature is required to assign such towns to the classes to which they belong at the first session of the legislature after such organization. It is further provided that no assignment shall be made except in pursuance to a law previously enacted and providing therefor. It follows, therefore, that so much of sections 3661 and 3662 of the Kentucky Statutes, supra, as attempts to authorize the circuit courts to assign or transfer a town or city from one class to another is unconstitutional and void, and that the judgment of the Hopkins circuit court attempting or assuming to transfer said city of Madisonville to cities or towns of the fourth class is null and void, and of no effect. So much of said sections, however, as provides means for taking the census or determining the population of any such city or town is constitutional and valid, and, when the population of a town is ascertained pursuant to the provisions of said section, the legislature will be author

ized to make the proper transfer of such town or city. The object of the framers of the constitution doubtless was to provide a certain, safe, and convenient means whereby it might be readily ascertained to what class any city or town belonged, and therefore provided that all assignments or changes from one class to another should be by an act of the legislature, which would always be a matter of record, and readily accessible to the whole people. The requirement of the general law providing for such changes was deemed proper and necessary to the end that the citizens of the several towns should know in advance how and when such changes might be lawfully made. For the reasons indicated, the judgment appealed from is reversed, and the cause remanded, with directions to grant the writ of prohibition and injunction prayed for, and for proceedings consistent herewith.

#### BOARD OF COUNCILMEN OF TOWN OF NICHOLASVILLE v. RARICK.

(Court of Appeals of Kentucky. Dec. 2, 1897.)

#### TAXATION—PROPERTY IN ADJOINING MUNICIPALITIES—CONSTITUTIONAL LAW.

Under Const. § 174, providing for the taxation "of all property in proportion to its value," and section 171, providing that taxes shall be uniform upon all property \* \* \* within the territorial limits of the authority levying the tax," the smaller portion of one's farm lying within the limits of a town is subject to a tax otherwise properly levied by the municipality.

Appeal from circuit court, Jessamine county.

"To be officially reported."

Action by board of councilmen of the town of Nicholasville against Phillip Rarick to recover a tax. From the judgment rendered, plaintiff appeals. Reversed.

Bronaugh & Bronaugh, for appellant. Breckinridge & Shelby, for appellee.

PAYNTER, J. Phillip Rarick is the owner of a farm containing about 236 acres, through which the boundary line of the town of Nicholasville passes in such a way as to include within the limits of the corporation about 120 acres of the farm. Under the doctrine of the Southgate Case (City of Covington v. Southgate), 15 B. Mon. 491, the 120 acres would not have been subject to municipal taxation. The sole question on this appeal is whether the present constitution has changed the rule of municipal taxation recognized in that case to be the correct one under the former constitution. We think that the case of Board v. Scott (opinion delivered September 24, 1897) 42 S. W. 104, determines the question in this case. There is no question raised as to the regularity of the assessment, nor that the board of councilmen sought to impose the tax under a general law. Section 174 of the constitution reads as follows: "All property,

whether owned by natural persons or corporations, shall be taxed in proportion to value, unless exempted by this constitution. There is no contention that the property assessed in excess of its value, nor is there any claim that it is exempted from taxation by the constitution. Section 171 of the constitution reads as follows: " \* \* \* Taxes shall be levied for public purposes. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and taxes shall be levied and collected by the laws." It is our opinion, when taxes are imposed by municipalities, they shall be levied and collected on all property within the territorial limits of such municipalities, except it be exempted from taxation in virtue of the provisions of the constitution. When taxes are imposed by the authority in the state, county, or any division thereof, or taxing district, they shall be levied and collected on all property situated within the territorial limits of the authority levying them, except it be exempted by the constitution. We are of the opinion that the constitution has changed the rule of taxation as announced in the Southgate Case and those following it which embodied a similar doctrine. The judgment is reversed.

#### McKENSIE v. SALYER.

(Court of Appeals of Kentucky. Dec. 2, 1897.)

#### JUDICIAL SALES—CREDIT—HUSBAND AND WIFE—FRAUDULENT CONVEYANCES—BURDEN OF PROOF—ADJUSTMENT OF RIGHTS.

1. Under Civ. Code, § 696, providing that a sale of real estate made by order of court shall be upon such reasonable credit, of not less than six months, as the court shall direct, it is a reversible error to direct a sale on a credit of less than six months.

2. Where a husband executed notes for the purchase of land, and made the first payment thereon, but the wife paid \$600 on the land, the burden is on the wife, as against her husband and prior creditors, to sustain her claim to a greater interest in the land than that created by the notes.

3. Such creditors can satisfy their claim on the land only subject to the claim of the wife for her own money invested therein.

Appeal from circuit court, Morgan county. "Not to be officially reported."

Action by John P. Salyer against John P. McKensie to subject land to the payment of a debt of the husband of defendant. Judgment for plaintiff, defendant appeals. Reversed.

Ed C. O'Rear, for appellant. Hines, for appellee.

PAYNTER, J. The judgment directing the sale to be made upon a credit of less than six months. Under section 696, Civ. Code, property cannot be sold on a credit of less than six months, and it is a reversible error for the court to direct real property sold upon a credit of less than six months.

The appellee, Salyer, sought to subject the land to the payment of his debt, because, as he alleged, W. A. McKensie bought the land after his debt had been contracted, and had it conveyed to his wife, Ellen McKensie; that, while it had been so conveyed, it was paid for, in part, at least, with the money of the husband, W. A. McKensie. The land was conveyed to Ellen McKensie, but W. A. McKensie executed his notes for it. It is admitted by the pleadings that W. A. McKensie made the first payment on the land, of \$285. It also appears that a parcel of the land was sold, and the proceeds, in part, applied to the payment of the purchase money. It is also averred in the pleadings that some timber was sold from the land, and the proceeds applied to the payment of the purchase money. The appellant claimed that she had borrowed the \$285 from her husband, and that it had been repaid. She also claimed that she had received money from her father's estate, which had been invested in the land. Under the issues, as formed by the pleadings, the burden of proof was upon the appellant to sustain her claim, except in so far as it was admitted by the pleadings. *Lavelle v. Clark*, 38 S. W. 481. The reply admits that Ellen McKensie paid on the land \$600, out of the estate which she received from her father. If that be true, then Salyer was entitled to a judgment, under the state of case as presented by the pleadings, for his debt, subject to the claim of the appellant, Ellen McKensie, for \$600. The judgment failed to do this. *Hinkle v. Gale's Adm'r*, 11 S. W. 664. Of course, this opinion is based upon the present condition of the case. Additional pleadings, and proof on the issues formed, may present the rights of the parties in a different light from that in which they now appear. There were other questions raised in the case, some of which have been fully answered by the filing of the additional transcript. We do not deem it necessary to discuss the other questions which counsel have raised. The judgment is reversed, for the reasons we have given, for proceedings consistent with this opinion.

#### COCKRILL et al. v. LINDON.

(Court of Appeals of Kentucky. Dec. 3, 1897.)  
RIGHTS OF HEIRS INTER SE—UNEQUAL DISTRIBUTION—SUBROGATION.

1. The payment by an administrator to one of several heirs of more than his share of the personality does not entitle the others to a lien upon his share of the realty in the hands of his grantee, even though the heir had agreed during his infancy that, on account of the overpayment, he would claim no part of the land.

2. Though one of several heirs has received more than his share of the personality, the others are not entitled to be subrogated, as against his share of the realty, to the rights of a lienholder whose claim has been paid by the administrator.

Appeal from circuit court, Breathitt county.  
"Not to be officially reported."

Action by J. W. Lindon against James Cockrill and others. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

J. J. C. Bach, for appellants. Samuel H. Patrick, for appellee.

WHITE, J. This action was begun in the county court of Breathitt county for partition by appellee, and was transferred to the circuit court. The petition filed alleges that appellee is the owner of one-seventh of a tract of land (describing same), and that appellants are the owners of the other six-sevenths. The title from the commonwealth is set out in full, down to Clifton Cockrill, father of appellants. The allegation is that appellee is the owner of the share of Curtis Cockrill, a son of Clifton Cockrill, and that Curtis and appellants are the only children and heirs of Clifton Cockrill, deceased, and the petition contains a prayer for partition. Appellants, by their guardian, filed an answer, which was afterwards amended, in which they pleaded that the administrator of their father's estate had paid to their brother Curtis several hundred dollars more than his share of the personality, in necessities for said Curtis, and that at the time of this payment to Curtis by the administrator it was agreed orally by Curtis that he would not claim his share of the land, but that the appellants should have it. They claimed a lien on the land to the extent that the administrator overpaid Curtis. The answer also alleged that the administrator paid off a lien note against the land due by the father, Clifton Cockrill, and that, to the extent of one-seventh of this payment, these heirs have a lien, by subrogation to the rights of the lienholder, through the administrator, as Curtis had received more than his share of the whole personal estate. To this answer, as amended, the court sustained a demurrer, and rendered judgment appointing commissioners to divide the land, allotting to appellee one-seventh the share of Curtis Cockrill. From that judgment this appeal is prosecuted.

Neither in the answer nor the amendment is it anywhere denied that Curtis Cockrill is one of the seven children of Clifton Cockrill, or that appellee bought the undivided share of Curtis. It is sought by the answer to charge an overpayment by the administrator to Curtis as a lien on this land in the hands of a third person. This cannot be done. It could not be done in the hands of Curtis Cockrill himself. We know of no rule of law that would recognize a verbal lien on land by an adult,—much less, an infant, as Curtis Cockrill was when this overpayment and agreement are alleged to have been made.

As to the payment of lien debts by the administrator: We are of opinion that appellants have no lien on this share of Curtis. It was the duty of the administrator to dis-

charge the lien debts against the land, if there were funds of the estate in his hands sufficient for that purpose, and by so doing the lien was discharged, and could not be revived, as to any heir, because such heir had received more than his share of the personality. The demurrer was properly sustained to the answer.

These being the only reasons why this partition should not have been made as suggested by the statutory guardian with an employed attorney, there was no sufficient reason why the judgment of partition should not have been granted. We perceive no error in the judgment of the circuit court decreeing the partition, and the same is affirmed.

#### BAKER et al. v. HINES et al.

(Court of Appeals of Kentucky. Dec. 1, 1897.)

#### EXEMPTIONS — PROCEEDS OF LIFE INSURANCE — FRAUDULENT CONVEYANCE.

1. Land purchased by a woman out of the life insurance of her husband, and used by her as a homestead, is exempt as against a judgment rendered after the land was bought, founded on a claim against her for goods, not necessities, sold while she was a married woman, and not a feme sole.

2. A disposition of a homestead, whether voluntary or for a valuable consideration, cannot be held fraudulent as to claims of a judgment creditor of the vendor.

Appeal from circuit court, Muhlenburg county.

"To be officially reported."

Action by H. C. Hines and others against M. P. Baker and others. From a decree for plaintiffs, defendants appeal. Reversed.

E. R. Weir, Jr., and Edward W. Hines, for appellants. Jonson & Wickliffe, for appellees.

WHITE, J. The appellant Mrs. M. P. Baker, in the year 1892, was a married woman, and, though not a feme sole, was engaged in the mercantile business in Warren county, Ky., near Bowling Green; and, while thus engaged, she purchased goods and merchandise of appellees, Hines & Co. and Ragon Bros., to the amount of several hundred dollars, that was never paid. In March, 1894, and after the death of the husband of appellant M. P. Baker, these appellees brought suits for the amounts due them respectively, in the Warren circuit court, against appellant M. P. Baker in person, as well as executrix de son tort of the estate of W. B. Baker, her husband. In these two actions by appellees, judgment was rendered by default for the sums claimed, against the administratrix of W. B. Baker, appellant M. P. Baker, both as executrix de son tort and personally. On these judgments *fi. fas.* were issued to the sheriff of Warren county, and by him returned "No property found." Appellees then had executions issued to Muhlenburg county, which the sheriff of that county returned "No property found."

This action was then instituted by appellees jointly, seeking to set aside a conveyance of some land, described, made by appellant M. P. Baker to appellant M. B. Covington, which deed was made November 25, 1892, and for the recited consideration of \$500 cash in hand paid. The reasons alleged by appellees for setting aside said conveyance are that the same was voluntary, and without any consideration, and made for the purpose of defeating appellees and other creditors of appellant M. P. Baker in collecting their claims. Appellant Covington filed answer, denying any fraud in the conveyance, but said it was regular, and for the consideration recited, which was paid. In a second paragraph he alleged that at the date of the deed and before, and long before the date of the filing the suit in the Warren circuit court, and before the judgment was rendered against appellant M. P. Baker, and in favor of appellees, M. P. Baker was occupying the land as a homestead, and had no other home, and was a widow with children, and alleged that, under this state of facts, there could be no fraud in the deed to him, even if it had been without consideration. Appellees filed an amended petition, in which is alleged the fact that the land was bought by appellant M. P. Baker after the debts due them were contracted, and that at the time of the creation of these debts she owned no homestead. On the issues thus presented, the case was tried on proof and an agreed statement of facts. The agreed statement of facts shows that the goods were bought by appellant M. P. Baker during the lifetime of her husband; that, at the death of her husband, they were unpaid for; that, after the death of appellant's husband, she received some insurance money on his life; that she bought the land in controversy before the appellees brought their actions, in the Warren circuit court, on the account for goods; that, at the time of the purchase of the goods, appellant M. P. Baker owned no homestead, and that this land was bought after the purchase of the goods from appellees; that the land was paid for out of the life insurance money, and the same was immediately after the purchase used and occupied by her as a homestead. Upon this agreed statement and the proof, the chancellor adjudged the deed to Covington fraudulent and void, and subjected same to the debts of appellees, and from that judgment this appeal is prosecuted.

If this land in the hands and possession of appellant Baker is not subject to appellees' debt, this deed to Covington, though voluntary and without consideration, does not affect their rights; for, if it was exempt to Mrs. Baker, it was because it was a homestead, and, if such, she had a perfect right, so far as her creditors were concerned, to deed it without consideration. So, the important inquiry is, was this land exempt to Mrs. Baker from the debts of appellees? It

is contended by appellants that, at the date of the deed from M. P. Baker to Covington, there was no existing demand against M. P. Baker. At the date of the deed, the claim of appellees was in the shape of an open account; had not been reduced to a written contract or judgment. The only obligation on M. P. Baker at the date of this deed was her contract to pay for the goods, made while she was a married woman, and not a feme sole. So, it is clear that as a contract of a married woman, not for necessities, is absolutely void, this claim of appellees was not a subsisting demand against M. P. Baker at the date of the deed to appellant Covington. *Parsons v. Spencer*, 83 Ky. 805; *Spencer v. Parsons*, 89 Ky. 578, 13 S. W. 72; *Green v. Page*, 80 Ky. 368, this court in the latter case saying: "The general rule being that all contracts attempted to be made by a feme covert were void." This court held in *Chaney v. Flynn*, 2 Ky. Law Rep. 417, that the contract of a married woman is void, and cannot be subsequently ratified.

It is unnecessary to determine the effect or validity of the judgment of the Warren circuit court against appellant Baker, as the same was rendered after the deed was made, but suffice it to say that in no event can the claim of appellees be extended further back than the date of that judgment. Nor is it necessary to determine whether the deed from M. P. Baker to Covington was for a valuable consideration, or was voluntary, as, in our opinion of the case, it can make no difference to appellees. It therefore follows that the land deeded to appellant, and sought to be subjected in this action, was exempt to appellant M. P. Baker as a homestead at the date of the deed; and her disposition of same cannot be held fraudulent as to the claims of appellees in this action. Wherefore the judgment is reversed, and cause remanded, with directions to dismiss the petition absolutely so far as it seeks to subject this land deeded to Covington to the payment of their claims.

#### SMITHERN et al. v. WADDLE.

(Court of Appeals of Kentucky. Dec. 3, 1897.)

#### APPEAL—CONFLICTING EVIDENCE—DECLARATIONS—CONSPIRACY.

1. A verdict cannot be disturbed unless it appears to be flagrantly against the evidence.

2. A statement made by one of two defendants, in the absence of the other, is admissible against the former.

3. A statement by one of two defendants charged with conspiracy, made in the absence of the other, is admissible in an action against them for damages.

Appeal from circuit court, Pulaski county.  
"Not to be officially reported."

Action by W. G. Waddle against M. T. Smitheren and another. From a judgment entered on a verdict for plaintiff, defendants appeal. Affirmed.

G. W. Shadoan, for appellants. Denton & Cook and O. H. Waddle, for appellee.

WHITE, J. The appellee, W. G. Waddle, began this action in the Pulaski circuit court against appellants, M. T. Smitheren and Thomas McWilliams, for damages, alleging that appellants conspired together, and willfully, unlawfully, secretly, and without his knowledge, and against his will and consent, placed a pistol in the pocket of appellee, and concealed the same therein, and, in further pursuance of the conspiracy to injure appellee, procured appellee's arrest and imprisonment, on a charge of carrying concealed deadly weapons. The answer was an absolute and specific denial of everything charged. With this issue made, the case was tried before a jury, who returned a verdict for appellee for \$200. After appellants' motion for new trial had been overruled, they prosecuted this appeal.

The court, on the trial, gave to the jury only one instruction, which seems to us to state the law of this case as favorably to appellants as could be given. The instructions asked by appellants were properly refused. The facts having been submitted to the jury under proper instructions, their verdict cannot be disturbed, unless it appears to be flagrantly against the evidence. From the proof, we do not feel authorized to disturb the verdict of the jury, as it cannot be said to be flagrantly against the evidence, nor to be excessive.

Appellants complain that the statement of one of the appellants was permitted to be proven on the trial, when the statement was shown to have been made in the absence of the other. This statement was made by one of appellants to the chief of police in procuring the arrest of appellee, Waddle. This was not error. Appellee could certainly prove the statements of either defendant as against himself, and he would not be deprived of this right because there were two defendants. Besides, there was a conspiracy charged, and on this ground this evidence was admissible. It seems to us, from the proof in the case, the verdict is not excessive. Wherefore the judgment is affirmed.

#### CITY OF WINCHESTER v. FRAZER.

(Court of Appeals of Kentucky. Dec. 1, 1897.)

#### MUNICIPAL CORPORATIONS—OFFICERS—INTEREST IN CONTRACTS.

1. Under Ky. St. § 3484 (providing that any officer of a city of the fourth class, who shall be directly or indirectly interested as agent, principal, or surety in any contract with the city, shall thereby vacate his office, and the contract shall be void), a member of the council, acting under an order of the council, cannot recover the reasonable value of his services in making a settlement with the city tax collector.

2. Where a settlement between a city and its tax collector is required by law to be made before the council, a member of the council cannot recover for services rendered in making such settlement, as that is a part of his official duties.

and the fact that he made the settlement under an order of the council is immaterial.

Appeal from circuit court, Clarke county. "Not to be officially reported."

Action by J. H. Frazer against the city of Winchester. From a judgment for plaintiff, defendant appeals. Reversed.

L. H. Bush and J. M. Benton, for appellant. Gibson Taylor, for appellee.

WHITE, J. This action was brought in the Clarke circuit court, by appellee, J. H. Frazer, against the city of Winchester, for services in making settlements with the city tax collector, for the years 1892, 1893, 1894, and 1895, which he alleges he did by and under an order of the board of councilmen of said city, and that such services were reasonably worth \$150, and that the same were necessary for said corporation. The answer filed does not deny the fact that the services were necessary or rendered. In fact, the only defense presented by the answer is that at the time the several orders were made directing appellee to make the settlements, as well as when the settlements were made, the appellee was a member of the board of councilmen, and was an officer of the city, and that, by the charter governing such city, all contracts of any kind made by an officer, either directly or indirectly, as principal or surety, are null and void. The answer also pleads that there is and was an ordinance of the city of Winchester that provides that no officer of the city of Winchester shall become interested while in office in any contract with said city the making or execution of which is connected with his official duties. To this answer a general demurrer was sustained, and, appellant failing to plead further, judgment was rendered for the amount claimed, and from that judgment this appeal is prosecuted.

As the answer does not deny the services, or that on quantum meruit they were worth the amount sued for, the only question is on the sufficiency of the answer. The city of Winchester is a city of the fourth class, and by section 3484 of the Kentucky Statutes, which is a part of the charter of cities of the fourth class, provides: " \* \* \* Should any officer of said city be directly or indirectly interested as agent or principal in any contract with said city, or as surety on any such contract, he shall thereby vacate his office, and the contract entered into before said officer vacates his office, shall be null and void." By the petition of the appellee it is stated that the board of councilmen of the appellant city, by a resolution, appointed appellee to make the settlement with the tax collector, and that appellee accepted the appointment, and made the settlement. If this be true, and it is not denied by the answer, it was a contract, by implication, to pay appellee the reasonable value of his

services for such work, and the same inhibited by the section of the charter and by the ordinance pleaded, provided appellee was at the time a member of the city. The answer pleads at the date of this resolution, the appellee was a member of the council, and the demurrer this is taken as true. The appellee presented a defense, and the demurrer thereto should have been overruled. Besides, by the answer it is pleaded that this settlement is required by law to be made before the city council, and the appellee was obliged, as a member of the council, to assist in making this settlement, that the same was a part of the duties of his office; and that the only compensation allowed by law to the members of the council was not exceeding three dollars for each meeting attended. For these reasons we are of opinion that the demurrer to the answer should have been overruled. The judgment following is therefore erroneous, is reversed, and the cause remanded with directions to set aside the judgment, grant a new trial, and overrule the demurrer to both original and amended answer, and to further proceedings.

RICHARDSON et al. v. HUFF et al.  
(Court of Appeals of Kentucky. Dec. 7, 1900.)  
APPEAL—REVIEW—NEW TRIAL—NEWLY-  
DISCOVERED EVIDENCE.

1. Where the verdict is not flagrantly against the evidence, it will not be disturbed.

2. A new trial will not be granted because of newly-discovered evidence, consisting of admissions of one of the parties, where the party proposes to prove was investigated on the trial, and the fact it proposes to establish was testified to by other witnesses.

3. A new trial will not be granted because of newly-discovered evidence where there is no affidavit of late discovery.

Appeal from circuit court, Barren county. "Not to be officially reported."

Action by John Huff and others, partners, against Richardson Bros. & Co., an account. From a judgment for plaintiffs, defendants appeal. Affirmed.

Dehoney, Taylor & Barlow, for appellants. Boles & Duff, for appellees.

WHITE, J. This appeal is prosecuted from a verdict and judgment of the Barren county court. The action was founded on an account for the hire of teams by appellants traveling salesman, or drummer, who was engaged in appellants' business. The defense presented was a general denial of the indebtedness, and a plea that the account was the personal account of the salesman, and was without authority from appellants. The contract such indebtedness, and the salesman had settled the account with the appellees. On this issue the case was tried before a jury, who returned a verdict for appellees for the full amount claimed, \$135.

ants asked a new trial on the ground court limited the argument of counsel minutes to a side. The record falls that the court limited the argument

er ground for a new trial is that the is not sustained by sufficient evidence, contrary to law. We have examined evidence, and cannot disturb the verdict. Evidence was sufficient to support the and it is not flagrantly against the

third ground relied on is newly-discovered evidence, very material to a fair trial, they could not, with reasonable diligence have discovered and produced at the trial. This newly-discovered evidence is set out in an affidavit, filed, of one Walton. The substance of this affidavit is that the affiant heard W. O. Allen, one of the plaintiffs, on several occasions, speak of the indebtedness of B. B. Williamson, a drummer, of the firm of Huff, Allen & Pedigo, and upon three occasions Allen said he held the note of Williamson for said indebtedness and the amount of the note was somewhere \$130. These conversations all occurred within the last 18 months. Dehoney Taylor, attorneys for defendants (now plaintiffs), file their affidavit, and say they know that plaintiff Allen would, on the trial of the case, deny taking and accepting the note of Williamson for the amount sued on herein, until he made the statement in court; that neither of the defendants' attorneys knew that Walton would produce the facts recited in his affidavit, until the trial, and they could not with reasonable diligence have discovered and produced the evidence on the trial. One of the issues at issue in the case was whether the defendants had accepted the note of Williamson in settlement of the account. In fact, this was one of the main issues. The whole case turned on the fact as to whether the account sued on was the debt of Williamson, or of appellants, Richardson Bros. & Co. Price's Adm'r v. Thompson, 84 Ky. 408, this court lays down the rule of law governing applications for new trial upon the grounds of newly-discovered evidence to be "that the evidence discovered should tend to prove facts which were not in issue on the trial, or were not then known or investigated by the proof, and is merely accumulative." In Mercer v. Price's Adm'r, 87 Ky. 21, 7 S. W. 307, this court has well said: "It is well settled that a new trial could not be granted upon the ground of newly-discovered evidence unless it be of a material character. If it be doubtful whether it would have any preponderating influence on another trial, then it will not avail in it. Allen v. Perry, 6 Bush, 85. Usually should this rule apply where the newly-discovered evidence is parol, and relates to a point litigated upon the former trial. In the case at bar there is no affi-

davit of appellants, or of any one for them, that they did not know of this evidence before the trial, but only the affidavit of the attorneys that they themselves did not, and with reasonable diligence could not have discovered this testimony before the trial. We have no doubt that appellants' attorneys were diligent on the trial, and that they did not know of this evidence is certain, from the fact that it was not introduced; but it seems to us that this newly-discovered evidence comes within the rule as approved by this court in the two cases cited above. The identical point proposed to be proven by this witness was investigated, and the fact proposed to be established by this testimony out of the mouth of one of the plaintiffs was proven on the trial by the drummer, Williamson, himself; and so this evidence, at best, would be but cumulative and corroborative. It seems to us that, by the rules of law laid down by this court, there was no error in the circuit court's refusing a new trial. Appellants also filed affidavits of McConnell and Snoddy as to facts they would testify, but, as to this, there is no affidavit of any person that this was newly discovered. For aught this record shows, both appellants and their attorneys may have known of this evidence before the trial. For this reason these two affidavits cannot be considered. Finding no error, the judgment is affirmed, with damages.

#### WILLIAMS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 7, 1897.)

CRIMINAL LAW—CONVICTION OF LESSER OFFENSE—ASSAULT WITH INTENT TO KILL—EVIDENCE.

1. Under an indictment for maliciously shooting at and wounding another with intention to kill (Ky. St. § 1166), a conviction "of shooting and wounding in sudden heat and passion" (section 1242) is valid as a lesser degree of the former offense, and a conviction under the latter section will bar a prosecution under the former.

2. Under an indictment for maliciously shooting at and wounding another with an intention to kill, testimony as to the extent of the injury is competent, not only as tending to show the intent with which the injury was inflicted, but as proper for the jury to consider in fixing the amount of punishment.

3. The jury will be warranted in concluding that defendant fired the pistol, where the testimony clearly showed that he drew the pistol, had hold of it, and was scuffling with the injured party when it went off.

Appeal from circuit court, Knox county.

"To be officially reported."

Under an indictment for maliciously shooting at and wounding another with a deadly weapon, John Williams was found guilty of shooting and wounding in sudden heat and passion, and appeals. Affirmed.

John T. Hays, for appellant. W. S. Taylor, Atty. Gen., for the Commonwealth.

DU RELLE, J. Under an indictment for maliciously shooting at and wounding another

er with a deadly weapon, with an intention to kill such person, the appellant was found guilty of shooting and wounding in sudden heat and passion, and his punishment fixed at a fine of \$500. The evidence tended to show that, after a quarrel, the defendant attacked one Jouwdy, and drew a pistol, as he claims, for the purpose of striking Jouwdy with it; that in the scuffle the weapon was discharged, and Jouwdy was struck in the knee.

The grounds for reversal relied on are:

1. That the second instruction as to shooting and wounding "in sudden heat and passion, without previous malice, was error, because not a degree of the offense charged in the indictment, viz. malicious shooting and wounding with intent to kill. This exact point seems to us to be decided in *Tyra v. Com.*, 2 Metc. (Ky.) 2, against appellant's contention; and we think that the question is settled by section 263 of the Criminal Code, which provides that the offenses named in each subdivision of the section shall be deemed degrees of the same offense, in the meaning of section 262, and in the second subdivision names all injuries to the person by maiming, wounding, beating, and assaulting, whether malicious or from sudden passion, and whether done or not with the intention to kill. The offense denounced by section 1242, Ky. St., is, under this section of the Code, clearly a degree of the offense denounced by section 1166, and a conviction under the former section would bar a prosecution under the latter.

2. The next ground urged for reversal is the admission of testimony by the prosecuting witness as to the amount and extent of his injury. We think this testimony competent, not only as tending to show the intent with which the injury was inflicted, but as proper for the jury to consider in fixing the amount of punishment.

3. The third ground urged for reversal is that there was no testimony to show that appellant fired the pistol. Inasmuch as the testimony clearly showed that he drew the pistol, had hold of it, and was scuffling with Jouwdy for its possession at the time it went off, we think the jury were warranted in concluding that he fired it. Judgment affirmed.

#### SHEPHERD v. HARVEY'S ADM'X.

(Court of Appeals of Kentucky. . Dec. 11, 1897.)

##### JUDGMENT—DAY IN COURT—VALIDITY.

1. When the record shows that on two occasions defendant filed exceptions to the report of a commissioner as to an amount due to an estate, and that the court on both occasions adjudged the same amount as his liability, and the second judgment recites that proof was heard on the question, he cannot complain that he was not given his day in court.

2. A judgment was rendered on a commissioner's report. Afterwards objections to the report were heard, and it was confirmed. Further pleadings being filed, the case was submitted to a special judge, who refused to disturb the judgment and confirmation, and entered formal judgment thereon, reciting for what it was rendered.

Hold not error, as constituting two judgments for the same debt.

Appeal from circuit court, Owsley county. "Not to be officially reported."

Action by the administratrix of P. H. Harvey to settle the estate. From a judgment therein, finding assets in the hands of Silas P. Shepherd, and a judgment against him for the amount thereof, he appeals. Affirmed.

James M. Sebastian, for appellant. E. E. Hogg, for appellee.

WHITE, J. On the 13th day of October, 1880, the administratrix of P. H. Harvey filed her petition in the Owsley circuit court, seeking a settlement of the estate and a sale of the land to pay the debts of the decedent. Shortly after the institution of this action, William Harvey, a son of decedent, and a party to the settlement suit, cut some timber on the land, and was proceeding to remove same when the administratrix and the creditors made complaint of this, by an amended petition; and on June 28, 1881, William Harvey appeared in open court, and executed bond, with appellant as surety. The terms of that bond were that they would pay, on the order of the court, the value of the timber cut from the lands of P. H. Harvey, the value to be ascertained by a commissioner. Afterwards William Harvey cut other timber from the land, and the court, upon being informed of this fact, directed that another bond be executed, similar to the other. But this second bond was, by consent of all parties, executed by appellant as principal, with surety, as appellant had purchased the timber. The whole case was then referred to the court's commissioner, to take proof of the assets and liabilities of the estate of the decedent. In that proof the commissioner also took proof of the value of the timber cut by William Harvey, and reported the same to court; and this report was excepted to by appellant and William Harvey, especially as to the value of the timber as fixed by the commissioner, to wit, \$227.93. The administratrix also filed exceptions to the report of the commissioner, and one objection urged is that the commissioner, in his report, fixes two valuations on the timber,—one of \$94.60, in the woods, and the other \$227.93, at the river; these two being in seeming contradiction. The case was again referred to the commissioner for further proof, who again reported. In March, 1884, upon hearing, a judgment was rendered. The judgment recites that the case was heard on the exceptions to the commissioner's report, and adjudges that there are assets of the estate in the hands of appellant and William Harvey, for timber, the sum of \$227.93, and provided for its use in the payment of the debts of decedent. It seems that at the March term, 1884, when the judgment above was ren-



d, the appellant and William Harvey n excepted to the report of the commiss- er. At the September term, 1885, the illant produced and offered to file an an- er and counterclaim. This appears to e been filed on the 5th day of the term. n answer and counterclaim specifically g in issue the liability of appellant for sum of \$227.93 on account of the timber, for which the two bonds were executed. court, on the 6th day of the term, upon f heard, overruled the exceptions and ctions to the commissioner's report, and rmed same, and adjudged that the e of the timber at the river is \$227.93. e of this term there was considerable ding filed by both appellant and appel- and proof taken; and in May term, 1894, case was submitted to R. W. Riddle, al judge, without jury; and appellee ed for rule against appellant to show e why he should not pay the amount of .93, the amount adjudged against him e value of the timber. Appellant re- ended to this rule, and to this response a urreur was sustained, and the court ad- ed that by the confirmation of the re- the matters in contest were settled and rmined, and that the court could not rtain the proceeding to disturb that ment and confirmation, and then the t rendered formal judgment for \$227.93, n interest. From this judgment this ap- is prosecuted.

Appellant complains of the judgment ren- d herein, and says that he was not giv- his day in court, and the right to litigate matter of his liability. This record wa that on at least two occasions he filed eptions to the report of the commission- and that the court, on two trials, ad- ed that the sum of \$227.93 was the cor- amount of his liability; one of the judg- ts reciting that proof was heard on the tion.

Appellee also complains that he was not ap- ed of the sittings by the commissioner originally fixed the value of the timber. This the record contradicts him, for the ce given by the commissioner shows it was executed on appellant, and that sittings of the commissioner were con- ed at appellant's place of business.

Appellant complains that the judgment ap- ed from is error, because it shows on its t that it is a judgment upon a judgment etofoe rendered in the same court, and t, therefore, there are two judgments nst him for the same debt, and for the e amount. It seems to us that the judg- t appealed from on the rule is just the al entry of judgment upon a fact there- e ascertained by the court upon hearing f. The ancient mode of proceeding in cases was by the summary method of , attachment, and contempt; but the r and more lenient practice has been to rd execution. The court in this case

could have done either, but chose to adopt the latter, of which appellant will not be heard to complain. However, if appellant be right in his contention that this is a judgment upon a judgment, it on its face recites for what it is rendered, and thus provides, necessarily, that the satisfaction of this judgment will satisfy the former. This, if true, cannot be held prejudicial to appellant. Finding no error, the judgment is affirmed.

## BISHOP v. JEWELL.

(Court of Appeals of Kentucky. Dec. 2, 1897.)  
ENFORCEMENT OF VENDOR'S LIEN—SUFFICIENCY OF EVIDENCE.

Defendant agreed with the holder of his notes, secured by vendor's lien, to deed the land to such holder on surrender of the notes. The notes were surrendered, and defendant rented the land, giving his notes for the rent, but executed no deed, but left the land, and thereafter, without plaintiff's knowledge, re-entered, claiming payment of the notes. One of the notes contained an indorsement, which defendant alleged was for \$500, which was in excess of the amount of the note. Defendant could not state where he got the money to make the payment, and why the surplus was not indorsed on the other note. *Held* insufficient to show a payment of the notes as a defense to the foreclosure of the lien secured thereby.

Appeal from circuit court, Barren county.

"Not to be officially reported."

Action by Jonathan Jewell against O. B. Bishop. From a decree for plaintiff, defendant appeals. Affirmed.

Bales & Duff, for appellant. W. L. Porter, for appellee.

HAZELRIGG, J. At some time prior to 1885, appellant, Bishop, bought from Renick a tract of land at the price of \$1,250, and made several small payments thereon, until, on settlement in 1887, he executed his notes for \$1,000 in three equal installments, and obtained a deed for the land. The notes were assigned to appellee, Jewell, and afterwards—perhaps in 1890—an agreement was made between Bishop and Jewell to rescind the contract, Bishop agreeing to convey the land to Jewell, while the latter was to surrender the notes to Bishop. Accordingly, the notes were delivered to Bishop, and the latter rented the land, and kept possession of it, executing his note for the rent. This continued for several years until Bishop left the land. Jewell then discovered that he had never obtained a deed from Bishop, and called on him for it. Bishop evaded the demand, and again moved back on the property, without the knowledge or consent of Jewell, and then claimed he had paid the notes, and was the owner of the property. Some slight color is given his contention by reason of a peculiar credit found on one of the notes, indorsed thereon thus, in the handwriting of Jewell: "Received on the within note, first note, \$5.00 <sup>00</sup>/<sub>100</sub>, May 19th, 1890." Jewell testifies that this was intended as a credit of only \$5, the amount in fact paid, while appel-

lant testifies that he paid Jewell \$500 at the date named. Appellant's testimony on this point is altogether unsatisfactory. He is unable to tell how the payment was made, or from whom or how he got any of the money. He seems to have been a man of very limited means, and would likely have remembered some of these details. Moreover, if he had made this payment, he would hardly have executed his note during several years for rent, and at last abandoned the property he had paid for. Besides, such a payment would have overpaid the note on which it was entered, and the parties would simply have canceled it, and entered the balance of the \$500 on the second note. The conduct of the appellant is wholly inconsistent with his contention. The chancellor ordered the land sold to pay the balance due on the notes, not being authorized to enforce the agreement to rescind, and require Bishop to convey the land to Jewell. In his conclusions he is clearly supported by the evidence and the facts and circumstances surrounding the parties. Judgment affirmed.

#### McGUIRE et al. v. WEST.

(Court of Appeals of Kentucky. Nov. 30, 1897.)  
WRONGFUL LEVY — OWNERSHIP OF PROPERTY — SALE.

1. In an action for the wrongful levy of an execution on some hogs, the evidence showed that they had belonged to plaintiff's employé, who kept them at plaintiff's logging camp, and allowed them to follow cattle owned and fed by plaintiff. Plaintiff purchased the hogs of his employé,—the latter to be credited on an obligation he owed plaintiff. The hogs were to remain at the camp, and feed after the cattle, awhile, before being weighed. During this interval the execution was levied. *Held*, the question of ownership was properly submitted to the jury; the purchase not being fraudulent per se, under Ky. St. § 1908, which provides that alienation of personal property shall be void, as to creditors, unless actual possession accompanies the same.

2. Where the evidence is conflicting, the verdict of the jury will not be disturbed.

Appeal from circuit court, Estill county.

"Not to be officially reported."

Action by James F. West against Pryse McGuire and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. B. White, for appellants. Grant E. Lilly, for appellee.

BURNAM, J. This suit was instituted by appellee upon an indemnifying bond given by appellants to the sheriff of Lee county, requiring him to levy an execution in favor of the commonwealth against one Lunsford, for the sum of \$28.40, on 17 head of hogs; appellee alleging that the hogs levied on belonged to him at the time the execution was issued and levied, and the hogs sold to satisfy same. The legal question involved in the case is, did the appellee take the actual possession of the hogs, in good faith, at the time of the alleged purchase, so as to vest him with the title under the provisions of section 1908 of the Kentucky Statutes? The facts, as shown by the

record, are about as follows: Appellee, who had employed one Harris to get out a lot of logs for him, and had furnished him the title necessary to do the work. Harris, it seems, had carried to the logging camp the appellee the hogs in question, claiming to be the owner thereof, and had them follow the cattle. While these hogs were run around the logging camp, appellee purchased them, and agreed to pay therefor \$4 per pound; the hogs to be weighed, and the balance to be credited with the price thereof of obligation he owed appellee. It was agreed between the vendor and the vendee that the hogs were to remain in the camp, and after the oxen, for a while, before being weighed; and it was during this interval the execution of appellants was levied on them. The testimony shows that the execution was sued out and levied subsequent to the date of the alleged purchase. It is to us that the fact that appellee was in possession of the camp where these hogs were being kept, that he owned and fed the oxen which they were following, and that Harris was simply an employé of his, facts which strongly tend to show that the hogs were in their actual possession under his purchase at the date of the levy of the execution. At all events, the fact that no visible change in the actual custody of the hogs followed the alleged purchase cannot be decided under the facts of the case, as per se fraudulent, and the question of their ownership and possession was properly submitted to the jury.

The first instruction required the jury to believe from the evidence that appellee had bought and received the hogs mentioned before the date of the levy of the execution; that he was the actual, bona fide owner at that date; and by the second instruction the jury were told that if plaintiff had only an executory contract for the purchase of the hogs, and no delivery of possession, plaintiff accompanied the transaction, should find for the defendants. The instructions are favorable to appellants, and no objections were taken to them; and the substantial ground relied on for reversal, that there was no evidence which authorized the verdict, or showed the delivery of the possession of the hogs by Harris to plaintiff. But, as this question was properly submitted to the jury, we do not feel authorized to set aside the verdict, which was palpably against the weight of the evidence thereon. Wherefore the judgment is affirmed.

#### LOUISVILLE & N. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 30, 1897.)  
RAILROADS—STATIONS—REGULATION BY STATE—PENALTIES—JOINDER OF CAUSES—DEMURRER—MOTION TO PANAGRAPH.

1. Under Ky. St. § 784, providing that all railroad companies "shall keep their ticket

for the sale of tickets at least thirty minutes immediately preceding the departure of all passenger trains from every regular passenger depot from which such trains start, or at which they regularly stop, and shall open the waiting room for passengers at the same time as the ticket office," a company is not required to open its ticket office and waiting room for night trains at a station at which it had never maintained a ticket office, where passengers boarding night trains at that point were charged no more on the night trains than ticket rates.

Civ. Code, § 11, provides that proceedings in civil actions shall be regulated by the Code of Civil Procedure in civil actions. A railroad company prosecuted under a petition charging it with having failed to keep its ticket office and waiting room open, as required by law, 400 different offenses. *Held* that, under Civ. Code, § 113, subsection 3, providing that if there be more than one cause of action stated in a petition, each must be distinctly stated in a separate numbered paragraph, the commonwealth was properly required to set out each offense separately.

Two or more violations of a penal statute cannot be prosecuted in one action, since Civ. Code, § 83, setting out the causes of action that may be united, does not provide for such joinder.

The fact that distinct offenses are not set out in separate paragraphs is not a cause of defense, but of motion to paragraph.

Appeal from circuit court, Whitley county. Error to be officially reported."

Appeal by the commonwealth against the Louisville & Nashville Railroad Company to recover the penalty for having failed to keep its ticket office open. From a judgment for the plaintiff, defendant appeals. Reversed.

W. Alcorn, R. D. Hill, Walker D. Hines, H. W. Bruce, for appellant. C. W. Lesonsky and W. S. Taylor, for the Commonwealth.

JOURNAL, J. This action was brought by the commonwealth against the appellant corporation to recover the penalty for having failed, for a period of 200 days, to keep its ticket office and waiting room at Williamsburg, Ky., open for passengers at its depot for 30 minutes immediately preceding the scheduled time of departure of its regular passenger train going south, which regularly stopped at the depot at the hour of about 4 a. m. each day, and of its regular passenger train going north, which regularly stopped there between the hours of 11 p. m. and 12 m. of each day. In the court below the jury recovered a verdict for \$4,000, upon which judgment was rendered. A number of errors are complained of by appellant. Defendant moved the court to require the plaintiff to elect which one of the 400 alleged causes of action set out in the petition it would prosecute, which motion was overruled by the court. A demurrer to the petition was then filed, which was also overruled. Defendant then moved the court to require the plaintiff to paragraph its petition, which motion was sustained; and the plaintiff filed an amended petition, containing 400 separate and distinct paragraphs, in each of which is alleged failure and refusal to keep defendant's ticket office and passenger room in Williamsburg open for 30 min-

utes preceding the arrival or departure of one or the other of the night trains, two offenses being alleged for each night. Defendant moved the court to require the plaintiff to elect which one of the paragraphs it would prosecute, which being overruled, defendant filed answer, which, in effect, admitted that it had not opened its ticket office or waiting room for passengers for 30 minutes preceding the arrival or departure of either of the night passenger trains, denying, in effect, that it had any passenger depot at Williamsburg for the through night trains in question. The testimony shows that defendant had never kept its ticket office or waiting room for passengers open at this depot during the night. The court instructed the jury to find for the plaintiff not less than \$10, nor more than \$20, for each time which they believed, from the evidence, the defendant, between the 10th of September, 1894, and the 28th day of March, 1895, failed to keep its ticket office open at Williamsburg for the sale of tickets for at least 30 minutes preceding the scheduled time of the departure of the night passenger trains from its depot in Williamsburg, and failed to keep open and comfortably warm in cold weather its depot at that point for at least 30 minutes immediately preceding the scheduled time of the departure of its night passenger trains.

The portion of section 784 of the Kentucky Statutes upon which this action is based reads as follows: "All companies shall keep their ticket offices open for the sale of tickets at least thirty minutes immediately preceding the departure of all passenger trains from every regular passenger depot from which such trains start, or at which they regularly stop, and shall open the waiting room for passengers at the same time as the ticket office, and keep it open and comfortably warm in cold weather, until the train departs." The statute further provides that any railroad company refusing or failing to comply with the provisions of this statute shall be fined not less than \$10 nor more than \$20 for each offense, to be collected in any court of competent jurisdiction.

Two questions arise on this appeal: First, is the depot building at Williamsburg a regular passenger depot for night trains, within the meaning of this statute, and does it require a ticket office at that point to be kept open for the sale of tickets for these two night trains? And, second, can circuit courts acquire jurisdiction by the joinder of separate offenses, the penalty for each separate offense being for a less amount than is necessary to give jurisdiction?

In section 203 of the original corporation act (Acts 1891-93, p. 704) the only requirement as to keeping open the waiting room for passengers was where a regular passenger train was delayed for 30 minutes in its arrival at a station which was a telegraph office, in which event the company was required to keep the waiting room open for

passengers until the train arrived; but in the amendment to this section (found in Acts 1894, p. 57, and which is the statute upon which this suit was instituted) the waiting room was required to be kept open in all cases where the ticket offices were kept open for the sale of tickets, and for the same length of time. If the statute required the ticket office to be kept open, then the waiting room had to be kept open also, but not otherwise. The amendment consists in the addition of the words "schedule time of" being inserted before the words "departure of all passenger trains," and the word "regularly" before the word "stop"; making it evident that the legislature did not intend in the amendment to enlarge the requirement in any way beyond the requirement as it existed in the original act, but intended to restrict and modify the meaning of the requirement, as the statute itself designates the purpose of the requirement when it says that "all companies shall keep their ticket offices open for the sale of tickets."

It will assist us in the determination of the legal question involved to consider for what purpose and for whose benefit tickets are sold for railway transportation; and why the public are specially interested in having ample opportunity to purchase them before the departure of trains from regular passenger depots. It is evident that the purpose of requiring passengers to pay their fare to ticket agents at regular depots, instead of conductors on the trains, is to protect the railroad company from its own employees, as the system affords a simple and effective check upon the carelessness or dishonesty of both classes of officers, and the reasonableness of this requirement on the part of the railroad is manifest; and, "to render the system effective and induce passengers to buy tickets, a higher fare is imposed on them when they neglect to do so and pay on the trains." In passing upon the legality and propriety of this regulation this court said, in the case of *Wilsey v. Railroad Co.*, 83 Ky. 511: "A higher rate may be collected of passengers who pay their fare upon the trains than those who purchase tickets before entering the cars. This discrimination is allowed because it tends to convenience in the prosecution of the business and to the proper accountability of the company's agents; but it must be general and uniform as to the purpose, and be carried out in good faith by the railroad corporation, accompanied with a reasonable opportunity for those who desire to do so to purchase tickets before entering the cars, and if they do not avail themselves of the privilege they are at fault, and must pay conductors fare. Such a rule affords a proper check upon the accounting officers of the railroad company, and protects it in a reasonable manner against possible fraud and dishonesty." And, in consequence of this requirement that passengers should buy tickets, the legislature passed the statute in question, by

which it was made the duty of the railroad companies to keep the ticket offices open a sufficient length of time immediately preceding the schedule time of departure of passenger trains to enable the traveling public to buy their tickets conveniently; and this is the manifest purpose of the statute. The requirement does not apply where the railroad regularly fails to maintain a ticket office for a particular train, as in such instance it is authorized to collect on the trains of passengers only; the ticket rate of fare is precisely as at points where there is neither depots nor agents, and as the passenger has not been subjected to expense by not having the opportunity to buy a ticket.

By an act of the Tennessee legislature it was made the duty "of every person who shall sell or be authorized to sell tickets to passengers to travel on any railroad to be at any station or depot within the time to open his office for the sale of tickets at least one hour before the time of the departure of each passenger train from the station, and keep the office open during the said hour of one hour and until the departure of the next passenger train, and be ready during the said time to sell tickets to passengers as they may apply for them." Brady was the sole agent of the company at a way station on the L. & N. Railroad, and acted as ticket agent, freight agent, and telegraph operator, and it was his duty to sell tickets for the various trains that stopped at the station; but he was not required by the statute of the company to open the ticket office for the early morning train which passed the station before 6 o'clock, and the railroad company, in consequence thereof, instructed the conductor running that train not to collect of passengers any other rate than the regular ticket rate. He failed to open his office for the sale of tickets before the time of the departure of the passenger train passing the station at 6 o'clock a. m., and this was, in fact, a violation of the letter of the statute, but the court held that the law had not been violated, because, it was held, the company might do away with its ticket office at the depot building, and require passengers to pay their fare on the cars; holding that the company might do for one train—namely, the morning train—mere caprice, but for reasons connected with the economic administration of its business, what it might do for all the trains, giving public proper and reasonable notice; that the statute was to compel ticket sellers to perform the duties imposed upon them by the companies at the most convenient time for passengers, and was not designed to compel them to do that from which they were expressly exempted by the rules of the company, without any detriment to the company, and without any notice to them; that the defendant was not, in fact, a ticket seller for the particular train, tickets for that train having been dispensed with by the company, and that the intention of the act was to c

performance of the duty only as to those as to which tickets were required to be purchased by the company; and that the intent and intention of the law, where obvious, would always prevail over the literal meaning of the word. See *Brady v. State*, 15 Ind. 828. The effect of the decision in that case was that the case did not come within the intention of the statute, and therefore the statute did not apply.

In the case of *Terre Haute & I. R. Co. v. State*, 13 Ind. App. 530, 41 N. E. 952, the court decided a question very similar to that presented here. The Indiana statute provides: "Every corporation company, or person operating a railroad within this state, shall immediately after the taking effect of the act, cause to be placed in a conspicuous position in each passenger depot of such company located at any station in the state at which there is a telegraph office a black-board on which such company, or person, shall cause to be written at least twenty minutes before the scheduled time for the arrival of a passenger train stopping upon such station at such station, the fact whether such train is on the schedule time or not, and if how late." The *Terre Haute & Indianapolis Railroad* had a telegraph office at a regular station, and did not maintain it at night, and omitted to post the information required by the statute for a train stopping at night, and the court, in construing the statute, said: "The statute was designed to give information to those interested in the arrival of the trains, so as to relieve suspense so frequently occasioned by delays and others thus interested by unduly delayed, and, this being the purpose of the law, it would seem that the solution of the question before us ought not to be a difficult task. It is obvious that it was the intention of the lawmakers to enjoin upon railroad companies any additional burdens with regard to the establishment and maintenance of telegraph offices, and that companies are not required, by the statute under consideration, to establish any telegraph office at any station where there was none prior to the enactment of the law, but to maintain one before established, if necessary to the transaction of their business."

\* \* \* We take it that, if a railroad company chooses not to maintain a telegraph office at any one of its stations where one is carried on, it may dispense with the telegraph office altogether, and there is nothing in the statute to keep it from doing so; and, if it is within the power of the company to dispense entirely with the telegraph office at any station (as we think it is), does it not follow that the company may dispense entirely with the maintenance or operation of a telegraph office at regular periods during any portion of a day of twenty-four hours when it deems it proper to do so?"—The court, in effect, holding that, because it is evidently not the purpose of the legis-

lature to impose additional burdens in the maintenance of telegraph offices, it was only during the intervals that the telegraph office was regularly maintained by the company for its own purpose that it was a telegraph office within the meaning of the statute.

Our statute requires the ticket office to be open for the sale of tickets 30 minutes before the departure of passenger trains from a regular passenger depot. This means a depot regularly maintained and used by the company as a passenger depot at the time that the train regularly stops there, and it is only when the railroad company regularly uses the passenger depot as such that the statute applies. It was not intended and does not have the effect of requiring, in any and all cases, the opening of ticket offices at depots during intervals when they are not regularly used as such.

It is a rule that penal statutes are given a strict construction in favor of persons against whom they operate, and this rule is not violated by adopting that sense which best harmonizes with the object and intent of the legislature when the entire text of a statute is considered as a whole. See *State v. Railroad Co.*, 133 Ind. 69, 32 N. E. 817. The statute in question is simply a reasonable requirement as to the regulation of the regular existing agencies of the company, and such similar agencies as may hereafter come into existence, and was not intended to impose upon railroad companies of this state the burden of creating a new and distinct lot of facilities, regardless of the necessity of the cost thereof. In this case appellant had never maintained a night office in Williamsburg for the sale of tickets, there is no pretense that it ever charged passengers getting on these night trains more than ticket rates, and we do not think appellant was required to open its depot for the trains in question.

The second question raised by the appeal is one of practice. As our conclusions on the first question dispose of the appeal, it is not absolutely necessary that the second question should be passed upon; but, in view of the importance of the question and the desirability that it should be finally determined, we will consider it. The Criminal Code makes no provision for the joinder of separate offenses in the same penal action, in suits for the recovery of fines or forfeiture, and section 11 of the Criminal Code provides that proceedings in actions of this character are regulated by the Code of Practice in civil cases. Subsection 3 of section 113 of the Civil Code provides that, if there be more than one cause of action, each must be distinctly stated in a separate numbered paragraph. It is made the duty of the court to enforce this provision, and we think the court properly required appellee to paragraph its petition, as there is no question that appellee sought in this action

to recover the penalty in one paragraph for 400 separate and distinct offenses, each of which could be, and was, properly required to be set up in a separate paragraph, and for recovery under each the commonwealth could have maintained its action in any court of competent jurisdiction. Section 83 of the Civil Code sets out the causes of action which may be united, but actions for the recovery of penalties for the violations of penal statutes are not included in the list. It therefore follows that they cannot be united in one suit. Section 1093 of the Kentucky Statutes provides that justices shall have jurisdiction, exclusive of circuit courts, in all penal actions the punishment of which is limited to a fine of not exceeding \$20; and, as the offenses embraced in this suit are all cases in which the punishment is limited to a fine of not exceeding \$20, the circuit court had no jurisdiction thereof, and the motion of defendant to require the plaintiff to elect which of the causes of action it would prosecute should have been sustained. Counsel for the state, in support of their contention that the offenses could be united in one action, so as to give the circuit court jurisdiction, rely upon the case of *Louisville & N. R. Co. v. Com.*, 92 Ky. 117, 17 S. W. 274. It is true that in that case the court sustained a petition in which it was alleged that the railroad company had employed 30 persons, whose names were unknown, to work for it on Sunday, and it was thus, as it is contended, allowing separate offenses to be recovered for in one action. No motion was made in that case in the lower court to require the petition to be paragraphed, and, not having been objected to there, of course the question could not have been raised in this court. It is also true that the petition was demurred to, but the fact that distinct offenses are not set out in separate paragraphs is not a cause of demurrer, but of motion to paragraph (see *Williams v. Langford*, 15 B. Mon. 566, and *Milligan v. Milligan*, 29 S. W. 319); and an objection to a pleading because not properly paragraphed is waived by answering (see *Noel v. Hudson*, 13 B. Mon. 206). But it seems to us that the facts of that case are so entirely unlike those of this that it affords no satisfactory guide. There the act complained of was the working of 30 men on Sunday by the same party, at the same time, and under the same circumstances. It was, in fact, so far as defendant was concerned, but one act; and, while the working of a single man on Sunday would have sustained the action, plaintiff had the right to allege all of them in the same paragraph, and if it failed to prove that as many as 30 men had worked, and yet proved enough to show a good cause of action, it would have been entitled to recover under the count (see *Newm. Pl. & Prac.* 410, and *Brewer v. Temple*, 15 How. Prac. 286), while here the acts complained

of were entirely distinct and independent of each other. It is not the policy of the law nor was it the intention of the legislature to oust magistrates' courts of their exclusive jurisdiction, in cases in which the penalty is limited to not exceeding \$20, by allowing joinder of numberless separate offenses in one action. Public interest requires that violations of penal statutes of this character should be proceeded against as soon as the violations are committed, in courts of competent jurisdiction thereof. We are therefore of the opinion that the facts relied on to make out a good defense, and the judgment of the lower court must be reversed, and the judgment rendered herein for the appeal.

### HARRIS v. KENTUCKY TIMBER LUMBER CO.

(Court of Appeals of Kentucky. Nov. 30, 1900.)  
DEATH BY WRONGFUL ACT—ACTION BY FATHER FOR LIABILITY OF EMPLOYER.

1. A father cannot maintain an action for the death of his son under Ky. St. § 4, which provides that a widow or minor child of a person killed by careless, wanton, or malicious use of firearms may maintain an action against the person who committed the killing, or aided or promoted it.

2. Nor under Ky. St. § 6, which provides that when death results from the negligence or wrongful act of a person, damages may be recovered for the benefit of the kindred of the deceased, and that the action shall be prosecuted by the personal representative of the deceased.

3. An averment in a petition that defendant enticed plaintiff's son to work for him without plaintiff's knowledge or consent, and unlawfully placed him at work among a number of boys, who, unknown to plaintiff's son, carried deadly weapons, and that defendant knowingly permitted said boys to wrangle and fight, and that the son was shot and killed by defendant's employes, does not state a cause of action under Ky. St. § 4, which provides that a widow or minor child of a person killed by the careless or wanton use of firearms, etc., may maintain an action against those who committed the killing, or aided or promoted it.

4. Nor under Ky. St. § 6, which provides that when death results from the negligence or wrongful act of any person, damages may be recovered for the benefit of the kindred of the deceased, in an action prosecuted by the personal representative of the deceased.

Appeal from circuit court, Lee county.  
"Not to be officially reported."

Action by J. K. Harris against the Kentucky Timber & Lumber Company for the killing of his son by defendant's employes. Judgment for defendant, and plaintiff appeals. Affirmed.

L. M. Day, for appellant. Robert F. Gourley, for appellee.

PAYNTER, J. The appellant avers that he was the father of Arthur C. Harris, who was past 18 years of age; that Smead, the agent of the appellee, "enticed, seduced, overpersuaded, and hired plaintiff's said son," without his knowledge or consent, to labor for the appellee at a sawmill, and that the defendant had a "considerable

of laborers working, among whom were some rude boys, less than twenty-one years of age, and some of them unlawfully carrying deadly weapons, though of which in fact plaintiff's said son knew nothing. One of said boys shot plaintiff's said son."

It was further alleged that the appellee lawfully placed plaintiff's said son to working said lawless boys at said mill, and was defendant negligently and carelessly knowingly permitted said minor boys to engage in lawless fight with sticks, stones, rocks, knives, and pistols at divers places, but all of which was unknown to plaintiff. It is also averred that the son was shot and killed by the employés of the defendant, and by its negligence and carelessness. The court sustained a demurrer to the petition.

This is not an action under section 4, Ky. Stat., which provides "that a widow and minor child or either or both of them of a person killed by the careless, wanton or malicious use of fire arms," etc., "may maintain an action," etc. The facts alleged did not constitute a cause of action under that section. If they did, the father could not maintain it. There is nothing in the petition or brief of appeal which indicates that it was intended to be an action under section 6, Ky. Stat., which provides for recovery for the death of a person, which results from injury inflicted by negligence or wrongful act. The facts alleged are not such as would entitle any one to maintain the action under that section. If they did constitute a cause of action under that section, then the father, by the express terms of the statute, could not maintain it. The right of action would have been in the personal representative of the deceased. It follows that the appellant is not entitled to maintain the action. It is a familiar principle of common law that the death of a human being could not be complained of as an injury in a civil court. It could be made a ground for an action for damages. It is only where the statute or constitution provides for recoveries for injuries resulting in death that an action can be maintained. In the facts stated, the appellee's corporation is not liable to the plaintiff for damages resulting from the death of the son. *Gordon v. Thompson*, 82 Ky. 383. The judgment is affirmed.

LOUISVILLE & N. RY. CO. v. BASS.  
Court of Appeals of Kentucky. Dec. 10, 1897.)

#### INJURY TO EMPLOYEE.

Plaintiff was a member of a crew of laborers on the road of defendant engaged in shoving a push car loaded with old ties over a trestle, which was done by men walking along the side of the car, and claimed that, by reason of the negligence of the foreman, he was injured by the car running over his foot and ankle. The negligence complained of was an order from the foreman to the men to hurry up the car. *Held*, no negligence was shown where there was no evidence that such an act was dangerous.

Appeal from circuit court, Hopkins county.  
"Not to be officially reported."

Action by John Bass against the Louisville & Nashville Railway Company for personal injuries. Judgment for plaintiff, from which defendant appealed. Reversed.

Gordon & Gordon (H. W. Bruce and B. D. Warfield, of counsel), for appellant. Thomas H. Hines, Waddell, Nunn & Waddell, and Edward W. Hines, for appellee.

HAZELRIGG, J. Appellee was a member of a crew of laborers on the road of the appellant engaged in shoving a push car loaded with old ties along the line of the railway in Hopkins county. It was such work as the crew had often done, and required no skill, and was attended with no special danger. While pushing the car over a trestle, which was done by men walking along the side of the car, the appellee was in some way hurt about the ankle, and in fact claims that the car ran over his foot and ankle, and for this injury, which he attributes to the gross negligence of the foreman, he brought this action. Judgment resulted in his favor, and it is insisted by appellant, among other things, that its motion for peremptory instruction should have been sustained, because there was no testimony showing negligence on the part of the foreman, and especially no gross negligence. It is substantially admitted by appellee that there is no ground for the charge of such negligence, unless in the order or command of the boss, given the crew when the car was going, in the language of the witness, "at full speed," or at "a fast gait." And the language of this order was, "By God! Shove that car," or "God damn! I wish I had a crew of men." There is no complaint that the pathway or rather plankway alongside the track over the trestle, and on which the men were walking, was not as it should be, or that the car or appliances were in any wise defective. The whole case rests upon the contention that this order was unreasonable, and ought not to have been given. It is assumed that some of the men responded more promptly than others to the order, and that the car ran upon appellee, and some attachment of the car struck him on the leg, and by some means the foot was thrown under the wheel. This theory requires us to believe that the appellee was one of the crew who did not respond promptly, and on that account let the car run upon him. So that it follows that a prompt obedience by the appellee of the order would have prevented the mishap. But the appellee himself testifies that, when the order was given, he obeyed it, and "shoved along with the others." We have examined the testimony carefully, and do not find that, except for its unnecessary emphasis, the order was at all unreasonable or unnecessary. There is no testimony that it was dangerous to shove the car in compliance

with the order, even though it was then going at full speed or at a fast gait. Indeed, it is shown that it was necessary and proper to hurry the car across in order that an expected train might pass safely. We are constrained to the conclusion that, upon the proof before us, the peremptory instruction ought to have prevailed. Judgment reversed for proceedings consistent herewith.

**COOLEY v. BARBOURVILLE LAND & IMPROVEMENT CO.'S ASSIGNEE.**

(Court of Appeals of Kentucky. Dec. 10, 1897.)

**VACATION OF JUDGMENT—UNAVOIDABLE MISFORTUNE.**

Where the civil docket was disarranged by the trial of the criminal docket, and appellant's cause was disposed of while his attorney was temporarily absent from the court room, knowledge of which did not reach him until several days thereafter, appellant is entitled to vacation of the judgment, under Civ. Code, §§ 518, 520, on the ground of unavoidable casualty or misfortune.

Appeal from circuit court, Knox county.

"Not to be officially reported."

Action by the Barbourville Land & Improvement Company's assignee against J. M. Cooley. From a judgment rendered therein, defendant appeals. Reversed.

John T. Hays, for appellant. J. Smith Hays and S. B. Dishman, for appellee.

**HAZELRIGG, J.** It is not necessary to decide whether or not the motion of appellant, Cooley, for a new trial in the old case, came too late, or whether the court properly overruled that motion. Appellant was not, in any event, precluded from seeking a vacation of the judgment by reason of unavoidable casualty or misfortune preventing him from appearing and defending the action, as expressly provided in subsection 7, § 518, of the Civil Code. This he undertook to do by presenting his petition in accordance with the provisions of section 520 of the Code, and, in our opinion, he showed himself entitled to the relief sought. The docket for the trial of civil cases was altogether disarranged by the trial of the criminal docket, and while appellant's attorney was temporarily absent from the court room the case was called and disposed of, knowledge of which did not reach the client or his attorney until five or six days thereafter. A new trial should be granted, and the case heard on its merits. Judgment reversed for proceedings consistent herewith.

**WHITAKER v. WHITAKER.**

(Court of Appeals of Kentucky. Dec. 10, 1897.)

**CONTINUANCE.**

Plaintiff sued defendant for trespass in cutting and removing timber from certain land described in his petition. After the cause had been partially heard, but before the court announced its judgment, plaintiff moved to continue the cause, with leave to retake his deposition, on the ground that, by the mistake of his

attorney, he had omitted to prove the boundary of the land from which the timber was taken. *Held* that, in view of the fact that plaintiff appeared to be the victim both of his ignorance and the wrongs complained of, the motion for a continuance should have prevailed.

Appeal from circuit court, Breathitt county.  
"Not to be officially reported."

Action by W. J. Whitaker against Anderson Whitaker for trespass. Judgment for defendant, from which plaintiff appeals. Reversed.

James H. Patrick, for appellant. J. J. C. Bach, for appellee.

**BURNAM, J.** This suit was instituted by appellant against appellee on the 12th day of March, 1892, for trespass on a certain boundary of land described in the petition, in cutting and removing timber therefrom, and to enjoin appellee from further waste and trespass thereon; and, in September thereafter, defendant filed answer, denying both the title and possession of plaintiff to the land in question, and also denying all the alleged acts of trespass, and alleging that he is the owner and in possession of the land described in plaintiff's petition. The case lingered on the docket until March, 1895, without any steps looking to its preparation, except that in March, 1893, W. C. Strong, surveyor of Breathitt county, was directed to go on the land in controversy, and survey and lay down the land as either party might direct, having regard to the title papers produced by either party, and to make out plats of the survey, etc., which he did, filing his report at the June term, 1893, of the Breathitt circuit court. Subsequently thereto, at the March term, 1894, by agreement, A. C. Russell was appointed special surveyor to go upon the land, and make a new survey in accordance with the terms of the former order. He filed his report at the June term, 1894; and at the March term, 1895, the plaintiff filed an amended petition, in which he alleged that, by mistake, his counsel, in preparing his petition, did not properly describe the boundary of the land claimed by him, and proceeds to set out the boundary in detail; and he alleges that the timber cut by defendant was taken from this boundary. At the March term, 1896, the cause was submitted and partially heard; but, before the court announced its judgment, the plaintiff moved to set aside the order of submission, and continue the cause, with leave to retake his deposition, because, as he sets out in his affidavit which was filed with the motion, there was no deposition in the record showing that the land described in the amended petition, and upon which the trespass was committed, was covered by his title papers filed in the record. He alleges that he believed the proof taken showed that fact until after the submission of the case, and that the land described in the petition and amended petition was embraced in the 100-acre patent to Rhoda Smith, dated May 7, 1885, to which he held title by deed from Taulbee,



commissioner, and by his 34-acre patent, dated April 16, 1889, a portion of same being covered by the patent and by the deed from Taubee; that the timber in controversy was taken from the land embraced in his title papers; and that he could prove these facts to be true by the surveyors Strong and Russell, whose reports are filed, if allowed to do so; further alleging that his omission to prove the boundary in the petition and amended petition was due to the mistake and inadvertence of his attorney in preparing his pleadings and in interrogating him as a witness. The court refused to set aside the submission, but permitted the plaintiff to file an amended petition, in order to make the pleadings conform to the proof in the case. By this amendment, filed in March, 1896, plaintiff alleges that none of the timber in controversy, for which he seeks recovery, was cut or removed from the land embraced in the boundary of 66 acres named in the deed from Taubee, as commissioner, to him, which is filed as an exhibit with the suit, and that part of the timber was cut within the 34-acre patent of plaintiff. The chancellor entered judgment dismissing the petition of plaintiff, because he had failed to show that the land embraced within his title papers, and the land from which the timber in controversy was taken, is the same land described in his petition; and from that judgment this appeal is prosecuted.

Neither of the reports filed by the surveyors makes any statement as to whether the timber which was alleged to have been taken was cut from the lands covered by appellant's title papers, and sued for in his petition; and it is impossible to determine this question from the proof in the record. Appellant, in his amended petition, describes the land he claims, and asserts (and we think his testimony conduces to show) that the trespasses complained of were committed within these boundaries, and that these boundaries constitute a part of the land to which he holds title; but both the pleadings and proof are so vague and indefinite that it is impossible to arrive at an intelligent opinion as to these matters. And in view of the fact that appellant is evidently an exceedingly ignorant person, and appears to be a victim both of his ignorance and of the wrongs complained of, the motion for a continuance should have prevailed; and for this reason the judgment is reversed, and cause remanded, with instructions to allow the case to be prepared so that the facts at issue may be definitely ascertained.

RICHMOND, N., I. & B. R. CO. v. RICHARDSON.

(Court of Appeals of Kentucky. Dec. 11, 1897.)

PAROL EVIDENCE—CARRIERS—DELAY IN SHIPMENT—CONNECTING LINES.

1. In an action brought against a railroad company for damages by reason of the failure of de-  
43 S.W.—30

defendant to transport and deliver a car load of hogs as agreed, when there is no plea of fraud or mistake in the execution of the written contract of shipment, it is error for the trial court to allow parol proof as to the terms of the contract of shipment.

2. Where a contract of shipment between plaintiff and defendant railway company provided, "Whereas, the said R. has this day shipped car of hogs, to be carried by the R., N., I. & B. R. R. from Irvine, Ky., to Richmond (both points on its own line of road), and by it, as agent of shipper, to be forwarded to G. & E., at Cincinnati, Ohio, on same terms as this contract," an instruction authorizing the jury to find against the defendant for any delay, or damage to the hogs, after the delivery of the car containing the hogs to the connecting line of another railroad company at Richmond, is error.

Appeal from circuit court, Estill county.

"Not to be officially reported."

Action by Curtis Richardson against the Richmond, Nicholasville, Irvine & Beattyville Railroad Company for damages for failure to transport and deliver a car load of hogs. Verdict for plaintiff. Defendant appeals. Reversed.

Riddell & Riddell, W. Marshall Bullitt, Bennett & Chenault, and Bullitt & Shields, for appellant. White & Smith, for appellee.

GUFFY, J. The plaintiff (now appellee) instituted this action in the Estill circuit court, seeking to recover judgment for \$375 on account of damages sustained by the failure of appellant to transport and deliver one car load of hogs and cows to Green & Embry, Cincinnati, Ohio, which it agreed, as is alleged, to ship from Irvine, Ky., to said Green & Embry. The substance of the complaint is that four of the hogs were never delivered, and one was delivered dead, and that, by reason of several days' delay in delivery the hogs decreased in value, and that the market at Cincinnati also declined. It is further alleged that the failure to deliver as agreed between the parties was on account of the carelessness and negligence of appellant. The appellant demurred to the jurisdiction of the court, and also to the petition, because it did not state facts sufficient to constitute a cause of action, which demurrer was overruled. Thereupon the appellant answered, and denied the jurisdiction of the court in its answer, and also denied that under the contract mentioned in the petition, or under any contract, it had received on cars three cows, or either of the cows mentioned in the petition, or agreed to deliver same, in good order and condition, at the Farmers' & Drovers' Stock Yards, to Green & Embry, in Cincinnati, Ohio, and further denied, under the contract mentioned in the petition, that defendant agreed to deliver the hogs at any point in Cincinnati, and also denied any negligence. Appellant files a copy of the written contract, and, in substance, avers that the undertaking was to only deliver the hogs to the connecting line, to wit, the Louisville & Nashville Railroad Company, at Richmond, Ky., and that

it did do so within a short time after the shipment from Irvine. The contract reads as follows: "Original. Richmond, Nicholasville, Irvine and Beattyville Railroad. John MacLeod, Receiver. Live-Stock Contract. Irvine, Kentucky, Station, Jan. 19th, 1893. This memorandum of a special contract of carriage between the Richmond, Nicholasville, Irvine and Beattyville Railroad and C. Richardson, of Irvine, Kentucky, witnesseth: Whereas, the said C. Richardson has this day shipped car of hogs, to be carried by the Richmond, Nicholasville, Irvine and Beattyville Railroad from Irvine, Kentucky, to Richmond (both points on its own line of road), and by it, as agent of shipper, to be forwarded to Green & Embry, at Cincinnati, Ohio, on same terms as this contract: In consideration of the special rate of \$36.00 per car guaranteed by said railroad company between said point of shipment and Cincinnati, Ohio, the shipper hereby agrees to load, unload, feed, water, and take all proper care of said stock, and insure the said railroad company and all connecting lines over which said stock may pass between point of shipment and destination from all loss or damage which may be incurred by delays in transportation or delivery, or arising out of its responsibility as master over its agents or servants (gross and wanton negligence excepted), growing out of this shipment. The shipper hereby further agrees that the actual value of said stock at time and place of shipment shall govern the settlement of any damages for which the carriers may be liable, and declares the value of the stock herein described does not exceed \$12 for each hog. In witness hereof the agent of the company and the owner of the stock, or his authorized agents, have affixed their signatures to two copies of this agreement. [Signed] C. Richardson, Owner. J. W. Rock, Agent, for R., N., I & B. R. R." The bill of lading shows one car of hogs consigned to Green & Embry, Cincinnati, Ohio, which bill of lading is signed by "J. W. Rock, Freight Agent." It is stipulated in said bill of lading that the responsibility of any carrier shall cease as soon as said property is ready for delivery to next carrier or to consignee, and each carrier shall be liable only for loss or damage accruing on its own line. After the issues were fully made up, a jury trial resulted in a verdict and judgment in favor of appellee for \$240; and appellant's motion for a new trial having been overruled it prosecutes this appeal. The grounds for new trial are, in substance, as follows: (1) Because the verdict is not sustained by sufficient evidence, and is contrary to law; (2) because the court gave instructions to the jury which were not the law, and refused to give instructions asked for by the defendants; (3) because of error of the amount of recovery, which was too large; (4) because the damages allowed by the jury were excessive, appearing to have

been given under the influence of passion and prejudice; (5) because the court permitted incompetent evidence to go to the jury, because the court refused to allow competent evidence to go to the jury.

It seems to us that the contract of shipment of the hogs in question does not make the appellant liable for any failure of the jury except such as occurred on its trial of the road between Irvine and Richmond, and as much as there was no plea of fraud or mistake in the execution of the contract of shipment, the court below erred in allowing any parol proof as to the terms of the contract of shipment. No instruction should have been given to the jury authorizing it to find against the appellant for any loss or damage to the hogs after the delivery of the car containing the hogs to the Louisville & Nashville Railroad Company at Richmond. For the errors indicated the judgment is reversed, and the cause remanded for a new trial upon principles consistent herewith.

#### RICHMOND, N., I. & B. R. CO. v. THOMAS et al.

(Court of Appeals of Kentucky. Dec. 11, 1900.)  
APPEAL — REVERSAL — EMINENT DOMAIN — OUT OF CHANCERY.

1. In an action by a widow and heirs of a railroad company for damages for taking a strip of land for right of way, and injury done to a farm, the defendant claimed the land under a written contract executed by deceased, and asked the jury to find that the plaintiffs be adjudged to convey it, and that the case be transferred to equity. There was evidence of injury to the farm, independent of the taking of the strip for right of way. *Held*, that the judgment for plaintiffs would not be reversed for failure of the court to direct a conveyance of the land to the defendant, as no conveyance was necessary.

2. In such case it was not the duty of the court to order an issue out of chancery.

Appeal from circuit court, Estill county. "Not to be officially reported."

Action by Eliza Thomas and others against the Richmond, Nicholasville, Irvine & Beattyville Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Bullitt & Shields, Riddell & Riddell and John Bennett, for appellant.

GUFFY, J. This action was instituted in the Estill court of common pleas by the plaintiffs against the appellant, seeking to recover \$1,000 damages for injury, etc., to a tract of land owned and possessed by them in Estill county; they holding the same as widows and heirs at law of Allen Thomas. It is admitted in substance, in the petition, that the defendant, with force and arms, about March, 1898, entered on plaintiffs' land, and forcibly dug up and created a railroad way thereon, and dug up and destroyed plaintiffs' said farm, and forcibly and unlawfully took possession of a strip 100 feet wide of said farm, entirely through plaintiffs' said farm, at least 1,000 yards long, and

up, and appropriated it to its own use, tore down and destroyed plaintiffs' fences, and grass, and blasted rocks and dirt plaintiffs' fields, and tramped and hauled them, to plaintiffs' great damage, in the sum of \$1,000. The defendant admits that Thomas, deceased, was the owner of the land named, until he donated part thereof to the defendant for the purpose of building a road thereon, and denies that the plaintiffs are the owners of the strip upon which the road is constructed and being constructed, and denies that plaintiffs own any part of the strip, and, in short, denies the unlawfulness, and denies that it tore down or destroyed plaintiffs' fences, or blasted rocks or earth over plaintiffs' lands, or tramped or hauled over them, and denies that it injured plaintiffs in the sum of \$1,000. By way of counterclaim, it alleged that the said Thomas, in his lifetime, by a writing, gave it the right of way over a certain boundary of land, which is the land (being 100 feet in width, 50 feet lying on either side of, and adjacent to and parallel with the center of, said roadway, and containing 6.98 acres), and asked that the plaintiffs be adjudged to convey the same to the defendant (now appellant), and moved a transfer of the case to equity, which motion was sustained by the court. The reply denying the execution of the contract aforesaid, in substance, alleges that, if it was ever executed, its execution was obtained by fraud and misrepresentations (setting out the facts of fraud). Upon a rule requiring the defendant to file the writing referred to, it filed an affidavit stating that the writing has been lost or misplaced, and could not be found. The appellant insists that the execution of the writing relied on has been proven by the deposition of W. B. Smith. The deposition of Smith, however, was excepted to by the plaintiffs, because no notice was given as required by law, and none in fact, and the deposition should not have been filed and considered. It does not appear that the court acted upon the exception. The notice is as follows: "Same vs. Same. The defendant will on the 30th day of May, 1891, at the law office of Smith & Moberly, in Lexington, Ky., take the depositions of W. B. Smith, John Bennett, and C. D. Chennault, to read as evidence in behalf of the defendant in the above-styled action, and will continue from day to day until finished. This day of May, 1891. Riddell & Sons, Attorneys for Deft." On the left-hand margin, below the signature, the names of the plaintiffs appear, and below all the names is following: "Executed May 28, 1891, in presence of S. P. Richardson, S. E. C., by D. W. White, D. S. E. C." We need not determine the sufficiency of the notice in question, for the reason that, even allowing the deposition of W. B. Smith to have been considered by the court, yet we are of the opinion that, putting the evidence all together, the court be-

low properly held that the defense relied on by appellant was not sustained; hence the judgment of the court should not be reversed.

It is suggested by appellant that the court ought to have directed a conveyance of the land to appellant, if it was required to pay for the same. We do not think that such failure of the court is sufficient ground for reversal. Nor do we think that an issue out of chancery should have been ordered in this case. It will be seen that the plaintiffs sued for the taking of the land, and for the injury done to the farm. There is proof conducing to show that the plaintiffs sustained considerable injury to the farm, independent of the taking of the 100-foot strip by the railroad. It also appears that the decedent objected to the building of the road, and that he died within about eight months after the commencement thereof,—which, however, is a matter not material to the issue. Inasmuch as the suit was to recover for the taking of the land and injury to the farm, the judgment in this case, in effect, leaves the road in the lawful possession of the right of way, and no formal conveyance is necessary. Judgment affirmed.

#### WEST v. PREWITT et al.

(Court of Appeals of Kentucky. Dec. 11, 1897.)

#### DIRECTING VERDICT.

In an action for commissions for a sale of real estate, the only evidence introduced was by the plaintiff, which showed an employment to sell the land at a fixed price; that the agent induced the purchaser to make an offer for it; that the offer was finally accepted, after sale or offer at auction on the terms of purchaser's offer to the agent; that no notice of discharge from further services had been given; and that the services were worth a certain sum, as fixed by a contract of employment which was proved. *Held*, that the court erred in giving a peremptory instruction, at the close of plaintiff's testimony, to find for defendants.

Appeal from circuit court, Clark county.

"Not to be officially reported."

Action by W. N. West against Margaret Prewitt and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

J. M. Benton, L. H. Bush, and Beckner & Jouett, for appellant. Gibson Taylor and Leeland Hathaway, for appellees.

WHITE, J. The appellant, a real-estate agent, in this action sought to recover commissions on a sale of land by appellees to Crawford. It is claimed in the petition that he was employed by appellees to sell the land, a large tract, some at one price, and other parts at other prices; that appellees effected a sale to three parties of 700 acres. Appellees admit an employment of appellant, but say he was to be paid to sell at the prices given; that appellant failed to sell at those prices, and the land was sold publicly, and bought by Crawford. Appellees allege

that appellant was discharged before the sale was made, and denied any liability. A reply was filed, by which it is denied that any notice was ever given that his services were not desired, admitted the sale at public outcry, but alleges that it was perfected at the price and on the same terms of the offer to appellant by Crawford when he was trying to sell the land to Crawford. Upon this issue thus made the case was tried before a jury, and, on peremptory instruction, a verdict was returned. Judgment was entered accordingly, and from that judgment this appeal is prosecuted.

The only evidence heard on the trial was introduced by appellant, which proved an employment to sell the land, prices being fixed as to certain parts; that appellant induced Crawford to investigate and make an offer for the land or part of it; that the offer of Crawford was finally accepted, after a sale or offer at auction, and the land sold to Crawford on the terms of his offer to appellant. Appellant denied any notice that his services would not be required further. Appellant proved the value of his services and the contract that fixed the amount he was to receive. It seems to us that this evidence presents such a case as should have been submitted to the jury for trial, under proper instructions. We are therefore of opinion that the court erred in giving the peremptory instruction, at the close of appellant's evidence, to find for defendants. Wherefore this judgment is reversed, and cause remanded, with directions to award a new trial, and for further proceedings.

#### GRADDY v. WESTERN UNION TEL. CO.

(Court of Appeals of Kentucky. Dec. 10, 1897.)

EVIDENCE—OPINIONS OF EMPLOYE—FAILURE TO DELIVER TELEGRAM.

1. Evidence that an employé of a telegraph company had said that a failure to deliver a message was "a piece of gross negligence" is not admissible in an action for damages for failure to deliver the message.

2. Where one asks damages for mental anguish caused by failure to deliver a telegram, and alleges that he was prevented from attending the burial of his mother, and "by reason of his inability to attend the funeral of his mother," etc., he suffered mental anguish, there is no allegation that there was a funeral, and instructions limiting the jury to damages by reason of the negligence in failing to deliver the telegram, if such failure prevented plaintiff from knowing of his mother's death, and thereby prevented him from attending her burial or seeing her after she was dead, were not erroneous.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action by Joseph J. Graddy against the Western Union Telegraph Company. From a judgment for the plaintiff, he appeals. Affirmed.

Webb & Farrell, for appellant. R. A. Thornton, for appellee.

PAYNTER, J. The telegraphic operator of the defendant at Lawrenceburg, Ind., on

August 18, 1895, at 6.45 a. m., sent a message, signed by one Walton, to the appellant, as follows, viz.: "Come home immediately. Mother is dead. Answer immediately." The message was directed to the appellant at Lexington, Ky., and was received there about 18 minutes past 8 o'clock a. m. An effort was made by those in charge of the appellee's office to find the appellant at the hotels and at the postoffice, and, by an examination of a city directory then in use, they failed to find the appellant on that day. The next day, which was Monday, during business hours, Roger Nichols, an employé of the appellee in the office at Lexington, Ky., in looking for an undelivered message for another party, discovered, as he says, after dinner, the message which was sent to the appellant, and had it delivered to him at five minutes past 2 o'clock, p. m. Between 9 and 10 o'clock on the day the message was received, and after they failed to find Graddy, a message was sent to the Lawrenceburg office notifying Walton that his message to Graddy was undelivered. The jury returned a verdict against the appellee for \$100.

Two grounds for a reversal are urged: (1) That the court erred in refusing to allow the appellee to prove a certain statement which Nichols made some time after the message was delivered; (2) because of an error in the instruction which the court gave the jury.

Nichols was not in the office on the day the message was received, and, of course, did not testify as to the effort made by those in charge of the office to find Graddy and deliver the message to him. The appellant avowed he could prove that, a short time after the message had been delivered to Graddy, Nichols told Wickliffe that the delay in the delivery of the message was a piece of gross negligence, and that he was sorry for it. The question that the court and jury were trying was as to whether the company was guilty of actionable negligence by its failure to deliver the message. The company could not be made liable because one of its employes had an opinion that the failure of the employes of the company to deliver the message amounted to gross negligence. It is not claimed that he admitted facts, but simply expressed an opinion as to the effect of the facts attending the failure to deliver a message. This is even more objectionable than to have allowed the appellant to prove statements that Nichols had made which purported to be of the facts connected with the failure to deliver the message. Such an opinion or statement of facts is not part of the res gestæ, and is not admissible as evidence. *Railroad Co. v. Reeves' Adm'r* (Ky.) 11 S. W. 464; *Railroad Co. v. Ellis' Adm'r*, 97 Ky. 330, 30 S. W. 979.

The court under its instruction allowed the jury to find damages for the appellant by reason of the negligence of the defendant in failing to promptly deliver the telegram, if

failure prevented him from knowing of mother's death, and thereby prevented from attending her burial, or seeing her she was dead; and this was permitted the purpose of allowing the jury to compute him for mental anguish or sorrow by reason of the fact that he failed to see his mother after her death or to attend her burial. Whether damages are recoverable where the only ground is mental suffering occasioned by a breach of a contract to promptly transmit or deliver a telegram is not decided, as the defendant failed to prosecute an appeal from the judgment of the court below, and the question is not before us. However, it might be involved had pleadings authorized the court to have permitted the jury to award damages to the plaintiff for being deprived of the opportunity of attending his mother's funeral. We do not think the pleadings sufficiently alleged there was a funeral over the remains of mother. The plaintiff specified the cause as mental anguish; hence it was proper for the court to confine the testimony and instructions to the allegations of the petition. The petition alleges that, by reason of the company's failure to promptly deliver a message, he was deprived of the privilege and opportunity of being present at and attending the burial of his mother, she having been interred when the plaintiff reached Lawrenceburg, and "by reason of his inability to attend the funeral of his mother," he suffered mental anguish. The pleadings show that he does not use the word "funeral" in the same sense as he uses the word "burial," as he alleges that he was deprived of the privilege of attending the burial of his mother, but he admits in his testimony that he was present at the "burial." The word "funeral" seems to have been used to convey the same meaning as "obsequies,"—a rite or ceremony pertaining to a funeral. The statement in the petition does not amount to an allegation that there was a funeral over the remains of his mother. As an allegation of the petition is not equivalent to a statement that there was a funeral, the defendant was not required to deny there was a funeral. The rules of pleading require that the facts relied upon shall be distinctly and positively alleged, and not stated by way of argument, inference, or belief. *Person v. Caldwell*, 1 Metc. (Ky.) 492. We are of the opinion that the plaintiff is not entitled to a new trial. Therefore the judgment is affirmed.

#### HUTSELL et al. v. DEPOSIT BANK OF PARIS.

Court of Appeals of Kentucky. Dec. 11, 1897.)  
DISTRESS WARRANT — VALIDITY — ASSIGNEE OF RENT NOTE.

It is not a material objection to a distress warrant that it directs a levy to be made upon the property of both the tenant and the subten-

ant, where levy is actually made only on the property of the subtenant.

2. An assignee of a note given for rent, who is not the assignee of the reversion, cannot avail himself of the remedy by distress, under Ky. St. §§ 2301, 2302.

Appeal from circuit court, Bourbon county.

"To be officially reported."

Action by Deposit Bank of Paris against J. W. Hutsell and others. Judgment for plaintiff. Defendants appeal. Reversed.

McMillan & Talbott, for appellants. Mann & Ashbrook, for appellee.

DU RELLE, J. Mrs. Taylor leased to C. E. Wood her farm for the year ending March 1, 1896, for \$1,300, and the tenant, with three others as sureties, executed a note for that amount, due March 1, 1896, payable to Mrs. Taylor, and negotiable and payable at the Agricultural Bank of Paris. Before maturity, Mrs. Taylor indorsed and assigned the note to Irwin Taylor, who indorsed it to McClintock, who discounted it to the Deposit Bank of Paris. In April, 1896, the tenant, with the consent of Mrs. Taylor, sublet the farm—or, rather, assigned the remainder of his term—to J. M. and J. W. Hutsell, appellants, for \$1,800, for which they executed their note, with surety, to Wood, who assigned the note to J. B. Wood, who assigned it to the Agricultural Bank of Paris. The \$1,300 note was not paid at maturity, and on April 11, 1896, the appellee, the Deposit Bank, through its president, made affidavit before the police judge and procured a distress warrant to be issued in favor of the bank against Wood, the tenant, and J. W. and J. M. Hutsell, the subtenants. The warrant was placed in the hands of the sheriff, who levied upon the property of the appellants, who executed a bond, with sureties, to discharge the levy. Motion was made by appellee, under section 654 of the Code, for judgment upon the bond against appellants, and defense was made upon the ground of irregularity in issuing the distress warrant, and that the distress warrant was in favor, not of the landlord, but of a remote assignee of a negotiable note given for rent. These defenses were presented both orally and by written answer and amended answer.

The objection to the distress warrant was upon the ground that it was issued both against the tenant and the subtenants, directing the levy to be made upon their property found in the county, whereas only the property of the subtenants found on the leased premises was subject to the levy. Inasmuch as the warrant was not levied upon any of the property of the subtenants found elsewhere than on the leased premises, we do not regard this objection as material.

The other objection is that the relation of landlord and tenant did not exist between the Deposit Bank and the Hutsells. This presents a question now, we believe, for the first time presented for decision, whether the remedy by distress or landlord's attachment, un-

der sections 2301, 2302, Ky. St., is available in favor of the assignee of a note given for rent who is not the assignee of the reversion. It is noticeable that this summary, and frequently oppressive, remedy by distress is, by the terms of the statute, given to the landlord, the language used being: "The landlord may, before a justice of the peace, \* \* \* by himself or agent, file an affidavit," etc. The language in the other section providing for an attachment for rent, while not quite so explicit, in our opinion means the same thing; the language being: "The person to whom the rent is owing, or his agent or attorney, may file an affidavit. \* \* \*" At common law, the right to rent was incident to the reversion, and the remedy by distress for arrears of rent was lost by assignment of the reversion, either absolutely or by way of mortgage. 1 Woodf. Landl. & Ten. (1st Am. Ed.) p. 421. It became a mere chose in action. And so not until the statute of 32 Hen. VIII. could executors or administrators distrain for arrears of rent incurred in the lifetime of the owner. 1 Woodf. Landl. & Ten. p. 427. By the same statute (32 Hen. VIII.) was given the power of distress upon the lands out of which the rent is reserved, so long as they continue in the hands of him to whom the rent is due, or of any person representing or claiming title through or under him, by purchase, gift, or descent; and it is argued that as this part of the statute of Hen. VIII. has not been copied into our statute, while the part of it giving the power of distress to a personal representative has been so copied, the remedy by distress does not follow even an assignment of the reversion. In this state, however, it has been held (*Breeding v. Taylor*, 13 B. Mon. 477) that, if a sale be made of land in possession of a tenant, the tenant, and all coming into possession under him, becomes the tenant of the vendee, and may not attorn his possession to a stranger. And see *Saunders v. Moore*, 14 Bush, 97. It would seem, therefore, that in this state the remedy might be held to follow the reversion, after notice to the tenant of the alienation, and would undoubtedly do so after an attornment, as that would establish the relationship of landlord and tenant. This question, however, is not before the court. In 6 Lawson, Rights, Rem. & Prac. § 2819, it is said: "The requisites of a valid distress are that there shall have been an actual demise or letting of the premises, and the relation of landlord and tenant exist between the parties; that there shall be a reversion in the landlord; that the rent be certain or capable of being made certain; and that the rent shall be due; and that there shall be a reservation of a certain rent." And in *Tayl. Landl. & Ten.* § 568, referring to the New York statute, in substance the same as the statute of 32 Hen. VIII., it is said: "But, in order to confer upon such assignee a right to distrain, the lease or land should be included in the assignment; for a mere transfer of the rent remaining unpaid, which is only the transfer of a chose in action, does not carry

with it the remedy by distress." We think clear from the authorities that the right of distress does not pass to the assignee of a note, in the absence of statutory provision therefor.

It is claimed that this statutory authority contained in section 2304 of the Kentucky Statutes: "If the owner or holder alien or assign his estate or term, or the rent thereon, to fail due thereon, his alienee or assignee may recover such rent,"—it being argued that the right given to alienee or assignee to recover the rent carries with it the right to the remedy of recovery to which the assignor or alienor would have been entitled. It is to be observed that, in several instances, the statute upon which the subject explicitly authorizes the remedy by distress,—in section 2305, against the assignee or undertenant of the lessee; in section 2311, against the tenant for life; in section 2312, against a person entitled to rents depending upon the life of another, after the death of the landlord; in section 2321, to a personal representative; and in section 2324, to enforce the lien given under contracts by which the landlord is to receive a part of the crop. These express provisions indicate that, whatever might have been the legislative intent in the adoption of the statute embodied in section 2304, it was not thereby intended to grant to the assignee of a mere chose in action this extraordinary and frequently oppressive remedy. Moreover, section 2312 allows double damages for wrongful distress against the landlord, who, by reason of his ownership of the property, may legally be supposed to be financially responsible. It is fair to presume that the reason a bond is required is because of this financial responsibility, the existence of which is not to be presumed in the assignee of the chose in action. Exactly what was the legislative intent in section 2304 is somewhat difficult of ascertainment. It may very well be considered that the statute was enacted to enable the assignee to sue for and recover the rent as rent, instead of being remitted to a recovery for use and occupation, which seems to have been the common-law remedy in such case. *Castle v. Belt*, 2 B. Mon. 157. But we are not disposed, by implication, to extend this harsh summary remedy so as to make it applicable to a case to which it has never, so far as we are informed, been applied in this or any other country. For the reasons given the judgment is reversed, and the case remanded, with directions to set aside the judgment sustaining the demurrer to appellants' answer, and to allow further proceedings consistent with this opinion.

TRAPP et al. v. FIDELITY NAT. BANK et al.

(Court of Appeals of Kentucky. Dec. 11, 1900.)  
APPEAL AND ERROR—CORRECTED RETURN—MORTGAGE  
FIDES OF LOAN TO CORPORATION.

1. Though the original transcript does not show that an appeal was prayed for, or granted by the lower court, the appeal will not be dismissed.



earing, where a corrected copy of the record, afterwards brought up, shows that the appeal both prayed for and granted.

Where a judgment is made up of several different items, those items not excepted to by appellants will not be disturbed.

Where a bank, within less than a month, had money, to the extent of \$418,292, on the books of a corporation which was known by the officers of the bank to be in a failing condition, it was also known that the president of the corporation, who was also vice president of the bank, discounted the bills, and was engaged at the same time in an enormous wheat speculation, which culminated in his failure, as well as that the bank and the corporation, it is unreasonable to suppose that the money was loaned in good faith by the bank to the corporation, so as to make the latter liable therefor.

Not to be officially reported."

On rehearing. Overruled. The creditors' bill that the previous opinion (41 S. W. 577) that the mandate be modified. Granted.

EWIS, C. J. One of the grounds of appellants' petition for rehearing, and eventual dismissal of the appeal for want of jurisdiction of this court, is that though the judgment of April 14, 1894, was treated by both court and counsel as properly before us for reconsideration, there was, as since discovered, not only no appeal prayed for, or granted by the lower court. But, though the original transcript did not show the fact, it does appear from an additional and correct copy of the record, since brought up, that an appeal was made from that judgment was both prayed for and granted by the lower court, to appellants, the unsecured creditors of Swift Iron & Steel Works. There is no new or independent reason offered for a change of our previous opinion that the judgment in favor of the appellee was for a very much larger sum than he is entitled to recover, and the petition for rehearing is therefore overruled.

Counsel for appellants asks the opinion of the court that the mandate be so modified that instead of directing a reference to the master commissioner to ascertain and report what, if any, part of the money sued for was actually appropriated and used for the benefit of Swift Iron & Steel Works, the lower court be reversed to disallow and dismiss the entire claim outright. Of the whole amount claimed, \$28,000 appear to have been reported by the commissioner as just, and, without exception on part of appellants, was allowed by the court, and therefore cannot be disturbed. Though satisfied that more than half of the money was adjudged to appellee, we do not undertake to ascertain and determine the exact amount. But in order to carry the litigation, already unnecessarily protracted, we think those items of the alleged indebtedness palpably and unquestionably just should be here indicated. In view of the failing condition of Swift Iron & Steel Company, culminating in actual failure on June 21, 1887, which we are satisfied is known to other officers of the Fidelity National Bank besides Harper, it is alto-

gether unreasonable that the enormous sum of \$418,292 was in good faith loaned to it between May 23, 1887, and June 18, 1887. And when we consider that the bank was at the same time being drained of its resources by Harper, and was on the same day closed, it is simply incredible that that sum was loaned to the corporation, or that it got the benefit of any part of it. To us it is too plain for discussion that Harper, with the knowledge and connivance of other officers of the bank, got and appropriated the entire sum to prop up his wheat speculation, then in a precarious condition, and about the same fatal day of June 21, 1887, ended in disaster and ruin to himself and the various business associations he was connected with and controlled. To the extent, at least, of said sum of \$418,292, we think that the items of the alleged indebtedness of the Swift Iron & Steel Works to the Fidelity National Bank should be rejected and disallowed, without further reference to, or proof by, the commissioner. As to the residue of the claims, additional proof may be taken, if necessary. The opinion and mandate are modified to the extent here indicated.

#### LOCK v. SLUSHER.

(Court of Appeals of Kentucky. Dec. 11, 1897.)

EXECUTION—LEVY—RETURN—FRAUDULENT SALE—VACATION—PLEADING.

1. A statement in a sheriff's return that "after duly advertising the property levied on under this execution, to wit" (describing the land), it was offered for sale, is a sufficient recital of the levy. Consequently, such a return is conclusive of the levy, under Ky. St. § 3760, prohibiting the impeachment of an official return in a collateral proceeding, except upon an allegation of fraud in the party benefited thereby, or mistake on the part of the officer.

2. In an action to restrain the levy of execution on the ground that a previous execution on the same bond had been satisfied, an answer alleging that the previous execution and return had been quashed, but failing to show that the execution debtor was before the court, or notified of the motion to quash, is insufficient.

3. An answer alleging that a sheriff's return "was made by fraud or mistake on the part of" the officer, "and defendant does not know which," is not a sufficient impeachment of the return, as authorized by Ky. St. § 3760, "upon an allegation of fraud in the party benefited thereby, or mistake on the part of the officer."

4. Ky. St. § 1710, providing that sales made under execution by fraud, etc., may be set aside does not apply where the claim of the party aggrieved is that there was no sale, and that the officer's return is false, and there is no averment that the sale was made under execution by fraud.

Appeal from circuit court, Bell county.

"To be officially reported."

Action by James F. Slusher against William Lock, assignee, to enjoin a levy under execution. Plaintiff had judgment, and defendant appeals. Affirmed.

J. Smith Hays and Tinsley & Faulkner, for appellant. A. K. Cook, for appellee.

**DU RELLE, J.** The appellee brought suit against the appellant, as assignee of the Cumberland Valley Bank, alleging that, in a suit by the bank against A. C. Carr and others, judgment was rendered for the plaintiff for its debt sued for, and it was adjudged a lien on lots 19 and 20 in block 13 in the Pine Mountain Iron & Coal Company's addition to the town of Pineville. Thereafter, in conformity to an order of sale, lot No. 19 was sold to appellee, Slusher, at the price of \$655, and he executed a sale bond, payable to the plaintiff. The bond not being paid at maturity, an execution was issued and delivered to Colson, sheriff of Bell county, who, by his deputy, Ingram, levied it upon lot No. 19, and, after due advertisement, exposed it at public sale to the highest bidder, it having been duly appraised at \$1,500; and the bank, being the highest bidder, became the purchaser, at the amount of its debt, interest, and costs. The officer's return indorsed upon the execution is as follows: "Officer's return: After duly advertising the property levied on under this execution, to wit, lot 19 in block 13, Pineville, Ky., did, on the 13th day of Nov'r, 1893, offer same for sale for cash in hand, at the court-house door in Pineville, Ky.; and the plaintiff in this action, being the highest bidder, became the purchaser for the debt, interest, and cost for the above-mentioned property, Nov. 13, 1893. Therefore this *fi. fa.* is returned satisfied. J. C. Colson, S. B. C., by W. H. Ingram, D. S." Appellee further stated that, since the return of the execution, the bank had made an assignment to appellant for the benefit of all its creditors; that Lock had caused another execution to be issued on the same bond, and placed it in the hands of the sheriff, and directed him to seize and sell of appellee's estate a sufficient amount to satisfy the execution; that the sheriff, unless restrained by injunction, would levy upon and seize appellee's (Slusher's) property, and sell the same; and that, unless restrained by injunction, other executions would in like manner be issued upon the sale bond. Slusher prayed an injunction to restrain any further attempts to collect the sale bond, or any part thereof; and a temporary injunction which, on final hearing, was made perpetual, was granted. The appellant filed an answer and counterclaim in two paragraphs, to each of which a demurrer was sustained. The first paragraph is a denial that Ingram ever levied the execution on the lot,—or that the bank or any one for it bid on the property the amount of its debt or any amount, or that the sheriff had any right to return the execution satisfied or to make the indorsement which he did, or that the return was true, or that the execution was satisfied, or that the sale was good, or that the issue of the execution sought to be enjoined was wrongful, or that the plaintiff would suffer any injury thereby. In the second paragraph, Lock states that the attempted sale was void, and passed no title, because there was no levy of the execution, and that it would not have passed title if any one had bid; that there was no bid, no one present

acting for the bank when the property was sold; that he had been informed by the deputy sheriff that he was proposing to sell, under said execution, two pieces of property which he had advertised for sale, one being lot 19, and the other the house and lot where J. F. Neal then lived; that he authorized the deputy sheriff to bid the bank's debt, interest, and cost on the two lots; that, if the sheriff cried for the bank any bid on lot 19 separately and by itself, it was done entirely without authority on his part or on the part of the bank; that afterwards, in October, 1894, before a year had expired, and as soon as he or his attorney learned of such return being made on the execution, and while Slusher was in possession of the property, which he still held, the defendant moved in open court that the execution, sale, and return be quashed, and the court entered an order in accordance with said motion. The answer concludes with a prayer that the petition be dismissed, and the injunction dissolved, and, if the court should hold that the return on the execution had not been legally quashed, that the same be now done on the facts presented in the answer, and a new execution awarded on the sale bond. A demurrer having been sustained to the answer, an amended answer was filed, in which it was averred that the indorsement of the deputy sheriff on the execution "was a mistake, or was made by fraud or mistake on the part of the said W. H. Ingram, and defendant does not know which." He further denies that Ingram, or any one, ever levied the execution on the lot, or that he (Lock) was the highest bidder, or bid at all at said sale.

The demurrer, in our opinion, was correctly sustained to the paragraphs of the original answer. The first paragraph was a mere traverse of the return of the sheriff. The second paragraph was an affirmative averment of facts tending to show that the return was untrue, and an averment that the court, upon his motion made in open court, had quashed the return, and awarded him another execution on the sale bond. By section 3760 of the Kentucky Statutes it is provided: "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement, in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer."

The first question is whether the officer's return before quoted recites a levy upon the lot. It states that, "after duly advertising the property levied on under this execution, to wit, lot 19 in block 13, Pineville, Ky.," it was offered for sale. This, we think, is a sufficient statement that the levy had been made. To constitute a valid levy on land, the return need not be written out and signed when the levy is made (*Demint v. Ringo*, 5 Ky. Law Rep. 320); and in this case we think it was sufficient to recite the levy upon



nd, describing the lot, after the sale made. It appears by the evidence that execution defendant consented to the levy on this lot, and was informed by the officer that it had been made. This, however, is necessary to the decision of the question of consideration. This being so, under the statute just referred to, the traverse in the last paragraph of the answer of the facts in the return, and the affirmative statement of facts constituting a denial contained in the second paragraph, do not constitute a defense; there being no allegation of fraud in the party benefited thereby, or misfeasance on the part of the officer.

It is urged that this court, in *Com. v. Jackson Bush*, 424, by implication, decided that the return of an officer could be impeached by the testimony of the clearest and most convincing character. The facts upon which this case was decided occurred prior to the enactment of the General Statutes, in which provision under consideration appears to have first been enacted. While not necessary to the decision of this case, it may be said that the testimony in this case is very far short of the standard indicated by the fact of the levy.

There was a sufficient defense stated in the second part of the second paragraph, for the appellant to averment that the appellee had no notice of the levy, or had notice of the levy and quashed. In fact, the averment, by implication, admits that there was no notice of the levy, or waived by the execution defendant the order of quashal without notice, and so conceded in appellant's brief. The amended answer was apparently intended to conform to the requirements of section 360, Ky. St. It pleads in the alternative that the return "was made by fraud or on the part of the said W. H. Inman and defendant does not know which." The alternative is permissible under section 4, § 113, of the Code; but in each alternative pleaded should be a complete and sufficient cause of action or defense. This rule was laid down in *Boyd v. Coppage*, 7 Ky. Law Rep. 1, which the syllabus states: "When a cause of action is presented by one alternative, but not by the other, it seems that the first is not to be regarded as stating a cause of action, as the facts may be as stated in that part of the petition which contains the insufficient allegation." Tested by this rule, which we regard as a sound and applicable one, the allegations of the amended answer are insufficient, under section 3760; while the one alternative—mistake on the part of the officer in making the return—does not authorize the facts stated in the return called in question in this suit, fraud on the part of the officer alone, in which the officer to be benefited thereby took no part, does not authorize the impeachment of the officer. We conclude, therefore, that, under

section 3760, the answer as amended is insufficient.

But it is earnestly insisted that it is sufficient under section 1710, providing that "sales made under execution by fraud, covin or collusion may be set aside on the motion of any person aggrieved, or by petition in equity." After a careful consideration of this section, we have reached the conclusion that it does not apply to the averments in this answer at all. There is no averment in the answer that any sale was made under execution by fraud, covin, or collusion. On the contrary, the claim is—and the evidence introduced on behalf of appellant is to that point—that there was no sale, but that the return of the officer that a sale had been made was false. The averments were not made under this statute, nor do they furnish ground for relief thereunder.

It appears from the evidence that the house on the lot in question was burned some eight months after the day of sale, which may account for the fact that it is the execution plaintiff, and not the execution defendant, who is objecting to the sale. We do not mean to decide that a person falsely reported as purchaser at an execution sale is without relief. Upon proper averments, such a return might be quashed; and, in any event, there is a remedy upon the bond of the officer for a false return. For the reasons given, the judgment is affirmed.

#### YOUNG v. NEW FARMERS' BANK.

(Court of Appeals of Kentucky. Nov. 18, 1897.)

DIRECTING VERDICT—ACTION ON NOTE—RELEASE OF SURETY—EVIDENCE.

1. Where, in defense to an action on a note, the first signer pleads that he is surety only, and that he has been released by an extension, granted without his consent, to the second signer, who is alleged to be principal, and there is direct evidence that the first signer is surety and got no benefit; that he signed first at the request of the second signer as a mere form; that the second signer is principal, and got the entire proceeds; and there is evidence that the officers of the payee had knowledge of and assented to the transaction,—it is the province of the jury to determine the credibility of the testimony and the bona fides of the transaction, and a charge directing a verdict for plaintiff is error.

2. In an action on a note, where the surety claimed a release by reason of an extension, granted without his consent, to the principal, in consideration of an advance payment of interest, it was error to refuse to allow the surety to testify as to whether, at the time he wrote plaintiff that he would pay the note, he knew that he had been released by the advance payment and the extension.

3. In an action on a note, where the first signer claimed that he was surety only, and that the second signer was principal, it was error to refuse to allow one who was appointed cashier of plaintiff bank, shortly after the note was executed, to testify who he was informed was principal.

Appeal from circuit court, Montgomery county.

"To be officially reported."

Action by Columbia Finance & Trust Company, assignee of the New Farmers' Bank, against J. T. Young and William Mitchell. Judgment was rendered for plaintiff, and defendant Young appeals. Reversed.

J. S. Hurt and Tyler & Apperson, for appellant. John F. Groene and Stone & Suduth, for appellee.

LEWIS, C. J. This action was brought December 7, 1893, by the Columbia Finance & Trust Company, assignee of the New Farmers' Bank, a state institution, on a note for \$1,000 executed to the latter April 12, 1890, by J. T. Young and William Mitchell, due in six months from date, and upon the back of which are these indorsements: "Paid \$80 up to Oct. 12, 1891; paid \$80 up to Oct. 12, 1892." Mitchell made no defense, but Young pleaded release from obligation to pay upon grounds stated in two paragraphs: First, that he was merely a surety in the note, and without his consent payment thereof was extended by the New Farmers' Bank beyond maturity of it, in consideration of usurious interest paid in advance by Mitchell, averred to be the principal payor; second, that Mitchell hypothecated with the New Farmers' Bank collaterals more than sufficient to discharge the note, which were held by it nearly four years without collecting or any attempt to collect them. Plaintiff, in reply, denied all material statements in the first paragraph of the answer, but not that of the second paragraph.

Trial of the action having been submitted to the jury under peremptory instructions of the court, a verdict was returned in favor of plaintiff for amount of the note, and interest only from October 13, 1893, up to which date it appears interest at the rate of 8 per cent. per annum had been paid; and the main question is whether that instruction ought to have been given. Mitchell was, at date of the note, cashier, and when the credits were put upon it president, of the New Farmers' Bank. But there was direct and positive evidence that he was principal in the note, and got entire benefit of the proceeds; and that Young was only surety, and got no benefit, his name being first signed at the request and suggestion of Mitchell, as a mere form. How credible that testimony may be, and whether the transaction was bona fide, it was the province of the jury, not the court, to determine. There was also evidence, both direct and circumstantial, tending to show, and from which the jury might have not unreasonably inferred, that other officers of the bank had knowledge of and assented to the transaction; one of such circumstances being acceptance and appropriation by the bank of the two payments of usurious interest, which it is admitted were made by Mitchell, and the other the receipt of the collaterals which it is alleged in the answer, and not denied, were at the date of the note

hypothecated by Mitchell. In this action we will refer to two rulings of the court as to competency of evidence, which we think were erroneous. There was an objection of plaintiff sustained to a question to Young, the defendant, at the time of writing to plaintiff whether he would pay the note, as he had on cross-examination just admitted, he was admitted to have been released by Mitchell's interest on the note in advance and extension. The other was refusing to admit witness Grubbs, appointed cashier of the New Farmers' Bank, shortly after the note was executed to state who he was in the transaction, as he was principal of the note. As no averment was made by defendant how, if permitted, the witnesses would answer either of the questions referred to, rulings of the court thereon are not strictly before us for revision; but, in view of a new trial granted, the admission of them now is not improper. The law, as argued by counsel, obviously is, and is, that an officer of a bank, acting as trustee or agent of the stockholders, in a transaction where he is personally interested, bind the institution; much less should the bank be prejudiced by his action. If it be made to appear it was done in collusion with another, likewise having interests, and in fraud of the rights of the bank. But if the transaction be legal, or not necessarily nor intended to be illegal on the bank, the mere fact that there was a miscarriage or miscalculation on part of the officer, resulting in ultimate injury to the institution, should not prejudice the other party owing no special duty to the bank, nor acting in bad faith. The fact that Mitchell caused the note to be first signed by Young, so as to make himself appear as surety instead of principal, does not in itself stamp the transaction fraudulent on the part of Young. But what may have been Mitchell's purpose, whether good or bad, and to what extent, if at all, he participated in it, was the province of the jury to consider and determine. No wrong was done, nor, so far as the evidence shows, intended, by Young, in permitting his name to be thus used, to enable Mitchell to get and appropriate the money; for Mitchell came thereby as fully bound to pay when it fell due as if really the principal instead of the surety, and he had in fact Mitchell gotten the benefit of the payment. Moreover, we are to assume, in the absence of the pleadings, that sufficient collateral security was, at the date of the note, deposited with and accepted by the bank to cover the debt. The wrong, if any, was done by Mitchell in extending payment of the note in consideration of usurious interest by himself, whereby Young, if surety, was released. But it seems to us, if the court had knowledge of that transaction, that the bank acquiesced in, appropriated, and derived benefit of the two payments, Young

in good faith, should not forfeit his thus obtained. The questions are whether the note was executed by in the manner done, in good faith, whether the two payments of usurious were made by Mitchell in good faith without collusion with Young. If so, at the jury must determine, we do not on what principle Young can be held. On the other hand, unless knowledge fact that Young was surety, and not, face of the note showed, principal, was to directors of the bank, or if payment the note were not actually and in faith made, he is liable. Wherefore judgment is reversed, and case remanded for trial consistent with this opinion.

OLIVER et al. v. SUTTON et al.

of Appeals of Kentucky. Dec. 1, 1897.)  
MENT FOR BENEFIT OF CREDITORS—PREFERENCES—PARTIES.

an action by a creditor, under the act of to have certain transfers by an insolvent adjudged to operate as an assignment of debtor's property for the benefit of all, a creditor who has not been made a plaintiff may come in by petition, and be defendant.

the transferees of an insolvent debtor's may be joined as parties defendant in on to have the transfers adjudged to operate as an assignment of all the debtor's property for the benefit of all creditors, under Act 1856, that such actions shall be conducted and proceedings for the settlement of of deceased persons, and that the court take possession of all the property owned by debtor, it being necessary to secure possession make all persons to whom transfers had made parties.

al from circuit court, Jefferson coun-

be officially reported."

n by Louisville Deposit Bank against Sutton and others. Oliver & O'Bryan their petition to be made defendants, a counterclaim against plaintiff, cross petition against the original defendants and others. From the order dismissing the cross petition, Oliver & O'Bryan Reversed.

her & Gordon and Kohn, Baird & , for appellants. Chas. G. Richie, & Pryor, Phelps & Thum, Speckert, & Boldrick, and Alfred Selligman, appellees Heissman and wife. Barnett, & Barnett, for appellee Louisville g Co. Walter Evans, for appellee Nat. Bank. Humphrey & Davie, for es J. M. Atherton Co. and others.

RELLE, J. This suit was originally ed by the Louisville Deposit Bank A. R. Sutton, under the act of 1856, g a debt due by him to the bank, and was insolvent, and had, in contem- of insolvency, preferred certain of editors; against four persons who

were alleged to have received preferences; and against three others claiming interests in the property by virtue of a deed of assignment and two attachments. Complete averments were made, in separate paragraphs, as to each of the four persons who had been preferred, and it was prayed that the preferences be adjudged to operate as an assignment of all of Sutton's property for the benefit of his creditors, for the payment pro rata of all his debts, that the other defendants be adjudged to take nothing by their attachments, etc., and the property taken by the defendants be delivered to a receiver for the benefit of all the creditors. The appellants, Oliver & O'Bryan, who were not parties to the original suit, filed a petition to be made defendants, making it a counterclaim against the plaintiff, and a cross petition against Sutton, the defendants named in the original petition, and a number of others who had not been parties. The appellees the Western Bank, J. M. Atherton Company, and Barkhouse Bros. Company moved the lower court to require appellants to elect which of the causes of action set up in their cross petition they would pursue, and to dismiss the cross petition as to the other cross defendants. The appellants, Oliver & O'Bryan, moved to strike out of the answer of the Louisville Banking Company to the cross petition 37 paragraphs, upon the ground that the banking company had no interest in the matters set up in the paragraphs in the cross petition to which such paragraphs were responsive. A similar motion by appellants was made as to the amended answer of Heissman and wife. The original plaintiff, the Louisville Deposit Bank, had dismissed its petition without prejudice. The court below sustained the motion to require Oliver & O'Bryan to elect, without passing on their countermotion; and, upon their refusal to do so, the court elected for them, ordered the suit to be dismissed as against all the cross defendants except the Fourth National Bank, and afterwards sustained the bank's demurrer to the petition. The case, therefore, presents the question whether, under the act of 1856, more than one person who is alleged to have received a preference can be made parties defendant. The question is also made whether Oliver & O'Bryan had the right to come into the case and be made parties defendant.

We have little difficulty with the latter question. The appellants were interested in the subject-matter of the original suit, which was a suit to adjudge that an assignment had been made for the benefit of all of Sutton's creditors, and for the administration of his estate under that assignment. Being creditors of Sutton, they might properly have been made parties plaintiff to the petition; and, not having been so made, they could only come in by petition to be made parties defendant, and

making their answer a cross petition against Sutton, the debtor, and his transferee. In our judgment, the appellants were properly made parties defendant, and permitted to make their answer a cross petition against Sutton and his transferee, and the subsequent dismissal, without prejudice, of the original petition, could not operate to defeat their right to have the question of assignment adjudicated. See *Sawyer v. Langford*, 5 Bush, 539.

The other question seems to be now raised for the first time. Undoubtedly the uniform practice has been to make more than one transferee parties defendant, with complete averments as to each transferee of facts showing that that transfer operated as a general assignment. In *Whitehead v. Woodruff*, 11 Bush, 209, and more than a dozen other cases decided by this court, this practice appears to have been followed. Several acts were relied on in each of the petitions as being each within the provisions of the act of 1856. It is true the act (Ky. St. § 1912) provides that "any number of persons interested may unite in the petition; but it shall not be necessary to make any persons defendants, except the debtor and the transferee; \* \* \*" and an elaborate argument has been made, based upon this section and section 96, subsec. 3, Civ. Code, that only one transfer can be averred in a petition of this character, and that if more than one transfer be alleged, with facts which would make such transfers operate as an assignment for the benefit of creditors, it is a misjoinder of causes of action. In our view, however, the act itself authorizes the joinder. It is provided in the section of the statutes above referred to that the action and proceedings as to the mode of proving claims, and otherwise, "shall be conducted as actions and proceedings for the settlement of the estates of deceased persons are now required to be conducted, so far as the same are applicable." And in section 1913 it is provided that "the court may at any time pending the action, and upon such terms as it shall deem proper, compel the transferee to surrender to a receiver of the court all the property and effects in his possession or under his control; and it may make such orders respecting the property as it may make concerning attached property. And when it is decided that a sale, mortgage or assignment was made in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, the court shall compel the debtor to surrender to such receiver all property and effects in his possession or under his control, except such property as is exempt from execution, to disclose the amount of his debts, the names and residence of his creditors, all offsets or defenses to any claim against him, or any other matter which shall be deemed proper; and the court shall also compel every person, except an assignee, for the benefit of all the creditors of the debtor,

who shall acquire by purchase, assignment or otherwise, any property or effects of such debtor, after the suit contemplated by this act shall be instituted, to surrender the same to such receiver." We see, then, that the proceeding contemplated by the act is one to secure the possession by the court of all the property owned by the debtor at the time the act was committed which was transferred as an assignment, and to administer the estate of the insolvent in the same manner as the estate of a deceased person is administered. To secure the possession, it was essential to make parties to the proceedings persons to whom transfers had been made, including preferences, and it was essential to make complete averments as to all such transfers, which were made prior to the bringing of the suit; for otherwise, as distinctly in *Fuqua v. Ferrell*, 80 Ky. 69, the surrenders of the property so transferred could not be compelled.

Holding this view as to the scope and effect of the act, we are of opinion that the transferees, within the statutory period of limitation, were properly parties defendant to the cross petition of appellants, and that, moreover, necessary parties, if it were held to subject the property transferred to the process of administration as against the insolvent's estate. The object of the act by the statute to be accomplished is the liquidation and administration of a trust embracing all the property of the insolvent debtor, for the benefit of all his creditors. The limitation sought to be applied by the appellants, *the Western Bank et al.*, would be in the declaration and administration of a trust embracing only such property transferred to a single creditor, to the exclusion of property transferred subsequent to the bringing of the suit. Taking the whole statute together, it is impossible to believe that it could have been the legislative intent. In any matter of course, each of the preferences alleged cannot be adjudged to operate as an assignment, but the earliest preference established within the period of limitation should be so adjudged, and the subsequent preferential transferees be adjudged to surrender the property obtained by them.

Nor does this view appear to us to be in conflict with section 83 of the Code, which provides that the causes of action set forth in the cross petition of appellants each affect all the parties to the action in respect to the trust sought to be declared, and the relief sought, to wit, the distribution of the trust estate among the creditors, and each cause of action, is an implied contract. By section 428 of the Code, provision is made for suits in equity for the settlement of decedents' estates, and it is provided that all persons having a lien or an interest in, the property left by the decedent shall be made parties as plaintiffs or defendants. By section 438 the provisions of the chapter (including section 428) are made applicable to proceedings for the

erty held in trust by virtue of the provision of article 2, c. 44, Gen. St. In *Anderson v. Anderson*, 80 Ky. 648, a suit brought by an assignee in bankruptcy attacking as fraudulent two deeds made by the bankrupt to different grantees, conveying two different parcels of land for different considerations—both transferees were joined in one and this court held it not to be a misapprehension, under section 83 of the Code, upon the ground that "the actionable wrong was fraudulently obstructing the collection of the debt by the assignee, and the remedy is to set aside the fraudulent obstructions by declaring the conveyances void." In that case the court relied upon the construction given in a similar case in New York (*Jacot v. Boyle*, 17 N.Y. 106), construing a section of the New York Code substantially the same as section 83 of the Kentucky Code, and upon the reasoning in *Newm. Pl. & Prac.* p. 460. The case at bar seems to us a much stronger one for the application of the rule than *Anderson v. Anderson*. The cause of action is the preference of one or more creditors. The remedy is to set aside the preferences, and to set aside the entire property, both that transferred and that not transferred, to the payment of the insolvent's debts. In *Pomeroy & Rem. Rights*, § 349, upon this subject it is said: "When the action is brought to set aside these objects, if the debtor has transferred different times assigned, in alleged fraudulent creditors, different parcels of property to different assignees, or any different parcels of property are held by different persons, in fraud of the debtor's creditors, so that equitable ownership is claimed to be vested in him, all of these assignees, or all of the holders of the legal title, may be joined with the debtor as co-defendants in one action." See, also, *Id.* § 347; *Bliss, Pl. & Prac.* 110, 125. For the reasons given the judgment is reversed, with directions to set aside the order dismissing the petition, commanding and making an election for the cross-defendants, *Oliver & O'Bryan*, and for further findings consistent with this opinion.

COMBS et al. v. CRAWFORD et al.

of Appeals of Kentucky. Dec. 14, 1897.)

FFS—PAYMENT OF COUNTY CLAIMS—LIABILITY ON BOND.

Gen. St. c. 27, art. 2, § 7, providing that a sheriff shall pay a county creditor 90 per cent. of his claim on the 1st day of October, and the balance on the 1st day of January, was repealed by the statute relating to the county levy, and the statute for collecting it, and the settlement of the officers.

Under Ky. St. § 4143, providing that the county levy shall be due in March, but not fixing the time within which the sheriff shall pay the claim against the county, and providing that he shall settle his accounts annually or oftener, in the court's discretion, a sheriff cannot be sued for official bond by a county creditor until the 1st of January following the March term, at which the taxes out of which the debt is or to be paid are due and collectible.

Appeal from circuit court, Breathitt county.

"To be officially reported."

Action by Crawford & Co. against Breck Combs and others. Judgment was rendered for plaintiffs, and defendants appeal. Reversed.

J. J. C. Bach, for appellants. J. B. Marcum, for appellees.

PAYNTER, J. At its October term, 1894, the fiscal court of Breathitt county allowed W. T. Hogg a claim of \$451.81, and ordered it to be paid out of the county levy for that year. The appellant Combs was the sheriff of the county, as it appears from the allegations of the petition, and collected the county levy for that year, but during the year of 1895 Hogg assigned this claim to Crawford & Co., and, the sheriff failing to pay it on demand, this action was brought on his bond. An answer was filed, to which the court sustained a demurrer. Counsel for appellants admits that the court did not err in doing so; hence the necessity is obviated to show that the court properly sustained the demurrer to the answer. It is contended that no cause of action had accrued against the sheriff and his sureties at the time the action was instituted, because, under the law, the sheriff was not required to pay the money until January 1, 1896. The correctness of this position depends upon the proper construction of the statute which was in force at the time the action was brought. Under section 7, art. 2, c. 27, Gen. St., a sheriff was required to pay a county creditor, whose claim had been allowed by the county court, 90 per cent. of it on the 1st day of October, and the balance of it on the 1st day of January following. This action was brought for 90 per cent. of the claim, upon the idea that this provision of the statute was still in force. We are of the opinion that it has been repealed, and was not in force when the county levy was made. The statutes relating to the county levy, the time for collecting it, and the time fixed for the settlement of the officer collecting it, show that the general assembly intended they should constitute the whole law on the subject. By section 1885, Ky. St., county taxes are due at the same time the law makes the state revenues due and collectible. Under section 4143, Ky. St., the state tax is due and payable on and after the 1st day of March following the assessment. Therefore the county levy which the sheriff was required to collect, and out of which the claim in suit was to be paid, was due March 1, 1895. We have been unable to find any provision of the statute which, in express terms, fixes the time at which the sheriff shall pay county claims; but section 1884, Ky. St., provides that the sheriff shall annually settle his accounts with the fiscal court as such collector of tax, and may be required to settle oftener,

in the discretion of the court. It seems to us, therefore, that, in the absence of a more specific statute fixing the time, the sheriff cannot be sued by a county creditor until after the time at which the law requires him to make his annual settlement, which we understand to be the 1st of January following the March in which the taxes are due and collectible. It will not do to allow every man who has a county claim to institute an action against the sheriff and his sureties at any time such creditor may think proper. If this can be done, then the sheriff can be continually harassed with suits on his official bond by persons who hold claims which he is to pay out of the county levy collected and to be collected. It may be said that he ought to pay a county claim as soon as he has collected enough of the county levy to meet that demand, but it must be borne in mind that there are probably other creditors of the county whose claims occupy the same position as the claim of the creditor who may elect to institute a suit. The sheriff might have money enough in his hands to pay one or more county claims, but not enough to pay all. It is urged that the claim upon which this action is brought is not assignable. The fiscal court made an order directing the sum to be paid out of the county levy of 1894. Under the law it was the duty of the sheriff to pay this claim. The covenants of his bond required the sheriff to collect the county levy, and pay the same over to the persons entitled to receive the same. We are of the opinion that an order of the fiscal court may be assigned the same as a note, bond, or bill, and the covenants of the sheriff's bond are such, under the law, as to entitle the holder of a county claim to maintain an action thereon when the sheriff fails to pay it as the law requires. The judgment is reversed for proceedings consistent with this opinion.

#### ARMSTRONG v. WAGNER'S EX'X.

(Court of Appeals of Kentucky. Dec. 11, 1897.)

##### INSOLVENT—ACCOUNTING BY ASSIGNEE.

Pending an appeal from a judgment for \$88,000 against a defaulting assignee of an insolvent corporation, the assignee's house and lot were sold on execution for \$4,100. The judgment was reduced, on appeal, to \$13,000. The bondsmen of the assignee paid in \$25,000 for the benefit of the insolvent estate, leaving a surplus of \$12,000. A creditor, whose judgment against the insolvent estate for \$581,942.20 had been reversed, and lessened by \$418,290, and as to whom a fund had been set aside to pay the dividend therefor declared on the basis of a judgment for \$581,942.20, objected to an order directing the said sum of \$4,100 to be repaid to the estate of the assignee, deceased. *Held*, that the order was without prejudice to the creditor objecting.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by the executrix of Adam Wagner, Jr., against David Armstrong, receiver, and others. From a judgment in favor of plain-

tiff, defendant David Armstrong appeals. Affirmed.

W. H. Mackey, for appellant. William Lindsay and Geo. Washington, for appellee.

LEWIS, C. J. In an action instituted by Adam Wagner, assignee of the Swift Iron & Steel Works, against the creditors of that corporation, a judgment was rendered against Wagner for misappropriation of the funds of the assigned estate to the amount of about \$88,000. Pending an appeal from that judgment (which was, however, not superseded), his house and lot were sold, under execution thereon, for \$4,100; but the judgment was reversed by this court (26 S. W. 720), the effect of which reversal was to reduce the sum adjudged to about \$13,000. Upon the filing of the mandate in the lower court, in January, 1895, Wagner moved that the proceeds of the sale of his property, which had gone into the general fund of the estate of the insolvent corporation, be paid back to him, which was overruled. Subsequently, and after his death, his executors, in June, 1895, renewed the motion, which was then sustained; and from that order David Armstrong, receiver of the Fidelity National Bank, one of the creditors of the Swift Iron & Steel Works, prosecutes this appeal.

It appears that after the judgment was rendered against Wagner, and pending the appeal therefrom in this court, there was a judgment affecting the two sureties on Wagner's bond as assignee of the Swift Iron & Steel Works. That judgment is as follows: "It is further adjudged, by consent of all the parties to these consolidated cases, that the full and only liability of H. A. Shriver and Agnes Wiedeman, executrix of George Wiedeman, deceased, to any and all parties to these cases, by reason of said H. A. Shriver and said George Wiedeman having been sureties for Adam Wagner on his said bond as assignee of the Swift Iron & Steel Works, is \$25,000; and it is adjudged that said H. A. Shriver and Agnes Wiedeman, executrix as aforesaid, pay to said special master herein, in full satisfaction of all liability on said bond, the sum of \$25,000, and, when said payment shall have been made, said bond shall be canceled. But this decree shall be without prejudice to the rights of any of the parties or creditors herein against the Swift Iron & Steel Works, and against Adam Wagner, assignee, except as hereinabove specifically set forth." It will be observed that the amount thus paid on the indebtedness of Wagner to the Swift Iron & Steel Works exceeds the sum actually due, as determined by this court, about \$12,000, which surplus is still retained for the benefit of the creditors of the assigned estate. If the judgment for \$88,000 against Wagner was still a subsisting debt, unquestionably, according to a fair construction of the agreed judgment, the \$25,000 paid by the sureties would go as

a credit thereon. If so, there is neither reason nor justice for withholding from his executors the \$4,100, proceeds of the enforced sale of his property. But as it appears that there were paid, from time to time, out of the assigned estate, to all the other creditors, except appellant, Armstrong, the receiver, amounts equal to about 13½ per cent. of their respective claims, his counsel contend that the withdrawal of the \$4,100 is detrimental to his rights. It may be that the fund set apart by the court to pay the same rate of dividends on the judgment for \$581,942.20 which Armstrong, the receiver, had just recovered against the Swift Iron & Steel Works, will be reduced to the extent of said sum of \$4,100; but inasmuch as that judgment has been reversed by this court, and, as a result, the sum recovered lessened certainly \$418,290, and it may be, upon the return of the case to the lower court, lessened still further, we do not see how appellant can possibly be prejudiced by the order complained of in this case.

Though but one question seems to be involved, there appear to be prosecuted two appeals, and two records are filed. We are, however, of the opinion that the court did not err in ordering the sum of \$4,100 in question paid back to the estate of Adam Wagner, and that judgment is now affirmed.

### BRIGGS v. WALKER.

Court of Appeals of Kentucky. Dec. 4, 1897.)

CONTRACT—CONSTRUCTION—CLAIMS AGAINST UNITED STATES—EXECUTORS—ALLOWANCES.

1. A sale of all cotton on the vendor's plantations was made in consideration of certain liabilities incurred by the vendee. The latter, in consideration of such transfer, agreed with another of the vendor's creditors to pay his claim and that of another creditor out of the proceeds of the cotton if the amount realized, after the payment of all expenses pertaining thereto, should be sufficient to pay the three claims in full, but, if not, then all should share pro rata. The cotton was afterwards confiscated and sold, during the Civil War, by the Federal forces, and by an act of congress the court of claims was subsequently authorized to determine the claim of the vendee's legal representatives for the proceeds thereof, provided it was found that the vendee had been loyal to the Federal government, and to render judgment for only the amount of the vendor's indebtedness to the vendee if it should be found that the sale was intended as security only. *Held*, that the two creditors were not precluded from claiming, under the agreement with the vendee, their pro rata share of the amount allowed by the court, after payment of expenses, by the fact that the allowance was made only on condition of the vendee's loyalty, or that only the amount of the vendor's indebtedness to the vendee was allowed, or that, in the prosecution of the cause in the court of claims, they testified that the sale was absolute and in good faith on account of the vendor's indebtedness to the vendee, and for no other reason, or that the claim was barred by the statute of limitations.

2. In an action by an executor to determine the rights of defendants on a contract with the decedent to share in a certain fund in his hands, the executor is not entitled to deduct counsel fees before the distribution, where there is suf-

ficient property left in his hands with which to pay them.

3. On the distribution of a fund pursuant to a judgment in an action brought by an executor to determine rights of claimants, the executor is not chargeable with interest where it does not appear that he used the fund, or made it profitable, or that he could have done so safely.

Appeal from circuit court, Jefferson county. "To be officially reported."

James A. Briggs, as executor of the estate of C. M. Briggs, deceased, filed his amended and supplemental answer and cross petition in the suit of McLemore, guardian, against Briggs' executor, alleging that Amanda M. Walker and the Ohio Valley Banking & Trust Company, as administrator of the estate of A. L. Shotwell, deceased, were each asserting a claim to a certain fund in his hands, and asking that they be required to set up whatever claims they had. Judgment was rendered for Amanda M. Walker and the Ohio Valley Banking & Trust Company, allowing them a share in the fund, but denying their right to interest during the time the fund was in the hands of the executor. James Briggs, as C. M. Briggs' executor, appeals, and Amanda M. Walker and the Ohio Valley Banking & Trust Company, administrator, prosecute a cross appeal. Affirmed.

Gibson & Marshall, for appellant. Helm & Bruce, Chas. M. Walker, W. B. Dixon, and S. B. & R. D. Vance, for appellee.

HAZELRIGG, J. The appellant James A. Briggs, as executor of C. M. Briggs, filed his amended and supplemental answer and cross petition in the suit of McLemore, guardian, against Briggs' executor, pending for the settlement of his intestate's estate in the Jefferson circuit court, chancery division, in which he averred that, since the last settlement of his accounts, he had succeeded in collecting from the United States government the "cotton claim" referred to in previous settlements; and that Amanda M. Walker and the Ohio Valley Banking & Trust Company, as administrator of the estate of A. L. Shotwell, deceased, were asserting some sort of claim against the money so collected by him; and he asked that, in order to a final settlement of his accounts, those parties be required to set up whatever claims they had. Accordingly, the parties named (being the present appellees) did appear and assert their claims; and, after a trial of the issues involved, judgment was rendered distributing the sum collected, namely \$44,000, among three parties, viz. James A. Briggs, as executor of C. M. Briggs, Amanda M. Walker, as assignee of her husband, and the banking and trust company, as administrator of Shotwell; the shares of each being fixed according to the terms of a writing to be noticed presently. That Walker and the company should have been allowed any part of this "cotton claim" is the subject-matter of Briggs' complaint in this appeal.

It appears that on April 18, 1862, C. S. Morehead executed and delivered to his nephew C. M. Briggs the following writing: "For and in consideration of money loaned and advanced heretofore by C. M. Briggs, and further valuable consideration by way of suretyship for me by said Briggs, I hereby sell and transfer to said C. M. Briggs all the cotton on my two plantations in Mississippi, near Egg's Point and Greenville. Said cotton embraces all that I have baled and unbaled, gathered and ungathered. This is intended to cover all cotton that I have now or may have this year on said two plantations, supposed to be about two thousand bales. April 18th, 1862. C. S. Morehead." At the same time, C. M. Briggs executed and delivered to Samuel J. Walker, who was the son-in-law of Gov. Morehead, the following writing: "In consideration of the sale and transfer this day made to me by C. S. Morehead of all the cotton on his two plantations near Egg's Point, in the state of Mississippi, as specified in said sale and transfer, in writing, I hereby assume and agree to pay Samuel J. Walker the sum of forty thousand dollars due and owing to said Walker by said C. S. Morehead, upon condition, however, that I realize sufficient amount from any cotton on or from said plantation or proceeds of same, together with about twenty-five thousand dollars due me from said C. S. Morehead for moneys advanced and liability for him as surety, also about ten thousand dollars, more or less, being a claim of A. S. Shotwell as he may hereafter establish against C. S. Morehead; but, in case I should not realize sufficient to pay all of said claims or amounts named above in full, then I am to pay or divide the amount that may be realized from said cotton proportionately or pro rata according to the respective amounts named, to the parties above named; first, however, paying and refunding any moneys paid by the respective parties for or on account of expenses pertaining to same, and in case more should be realized than sufficient to pay said amounts, with interest thereon to the time of realization and payment, then any surplus to be divided, one-half to said Shotwell and [C. M. Briggs] jointly for any services, and the remaining one-half to said Samuel J. Walker, but no other consideration to be paid said Shotwell and Briggs for their services. April 18th, 1862. C. M. Briggs." Briggs at once took steps to get possession of the cotton, but, by reason of the operations of the Federal and Confederate forces in its vicinity, was unsuccessful. The cotton was finally seized by the Federal authorities, who sold it, and the money was paid into the treasury of the United States.

C. M. Briggs died in 1875, after unsuccessful and repeated efforts to obtain the money for which his cotton sold. Thereafter his executor undertook the task, and finally, in June, 1888, through his attorneys, obtained the passage of the following act of congress: "Be it enacted," etc., "that the court

of claims is hereby given, subject to the proviso hereinafter mentioned, like authority to hear and determine the claims of the legal representatives of C. M. Briggs, ceased, for the proceeds of 455 bales of cotton, now in the treasury of the United States, alleged to have been owned, in whole or in part, by said Briggs as is given to said C. M. Briggs by the acts of March 12th, 1863, and July 1st, 1864, upon petition to be filed in said court at any time within two years from the date of this act, any statute of limitation to the contrary notwithstanding: Provided, however, that unless the said court shall, after a preliminary inquiry find that said C. M. Briggs was in fact loyal to the United States Government, and that the assignment of the cotton hereinafter mentioned was bona fide, said court shall not have jurisdiction of the claims, and the same shall without further delay be dismissed: And provided, that if the court shall find that the assignment from one Morehead to said C. M. Briggs of date April 18th, 1862, under which said Briggs claimed said cotton was intended to be made as security to said Briggs for the payment of his debts, and against contingent liabilities incurred by him for said Morehead, judgment shall be rendered for such portions of the proceeds of said cotton as will satisfy the demands of said Briggs to secure which the assignment was given: Provided, however, that said assignment shall not be paid out of the proceeds of the cotton fund in the treasury arising from the sale of captured and abandoned property, but shall be paid out of the special fund charged to the account and accounted for by Captain G. W. Brown, asst. quartermaster at Memphis, arising from the sale of 2,209 bales of cotton claimed by him with which claimants' cotton was intermingled, said claimant to receive from the proportion which his cotton bears to the whole, net proceeds accounted for by said C. M. Briggs. Act June 4, 1888, c. 348 (25 Stat. 107). Under the provisions of this act, the executor filed his petition in the court of claims, and when, after an investigation, he was awarded the sum of \$88,000, to one-half of which, however, the attorneys for the claimants were entitled, in pursuance of their contract with C. M. Briggs. Thus, there came to him in March, 1894, the sum of \$44,000, the net proceeds of the cotton sold to him in pursuance of the tract of April 18, 1862, and to the executor of which, in the particular manner pointed out, he stood pledged in his contract of the same date.

The appellees base their claims upon the executor's pro rata share of this \$44,000 on the ground that it was signed by Briggs. No question is raised as to Amanda J. Walker's ownership of the claim in favor of Samuel J. Walker, her husband, and widow she is; and there is no serious question as to the amount of the Shotwell claim. At the inception of the litigation over the claims, the executor contented himself with a general denial, from want of knowledge of the information of the averments of the petition.



the appellees; but, after some preparation in the case, he filed an amended pleading, rested his defense on certain facts connected with the prosecution of the claim in court of claims, which he contended excluded the appellees from asserting their demands, and established that C. M. Briggs, or his estate, was entitled to the sum collected. This pleading was filed notwithstanding the objections of the appellees, but, upon final hearing, their demurrers thereto were sustained, and the sufficiency of this pleading is the question to be determined. The averments, briefly stated, are that the purpose of the act in virtue of which recovery was made possible was a pure matter of grace on the part of the government, for the sole benefit of C. M. Briggs' estate; that the claim had long before been barred by statute, and was in fact worthless except by the act of grace; that in the action of court of claims it was finally determined that C. M. Briggs was loyal to the United States, and for this reason the amount of recovery was limited to such sum as would satisfy the debt and claims alone of C. M. Briggs against Morehead, and no recovery could have been allowed for anything due Walker or Shotwell by Morehead, and, moreover, that the most important and material evidence he could procure in the prosecution of the claim in that court was furnished by Walker and Shotwell, who testified that the sale of the cotton by Morehead to Briggs was absolute and in good faith, on account of Morehead's indebtedness to Briggs existing prior to the sale, and for nothing else; that the interest of Walker and Shotwell in the claim, if they intended to assert any, was fraudulently suppressed and concealed by them, and this was a fraud upon the government. He files, as part of his pleading, copies of certain depositions of Walker and Shotwell taken before the court of claims, likewise a copy of Walker's affidavit. He called in question the execution of the order of April 18, 1862, purporting to have been signed by Briggs, and denied its genuineness. This, however, he afterwards retracts, and no attention need be paid to this part of his defense. The affidavit of Walker in the court of claims is to the effect that he was the son-in-law of Ex-Governor Morehead, and was intimate with him since childhood until his death, in 1868; he was his secretary, adviser, and friend; that he frequently heard Morehead talk of his indebtedness to C. M. Briggs prior to 1862, and of all his conversations on this subject he was indebted to Briggs largely for money advanced and liabilities as surety for Briggs; that in April, 1862, a bill of sale was given by the affiant of all of Morehead's land on his two cotton plantations, in Washington county, Miss., which was done in evidence of a bona fide sale and transfer of the same, and for the purpose specified in said writing; that the said

transfer of the cotton as specified in the writing was absolute and bona fide, on account of said liabilities and indebtedness existing prior to the date of said bill of sale. Shotwell's statements were to the same effect, but he testified, further, that he did have an interest of one-third in the claim under a contract with Briggs, and that the sale was for the purposes in the writing, and for nothing else. These statements were all true, except, perhaps, the last one of Shotwell; and, as it is not shown certainly that Shotwell knew of the writing which had been delivered to Walker, he may not have told an untruth intentionally. But, in any event, it was wholly immaterial, and did not deceive or defraud the government.

It is averred in the appellant's pleadings that no allowance was made to Briggs, and "he only received and recovered from the United States such sum as was owing directly to his testator by said Morehead." Here it is confessed that nothing was recovered from the United States except what was justly owing from Morehead to Briggs; and this amount the government was willing to pay, because of the known loyalty of claimant, Briggs. But, surely, the government did not seek to impress on the sum it was willing to pay Briggs, on a debt justly due him, an exemption from Briggs' obligations. Walker and Shotwell had no claim on the government, and presented none. They helped Briggs get only what was due him, and how could the government be interested in preventing Briggs' discharge of his honest obligations after he got his money? There is nothing to show that either Shotwell or Walker were disloyal, and, even if they were, the policy of the government has never been so far extended as to refuse to pay its loyal subjects only on condition that they do not pay out the money to those who may have been disloyal. But, while appellant's pleadings aver as a fact that suppression and concealment of the facts were resorted to by these affiants in the court of claims, the deposition of Shotwell, made a part of the pleading, discloses that he testified in that court that, because of Morehead's indebtedness to him on bank paper and securities, he was to have one-third of the claim, and that C. M. Briggs had told him "that the bill of sale for the cotton was given to the said Briggs by Morehead for the purpose of paying Briggs, S. J. Walker, and himself for such sums or notes by virtue of indorsements."

So, it would seem that no concealment of facts was made, and the court of claims did not refuse to allow Briggs the amount of his debt on Morehead out of the proceeds of the cotton sold by the government by reason of the fact that the sale by Morehead was for the purpose of securing other parties than Briggs, though it may have confined its allowance to what Morehead owed Briggs alone. The obligation of Briggs,

however, was to prorate whatever sum he might get out of the cotton, and with this obligation the government was, as we have seen, not concerned. We attach no importance to the suggestion that the government saw fit to waive plea of limitation. Individuals do this sometimes, and there were strong reasons why the government should do so in this case; for it is manifest that there was no delay on the part of the claimant in presenting and urging his claim. The allowance to Briggs was certainly not a gratuity. The claim was to be established by proof and determined in a court, and was to be paid, not out of the general fund in the treasury arising from the sales of captured and abandoned property, but out of the sales of cotton by Capt. Fort, with which the claimant's cotton became intermingled, and then only in the proportion which his cotton bore to the net proceeds of the Fort sales. The judgment below allowed the executor \$2,200 as his commission on the amount collected, and adjudged the appellees entitled to recover such proportion, respectively, of the sum of \$41,800, as their respective demands against the estate, namely, \$40,000 and \$6,681 (amount fixed for Shotwell debt), bear to the aggregate of the three sums of \$25,000, \$40,000, and \$6,681.

It is urged for appellant that he is entitled to counsel fees to be deducted before distribution of this fund; and so he would if there was not sufficient estate left in his hands out of which to pay them; but appellees cannot be compelled to pay for services rendered against them when sufficient estate is left in the executor's hands for that purpose.

On the cross appeal it is suggested that the executor should account for interest on the fund collected in March, 1894, until the rendition of judgment, in July, 1895. We think not, because it does not appear that he used the fund or made it profitable, or that he could have done so safely, in view of the litigation. The judgment, on the original and cross appeal, is affirmed.

#### MOXLEY v. ROBERTS et al.

(Court of Appeals of Kentucky. Nov. 23, 1897.)

#### TOWN MARSHAL—LIABILITY—NEGLECT OF PRISONERS.

Plaintiff alleged that while in the lockup, by order of defendant marshal, he was beaten by a fellow prisoner, and that defendant refused to furnish adequate attention or minister to his wounds. *Held*, that an instruction that it was the marshal's duty to furnish such attendance, and, if he failed to do so, plaintiff could recover, was erroneous, where it did not state that the suffering or injury must have been known to the marshal.

Appeal from circuit court, Ohio county.  
"Not to be officially reported."

Action by J. N. Moxley against J. H. Roberts and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

E. D. Guffy, for appellant. R. A. and J. B. Vickers, for appellees.

WHITE, J. The appellant, Moxley, this action in the Ohio circuit court at Mages, claiming that appellee J. H. was the marshal of Fordsville, and that appellees are his bondsmen on his bond. The cause of action stated that while appellee was marshal, he arrested appellant, and put him in the town lockup, while appellant was thus incarcerated, appellee placed another person, one Miller, in the same cell or room with appellant, and that Miller, who was ill-tempered and drunken when drinking, and known to be so by appellee, beat, bruised, maltreated, and injured appellant, and that appellee refused to furnish appellant medical attention or minister to his wounds; and claimed damages fixed in the petition at \$5,000. The defendant admitted the arrest and confinement, and alleged appellant was drunk and disordered, and denied any injury by Miller, or that Miller did hurt appellant. Appellee had any knowledge or information that such would be done, or was being done, and pleaded that Miller, who was also drunk when for drunkenness, was not ill-tempered or inclined to fight when drinking, and that appellee had no cause to suspect that he would hurt appellant; denied any damage. The cause thus presented was tried before the court, and a verdict was rendered for defendant, and, after appellant's motion for a new trial had been overruled, he appealed from the court.

On the trial, the court gave instructions numbered 1, 2, 3, and 4, and appellant reserved exceptions to instructions 1 and 2, but in their brief no error is suggested as to either; so we consider that appellant acquiesces in their correctness. Appellant excepted to four instructions, A, B, C, and D, which the court refused, and appellant excepted to instruction A, which was equivalent to a peremptory instruction, and was properly refused. As to the measure of damages, the court, in effect given. Instruction C, referred to by the only one referred to by appellant, complained of in his brief. It reads as follows: "The court instructs the jury that if J. H. Roberts being town marshal of Fordsville, and plaintiff being a prisoner in his charge, that it was the duty of the defendant to treat plaintiff humanely; that if plaintiff was injured or sick while under the control of said defendant, it was the duty of said defendant to furnish plaintiff medical attention and the services of a physician; and if plaintiff was so injured, and defendant failed and refused to furnish the services of a physician or proper medical attention, and plaintiff was damaged, injured or underwent any suffering or expense on account of such failure, the jury will assess the plaintiff damage he thus sustained, and award him the amount claimed in the petition to exceed the amount claimed in the petition."

tion." In our opinion, this instruction was properly refused. The instruction nowhere intimates that this sickness or injury, if any, must be known to the defendant Roberts, but is on the theory that if it happened at all, whether Roberts knew it or not, and he failed to furnish a physician, he would be liable. The court properly refused instruction D. The instructions given, we think, present the law of the case, and the verdict is in full accord with the testimony; and, finding no error, the judgment is affirmed.

#### O'CONNOR v. STONE et al.

(Court of Appeals of Kentucky. Nov. 24, 1897.)

##### JUDGMENT—SATISFACTION—SECURED JUDGMENT—EXECUTION—FORECLOSURE OF MORTGAGE.

1. Execution levied by the state on certain lands was satisfied by a sale of the land subject to a prior mortgage, and liens were thereby obtained, and subsequently, on foreclosure of said mortgage, a personal judgment was entered in favor of the state on account of the lien obtained. *Held* that, as the execution in the state's favor was satisfied by the sale of the property, a further judgment in the foreclosure suit was erroneous.

2. An execution issued without a judgment, order, or decree of court to support it is void, and confers no authority on the officer to whom it is directed.

3. An allegation, in a suit to foreclose a mortgage, that it was executed to secure payment of a note, and that defendant has failed to pay it, is sufficient.

Appeal from circuit court, Fayette county.  
"Not to be officially reported."

Action by Annie Stone and the commonwealth against John O'Connor. From a judgment in favor of the plaintiff defendant appeals. Affirmed as to plaintiff Annie Stone, and reversed as to plaintiff the commonwealth.

Z. Gibbons, for appellant.

HAZELRIGG, J. Appellee Stone had a mortgage on certain real property in Lexington to secure the payment of a promissory note executed to her by appellant. Certain executions in favor of the commonwealth and against appellant issued from the clerk's office of the circuit court of Fayette county, and were levied on the same property. The property was thereupon, after appraisalment, notice, etc., required by law, sold, subject to the Stone mortgage, and bid in by the state for the execution debts. Subsequently appellees, Stone and the commonwealth, joined as plaintiffs in this action to sell the property to satisfy the mortgage and the liens claimed to have been secured by the levy of the executions and the sales thereunder. No defense was made, and judgment of sale went as prayed for, as well as personal judgments in favor of plaintiffs against the defendant. There is no brief for appellees, and we are not advised of the ground upon which the personal judgment in favor of the state can be sustained. The executions which were levied on the property were

probably issued on judgments against the defendant, and certainly no further judgment of that character should have been rendered; and especially so as it appears that the executions in the state's favor have been satisfied by the sale of the mortgaged property, and have taken the form of a lien thereon. Moreover, while the suit on the part of the state was thus presumably on various judgments in its favor against the appellant, yet there is no judgment set up or referred to in any way in the petition. There must be a judgment, order, or decree of court to support an execution, otherwise it will be null and void, and will confer no authority on the officer to whom it is directed. 8 Enc. Pl. & Prac. 312.

It is further insisted that no cause of action is set up in the petition on behalf of appellee Stone, because it is nowhere averred in what particular there has been a breach of the conditions of the mortgage. It is averred, however, that the mortgage was executed to secure the payment of the note sued on, and that the defendant has failed to pay it. This would seem to be a sufficient breach. The judgment as to appellee Stone is affirmed, and as to the state is reversed for proceedings consistent herewith.

#### MT. STERLING NAT. BANK v. BOWEN et ux.

(Court of Appeals of Kentucky. Dec. 2, 1897.)

##### FRAUDULENT CONVEYANCE—EVIDENCE.

1. In an action to subject land conveyed by a husband and wife to a company, and by the company reconveyed to the wife, to the payment of the husband's debt, on the ground that the reconveyance was in fraud of the husband's creditors, the wife contended that her money had paid for all the land, and it did not appear that the husband had ever held the legal title to any of it, but it did appear that the wife had held the legal title to at least the greater portion, and that the conveyance to the company was made long before the creation of the husband's debt. *Held*, that there was no evidence of fraud.

2. Parol evidence is inadmissible to prove the contents of a public record, though the witness may have the record before him while he testifies.

Appeal from circuit court, Powell county.  
"Not to be officially reported."

Action by the Mt. Sterling National Bank against William Bowen and his wife. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Atkinson & Spence, for appellant. J. B. White, for appellees.

BURNAM, J. Appellant recovered a judgment against appellee William Bowen at the June term, 1893, of the Powell circuit court, upon which execution issued, directed to the sheriff of Powell county, and which was returned by that officer, "No property found"; and this action was then instituted by appellant against appellees, William Bowen and his wife, George Ann Bowen, alleging

that they had conveyed a tract of land situate in Powell county, containing about 194 acres, to the Union Land Company, in consideration of the sum of \$10,000, paid and to be paid; that subsequent to the sale the receiver of the company had resold the land in question, excluding the right of way for the railroad, to defendant William Bowen, in consideration of the sum of \$1,166.67, and the further consideration of a note for \$3,333.33, due on the 1st day of December, 1890, executed by the land company to defendant William Bowen for the purchase price of the land; and that, for the purpose of defeating his creditors, he had had the reconveyance of the title to the entire tract made to his wife,—and sought to subject the property, or a sufficient amount thereof, to the satisfaction of its debt, and at the same time sued out a general attachment, which was levied by the sheriff upon four tracts of land,—one containing 50 acres, two others containing 15½ acres each, and a fourth containing 13½ acres. The petition contained no description of any kind of the land sought to be subjected, and no allegation that the tracts upon which the attachment was levied belonged to the defendant Bowen, but the return of the sheriff upon the attachment describes the land levied upon by metes and bounds. Defendants traversed the affirmative allegations of the petition, and defendant George Ann Bowen alleges that she held the legal title to 104 acres of the land sold the land company, and that her money had paid for all the residue of the land conveyed to the company at the date of the purchase thereof, although the title to a part of it had been taken to her husband; that, at the date of the sale to the land company, she was entitled to have had the proceeds of all the land secured to her; that the cash payments made by the land company had all been made to her husband, and that the unpaid note for \$3,333.33 had been delivered to her at the date of the sale as her property, and in part consideration of what was due to her for her land which was sold to the land company, and that she had ever since held possession thereof; and that in the repurchase of the land she had used this note in part payment therefor, and had in good faith paid the balance of the purchase money in cash.

The proof in the case shows that appellee George Ann Bowen held the legal title to 103 acres of the land, and it strongly conduces to support her contention that her money had in reality paid for all of it. The land in question had been sold and conveyed by the appellees long before the creation of the obligation sued on, and there is no competent evidence in the record which shows that the husband ever held the legal title to any part of it, as the testimony of the county court clerk, Lyle, is incompetent. Parol evidence is never received to prove the contents of a record or public book which is

in existence, and the fact that the had the record before him at the testified is not a fact which would rule. Primarily, the record itself is produced for the inspection and execution of the court; but this is wholly practicable, as not only would great convenience result from the removal of documents from the custody of the in charge of them, but the change of and custody would be likely to cause loss or destruction of them; and for reason courts allow certified copies of original records to be used as evidence being one of the exceptions to the requiring primary evidence. See Be 860, and 1 Greenl. Ev. 501. There is evidence in the record which tends to show any fraud was committed upon the either by the sale or purchase of the title in question. The judgment is affirmed.

#### OHESAPEAKE & O. S. W. R. CO.'S RECEIVER v. HOSKINS.

(Court of Appeals of Kentucky. Nov. 3)

##### INJURY TO RAILROAD EMPLOYEE.

1. The first section of defendant's freight train left C. 10 minutes before the section, under the company's rule that trains must keep not less than 10 minutes except in closing up at a station, or at a or a passing point. When out about for the first section slowed up on the explosion danger signal, but in a short time, meeting no danger, it increased its speed, where being no steps taken to signal the second it ran into the first, which was behind the ing serious injury to plaintiff, the engine second section. *Held*, that a finding by that defendant was guilty of negligence to signal or protect the following the train will not be disturbed.

2. A failure on the part of defendant servants to exercise reasonable, ordinary, the observance of schedule time, and prescribed for their observance in the management of the train, is gross negligence.

Appeal from circuit court, Jefferson  
"Not to be officially reported."

Action by G. Q. Hoskins against the peake & Ohio Southwestern Railroad ay's receiver for damages for injuries ed through defendant's negligence. had judgment, and defendant appealed. affirmed.

P. H. Darley and Grubbs & Moran appellants. Young, Trabue & Young, appellee.

HAZELRIGG, J. A through freight running in two sections, left Paducah about 30 minutes of each other on the January 1, 1894, bound for Louisville scheduled time for St. Charles—a station 150 miles from Louisville—was 9:43 the and the two sections reached that time; the first section leaving there time mentioned, and the second section utes later. A short distance out of Charles, the first section was slowed

some 18 or 20 miles per hour to some 10 miles per hour by the explosion of a danger signal on the track. In a short time, meeting with no danger, the speed was increased, but at this moment, which was at 10:02 o'clock, and when out from St. Charles some four miles, and within two miles from Nortonville, the next stopping point, the second section overtook the first, and ran into it, by which the appellee, the engineer on the second section, was rather seriously injured. In this suit for damages he has recovered of the appellant company judgment for \$1,000.

The question of fact presented to the jury was whether the first section was where it ought to have been at the time of the collision, according to the schedule time; or, if not, and it was delayed by reason of any obstruction or otherwise, whether proper care was used to protect the section following it. The rule under which the train was running is as follows: "No. 89. Freight trains following each other must keep not less than ten minutes apart (except in closing up at stations or at meeting and passing points), unless some form of block signal is used." No form of block signal was in use, and that feature is not involved. The collision occurred within 19 minutes after the first section left St. Charles, and at the fourth mile post from the station. This section was therefore running at the rate of something less than 13 miles per hour, when the schedule time between the two sections required it to make a little less than 17 miles per hour. At the time of collision the first section was from 4 to 6 minutes behind its schedule time. It is the contention of the appellant company that this section had the right, under the rule quoted, to lose the whole of the 10 minutes, if necessary, before taking any steps to signal or protect the rear section; and that, as it had only used about one-half of this margin, it was not out of its proper place at the time of the accident. On the other hand, it is contended that in approaching Nortonville, where the entire train was due at 10:06, the rule allowed the second section to close up the gap of 10 minutes, in order to be at the station, or about it, on time; and this construction of the rule is approved by a number of witnesses who have great experience in the business. Even appellant's witnesses say that the second section was due at Nortonville at 10:06, which is the only time on the schedule for that train. But, whatever may be the proper construction of the rule, it is clear that the first train was quite behind its schedule time, and took no steps to signal the following section. We are not prepared to say, therefore, in opposition to the finding of the jury, that its managers were free from negligence.

It is further contended by appellant that recovery was allowed for only ordinary negligence, when, under the law, there must have been gross negligence to authorize a finding for the plaintiff. The instructions authorized such a finding if those in charge of

the first section failed to exercise reasonable, ordinary care in the observance of schedule time and the rules and regulations prescribed for their observance in the speed and management of the train, unless the plaintiff himself failed to exercise similar care, etc. As the failure to exercise such care would be gross negligence, the criticism of appellant is not well founded. Nor does there seem to have been any error as to the introduction or rejection of testimony. Judgment affirmed.

### SHIELDS v. HINKLE.

(Court of Appeals of Kentucky. Nov. 30, 1897.)

TRUSTS—SALE OF LAND—PARTIES—INFANTS—DEED—CONSTRUCTION.

1. In an action for an order to sell land held in trust for several parties, which could not be divided without materially impairing its value, minors over 14 years of age, who are interested therein, are properly before the court, who have been served with the summons required by statute, and are represented by a guardian appointed by the court.

2. It is not necessary that the trustee, to whom the purchaser's bond is payable, should execute a bond before entering the order of sale of the land ordered to be sold.

3. The conveyance of one party's interest in the land to his mother pending a suit for an order to sell same renders him an unnecessary party, where his mother sets up the facts in reference to the purchase, and the son's interest in the property.

4. The description of the vendor's interest in the land in the deed as having been acquired by will from his great-grandfather, when it was acquired by deed from his grandfather, does not affect the validity of the deed, when, by the grandfather's deed, it is shown that he could have no interest in the land at his death which he could devise to any one.

Appeal from circuit court, Nelson county.  
"Not to be officially reported."

Action by Samuel D. Hinkle, trustee, to have land held in trust sold because it could not be divided without materially impairing its value. From an order of sale, M. T. Shields, the purchaser, appeals. Affirmed.

John S. Kelly, for appellant. Geo. S. Fulton, W. S. Pryor, and W. W. Longmoor, for appellee.

PAYNTER, J. At the time the order of sale was entered in this action four of the six children of the plaintiff, Samuel D. Hinkle, were past 21 years of age, and were properly before the court, except Samuel D. Hinkle, Jr., who had sold his interest to his mother, and she was a party to the action. The remaining children, Austin Taylor Hinkle and George Rose Hinkle, were past 14 years of age when the summons was served upon them and when the judgment was rendered. By virtue of a deed which Alexander McMakin, the grandfather, executed and delivered to Samuel D. Hinkle, there was conveyed to him, as trustee for his children, a boundary of land containing something over 400 acres. This suit was brought originally to have the land sold, and proceeds reinvested. By amended petition (four of the chil-

dren having obtained their majority) it was asked to have it sold because it could not be divided without materially impairing its value. It was ordered sold, and at the sale the appellant became the purchaser, and complied with the order of sale by executing bonds for the purchase money. The bonds were made payable to the plaintiff as trustee, but the court, by an appropriate order, directed the commissioner of the court to collect and hold the proceeds subject to the order of the court for reinvestment. The minors did not have a statutory guardian, but one had been appointed for them by the court, and he acted for them. The summons, as required by the Code, was served on the minors, as they were over 14 years of age. We think they were properly before the court. It was not necessary for the plaintiff to execute a bond (*Kendall v. Briggs*, 81 Ky. 119) before entering the order of sale. Samuel D. Hinkle, Jr., pending the suit, conveyed his interest to his mother. He had not been properly served with the summons, but his mother set up the facts with reference to the purchase of her son's interest in the property. Her pleadings show that she owned his interest in the land, therefore he was an unnecessary party. While his deed to his mother described his interest as being acquired under the will of his great-grandfather, Alexander McMakin, that did not alter the effect of the deed. The deed which the grandfather had made showed that he could not have any interest in the land at his death which he could devise to any one. It was simply an erroneous description of the instrument under which the grantor claimed title to the land. Samuel D. Hinkle, as we have said, held the legal title to the land in trust for his children, and Samuel D. Hinkle, Jr., had such interest in it as could be conveyed by the deed to his mother. It could have been subjected to the payment of his debts, and he could, as he did, vest his mother with all interest he had in the property. None of the parties who had an interest in the land are complaining of the sale. They seek to have it treated as a valid one, and binding on the purchaser. We do not think the exceptions which the purchaser filed to the sale were well taken. The judgment is affirmed.

#### HOOBLER v. HOWLAND.

(Court of Appeals of Kentucky. Dec. 10, 1897.)

##### ATTACHMENT—DISSOLUTION.

Plaintiff sued defendant for goods sold, alleging grounds of attachment which defendant, by his answer, denied, and filed a motion to discharge the attachment, which motion he afterwards withdrew. After plaintiff had recovered a personal judgment against him, and had entered a motion to sustain the attachment, defendant renewed his motion to discharge. *Held* not an abuse of discretion to refuse to entertain such motion.

Appeal from circuit court, Kenton  
"Not to be officially reported."

Action by L. A. Howland against Hoobler (Covington Stone & Marble Company garnishee) for goods sold and delivered, and praying for an attachment. Final judgment for plaintiff, defendant Hoobler appeals. Judgment affirmed.

J. W. Menzies, for appellant.

BURNAM, J. Plaintiff brought this action against defendant Hoobler on September 18, 1894, alleging that he was indebted to him for stone sold and delivered to him, in the sum of \$151.70, and that his co-defendant, the Covington Stone & Marble Company, was indebted to him in a sum sufficient to pay the debt, and that the defendant Hoobler had no property in the state sufficient to satisfy the demand, and that the claim would be endangered by delay in obtaining judgment and execution, and return of "No property found." He also alleged that defendant Hoobler was about to sell, convey, or otherwise dispose of his property with the fraudulent intent to cheat, hinder, and delay his creditor in obtaining judgment. Defendant Hoobler answered that plaintiff had sold and delivered to him the stone sued for. He admitted that he was indebted to plaintiff in the sum of \$151.70, but denied that plaintiff was his creditor, and that the debt was due to him. He also denied that the defendant Hoobler had any property in the state sufficient to satisfy the demand, and that the claim would be endangered by delay in obtaining judgment and return thereon. He also denied that the defendant Hoobler was about to sell, convey, or otherwise dispose of his property with the fraudulent intent to cheat, hinder, and delay his creditor in obtaining judgment. On the 12th day of October, 1894, defendant Hoobler withdrew the motion to discharge the attachment. In January, 1895, plaintiff recovered a judgment against defendant for \$151.70, and the garnishee answered admitting that it was indebted to the defendant Hoobler in the sum of \$151.70, and on the 18th day of May, 1895, the plaintiff entered his motion to sustain the attachment, and that the money due by the defendant Hoobler be paid over to him. Subsequently, on the 20th day of May, 1895, defendant Hoobler renewed his motion to discharge the attachment, to which plaintiff objected, and the court refused to allow the motion to be renewed; and the attachment was sustained, and the money paid into court by the garnishee was adjudged to be turned over to the plaintiff. To this judgment defendant Hoobler objected, and prayed an appeal to this court.

Under the statute which authorizes attachment on the ground that the debtor has no sufficient property in the state, subject to execution, to satisfy plaintiff's demand, that its collection will be endangered by delay, etc., the fact that the debtor has enough property in the state, subject to execution, to satisfy the plaintiff's demand, is always prima facie evidence that its collection will be endangered by delay. But this may be rebutted by showing that def-

was, notwithstanding his lack of property, able and willing to pay the demand. See *Robinson v. McInteer*, 15 Ky. Law Rep. 128, and *McCulloch v. Cook*, Id. 207. The answer of appellant admitted that he had no property liable to execution, thus making out a prima facie case against him,—that the collection of the debt sued for would be endangered by delay; but, as he denied that this was the fact, he had the right to have taken proof on this issue. But as he abandoned his motion to discharge the attachment, and took no steps looking to the preparation of his defense on this issue until after personal judgment was rendered, and after the submission of the cause on motion to sustain the attachment and direct the garnishee to pay over the funds attached in its hands, we do not think that it was an abuse of discretion on the part of the trial judge, at that late date, to have refused to entertain his motion. Wherefore the judgment is affirmed.

### DAISY v. HOULIHAN et al.

(Court of Appeals of Kentucky. Nov. 24, 1897.)

#### SALE OF HOMESTEAD ON EXECUTION—ABANDONED WIFE—RIGHT OF ACTION.

1. Defendant attached, on constructive service, money in the hands of the court, belonging to plaintiff, and secured judgment therefor, giving bond to restore the money should the judgment be set aside. *Held*, an action could not be maintained on such bond until the judgment had been set aside, under Civ. Code Prac. § 414, which provides that a defendant against whom judgment has been rendered upon constructive service may at any time within five years move to have the action retried.

2. Where a husband has abandoned his wife, she cannot sue to recover money due him from the sale of a homestead under execution, under Civ. Code Prac. § 34, subsec. 4, giving her, if abandoned, a right to bring an action which he might bring, where, for failure of the husband to take certain statutory steps, he could not sue in his own right.

Appeal from circuit court, Fayette county.  
"Not to be officially reported."

Action by Martha Daisy against E. T. Houlihan and others. Demurrer to the petition sustained, and plaintiff appeals. Affirmed.

A. M. Baker, for appellant. Beauchamp & Walton, for appellees.

PAYNTER, J. William Daisy was the owner in fee of a house and lot in Lexington, Ky. To enforce a mortgage which he executed upon the property, his wife joining him, it was sold; and, after satisfying the mortgage debt, there remained in court the sum of \$188, the balance of the proceeds of the sale. E. T. Houlihan instituted an action against William Daisy, in which he sued out an attachment, and by an order of court in that action the \$188 was paid to Houlihan. Before the judgment was entered, giving the money to Houlihan, he was required to give a refunding bond, with appellee W. J. Houlihan as surety, and its terms were as provided in section 410, Civ. Code Prac. William Daisy was

brought before the court in that action by constructive service, and no defense was made to it. William Daisy has abandoned his wife, Martha Daisy; and she brings this action on the refunding bond, and sues for her absent husband, and in her own right. From the facts as they appear in the petition, to which the demurrer was sustained, had William Daisy asked it in the suit to enforce the mortgage, or defended the action of Houlihan, the court would have adjudged the fund to him, for reinvestment in another homestead. By the terms of the bond which E. T. Houlihan was required to give, it was covenanted that the plaintiff would restore to William Daisy money obtained under the judgment, should the judgment be vacated or modified, and restoration of the money adjudged. Under section 414, Civ. Code Prac., William Daisy had a right, within five years of the rendition of the judgment, to move to have the action retried. Had the certified copy of the judgment been served on William Daisy under the provisions of section 415, Civ. Code, then it would have been necessary for him to have moved for a retrial within 12 months after the service of the certified copy of the judgment on him. However, this does not appear to have been done. As William Daisy could not have maintained an independent action to recover on the bond until the vacation or modification of the judgment, and the restoration of the money ordered, certainly the wife could not do so for him. The remedy which the Code provided for relief against the judgment in favor of Houlihan was by motion in that action within the time prescribed by the Code. The husband, and not the wife, was entitled to the fund which was adjudged to Houlihan. The homestead belonged to the husband. The law gave it to him by reason of the fact that he had a family and was a bona fide housekeeper. At the death of a husband the wife has certain rights in the homestead. She has no such interest in the fund, independent of the right which her husband possessed, as would enable her to maintain this action, or to move for a retrial in the action in which the bond was given. If the husband could have claimed the fund for reinvestment in a homestead, but abandoned his wife, or refused or failed to assert his right, then she had the right to bring or defend any action, which he could have defended or brought, which would have resulted in protecting her and her children in the enjoyment of such homestead as the fund in question would have secured, or, if necessary, to have recovered the fund for reinvestment in a homestead. When a husband abandons his wife, then she, under subsection 4, § 34, Civ. Code Prac., which reads as follows: "If a husband desert his wife, she may bring or defend for him any action which he might bring or defend, and shall have the powers and rights with reference thereto which he would have had but for such desertion,"—is entitled to bring or defend any action which

a husband might bring or defend. We hold that the husband could not maintain this action, as it is not the form of remedy prescribed by the Code; and it follows that the wife cannot do so for him, or for herself. The judgment is affirmed.

**WALDEN et al. v. CITIZENS' SAV. BANK.**  
(Court of Appeals of Kentucky. Dec. 1, 1897.)

**AMENDED ANSWER—STRIKING FROM FILES—ACCOMMODATION DRAFT—MISAPPLICATION OF PROCEEDS—BONA FIDE PURCHASER.**

1. In an action on a bill of exchange it was error to strike from the files amended answers of the drawer and indorser, filed on rule days, after a trial and disagreement of the jury, and a continuance for a new trial, alleging facts to show that the bill had been drawn and indorsed for the sole accommodation of the drawee; that the drawer and indorser had never had due notice of the nonpayment of the bill; that the bill had not been duly protested, and had been drawn and indorsed under an agreement with the drawee that it should be used for a certain purpose; and that it was discounted by the plaintiff bank, and the proceeds by it wrongfully applied, contrary to, and with knowledge of, the terms of the agreement.

2. In an action against the drawee, and the accommodation drawer and indorser of a bill of exchange, the refusal to instruct that, if the jury should find that the bill was drawn and indorsed under an agreement with the drawee that it should be used for a certain purpose, and that it was discounted by plaintiff bank, and the proceeds by it applied contrary to the terms of the agreement, and that plaintiff's cashier had knowledge of such agreement, the plaintiff was bound by the knowledge of its cashier, and was not an innocent purchaser, and the drawer and indorser were not liable; and that, if they found that the proceeds were credited on the drawee's debt to the bank, without his request, and against his consent, none of the defendants were liable, though the plaintiff had no knowledge of the agreement,—was error.

3. In an action on a bill of exchange, to instruct that, if the jury believe the bill to have been drawn and indorsed for the accommodation of the drawee, and by agreement between him and the drawer and between the drawee and another, for the purpose of renewing the bill held by the latter, and that the bill was discounted by the plaintiff, and the proceeds by it wrongfully credited to the drawee, against his will and consent, and that the cashier of plaintiff bank had knowledge of the agreement, their verdict should be for defendants, is error.

Appeal from circuit court, Daviess county.  
"Not to be officially reported."

Action by Citizens' Savings Bank against S. V. Walden and others. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

C. S. Walker and Sweeney, Ellis & Sweeney, for appellants. Robert S. Todd and Reuben A. Miller, for appellee.

GUFFY, J. This is an appeal from a judgment of the Daviess circuit court rendered in an action of the Citizens' Savings Bank against S. V. Walden, etc. The appellants are S. V. Walden, T. W. McAtee, and E. P. Taylor, administrator of J. P. Moreland.

It is substantially alleged in the petition:

That on the 10th day of May, 1892, Moreland drew his certain bill of exchange upon and addressed to S. V. Walden, requesting the said Walden, 60 days after date, to pay to the order of T. W. McAtee, negotiable at the First National Bank of Owensboro, Ky., \$1,000, and charge same to the account of said Moreland. That on the same day the said bill was presented to said Walden for his acceptance, and he accepted same by writing his name on the face thereof, and delivered it to McAtee, who indorsed same by writing his name across the back thereof, and delivered the same to plaintiff, who, on the day of its date, before the maturity thereof, discounted same, and became, and is now, the holder thereof for value. Said bill is numbered 14,909, and is filed herewith as part hereof, marked "A."

It is further alleged, in substance: on the 12th day of July, 1892,—that on the day of maturity of said bill,—the plaintiff caused same, during banking hours, to be duly presented by W. H. Moore, a notary public, duly appointed, commissioned and qualified in and for Daviess county, Ky., to the said First National Bank of Owensboro, Ky., where same was and is made payable, as aforesaid, and payment thereof demanded of the proper officer of said bank, was refused by him, saying "No funds on hand." Thereupon the said notary did, immediately and upon the same day, duly and regularly protest said bill for nonpayment, and on said day made out notices of protest, setting forth the facts of said demand, nonpayment, and protest for nonpayment, and not only so, but the said Moreland and McAtee thereupon deposited two of said notices in the post office at Owensboro, Ky., duly inclosed, postage prepaid, and addressed one to said defendant J. P. Moreland, Owensboro, Ky., and one to E. P. Taylor, trustee of J. P. Moreland, Powers, Ky., and delivered one of said notices to defendant T. W. McAtee in person; and the notice so mailed to the said Moreland was registered at the post office where mailed, as aforesaid,—all of which said notary duly certified under his hand and seal of office, and his said certificate of mailing same is filed herewith as part hereof, marked "B." That the said post office at Owensboro, Ky., is, and was at the time of the mailing of said notice to him, the said Taylor, at which said Moreland received his letters and mail matter, and is, and was at the time, the nearest post office to the residence of the said Moreland, who did not then, and does not now, reside in the city of Owensboro, Ky., but in Daviess county, Ky., and that the said post office at Powers, Daviess county, Ky., is, and was at the time of the mailing of the notice to him aforesaid, the nearest office at which the said Taylor received his letters and mail matter, and is, and was at the time of mailing same, the nearest post office to the residence of the said T.



who did not then, and does not now, reside in the city of Owensboro, Ky., but in Daviess county, Ky., near said post office called "Powers." And plaintiff says that said Moreland and Taylor each duly received said notices respectively so deposited in said office, and that they and the said McAtee were each duly notified, and knew of the said demand made by said notary for the payment of said bill, of the nonpayment thereof, and of the protest thereof for nonpayment by said notary aforesaid. Said bill was protested at a cost of \$2.24 to this plaintiff. No part of said bill or of said cost of protest has ever been paid to this plaintiff, or to any one for it.

The plaintiff says: That the statement contained in the said notarial certificate that "I, the said notary, did present the said bill of exchange at the Citizens' Savings Bank, at Owensboro, where the same is made payable, and demanded payment of the proper officer," is a mistake, and in lieu thereof, and in the same place in said notarial certificate where the statement just quoted occurs, should be this statement, which is true, namely: "I, the said notary, did present the said bill of exchange at the First National Bank of Owensboro, at Owensboro, where the same is made payable, and demanded payment of the proper officer." That said bill was, in fact, presented at said First National Bank, and said notary intended to so certify, but in filling up and making out said notarial certificate the clerk of the said notary, who filled it up and made it out, all save the signature of said notary thereto, inadvertently and by mistake wrote the words "Citizens' Savings Bank" instead of "First National Bank of Owensboro" in said certificate, in the connection referred to, and in this way said certificate was erroneously made to read that said bill was presented to, and payment demanded at, the Citizens' Savings Bank, when it should have been made to read that said bill was presented to, and payment demanded at, the said First National Bank of Owensboro; and said notary inadvertently overlooked said mistake when he signed said certificate. Wherefore plaintiff prays judgment against the defendants for \$1,002.24, with interest thereon from the 12th day of July, 1892, etc.

Said bill of exchange reads as follows: "No. 14,909. \$1,000.00. Owensboro, Ky., May 10, 1892. Sixty days after date, pay to the order of T. W. McAtee, payable at First National Bank of Owensboro, one thousand dollars; value received, & charge to account of

— To S. V. Walden, Owensboro, Ky. J. P. Moreland." Across the face: "S. V. Walden." Indorsed: "T. W. McAtee." Notarial certificate reads as follows: "United States of America, and Commonwealth of Kentucky. By this public instrument of protest be it known: That on the 12th day of July, in the year of our Lord one thousand eight hundred and ninety-two, I, W. H. Moore,

notary public in and for the county of Daviess, and state of Kentucky, duly commissioned and sworn, and residing in the city of Owensboro, in said county, did receive from C. H. Todd, president, a certain bill of exchange, being in words and figures as follows, to wit: 'No. 14,909. \$1,000.00. Owensboro, May 10, 1892. Sixty days after date, pay to the order of T. W. McAtee, payable at First National Bank of Owensboro, one thousand dollars; value received, and charge to the account of. To S. V. Walden, Owensboro, Ky. J. P. Moreland.' Indorsed on the back, 'T. W. McAtee.'—of which said bill of exchange the said president required me, the said notary public, to demand payment, and, in case of refusal, or failure to obtain same, to make a protest in the premises. Whereupon, at the request of aforesaid, I, the said notary, did present the bill of exchange at the Citizens' Savings Bank, at Owensboro, where the same is made payable, and demanded payment of the proper officer, which was refused by him, saying, 'No funds.' And thereupon I, the said notary, did protest, and by these presents I do solemnly and publicly protest, as well against the drawer and indorser as against all others whom it may or doth concern, for exchange, re-exchange, damage, costs, charges, and interest suffered or to be suffered for want of payment; and on the same day duly deposited notices of protest in P. O., addressed to J. P. Moreland, Owensboro, Ky., registered, delivered one to T. W. McAtee in person, and sent one through P. O. to E. P. Taylor, trustee of J. P. Moreland, Powers, Ky. Thus done and protested at Owensboro. In testimony whereof, I, the said notary, grant these presents under my signature and seal notarial. W. H. Moore, Notary Public." Fee, \$2.24.

Said petition was filed May 12, 1893.

On the 5th of June, 1893, the defendants filed their answer, which reads as follows:

"The defendants, S. V. Walden, J. P. Moreland, and T. W. McAtee, deny that the said McAtee ever delivered the bill of exchange in suit to plaintiff, or that plaintiff ever discounted it, or became or is the owner or holder thereof for value. They state that the said Moreland was drawer, and the said McAtee was indorser, each for the sole accommodation of the said Walden, on a bill of exchange for \$1,000, past due, in First National Bank of Owensboro, held and owned by it, and it was agreed between said Walden and P. T. Watkins, as cashier of said First National Bank of Owensboro, that the said Walden was to pay \$800 on said debt, and renew for \$1,000, with the said Moreland as drawer and the said McAtee as indorser; and the said Watkins filled out a blank bill of exchange by writing the following words and figures, namely: 'May 10, 1892. Sixty days after date. T. W. McAtee. One thousand. S. V. Walden, Owensboro, Ky.'—and delivered it to said Walden, who accepted it in writing across the face thereof, and car-

ried it to the said Moreland and McAtee, informing each of them of the agreement between him and the said bank, through its cashier. And, with the understanding and agreement that it was to be used for said purpose, the said Moreland signed it as drawer, and the said McAtee as indorser, and the said Walden, with said paper so accepted, drawn, and indorsed, went to the plaintiff bank, to see its cashier, W. H. Moore, in order to have him cancel certain insurance policies on the life of said Walden so as to procure the \$600 to pay the said First National Bank of Owensboro, and informed him of the agreement between the said First National Bank and himself, and showed him the said \$1,000 bill, which the said Moore took and retained, and wrongfully appropriated it to the use of plaintiff bank, against the consent of said Walden, and without the consent or knowledge and against the will of said Moreland and McAtee, and refused to return it to the said Walden, although he insisted upon his doing so. It was in this, and no other way, that plaintiff came into possession of said bill of exchange, and has never paid anything for it, and the same is without any consideration, and it wrongfully and illegally procured the said bill of exchange, with notice and knowledge of the said agreement between Walden and the First National Bank of Owensboro, and that the said Moreland and McAtee were the accommodation drawer and indorser, respectively, thereon, and became such for the sole purpose of renewing the said \$1,600 bill in the First National Bank of Owensboro to the extent of \$1,000, upon which bill they were such respective drawer and indorser for the accommodation of Walden; and with such knowledge and notice plaintiff wrongfully and illegally obtained the possession of said bill of exchange, and refused to surrender or return it, although it has never paid anything for or on account of it, which was a fraud upon the said Walden, and especially upon the said Moreland and McAtee, who were ignorant as to the disposition and wrongful appropriation of said bill of exchange until after its maturity. The defendants state that W. H. Moore was cashier of the plaintiff bank for a number of years, and was such cashier before and during the year 1892 until some time after July 12, 1892, and he was such cashier as well as stockholder in plaintiff bank when, as notary public, he pretends to have protested the bill of exchange in suit, falsely stating in the instrument of protest that he received from C. H. Todd, president, said bill of exchange, of which bill of exchange the said president required him, as notary public, to demand payment, and, in case of refusal or failure to obtain same, to make a protest in the premises. He never received said bill from said president, and was never required by said president to demand payment, or, in case of refusal or failure to obtain same, to make

a protest, and they submit that the said Moore, being at the same time cashier of plaintiff bank, had no authority or power to protest said bill of exchange as a notary public. Moreover, he never made any demand of payment. They deny that July 12, 1892, or at any time, plaintiff caused said bill of exchange to be presented by said notary to the First National Bank of Owensboro, Ky., during banking hours, and payment thereof demanded of the proper officer of said bank, or that payment was refused, or that said bill of exchange on said day, or at any time, was presented to the First National Bank of Owensboro, Ky., and payment thereof demanded of the proper officer by said notary public, or at all, or that said bill of exchange was ever presented to the said First National Bank of Owensboro, or payment thereof demanded. They deny that the statement in the notarial certificate that 'I, the said notary, did present the said bill of exchange at the Citizens' Savings Bank at Owensboro, where the same is made payable, and demanded payment of the proper officer,' is a mistake, or that, in lieu thereof, or in the same place in said certificate, should be this: 'I, the said notary, did present the said bill of exchange at the First National Bank of Owensboro, at Owensboro, where the same is made payable, and demanded payment of the proper officer,' or that this statement is true, or that said notary intended to certify that he presented said bill of exchange at the First National Bank of Owensboro, and demanded payment of the proper officer, or that inadvertently or by mistake 'Citizens' Savings Bank' instead of 'First National Bank of Owensboro' was written in said certificate, or that said notary inadvertently overlooked same when he signed it. The defendants believe and charge that said certificate tells the truth as to the place of presentation and demand of payment. They deny that the said notary gave either the said Moreland or McAtee any notice of protest showing that the demand of payment was made elsewhere than at the Citizens' Savings Bank, or was made at the First National Bank of Owensboro. Wherefore the defendants pray that the petition be dismissed, that they recover their costs, and for all other proper relief."

It appears that on the 16th day of June, 1893, defendants' demurrer to the petition theretofore filed was overruled, with exceptions. The reply of plaintiff may be considered a traverse of all the affirmative averments in the answer, except the charge that Moore was cashier of plaintiff bank. And on the 16th of June, 1893, plaintiff filed an amended petition, which reads as follows: "The plaintiff, by leave of court, amends its petition herein, and says that the statement contained in its original petition that the bill of exchange sued on herein was delivered to and discounted by it on the day of the date of said bill is a mistake; that said bill was delivered to and discounted by it on the 16th

day of June, 1892, and it should have been so stated in its original petition, but by mistake it was stated in the petition that said bill was delivered to and discounted by this plaintiff on the day of its date."

It further appears that on the — day of June, 1893, a jury was impaneled, and the evidence and arguments heard, and the jury, after considering the case, failed to agree, and were discharged. On the 15th of February, 1894, another jury was sworn to try the issues, and during the trial thereof the defendant McAtee offered and asked leave to file an amended answer, which motion and leave were overruled by the court, with exceptions. The amended answer reads as follows: "The defendant T. W. McAtee, by leave of court, amends his answer, and says he never at any time or place received a notice of the nonpayment or protest of the bill sued on. He denies that such notice, or any notice, of the nonpayment or protest of the bill sued on was ever delivered to him at any time or place or by any one. He says he is a mere surety on the paper sued on, and that he left the preparation of the answer to his co-defendants, and the fact that this denial is not made in the original answer is the result of mistake and oversight; and T. W. McAtee says he believes the foregoing statements are true. Sworn to," etc. On the 19th of February, 1894, the defendants tendered and moved to file an amended answer, to which plaintiff objected, and the court refused to allow the same to be filed, to which defendants excepted. Said amended answer reads as follows: "The defendants, S. V. Walden, J. P. Moreland, and T. W. McAtee, amend their answer in order to conform to the facts proved. They deny that the bill in suit was ever protested for nonpayment. They state that the notary made no minute on the bill in suit, or in his register, or on a ticket attached to said bill of the presentment, refusal to pay, the month, day, and year thereof, and his charges of protest on the day of the pretended dishonor thereof, and never made any minute at any time of either of the foregoing, and never made any noting of the pretended dishonor of said bill, and the pretended instrument of protest filed with the petition was not written on the day of the pretended dishonor of said bill, or the refusal to pay same. They state that said instrument was written up on July 13, 1892, and the pretended dishonor of said bill was in no way or manner noted. Wherefore," etc. And on the same day, viz. February 19, 1894, the jury announced that they were not agreed, and they were dismissed from further consideration of the matter. On the 28th day of May, 1894,—a rule day,—the following order was entered herein, to wit: "The defendants J. P. Moreland and T. W. McAtee this day filed an amended answer herein." The amended answer referred to in the foregoing order is as follows: "The defendants J. P. Moreland and T. W. Mc-

Atee deny that the bill in suit was ever protested for nonpayment. They state that the notary made no minute on the bill in suit, or in his register, or on a ticket attached to said bill, of the presentment, refusal to pay, the month, day, and year thereof, and his charges of protest on the day of the pretended dishonor thereof, and never made any minute at any time of either of the foregoing, and never made any noting of the pretended dishonor of said bill, and the instrument of protest filed with the petition was not written on the day of the pretended dishonor of said bill, or the refusal to pay same. They state that the said instrument was written up on July 13, 1892, and the pretended dishonor of said bill was in no way or manner noted. (2) They state that at the time of the maturity of the bill in suit the defendant Moreland was the accommodation drawer for S. V. Walden on many bills of exchange of different dates, sums, and times of payment, and payable to different persons, and at different banks. He was such accommodation drawer on the following bills of exchange held by the plaintiff bank, namely: [A great number of bills are set out, amounting to, perhaps, thirty or forty thousand dollars.]" The amended answer also shows that he was accommodation drawer for Walden on a number of other bills in Owensboro and other places. It is further alleged in the answer that the Citizens' Savings Bank, Bank of Commerce, Owensboro Savings Bank, Owensboro National Bank, Farmers' & Traders' Bank, Deposit Bank, and Owensboro Banking Company are banking corporations doing business in the city of Owensboro, in the state of Kentucky, and were engaged in such business, at said place, on the 12th day of July, 1892, and previous thereto. They state that in the notice of dishonor of said bill sent to the defendant Moreland it was not stated at what bank or place said bill was payable, the only statement being that it was payable at Owensboro, Ky., and the said Moreland did not know to what particular bill said notice applied. At the time said notice was sent to the said Moreland, the plaintiff bank and the notary public knew that the said Moreland was on these many different bills as accommodation drawer for the said Walden, held by plaintiff, as well as he was on various other bills as such accommodation drawer held by other banks in the city of Owensboro, as well as in other places. "(3) They state that the defendant T. W. McAtee never at any time or place received a notice of the nonpayment or dishonor of the bill in suit, and say that no notice of the nonpayment or dishonor of the bill in suit was ever delivered to him. Wherefore they pray," etc.

At the June term, 1894, the plaintiff moved the court to strike from the files defendants' amended answer filed May 28, 1894, to which defendants objected, and said motion was set for the sixth day of the present term for

hearing. On September 24, 1894,—being a rule day,—the following order was entered: "The defendants J. P. Moreland, and T. W. McAtee this day filed amended answer herein, which reads as follows: 'The defendants J. P. Moreland and T. W. McAtee amend their answer herein, and state, in addition to the facts in the amended answer filed May 28, 1894, and the third paragraph thereof, that in the instrument of protest, where it is stated that the notary public delivered to the defendant T. W. McAtee notice of protest in person, the same is a mistake. The said notary, or any for him, never did deliver to him any notice of the nonpayment, dishonor, or protest of the bill in suit, and he never received any such notice. Wherefore,' etc."

October, 1894, the death of J. P. Moreland was suggested, and the cause continued for revivor, and on the 12th day of July, 1895, the action was revived against E. P. Taylor, administrator of J. P. Moreland. On a rule day—22d day of July, 1895—the following order was entered, to wit: "This day came the defendant E. P. Taylor, administrator of J. P. Moreland, and moved the court to set aside the order of revivor herein, and, without waiving said motion, the defendants tendered and moved the court to file an amended answer herein, which is ordered to and is hereby filed." The amended answer reads as follows: "The defendants, S. V. Walden, E. P. Taylor, administrator of the estate of J. P. Moreland, and T. W. McAtee, state that the said Moreland was the drawer and the said McAtee was the indorser, each for the sole accommodation of the said Walden, on a bill of exchange for \$1,600, held by the First National Bank of Owensboro, Ky., where it is payable. And it was agreed by the said Walden and the said First National Bank of Owensboro that the said Walden was to pay \$600 on said bill, which was then due, and renew for \$1,000, with the said Moreland as drawer and the said McAtee as indorser; and in pursuance to this agreement the cashier of the said First National Bank filled out a blank for the said Walden for him to have the said Moreland draw and the said McAtee indorse, which is the bill in suit. The words and figures in said blank or bill filled out by the said cashier of the First National Bank, are as follows, viz.: '\$1,000.00. May 10, '92. Sixty days after date. T. W. McAtee. One thousand. S. V. Walden, Owensboro, Kentucky.' And the said Walden procured the said Moreland to draw and the said McAtee to indorse said bill of exchange for the specific purpose of renewing the said \$1,600 in the First National Bank of Owensboro to the extent of \$1,000 for sixty days after May 10, 1892, and they respectively drew and indorsed said paper for this, and no other, purpose. Long after the date of said bill, and shortly before its maturity, the plaintiff came into the possession of same wrongfully, as set out in the answer, claiming it as owner, and by crediting Walden on papers past due,

though its cashier had it wrongfully prior to that time, and it was never discounted with the knowledge, through W. H. M. who was then its cashier, of the fact said bill had been given for said specific purpose, and was drawn by Moreland and indorsed by McAtee for only said purpose; it fraudulently, and without the knowledge or consent of either said Walden, Moreland, or McAtee, diverted said bill from such purpose, and that, too, without paying the said W. anything therefor. Moreover, the said cashier of the plaintiff bank was familiar with and well acquainted with the fact that the above figures and words were in the handwriting of the said cashier of the National Bank of Owensboro, and he made inquiry of the said Watkins, or any one else, as to the purpose for which said bill had been accepted, drawn, and indorsed, in which he was guilty of negligence and bad faith, though it is true that the said Walden informed him of the purpose for which said bill had been accepted, drawn, and indorsed, and the said cashier of plaintiff bank, was aware that it had been accepted, drawn, and indorsed to renew said \$1,600 bill to the extent of \$1,000. No money passed from said bank to said Walden, or to any party to said bill, or to any on account of any party to said bill, from said bank, or any deposit to the credit of any party to said bill in said bank, and the possession of said bank is not only wrongfully obtained, but without consideration, and fraudulently. The defendants deny that on the 12th day of July, 1892, or the day of the maturity of said bill in suit, that the said bill was protested for nonpayment, and they state that the instrument of protest was written upon July 10, 1892, and after the day of the maturity of said bill, and this was the only protest of said bill, and this was the only protest pretended dishonor of said bill was in no way or manner noted. Wherefore defendants pray," etc.

On the 23d day of September, 1895, the following order was entered herein, to wit: "The plaintiff tendered and moved to file written motions and demurrers herein, and on his motion said written motions and demurrers were ordered to be filed, and pursuant thereto the plaintiff moved the court to strike from the files the amended answer filed herein a rule day on the 22d day of July, 1895, and the court to strike out the amended answer filed at rule day on the 28th day of May, 1894, and the amended answer filed at rule day on the 22d day of July, 1895."

The written motions and demurrers were read to are as follows:

"(1) The plaintiff, having heretofore moved to strike from the files the amended answer filed herein at a rule day on the 28th day of May, 1894, is still insisting upon said motion and now moves the court, in the event said motion to strike said amended answer from the files is overruled, to strike out of the amended answer the first, second, and third paragraphs thereof, because the facts stated in neither the first nor second paragraph

stitute any defense to the plaintiff's cause of action stated in the petition, and the defense therein attempted to be stated comes too late, and is inconsistent with the original answer of the defendants; and the same has been heretofore refused by the court when proposed in an amended answer which the defendants tendered and moved to file at the January term, 1894, of this court, but which the court refused to allow to be filed; and for other reasons. (2) The plaintiff moves the court to strike from the files the amended answer filed herein at a rule day on the 22d day of July, 1895. (3) The plaintiff, if its motion to strike from the files the amended answer filed at rule day, July 22, 1895, is overruled, moves the court to strike out of the amended answer all that part thereof commencing on the first page with the words 'defendants' and ending with the words 'and no other purpose,' on the second page, because same is but a repetition of what is contained in the original answer of defendants, is a statement and pleading of evidence, is immaterial, irrelevant, and constitutes no defense to the plaintiff's cause of action stated in the petition, and for other reasons; and for the same and other reasons the plaintiff moves to strike out of said amended answer all that part thereof commencing with the words 'long after the date,' on the second page, and ending with the words and figures 'bill to the extent of \$1,000,' on the same page. (4) To strike out of said amended answer all that part thereof commencing with the words 'no money passed,' on the second page, and ending with the words 'but without consideration, and fraudulent,' on the third page, because same is but a repetition, in substance, of what is contained in the original answer, and has been heretofore pleaded, and constitutes no defense to the plaintiff's cause of action, and for other reasons; and for the same and other reasons the plaintiff moves the court to strike out of said amended answer all that part thereof commencing with the words 'the defendants deny,' on the third page, and ending with the words 'manner noted,' on the same page."

Demurrers: "(1) And if its motion to strike out the first and second paragraphs of the amended answer filed at rule day on the 28th day of May, 1894, is overruled, then the plaintiff demurs separately to each of said paragraphs, because the facts stated in neither constitute any defense to the plaintiff's cause of action stated in the petition. (2) And if its motion to strike from the files the amended answer filed at a rule day on the 22d day of July, 1895, and its several motions to strike out of said amended answer the certain parts thereof separately designated in said motions, respectively, shall be overruled by the court, then the plaintiff demurs to the said amended answer because the facts therein stated constitute no defense to its cause of action set out in its petition; and it demurs separately to

each part of said amended answer so separately designated in its motions aforesaid to strike out of said answer the parts thereof separately designated in said motions, because the facts stated in neither of said several parts or portions of said answer constitute any defense to the plaintiff's cause of action."

On the 23d day of September, 1895, the plaintiff also moved to strike from the files the amended answer filed herein on the 24th of September, 1894, to which defendants object, and, all of said motions and demurrers being argued by counsel, and heard by the court, the same were taken under advisement. On the 16th day of October the following order was entered: "This day came the parties, by their attorneys. The court being sufficiently advised, the motions of the plaintiff to strike from the files the amended answers filed herein at rule days on the 28th day of May, 1894, September 24, 1894, and July 22, 1895, respectively, are sustained, to which defendants except, and said amended answers are stricken from the files, to which defendants except, and are ordered to be made part of the record." Thereupon the defendants moved in open court that said amended answers be now filed, to which the plaintiff objects, and the court refused to allow the same to be filed, to which the defendants except. Thereupon came a jury, who were sworn to try the issues, and afterwards, on the 21st of October, 1895, the following order was entered: "This day came the parties, by their attorneys, and also the jury sworn herein on a former day of this term. The arguments were concluded, and the jury retired to consider of their verdict, and returned into court the following verdict: 'We, the jury, find for the plaintiff. [Signed] John Payne, E. C. Lyons, Clint Headden, R. E. Graham, C. N. Higdon, Thomas Vowells, J. P. Ford, J. S. Rodman, and A. J. Bridges.' It is therefore adjudged that the Citizens' Savings Bank recover of S. V. Walden, T. W. McAtee, and E. P. Taylor, administrator of the personal property of the estate of J. P. Moreland, deceased (and, as to said administrator, the following judgment to be levied on assets in his hands as administrator), the sum of \$1,000, with interest thereon at the rate of six per cent. per annum from the 18th day of July, 1892, until paid, and \$2.24 cost of protest and its cost herein expended, and may have execution; to which defendants except." And afterwards, on the 23d of October, the defendants filed grounds for new trial, which are as follows: The defendants, S. V. Walden, E. P. Taylor, administrator of J. P. Moreland, and T. W. McAtee, move the court for a new trial upon the following grounds: "(1) The court erred in overruling the demurrer of the defendants Moreland and McAtee to the petition filed June 5, 1893. (2) The court erred in allowing the amended petition to be filed June 16, 1893

(3) The court erred in overruling the demurrer of June 16, 1893. (4) The court erred in overruling the exceptions filed by the defendants on June 16, 1893, to the deposition of W. H. Moore, and each of them. (5) The court erred in sustaining the exceptions, and each of them, filed by plaintiff to the deposition of W. H. Moore on cross-examination. (6) The court erred in overruling the exceptions to the deposition of W. H. Moore filed June 17, 1893. (7) The court erred in overruling the exceptions to the deposition of W. H. Moore filed January 16, 1894. (8) The court erred in refusing to file the amended answer tendered February 17, 1894, which is marked 'No. 4.' (9) The court erred in refusing to file amended answer tendered February 19, 1894, which is marked 'X.' (10) The court erred in striking from the file amended answer filed by J. P. Moreland and T. W. McAtee, May 28, 1894, which amended answer is marked 'V.' (11) The court erred in striking from the files the amended answer filed by Moreland and McAtee, September 24, 1894, which is marked 'W.' (12) The court erred in striking from the files the amended answer filed July 22, 1895, which is marked 'X.' (13) The court erred in its order of July 12, 1895, reviving the action against E. P. Taylor, administrator of J. P. Moreland. (14) The court erred in its order of October 16, 1895, in striking the amended answers from the files, and each of them. (15) The court erred in refusing on said date to allow said amended answers, and each of them to be filed. (16) The court erred in admitting incompetent and irrelevant evidence. (17) The court erred in refusing competent and relevant evidence. (18) The court erred in permitting Parrish and Baker to testify from the books of the Citizens' Savings Bank as to entries not made by them, and also permitting Parrish to argue in his testimony. (19) The court erred in permitting the second deposition of W. H. Moore to be read in chief, or before the defendants had introduced any testimony. (20) The court erred in giving each of the instructions Nos. 1, 2, 3, 4, and 5 to the jury in paper marked 'No. 1.' (21) The court erred in refusing each and every instruction asked for by defendants in papers marked 'S. V. W.,' and 'X. Y. Z.,' and 'T. W. M.,' respectively. (22) The verdict is contrary to the law. (23) The verdict is contrary to the evidence. (24) The court erred in permitting Parrish to testify, he being a stockholder in plaintiff bank, as against J. P. Moreland's estate."

On the 13th day of November, 1895, motion for new trial was overruled, and appeal granted. Afterwards, on the 15th day of November, 1895, the following order was entered herein: "The plaintiff filed the affidavit of J. Q. Haynes and a remitter herein, and the said plaintiff remits from the judgment against Walden and McAtee the sum of \$9.87." This order is set aside. After-

wards, on the 15th day of November, the following order was entered herein: "This day came the plaintiff, and he moved and moved to file the affidavit of J. Quint Haynes, in proof of claim sued on herein as a demand on the estate of J. P. Moreland, deceased, and moved the court to set aside the judgment on the verdict herein as to the defendants, P. Taylor, administrator of the personal property of the estate of the said J. P. Moreland, deceased, to both of which motions the defendants object; and, the court being duly advised, it is ordered that said judgment be, and the same is, set aside as said Taylor, administrator, and said plaintiff, which is as follows: 'State of Kentucky, County of Daviess—act.: This J. Quint Haynes, states that he is the president of the Citizens' Savings Bank of Moreland, Ky., and that the bill of exchange drawn by J. P. Moreland upon and payable by S. V. Walden and indorsed by T. W. McAtee, for one thousand dollars, dated October 10, 1892, and due sixty days after date, on by said bank in the Daviess circuit, in common-law action number 11,300, against the Citizens' Savings Bank, Plaintiff, against Walden, J. P. Moreland, and T. W. McAtee, Defendants, together with the sum of cost of protest, amounting to one thousand and two and  $\frac{24}{100}$  dollars, is a just debt in its favor and against the estate of said J. P. Moreland, who is now deceased, as well as against the said S. V. Walden and T. W. McAtee, and has never, to the knowledge or belief, been paid, and there is no offset or discount against the same, or any usury, beyond nine and one-tenth per cent, embraced therein. In fact, the amount says the usury embraced in said bill will not amount to as much as the amount mentioned, nine  $\frac{27}{100}$  dollars, but the said bank is willing to concede that amount and that said bill may be purged off to the amount of the said sum of nine and  $\frac{27}{100}$  dollars. J. Quint Haynes, subscribed and sworn to before me by J. Quint Haynes, this 14th day of November, 1895, H. W. Baker, N. P. D. C. Ky.,—is a bill to be filed, to which the defendants object, and thereupon, on the further motion of the plaintiff, to which the defendants object, is adjudged by the court that the plaintiff recover of the defendant E. P. Taylor, administrator of the personal property of the estate of J. P. Moreland, deceased, the sum levied of assets in his hands unadmitted, the sum of nine hundred and ninety and  $\frac{27}{100}$  dollars, with six per cent annual interest thereon from the 13th day of July, 1892, until paid, and its cost and expenses expended, the said sum being the sum of the verdict of the jury in plaintiff's favor herein after crediting the amount of said verdict by nine and  $\frac{27}{100}$  dollars of usury, shown by the affidavit of J. Quint Haynes aforesaid to be embraced

claim sued on herein, and for the amount of which said verdict was rendered; to which the said Taylor, administrator, and the defendants Walden and McAtee, except. And thereupon plaintiff filed a remitter remitting nine and  $\frac{87}{100}$  dollars of the judgment herein against the defendants Walden and McAtee, and it was thereupon ordered and adjudged that nine and  $\frac{87}{100}$  dollars of said judgment against said Walden and McAtee be, and the same is now, remitted; to all of which the defendants object and except. The defendants except, not to setting aside the judgment, but consent to that; but they, and each of them, except to entering this judgment instead of the one in pursuance to the verdict of the jury, and except also to the filing of the affidavit referred to, and the verification of the demand after verdict and judgment." Afterwards, and on the same day, the following order was entered: "The defendants, S. V. Walden, T. W. McAtee, and E. P. Taylor, administrator of J. P. Moreland, this day filed grounds for a new trial, and moved the court to set aside the verdict of the jury and judgment of the court, and grant a new trial herein, to which plaintiff objects; and the court, being advised, overruled the motion, to which the defendants except, and pray an appeal to the court of appeals, which is granted." The grounds referred to in the foregoing order are as follows: "The defendants, S. V. Walden, E. P. Taylor, administrator of J. P. Moreland, and T. W. McAtee, move the court for a new trial herein on the following grounds in addition to those already filed: (1) On November 15, 1895, the plaintiff, for the first time, filed the affidavit of its president, J. Quint Haynes, in which an attempt is made to purge the bill sued on of usury of \$9.87, which, in said affidavit, is admitted to be embraced in said bill as usury. (2) The court erred in entering the judgment of November 15, 1895. (3) The court erred in permitting the said affidavit of J. Quint Haynes to be filed. (4) The court erred in purging said judgment of usury, or in purging it of only \$9.87, without giving the defendants an opportunity of contesting the amount of usury in the demand sued upon. (5) The court erred in determining the amount of usury after the verdict of the jury and the judgment of the court upon the ex parte affidavit of plaintiff. (6) The court erred in remitting \$9.87 of said judgment against the defendants Walden and McAtee. (7) The court erred in determining that \$9.87 was all the usury embraced in the demand sued upon."

Counsel for appellants contend that the judgment is erroneous for the reason the affidavit as required by the statute was not filed before judgment, and before the order of revivor was made, and calls attention to the fact that opposition to the order of revivor was made at the time, and the record

shows that a motion was made to set same aside after it was entered. It is also contended that the court had no right, after the verdict of the jury, and rendition of the judgment, to permit the filing of the affidavit, and set aside the judgment, and then re-enter the order remitting the amount shown by the affidavit to be usury. It is contended that the court erred in refusing to allow appellant McAtee to file the amended answer February 17, 1894, and that the court erred in striking from the files the amended answer filed on a rule day,—28th of May, 1894; and also complains of a similar order regarding the amended answer filed on a rule day,—September 24, 1894. These orders, as before shown, were made in October, 1895. It is also insisted that the motion to refile these answers should have been sustained. The power of the court to strike these answers from the files at the time the orders were made is also questioned. Appellants further contend that, as no written protest of any kind of said bill was made until the day next after its maturity, the protest filed with the petition is, in no event, valid, and is not sufficient, even if notice had been given, to charge the drawer and indorser. Numerous errors are complained of as to the admission and rejection of evidence, and it is earnestly insisted that the court erred in refusing the instructions offered by appellants, and in giving those that were given.

The instructions offered by appellants are as follows: "(1) Although the jury may believe from the evidence that defendant actually discounted the bill sued on to plaintiff bank, and got credit by the proceeds, yet, if they shall also believe that before and at the time it did so W. H. Moore, cashier of plaintiff bank, knew that the bill had been drawn by J. P. Moreland and indorsed by T. W. McAtee under an agreement between them and Walden it was to be used in renewal of the balance of a bill for \$1,600 at the First National Bank of Owensboro, on which said Moreland and McAtee were already bound as drawer and indorser, respectively, for said Walden, then the plaintiff was not an innocent purchaser of said bill, and the jury should find for defendants J. P. Moreland and T. W. McAtee. Refused. (2) Although the jury may believe from the evidence that plaintiff actually discounted the bill sued on, and that Walden was duly credited with the proceeds thereof, yet, if they shall also believe that it discounted said paper without the request and against the consent of Walden, then they should find for the defendants, although they may believe that plaintiff bank had no knowledge or notice of the purpose for which the said bill was made. Refused. (3) If the jury believe from the evidence that W. H. Moore, cashier of plaintiff, knew, or had notice, before he discounted the bill (if he did discount it), that it had been drawn and indorsed by J. P. Moreland and T. W. McAtee under an agree-

ment between them and Walden that the paper was to be used, as supposed in the first instruction, in renewing a balance of a \$1,600 bill at the First National Bank, plaintiff is bound by the knowledge or notice of its cashier, Moore, and the jury in that case should find for defendants Moreland and McAtee. Refused." Thereupon the defendants moved the court to give the four instructions in paper marked "X. Y. Z.," and, the court being advised, refused to give such instructions, or either of them, to which defendants excepted. Said instructions are as follows: "(1) If the jury believe from the evidence that the bill in suit was drawn by J. P. Moreland and indorsed by T. W. McAtee, for a specific purpose, and that the plaintiff bank, through its then cashier, W. H. Moore, knew this fact, or that the circumstances at the time it procured it, or got possession of it, were such as to excite the suspicion of a prudent and careful man about to receive a note or bill to render inquiry necessary, and if the plaintiff failed to make such inquiry, and upon such inquiry could have ascertained said fact, and the means of ascertaining were reasonable to it, it was guilty of negligence, and the jury should find for the defendants J. P. Moreland's administrator and T. W. McAtee. And if the said paper was knowingly diverted by said bank through its then cashier, W. H. Moore, from the purpose for which it was given, without the knowledge, consent, or acquiescence of S. V. Walden, they should find for the said Walden. Refused. (2) If the jury believe from the evidence that the bill in suit was discounted by the plaintiff bank, and the proceeds arising from the discount were credited on paper held by said bank against S. V. Walden, or upon which Moreland and McAtee were not bound, and that said paper was given for a specific purpose, different from that made use of it by the plaintiff bank, and the use of it by the plaintiff bank was without the knowledge or consent of Moreland or McAtee, they must find for the defendants Moreland's administrator and McAtee. Refused. (3) If the jury believe from the evidence that the plaintiff bank, through its then cashier, W. H. Moore, knew that the bill in suit was given for the purpose of renewing it—the \$1,600 bill in the First National Bank—to the extent of \$1,000, or the circumstances were such as to raise the suspicion of a prudent and careful man about to receive a bill so as to render inquiry on his part necessary, and the plaintiff failed to make such inquiry through its said cashier, or any other officer, they ought to find for the defendants Moreland's administrator and McAtee. Refused. (4) If the jury believe from the evidence that the plaintiff bank purchased the bill in suit in good faith, and did not knowingly divert it from the purpose for which it was given, and the circumstances were such as not to raise a suspicion so as to place it upon inquiry, as in the in-

structions above given, they can find for the plaintiff only the amount actually paid for such bill. Refused." Thereupon the defendants moved the court to instruct the jury as in paper marked "T. W. M.," and the court, being advised, refused to give said instruction. Said instruction reads as follows: "T. W. M. On motion of defendants J. P. Moreland's administrator and T. W. McAtee, the court instructs the jury that, if they believe from the evidence that the bill in suit was drawn by Moreland and indorsed by McAtee for the purpose of renewing the \$1,000 bill in the First National Bank to the extent of \$1,000, and that the plaintiff bank, through its then cashier, W. H. Moore, knew this fact at the time it is claimed that it was discounted in said bank, or previous thereto, or the circumstances were such as to raise a suspicion so as to render inquiry necessary, and the said bank carelessly and in bad faith refused to make such inquiry, and for the fraudulent purpose of cheating Moreland as drawer and McAtee as indorser, and to appropriate the proceeds arising from the bill in suit to paper held by it against S. V. Walden, they should find for the defendants Moreland's administrator and T. W. McAtee. Refused."

The instructions given are as follows: "The court, on its own motion, instructs the jury as in paper marked 'No. 1.' to each of which the defendants and plaintiff then and there excepted. (1) The court instructs the jury that, if they believe from the evidence that plaintiff, in due course of its business, and for value, acquired or became the owner of the bill of exchange sued on in this action before the same was due, and that W. H. Moore, a notary public in and for Daviess county, Ky., on the 12th day of July, 1892, on the day when said bill became due, at the instance of plaintiff, presented the same at the First National Bank of Owensboro, where the same was made payable, during the business hours of said day, and demanded payment of the person or officer in charge of said bank, who refused to pay same, and that on said day said Moore, as notary public, protested said bill for nonpayment, and on said day deposited a notice in the post office at Owensboro, addressed to J. P. Moreland, Owensboro, Ky., and one addressed to E. P. Taylor, trustee of J. P. Moreland, Powers, Ky., and such post offices were the offices where the said Moreland and Taylor commonly received their mail, and delivered a notice to T. W. McAtee, which notices informed the said parties of the dishonor of said bill by nonpayment, and that they would be looked to for payment, they should find for plaintiff the amount of said bill, with interest from the time same was due at 6 per cent. per annum till paid, and \$2.24 protest fee, unless as hereinafter instructed. (2) The court instructs the jury that the certificate of protest of a notary public under the seal of his office is, by the law of this state, prima facie evidence of the truth of the facts



therein recited, and that they occurred as stated. But, if the jury believe from the evidence that the name of the Citizens' Savings Bank was inserted by mistake in the certificate in this case, when it was intended and should have been the First National Bank of Owensboro, and that the demand of payment of said bill was in fact made at said First National Bank, they should so find on this subject for plaintiff. (3) The court further instructs the jury that, if they believe from the evidence that the bill of exchange in suit was made by defendants Moreland and McAtee as accommodation drawer and indorser for Walden, and by agreement between them and S. V. Walden, and by agreement between said Walden and P. T. Watkins, cashier of the First National Bank of Owensboro, Ky., for the purpose of renewing \$1,000 of a bill in said First National Bank for \$1,600, on which the said Moreland and McAtee were drawer and indorser, and that, after being signed and made as aforesaid, said bill was taken by said Walden to the plaintiff bank and to W. H. Moore, in order to have him cancel certain insurance policies on the life of said Walden to procure \$600 to pay to the said First National Bank of Owensboro, and Walden informed the said Moore of the agreement between said Moreland and McAtee and said bank and himself, and showed him said \$1,000 bill, and the said Moore took and retained and discounted said bill, and wrongfully appropriated said bill to the use of plaintiff, or placed it to Walden's credit, against the will and consent of said Walden, Moreland, and McAtee, and refused to surrender it, although demanded of him, they should find for defendants. (4) The court further instructs the jury that, if they believe from the evidence that W. H. Moore, cashier of plaintiff bank, wrongfully procured possession of said bill, with notice and knowledge of an agreement between Walden and the First National Bank as aforesaid, and with knowledge that Moreland and McAtee were accommodation drawer and indorser thereon, and had become such for the purpose of renewing the \$1,000 bill in the First National Bank of Owensboro to the extent of \$1,000, they should find for defendants. (5) The court further instructs the jury that, although they believe from the evidence that the bill sued on was drawn by J. P. Moreland, and indorsed by T. W. McAtee for the accommodation of S. V. Walden, with the understanding and agreement between them and Walden that the same was to be discounted at the First National Bank of Owensboro, or to be taken by said bank in renewal of \$1,000 of a \$1,600 bill on which they were bound for said Walden in said First National Bank, plaintiff has the right to said bill, and its rights are not affected by such facts, unless they believe, from the evidence, plaintiff, or its cashier, had notice of said agreement at the time of discounting it, and discounted it, and the bill was applied as payment on pre-existing debt.

of said Walden to plaintiff; in which event they should find for defendants."

Counsel for appellants ably and at great length argue in support of their contentions, while counsel for appellee in like manner combat the arguments and contentions of appellants. The exceptions and objections to the admission and rejection of testimony in this case are so numerous that it is impracticable to notice the same in detail. A number of the errors (if such they were) complained of were immaterial, and will probably not occur again. The entries on the books of the bank can only be proven by the party making the entries, or, in case of the death or absconding of the party making them, by some one acquainted with the handwriting of the party making the entries; and all testimony otherwise admitted by the court was erroneously admitted. It may be further said that the entry on the teller's blotter could only be proven by the party making the entry, unless the party making same has died or absconded; and no evidence except in accordance with the foregoing should have been admitted. The witness should have been allowed to state the amount of appellant Walden's indebtedness to the Citizens' Savings Bank, June 16, 1892, and also that J. P. Moreland was drawer upon other bills for Walden on the 16th of June, 1892, and also should have been allowed to state whether or not W. H. Moore, cashier of plaintiff bank, on the 16th day of May, 1892, and before that date, was a life insurance agent. The witness should have been allowed to state whether Walden had other paper in bank at the date of the respective credits to it,—June 4, 1892, and June 18, 1892,—and, if so, to give the date of each paper, the drawer and indorser thereon, and what credits appeared thereon, and the date of each credit, and when these bills matured. The conversation between W. H. Moore and Harris, Jr., was not competent, and should have been excluded. The conversation detailed by W. H. Moore with A. M. C. Simmons should not have been admitted. If Isaac N. Parrish knew the form of notice that Moore sent (if any he sent) to Moreland and McAtee, it would have been proper to have let him so state, but it was not competent to let him state the form of notice used by Moore at the time of the protest. Unless the witness knew that the receipts were executed by the proper officer, they should not have been read to the jury. The defendants should have been allowed to prove that at the time of the alleged discounting of the bill Walden was largely indebted to the plaintiff bank. The witness should have been allowed to answer the fourth question on page 186 of the record. The witness should have been allowed to answer the fourth question on page 194, as to the signature to the notarial certificate. The witness should have been allowed to answer the fifth question on page 201. The last

question on page 208 should have been allowed to be answered, and so should question 1 on page 209. The fifth question on page 214 should have been answered, and second question on page 215 should have been answered. Question 1 on page 216 should have been permitted to be answered. The motion of defendants to exclude from the jury all the evidence in regard to the payment of the \$1,600 bill due the First National Bank should have been sustained. The third question on page 241, McAtee should have been allowed to answer, as to what the purpose of indorsing the bill was. The fourth question on page 244 should have been answered, and so should have question 5 on same page. Question 1 on page 245, as to the inquiry by McAtee of Moore concerning this bill, or any other paper on which he was bound at that bank, should have been answered. The appellants should have been allowed to prove whether or not the cashier, W. H. Moore, was a stockholder in plaintiff bank.

As to the contention of appellants in regard to the setting aside the judgment, and allowing the affidavit and remittitur to be filed, and then re-entering the judgment, it is sufficient to say that upon the return of this case the defendants will be entitled to litigate the question of interest, offsets, and discount. It is therefore unnecessary to determine as to the legality or propriety of the orders complained of.

As to the actions of the court in refusing to allow the amended answers tendered by McAtee to be filed, it may be that there was no abuse of discretion in refusing to allow same to be filed at the time they were first offered, but, inasmuch as the jury failed to agree, and the cause was continued, the three amended answers filed at rule days on May 28, 1894, September 24, 1894, and July 22, 1895, should not have been stricken from the files, but allowed to remain; and the court also erred in refusing the motion of defendants to refile these amended answers.

The first, second, and third instructions asked by defendants should have been given. Instruction No. 3 given by the court was erroneous in this: that, in order to exonerate the defendants Moreland and McAtee, the jury were required to believe that there was an agreement with P. T. Watkins, cashier of the First National Bank of Owensboro, to the effect that said bill was to be used in renewal of a part of the \$1,600 note on which said Moreland and McAtee were drawer and indorser. If Moreland and McAtee became the drawer and indorser for the accommodation alone of Walden under an agreement between them that the bill was to be used for the purpose of renewing in part the \$1,600 bill due to the First National Bank of Owensboro, and that fact was made known to Moore, the cashier of plaintiff bank, before he discounted the bill (if he did discount it), Moreland and McAtee

are not liable to plaintiff for the amount thereof, and it is of no importance whether Watkins, cashier of the First National Bank, was a party to said agreement or not. Instruction 4 is erroneous for the same reason—that it makes the exoneration of the defendants depend upon an agreement with the First National Bank. For the errors indicated, the judgment appealed from is reversed, and the cause remanded, with directions to award the appellants a new trial and for proceedings consistent herewith.

#### HENRY v. STATE.

(Supreme Court of Arkansas. Dec. 18, 1895.)

##### INTOXICATING LIQUORS—PLACE OF SALE.

Evidence that a distiller shipped liquor to a man in Missouri is no evidence that the sale of the liquor was made at the place from which it was shipped.

Appeal from circuit court, Howard county. Will. P. Feazell, Judge.

Dave Henry was convicted of a violation of the liquor law, and he appeals. Reversed.

Jas. D. Shaver, for appellant. E. B. Ketchum, worthy, Atty. Gen., for the State.

BUNN, C. J. The appellant, Dave Henry, was indicted, at the February term, 1897, by the Howard circuit court, for the crime of violating the liquor laws; and, omitting merely formal parts, the indictment reads as follows: "The grand jury of Howard county, in the name of and by the authority of the state of Arkansas, accuse Dave Henry of the crime of violating the liquor law, committed as follows, to wit: The said Dave Henry, in the county and state aforesaid, on the 13th day of July, A. D. 1896, did unlawfully sell ardent, vinous, malt, fermented, spirituous, and intoxicating liquors, without having obtained a license from the court of the county aforesaid authorizing such sale." The evidence on the part of the state was to the effect that the defendant was the owner and operator of a distillery located about three-fourths of a mile from Nashville, in Howard county; that in the town of Nashville was located Central College, an institution of learning, within five miles of which the sale of liquor is prohibited by special act of the general assembly approved March 10, 1891; that in February, 1896, one quart of whisky was sold to state witness, by some one to the purchaser unknown, and who the jury might or might not have found was one of the persons engaged about the distillery; and that the sale, under the circumstances, may or may not have been such as the defendant was in some way connected with or responsible for. And further, the evidence shows that the defendant, at times during the year 1896, shipped whisky by rail from the depot of the Arkansas & Louisiana Railway, at Nashville, to persons in Texas and other points.

Texas, and also to one Little, in the state of Missouri; and the defendant, as a witness, said he supposed the depot at Nashville was within Howard county. On the part of the defense, the evidence shows that defendant's distillery was a government registered distillery, and that all the liquor he manufactured he was required to deposit at once in the bonded warehouse, and was not permitted to sell any except upon withdrawal permits and the payment thereon of the federal license, and was not permitted to have the key of the warehouse, but the federal officer kept it; and there was evidence showing that the defendant had observed the requirements of the federal law.

The court, over the objections of the defendant, gave two instructions asked by the state, and also gave two asked by the defendant, about which two given at the instance of the defendant there is no controversy. The second instruction given for the plaintiff is as follows, to wit: "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, within twelve months before the finding of the indictment, did sell whisky to Little in Missouri, and deliver the whisky on the train at Nashville, to be shipped to the said Little, this would be a sale to Little at Nashville, and he would be guilty, provided they find the depot is in Howard county, and within ten miles of Central College." In the first place, there was no evidence upon which to base this instruction; for while the evidence showed that defendant had shipped whisky from Nashville to Little, in Missouri, there is none that he sold whisky to Little, and shipped to him in pursuance of such sale. In the next place, there does not appear any order for the purchase of the whisky from Little to the defendant; and, if the shipment was made as part of a sale, there is nothing to show us whether the carrier was the agent of the seller or the purchaser in carrying and delivering the whisky. Little may have been a mere agent of defendant, and not a purchaser at all, for anything that appears in evidence to the contrary. The giving of said second instruction on the part of the plaintiff was error; and, as we cannot see what influence it had on the jury in arriving at their verdict, the error is a reversible one. Judgment reversed, and cause remanded for a new trial.

#### HENRY v. STATE.

(Supreme Court of Arkansas. Dec. 18, 1897.)

INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

1. Proof of a sale of liquor is not sufficient to support a verdict of guilty, where there is no evidence connecting the defendant with it.

2. An instruction which attaches importance to particular facts is error.

Appeal from circuit court, Howard county; Will P. Feazell, Judge.

Dave Henry was convicted of a violation of the liquor law, and he appeals. Reversed.

Jas. D. Shaver, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

BATTLE, J. Dave Henry was indicted for, and convicted of, selling liquor without license. A sale of liquor was proved, but there was no evidence adduced tending to prove that Henry participated in it, or was connected with it, or was interested in it, in any manner whatever, and he was, consequently, unlawfully convicted.

An instruction given by the court to the jury is objected to because of the importance it attaches to particular facts. As the cause will be remanded, it is sufficient to say, upon this point, that the court, in its instructions, should not assume facts to be true (*Polk v. State*, 38 Ark. 117, and *Jones v. State*, 59 Ark. 417, 27 S. W. 601); should avoid telling the jury "what degree of importance should be attached to a particular kind of evidence, or to the absence of it" (*Polk v. State*, 45 Ark. 165, and *Railway Co. v. Lyman*, 57 Ark. 512, 22 S. W. 170); and should not "point out what inferences may or should be drawn from particular facts in proof" (*Haley v. State*, 49 Ark. 147, 4 S. W. 746; *Bing v. State*, 52 Ark. 263, 12 S. W. 559; *Reed v. State*, 54 Ark. 621, 16 S. W. 819; and *Blankenship v. State*, 55 Ark. 244, 18 S. W. 54); "and the judge should not express or intimate an opinion as to the credibility of a witness, or as to controverted facts, for the jury are the sole judges of fact and the credibility of witnesses, and the constitution expressly prohibits him from charging them as to the facts" (*Sharp v. State*, 51 Ark. 147, 10 S. W. 228; *Stephens v. Oppenheimer*, 45 Ark. 492).

The judgment of the circuit court is set aside because the verdict of the jury was not sustained by any evidence, and the cause is remanded for a new trial.

#### BURNS et al. v. THOMPSON.

(Supreme Court of Arkansas. Dec. 11, 1897.)

SCHOOL DISTRICT—MEETING OF DIRECTORS—NOTICE.

In an action to recover for service rendered a school district pursuant to an agreement with two of the three directors, where it was shown that notice of the meeting at which the agreement was made was not given in writing, stating the time, place, and purpose of the meeting, the meeting was not a corporate meeting; and the contract, as executed, was invalid so far as the corporation is concerned.

Bunn, C. J., dissenting.

Appeal from circuit court, Johnson county; Jeremiah G. Wallace, Judge.

Action by J. H. Thompson, as next friend of R. E. Thompson, against Sam J. Burns, Sam Robins, and Thomas Brown, as directors of school district No. 41 of the county of Johnson. From a judgment in favor of

plaintiff, defendants appeal. Reversed and dismissed.

This is an appeal from a judgment for \$68.50, against school district No. 41 of the county of Johnson, in favor of the appellee, for services rendered by appellee in teaching a summer school of two months' duration, under a contract therefor made by two of the three school directors of said district, at a called meeting of the board of school directors of said district, one of the three directors composing the board being absent from the meeting. The evidence in the case tends to show, on the one hand, that the absent director Brown was, on the day before the meeting, notified, verbally, of the time, the place, and the purpose of the meeting, while Brown, the member of the board who did not attend the meeting, testifies that he was not notified of the meeting.

E. B. Kinsworthy, Atty. Gen., for appellants. Jordan E. Cravens, for appellee.

HUGHES, J. (after stating the facts). The question to be decided in this case is: "Was the meeting a lawful meeting of the board of school directors of district 41?" "Was the notice of the meeting sufficient?" The school directors could act only as a board, and could not bind the district by their action as individuals. *School Dist. v. Bennett*, 52 Ark. 511, 13 S. W. 132. It is undoubtedly true that the corporate authority must be exercised by the proper body. "The members of the board of directors of a common school district are not only not the municipal corporation, but are not even a corporation." The "affairs of a corporation must be transacted at a corporate meeting." 1 Dill. Mun. Corp. (4th Ed.) §§ 259, 274. There is no question that notice of the time and place of a called meeting must be given, if practicable, to every member who has a right to vote. 1 Dill. Mun. Corp. § 263; *School Dist. v. Bennett*, 52 Ark. 511, 13 S. W. 132. "All corporators are presumed to know of the days appointed by the charter, usage, or by-laws for the transaction of particular business, and hence no notice of such meeting for the transaction of such business is necessary, or for the transaction of the mere ordinary affairs of the corporation on such days; yet, if it is intended to proceed to any other act of importance, a notice is necessary, the same as at any other time." 1 Dill. Mun. Corp. § 262. If the charter or the statute provides a method by which the notice shall be served, its provisions must be strictly obeyed. 1 Dill. Mun. Corp. §§ 263, 268. By the English municipal corporation act, "due notice of the time and place of a corporate meeting is, by the English law, essential to its validity, or its power to do any act, which shall bind the corporation" (1 Dill. Mun. Corp. § 262); and the "subject of meetings, stated and special, the notice and summons required, are

made matters of express regulation" (Id. 263). So, many of the American states have regulated by statute the manner of giving notice, and it is generally required, it seems by these statutes that the notice must be in writing, and the courts in this country seem generally, so far as we know, to have followed, in this behalf, the rules adopted in England. 1 Dill. Mun. Corp. § 262. Our statute is silent upon the question whether a notice of the called meeting of a municipal corporation shall be in writing. But we are of the opinion that, when an official notice is required to be given of such a meeting, it is contemplated that it shall be in writing, and that it shall state the time, place, and purpose of the meeting. The notice of the meeting at which the contract sued upon in this case was made was not so given, and the meeting was therefore not a corporate meeting; and the contract is invalid so far as the corporation is concerned. We think this case illustrates the necessity of strictness and certainty in regard to the notice of called meetings of municipal corporate bodies, which are the representatives of the interests of, and the agents to transact business for the public, in matters committed to their charge. The judgment is reversed, and the cause is dismissed.

BUNN, C. J., dissents.

MONTICELLO BANK v. SWEET et al.  
(Supreme Court of Arkansas. Dec. 18, 1897.)

MATERIAL MAN'S LIEN—PRIORITY.

Where certain lands had been mortgaged, and, two days after the mortgage was filed for record, lumber was furnished to the owner of the lands for the building of a barn on the lands, the lien of the mortgage is superior to the lien of the vendor of the lumber, both as to the land and as to the barn.

Appeal from circuit court, Desha county, John M. Elliott, Judge.

Action by Sweet & Trippe against the Monticello Bank to enforce a lien. Judgment for plaintiffs. Defendant appeals. Reversed.

Wells & Williamson, for appellant. F. M. Rogers, for appellees.

WOOD, J. On the 19th day of October, 1894, appellees furnished lumber to one S. M. Courtney for the building of a barn on lands which S. M. Courtney and wife had prior to that time, mortgaged to appellant. The mortgage was filed for record March 1, 1894. Appellees, to fix their lien, filed a verified account with the clerk of the Desha circuit court January 4, 1895. The lands were sold, under power of sale contained in the mortgage, March 19, 1895; and appellant purchased same, paying therefor more than two-thirds of the appraised value. Appellees brought this suit June 15, 1895, against Cour

ney and the bank, to enforce their lien. The bank claimed that its lien under the mortgage was superior to that of appellees. At the trial, appellees waived all claim of lien on the land. Judgment was rendered against Courtney for the debt due appellees, and same was declared a lien on the land superior to the lien of the mortgage, and the bank appealed.

The question is, which had the superior lien? The rule generally obtains "that fixtures attached to the realty after the execution of a mortgage of it become a part of the mortgage security, if they are attached for the permanent improvement of the estate, and not for a temporary purpose, or if they are such as are regarded as permanent in their nature." *Bank v. Baumeister*, 87 Ky. 6, 7 S. W. 170; *Crane v. Brigham*, 11 N. J. Eq. 29; *Winslow v. Insurance Co.*, 4 Metc. (Mass.) 806; *Potter v. Cromwell*, 40 N. Y. 287; *Wight v. Gray*, 73 Me. 297; *Wood v. Whelen*, 93 Ill. 153; *Frankland v. Moulton*, 5 Wis. 1; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21; 1 Ping. Mortg. § 403; 1 Jones, Mortg. § 433. It is said in *Goff v. O'Conner*, 16 Ill. 422, that "houses, in common intendment of the law, are not fixtures, but part of the land." Without going thus far, it sufficeth to say that, in the absence of any express or implied agreement to the contrary, a barn must be regarded as permanently attached to the freehold. The nature, use, and purpose of such an improvement are to permanently benefit the estate to which it is annexed. *Bank v. Kercheval*, 65 Mo. 682. See, on Fixtures, *Choate v. Kimball*, 56 Ark. 55, 19 S. W. 108. Therefore the mortgage to the bank included the land and all permanent annexations thereto made either before or after its execution. Such being the effect of the mortgage contract between the bank and Courtney, no subsequent law could provide for the creation of a lien by the mortgagor to a third party that would defeat the lien of the mortgagee, without destroying vested rights, and impairing the obligation of contracts. It follows that the priority of lien in this case depends upon the law concerning liens for materials furnished, as it existed at the time of the execution of the mortgage. At that time one who furnished materials for a building had a lien on said building, and the land upon which it was situated, for said materials, to be preferred to all other liens and incumbrances attached to or upon such building and lands, made subsequent to the commencement of such building. *Sand. & H. Dig.* §§ 4731, 4737. The mortgage lien upon the land was prior to the commencement of the building. It covered the building coetaneously with its commencement, and not subsequently thereto. At the time the materials were furnished and the building was commenced, the mortgagor had no interest in the land that would give him the right, without the knowledge and consent of the mortgagee, to incumber same with liens upon

buildings, in favor of third parties, that would take precedence of the rights of the mortgagee. "The title to real estate would be infinitely perplexed if one person owned the structure and another the land." *Meyer v. Berlandi* (Minn.) 40 N. W. 513. The court erred in its declarations of law. Reversed, and judgment entered here for appellant.

#### SCHOOL DIST. NO. 14 v. SCHOOL DIST. NO. 4.

(Supreme Court of Arkansas. Dec. 11, 1897.)

#### MANDAMUS—JUDGMENT—APPEAL—BILL OF EXCEPTIONS.

1. A motion for a new trial and a bill of exceptions are, under Rev. St. p. 532, § 10, necessary to be filed in a mandamus proceeding to enable the supreme court to review a decision of the circuit court, whether the judgment of the circuit court was based upon an agreed statement of facts or otherwise, under the same circumstances, and for the same purpose, as in ordinary actions.

2. Where the court in mandamus ordered the directors of a school district to issue a warrant, but did not require them to specify the fund upon which the warrant was to be drawn, as required by statute, the cause will be remanded, with instruction to amend the judgment so as to require the directors of the school district to specify in the warrant that it should be paid out of any funds not specifically appropriated, unless there be a fund in the county treasury lawfully set apart for the payment of such warrants; in that event, to specify such fund in the warrant.

Appeal from circuit court, Columbia county; Charles W. Smith, Judge.

Petition for mandamus by school district No. 4 against school district No. 14. Judgment for plaintiff, and defendant appeals. Remanded.

Gaughan & Sifford and J. Y. Stevens, for appellant.

BATTLE, J. On the 13th day of March, 1890, school district No. 4 recovered a judgment in the Columbia circuit court against school district No. 14 for the sum of \$165.65 and costs. The directors of the latter district refused to draw a warrant on the county treasurer for the amount due on this judgment. On the 16th of August, 1893, the former filed a petition in the Columbia circuit court for a mandamus to compel the directors of the latter to issue a warrant in its favor for the amount of the judgment. On the 12th of September, 1893, the defendant filed its answer, in which, among other things, it alleged "that there are no funds in the hands of the treasurer of Columbia county subject to the payment of plaintiff's claim, belonging to defendant." After this the court directed the clerk to issue an alternative writ of mandamus, commanding defendant's directors "to pay said judgment and costs," or show cause why they should not do so. The writ was accordingly issued, and the directors responded, alleging, in part, as defendant had already done in its answer. The cause was heard upon the complaint of the plaintiff and the answer of the defendant and an agree-

statement of facts, and the court made the alternative writ final and perpetual, and ordered the clerk to issue a peremptory writ of mandamus, commanding the directors of school district No. 14 "to make out, sign, and deliver to the plaintiff, school district No. 4, the warrant of said district No. 14, drawn on the treasurer of Columbia county, for the full amount of said judgment, and interest up "to date," and the costs of the "suit."

There was an agreed statement of facts, marked "A," filed. It is stated in the judgment in this proceeding that the cause came "on for hearing on the complaint of the plaintiff and answer of the defendant and agreed statement of facts, marked 'A,' being all the evidence in the case." There was no order of the court making the statement a part of the record. No bill of exceptions nor motion for a new trial was filed.

An appeal was granted, on application, to the defendant by the clerk of this court.

Is it necessary to file a bill of exceptions or a motion for a new trial in a mandamus proceeding for the purpose of enabling the supreme court to review the decisions or judgments of the circuit court on appeal, where the judgment was based upon an agreed statement of facts, as in this case?

"Originally," says Mr. High, "the writ of mandamus was purely a prerogative remedy, and to this day it preserves in England some of its prerogative features. It was called a prerogative writ from the fact that it proceeded from the king himself, in his court of king's bench, superintending the police and preserving the peace of the realm, and it was granted where one was entitled to an office or function, and there was no other remedy."

"At common law," says the same author, "upon a suggestion under oath, by the party injured, of his own right, and the denial thereof, the usual practice was to issue a rule to show cause, directed to the respondent, and requiring him, within a certain time to show cause why a writ of mandamus should not issue. If no sufficient cause was shown, the writ itself was then issued, at first in the alternative form, to which the respondent was required to make return by a certain day, unless he chose to perform the act required. If he neither performed the act, nor made return within the time fixed in the alternative writ, the peremptory writ was then issued, commanding him absolutely to do the act in question; and to this writ no other return was allowed than a certificate of obedience to the mandate of the court." High, Extr. Rem. §§ 3, 500. "But," says Blackstone, "if he \* \* \* returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits, but will, for the present, believe him, and proceed no further on the mandamus. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injuries sustained, together with

a peremptory mandamus to the defendant to do his duty." 3 Bl. Comm. 110. There is no means of reviewing by appeal, writ of error or otherwise, a judgment granting or refusing a peremptory writ of mandamus. This was, however, changed by statutes passed in the British parliament.

The Revised Statutes of this state also make changes in the procedure, and provide that "When any writ of mandamus shall be issued, and return shall be made thereto, the party prosecuting such writ may demur, plead traverse all the material facts contained in such return, to which the officer, tribunal, person, or body corporate, making such return, shall reply, take issue, or demur, and such other proceedings shall be had therein, and in such manner for the determination thereof might have been had, if the person suing such writ had brought his action on the case for a false return." Rev. St. p. 532, § 3. "If an issue shall be joined upon such proceeding the same shall be tried by a jury, but if the other party should require a jury, then by the court." Id. § 4. "In case a verdict shall be found for the person suing out such writ, or if judgment be given for him upon demurrer or by default, he shall recover damages and costs in like manner as he might have done on such action on the case, and a peremptory writ of mandamus shall be granted to him without delay." Id. § 5. And that "appeals and writs of error may be taken to the supreme court from the decisions of the circuit court on writs of mandamus, as in other cases." Id. § 10.

The effect of the Revised Statutes was to consolidate the proceedings instituted by the writ of mandamus with the alternative writ of mandamus as it existed prior to the statute of 9 Anne, and to create an action in which the alternative writ served as a declaration or complaint, and the response to the same as the plea or answer. The issues of fact joined therein were triable by a jury, as in ordinary actions at law, and the judgment and decisions of the court on the same were made reversible by appeal or writ of error, as in other cases. Having no other provision as to the action that should be taken in order to enable the appellate court to review the decisions of the inferior court, those necessary for that purpose in ordinary cases become essential in this action. The adoption of the proceeding of appeal or writ of error as the mode of correcting the error of the inferior court, as in other cases, carried with it as an incident, and made essential the machinery necessary to put in motion and effect the proceeding adopted.

The Code of Practice in Civil Cases of this state made some changes. Defining the writ of mandamus, as treated in the chapter on "writs of mandamus and prohibition," to be the order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act or omit to do an act the performance or omission of which is enjoined by law." Code Civ. Prac. § 519 provides that writs of mandamus shall be

tained by motion, and that the applicant shall file a petition wherein he shall state the cause and ground of his application, and then give notice of his motion to the party against whom the mandamus is sought; that the defendant shall file an answer, wherein he shall state the reason why the writ should not be granted; and that "the court shall hear and decide all questions of law or fact arising in the motion." *Id.* § 517. Without specifying in what courts or proceedings it shall be necessary, it defines a new trial to be "a re-examination in the same court of an issue of fact, after a verdict by a jury or a decision by the court" (*Id.* § 371); and provides that "the former verdict or decision may be vacated and a new trial granted, on the application of the party aggrieved" (*Id.*), for certain causes named; and in a subsequent chapter and section declares that "the provisions of this Code shall apply to the courts of this state, though not expressly enumerated" (*Id.* § 796), and thereby made the motion for a new trial necessary in proceedings for a mandamus, under the same circumstances, as it is in ordinary actions at law, and required it for the purpose of filling the same office in both cases. *Aven v. Wilson*, 61 Ark. 287, 32 S. W. 1074.

A motion for a new trial and a bill of exceptions are, therefore, under the statutes of this state, necessary to be filed in proceedings for a mandamus, under the same circumstances, and for the same purpose, as it is in ordinary actions.

The agreed statement of facts upon which the case before us was heard was not made a part of the record by bill of exceptions or an order of the court. The reference to it in the judgment was not sufficient. *Lawson v. Hayden*, 18 Ark. 316; *Boyd v. Carroll*, 80 Ark. 527; *Smith v. Hollis*, 46 Ark. 17.

No motion for a new trial was filed. The agreed statement of facts did not render it unnecessary. *Smith v. Hollis*, 46 Ark. 17.

We cannot, therefore, notice any error, if any, committed by the court, which is made apparent only by the agreed statement of facts. An error, however, appears of record. The court, in ordering the directors of school district No. 14 (a special district including the town of Magnolia, as admitted in the proceedings) to issue a warrant, did not require or authorize them to specify the fund upon which the warrant is to be drawn. The statutes provide that all such warrants "shall specify the fund on which they are drawn, and the use for which the money is assigned." This is necessary for the information of the county treasurer, and to prevent funds collected for a specific purpose from being misappropriated. Funds raised and set apart under the law for a specific purpose should not be used for any other. *Const. art. 16, § 11; Sand. & H. Dig. §§ 7051, 7053, 7104.* To protect such funds, the court should have ordered the directors to specify in the warrant that it should be paid out of any funds not specifically appropriated, unless there be a fund in the county treasury

lawfully set apart for the payment of such warrants. In that event such fund should be specified in the warrant.

The cause is remanded, with instructions to the circuit court to amend its judgment so as to conform with this opinion.

#### BLUFF CITY LUMBER CO. v. BLOOM.

(Supreme Court of Arkansas. Dec. 11, 1897.)

HOMESTEAD—MORTGAGE—REDEMPTION—VESTED RIGHTS.

1. Under *Sand. & H. Dig. § 3718*, which requires the wife to join in the granting clause of a mortgage of a homestead, such a mortgage, in which the wife fails to join, is void, and the holder thereof is not a necessary party to a suit foreclosing a mechanic's lien on such homestead.

2. A mechanic's lien was foreclosed against a homestead, the mortgage thereon being invalid, because of failure of the wife to sign the same. The land was sold under a judgment recovered in the mechanic's lien suit. *Held*, that the interest of the purchaser in the land was not affected by a subsequent act of the legislature making valid conveyances of homesteads defective by reason of failure of the wife to sign the same.

3. An invalid mortgage on a homestead was rendered valid by the curative act of April 13, 1893. The land on which it was given had in the meantime been sold under a mechanic's lien. *Held*, that the effect of the act was only to render the mortgage valid as to the right of redemption which the mortgagor had after the sale of the land on foreclosure of the mechanic's lien, if exercised within one year from the date of such sale.

Appeal from chancery court, Jefferson county; James F. Robinson, Chancellor.

Action by Bloomah J. Bloom against the Bluff City Lumber Company to enforce equity of redemption to land sold under foreclosure of mechanic's lien. Judgment for plaintiff, and defendant appeals. Reversed.

In 1892, James Floyd was the owner of a lot in Taylor's addition to the city of Pine Bluff. In that year he became indebted to the Bluff City Lumber Company for materials furnished him by said company towards the erection of a building upon said lot; and on the 14th day of May, 1892, said company duly filed its lien for the price of said materials in manner as provided by statute. Afterwards, while said lien existed, Floyd mortgaged the lot to appellee, Bloomah J. Bloom, to secure payment of \$300 borrowed money, which is still due and unpaid. At the time the lien for price of materials was filed, and at the time this mortgage was executed, the lot, with improvements thereon, was the homestead of Floyd. His wife, Esther Floyd, relinquished her right of dower in said land to the mortgage, but did not join in the granting part of the deed. After this mortgage was executed and recorded, the Bluff City Lumber Company brought suit against Floyd, in the Jefferson circuit court, to enforce its lien for materials furnished, and recovered a judgment for the sum of \$197.87, and also condemning the property to be sold. The lot was sold under an execution upon the judgment, and purchased by the company for the

amount of its judgment and in satisfaction of the same. At the expiration of one year from the date of the sale, the land being unredeemed, the sheriff of Jefferson county executed and delivered a deed conveying the lot to said company. The appellee, Bloom, was not made a party to this action enforcing a lien for materials furnished. After the year for redemption had expired, she, in January, 1895, tendered to said company the full amount of the price paid by the company for the land at the sale under the execution, together with penalty, interest, and costs, which tender was refused. Shortly afterwards she brought this action in the Jefferson chancery court, asking to be allowed to redeem the land from the sale under the judgment aforesaid, and to foreclose her mortgage. Her right to redeem was denied and resisted by the appellant company. The chancellor held that, under the facts stated, she was entitled to redeem, and to enforce her mortgage against the land, and decreed accordingly.

Bridges & Wooldridge, for appellant.  
Austin & Taylor, for appellee.

RIDDICK, J. (after stating the facts). The question in this case concerns the right of the appellee, Bloomah J. Bloom, to redeem land of one James S. Floyd, sold under an execution upon a judgment against him in favor of the appellant, the Bluff City Lumber Company. The judgment was recovered against Floyd in a proceeding begun by said company to enforce a lien for materials furnished by it to Floyd for the erection of a house upon the land sought to be redeemed. Appellee bases her right to redeem upon a mortgage executed by Floyd to her after the lien for materials furnished had attached in favor of the appellant company. Now, as her mortgage was executed and recorded before the commencement of the action of the lumber company against Floyd, if such mortgage had been valid, she would have been a necessary party to said action; and, as she was not made a party, her rights would have remained unaffected by such action and the judgment therein. But, at the time her mortgage was executed, the land mortgaged was the homestead of Floyd, and his wife did not join in the granting clause of the deed, as required by statute in mortgages or other conveyances of a homestead. Sand. & H. Dig. § 3713. By reason of the failure to comply with the statute in this respect, the mortgage upon the homestead was, to quote the language of this court in a similar case, "a nullity, and left the title as though it had never been made." Pipkin v. Williams, 57 Ark. 242, 21 S. W. 433. The interpretation given to the statute by the above and other decisions has become fixed, and cannot now be changed. The mortgage of appellee being a nullity, she had, at the time the company commenced its action to enforce its lien for

price of materials furnished, no interest in the land, and it was unnecessary to make her a party to said action.

This action of the lumber company has been stated, progressed to trial and judgment; and, on the 14th day of February, the land was sold and purchased by the company in satisfaction of its judgment against Floyd. After this purchase by the company, the legislature, on the 13th of April, 1895, passed an act curing conveyances made defective by reason of the failure to comply with provisions of the statute referred to; but this curative act could not affect vested rights. At the time the act was passed, the appellant company, in pursuance of its judgment against Floyd, had purchased at the sale of the land under the execution issued thereon, and had become vested with the right to receive a conveyance of title to said land if not redeemed within one year. The sheriff offered and sold the land to the company that interest in the land, and the company acquired a property right, which could not be affected by a subsequent act of the legislature. *Barnitz v. Beverly*, 163 U. S. 16, 16 Sup. Ct. 1042; *Bank v. Gibson*, 269, 30 S. W. 39; *Greenwood v. B. & O. R. Co.*, 424, 34 Pac. 967; *Cooley, Cor.* (6th Ed.) 465. The only effect this act of 1893 had upon the rights of the appellee to this action was to render the mortgage of the appellee valid as to the interest in the land still held by Floyd at the time the act was passed, and this was the right to redeem from the sale at which the company purchased within one year from the date of the sale. But appellee failed to exercise this right within the time allowed. The year for redemption expired. The sheriff executed a deed conveying the land to the company, and it thus became the absolute owner of the land.

The appellee is said to be a poor person, not able even to pay for the printing of a brief of her counsel in this case; and, as a matter of fact would, if we were allowed any discretion in the matter, incline us to uphold the decree granting her the right to redeem under the law as determined by previous decisions of this court, the property in the land very much belongs now to the appellant company, and appellee has no right to redeem without its consent. The judgment in her favor should therefore be reversed, and her action should be dismissed, for want of equity.

HUGHES, J., did not participate in the decision of this case.

DE LOACH MILL MFG. CO. v. B. & O. R. CO. (Supreme Court of Arkansas. Dec. 2, 1895.)  
SALES—BREACH OF WARRANTY—DAMAGES—REVERSAL—OBJECTIONS—NEW TRIAL.

1. In a counterclaim for damages for the breach of plaintiff's warranty on the sale of a



defendant was not entitled to include a claim for damages growing out of the loss of certain timber which he had prepared for conversion into lumber, by reason of the failure of such mill to operate as warranted, where such damages were not contemplated at the time of such sale, as they were too uncertain and remote.

2. Under Sand. & H. Dig. §§ 5720, 5743, providing, in effect, that the objection to a complaint, or to an answer, that it does not state facts sufficient to constitute a cause of action, or a defense, as the case may be, is not to be considered as waived by any failure to make it, such question may be raised after verdict, on motion for a new trial, notwithstanding a previous ineffectual interposition of a demurrer, and of a motion to strike, on the same ground.

Appeal from circuit court, Phillips county; Hance N. Hutton, Judge.

Replevin by the De Loach Mill Manufacturing Company against J. C. Bonner. There were verdict and judgment in favor of defendant, and, a motion for a new trial having been overruled, plaintiff appeals. Reversed.

P. O. Thweatt, for appellant. John J. & E. C. Hornor, for appellee.

BUNN, C. J. This is an action of replevin by the appellant company against appellee, J. C. Bonner, for the recovery of one De Loach variable feed single saw mill, attachments and extras, and one 56-inch solid circular saw. It appears that the appellant company, domiciled at Atlanta, Ga., had its agents at Little Rock, this state, who on the 2d of December, 1891, sold to Bonner the property aforesaid, for the price of \$390, one-fourth paid in cash, and the remainder in equal installments, payable in 4, 8, and 12 months, respectively, for which Bonner executed and delivered his several promissory notes, and plaintiff reserved title in the property until these notes should be paid, and gave to Bonner a warranty in writing that the mill and machinery would properly do the work of one of that size and capacity, with proper management. The defendant failing and refusing to pay said notes when due, this action was brought under the reservation of title in the vendor to recover the property as stated. The defendant answered, admitting the sale, but, by way of counterclaim, set up the fact that the mill and attachments were not such as he had purchased, in this: that they failed to do the work which they had been represented as capable of doing, and that, therefore, there was a breach of the warranty; and that he had gone to a large expense in endeavoring to operate said mill, but without success, in putting up and taking down the same, and in paying freight that he would not have had to pay otherwise; and, finally, in the loss of 60,000 feet of oak timber, worth \$600, and 30,000 feet of gum timber, worth \$150, which he had purchased, cut, and hauled to the mill site, and which, by reason of the utter failure of the sawmill to do its work as aforesaid, became and was a total loss to him. To this part of the counterclaim plaintiff interposed its demurrer on

the ground that the claim for damages for the loss of the timber was too indefinite, uncertain, and remote for a counterclaim. The demurrer was overruled, and, without exceptions taken, the plaintiff filed its reply to the answer and counterclaim, concluding by moving the court to strike out the timber-loss portion of the same, because the same was too indefinite, uncertain, and remote as a defense by way of counterclaim. Without any disposition of this motion, except by implication, the parties went to trial, which resulted in judgment for the defendant in the sum of \$698. Plaintiff filed its motion to set aside the verdict and for a new trial on the following grounds: Because the court erred in compelling it to make the complaint more certain; because the court erred in overruling its demurrer to the counterclaim, and also in overruling its motion to strike out the item of loss of timber in the counterclaim; and because the verdict was contrary to the law and to the evidence, and to both the law and the evidence. The motion for new trial being overruled, plaintiff appeals.

On the trial it was admitted by the defendant that the plaintiff was entitled to the possession of the property sued for, and it was so adjudged, and the real and only controversy was over the matters of counterclaim set up by the defendant in his answer. The item of damages growing out of the loss of the timber was not a proper item to be taken into account when estimating the damages in this action, because, as claimed by plaintiff, such damages are too uncertain and remote; and, besides, the plaintiff does not appear to have had any notice that such were to enter into the contract of sale of the mill and machinery or its warranty therefor, or in any wise affect the same, and, in fact, they do not appear to be connected with the sale. The loss of the timber, therefore, constituted no sufficient cause of action against the plaintiff. *Suth. Dam. (2d Ed.) § 705; Stamping Works v. Koehler, 45 Hun, 150; Loudy v. Clarke, 45 Minn. 477, 48 N. W. 25.*

It is contended, however, by the defendant's counsel, that, as plaintiff pleaded over after its demurrer was overruled, and went to trial after its motion was overruled, without reserving its objections to the said item of counterclaim, it waived them, and cannot now be heard upon them. The several provisions of our Code of Pleading and Practice (sections 5720, 5743, Sand. & H. Dig.) provide, in effect, that objection to a complaint or answer that the same does not state facts sufficient to constitute a cause of action, or facts sufficient to constitute a defense, as the case may be, is not to be considered as waived by any failure to make it, but that the same may be taken advantage of at any stage of the proceedings. In *Chapline v. Robertson, 44 Ark. 205*, on a like issue as the one here made, this court said: "The first assignment in the motion for a new trial is for alleged error in overruling the demurrer to the com-

plaint. As the defendants pleaded over to the merits, they waived all objections to the ruling, except the two radical ones of want of jurisdiction over the subject-matter of the action, and failure of the complaint to disclose any cause of action entitling the plaintiff to relief." To the same effect are *Martin v. Royster*, 8 Ark. 74, and *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. 329. In the case of *Chapline v. Robertson*, supra, the objection made by the demurrer was to the complaint, while in the case at bar the objection is to one item or clause of the counterclaim; but the principle governing both cases is the same, for, in pleading a counterclaim or set-off, the defendant occupies the relative position of a plaintiff for the purposes of the plea, and the same rule as to sufficiency applies to the statement of the counterclaim as is applied to a complaint. In this case the radical defect of letting in the loss of the timber, as an element of damages against the plaintiff, was not waived, nor did it cease to be a defect to the last. The testimony upon which the loss of the timber was sought to be established was irrelevant to the legitimate issues made by the counterclaim and the reply thereto, and to that extent, and in that way, the verdict (which was manifestly largely made up of the amount of the alleged loss of the timber) was not supported by the evidence; and for this error the judgment is reversed, and the cause remanded.

**MASSEY-HERNDON SHOE CO. et al. v. POWELL, Sheriff.**

(Supreme Court of Arkansas. Dec. 24, 1897.)

**CONSTITUTIONAL LAW—SUPREME COURT—ORIGINAL JURISDICTION—SUMMARY JUDGMENT AGAINST SHERIFF.**

Under Const. art. 7, § 4, providing that "the supreme court, except in cases otherwise provided in the constitution, shall have appellate jurisdiction only," and section 5, providing that, "in the exercise of original jurisdiction, the supreme court shall have power to issue writs of quo warranto to the circuit judges and chancellors, \* \* \* and to officers of political corporations when the question involved is the legal existence of such corporations," such court has no jurisdiction to hear and determine a motion for a summary judgment against a sheriff for failure to return an execution issued from such court, and directed to and received by such officer.

Motion by the Massey-Herndon Shoe Company for a summary judgment against J. T. Powell, as sheriff of Madison county, for failure to return an execution. Judgment for defendant.

J. M. Pittman, J. W. Walker, W. L. Stuckey and Nathan B. Williams, for petitioners. Dan W. Jones & McCain, for respondent.

**BUNN, C. J.** This is a motion for summary judgment, made by the plaintiffs against the defendant, as sheriff, for failure to return an execution issued out of this court, directed

to him and received by him. The first, and the only, question in this case, is whether or not this court has jurisdiction to hear and determine the motion, which is made under the provisions of the constitution, in conformity to, the provisions of the constitution on the subject. The petition shows that the plaintiff in this action obtained final judgment against D. B. Elliott, H. Combs, Tucker, A. J. Tucker, A. J. Patrick, Patrick, and E. C. Combs for the sum of \$673.73 and interest, and that execution was issued by the clerk of this court, directed to the sheriff, and delivered to the defendant, and charged him to return the same in the time and manner as required by law. It is manifest that this is a different proceeding from the original proceeding in this case. The parties are different, the object of the present suit is not the same, and consequently this is a new suit, and an original proceeding. As regards the jurisdiction of this court, the constitution of this state says: "The supreme court, except in cases otherwise provided in the constitution, shall have appellate jurisdiction only, which shall be conferred on the state, under such restrictions from time to time be prescribed by law." This is part of section 4, art. 7, Const. And there is no other reference to the subject which the question before us is contained in section 5 of the same article, which reads as follows: "In the exercise of original jurisdiction the supreme court shall have power to issue writs of quo warranto to the circuit judges and chancellors when created and to officers of political corporations when the question involved is the legal existence of such corporations." The petition does not set forth or refer to the cases, the original jurisdiction to hear and determine which is conferred upon this court by the constitution; and this court has no jurisdiction of no other kind of cases, and therefore has no jurisdiction to hear and determine the motion, and things set forth in the petition; and the judgment, accordingly, is here rendered for the defendant.

**BUGG v. FT. SMITH DIST., SEBASTIAN COUNTY.**

(Supreme Court of Arkansas. Dec. 24, 1897.)

**COLLECTOR—COMPENSATION—REDUCTION OF COMPENSATION—ABOLITION—CONSTITUTIONALITY.**

1. The courts have no power to interfere with an act of the legislature fixing the compensation of an officer provided for in the constitution, unless the compensation as fixed is clearly and palpably as to practically abolish the office.

2. The evidence showed that the cost of collecting the taxes of a county, when performed by a collector who was also sheriff, was from \$1,200, consisting mostly of clerk hire on the board of the collector and clerks while collecting the taxes, and did not show that all the expenses would be necessary to a collector who was not also sheriff. Held that, under the act of Feb. 20, 1893, providing that the compensation of the collector of said county should be per annum, out of which sum clerk hire should be paid, was not unconstitutional, as being a reduction in the compensation of the collector, and not virtually abolish the office.

Appeal from circuit court, Sebastian county; Edgar E. Bryant, Judge.

Action by T. W. Bugg against the Ft. Smith district of Sebastian county. Judgment for defendant, and plaintiff appeals. Affirmed.

Rowe & Rowe and Hill & Brizzolara, for appellant. Joseph M. Spradling and T. L. Brown, for appellee.

RIDDICK, J. This is an action by the appellant, T. W. Bugg, sheriff and ex officio collector of Sebastian county, to recover from said county \$1,810.92, claimed to be due him for collecting the taxes of said county. The services were performed by him after the act of February 20, 1893, in reference to the salaries of certain officers of said county, went into effect. This act provides that "the fees and salary of the sheriff of Sebastian county shall be thirty five hundred dollars per annum and the salary of the collector of said county shall be twelve hundred dollars per annum, out of which sums the said sheriff and collector shall pay such deputies and assistants as shall be required to discharge the duties of said offices." Appellant contends that said act, so far as it attempts to regulate the compensation to be paid the collector of Sebastian county, was a nullity, and he bases his right to recover upon the law existing prior to the passage of said act.

The only question for us to consider is whether such provision of the act in question was a valid exercise of legislative power. The argument of the appellant is that the office of collector is one established by the constitution, and that the legislature cannot abolish it, but that the salary provided by this act for such office is so small and inadequate that it will prevent the duties of said office from being performed, and will, in effect, abolish the office. We may concede that the office of collector is, in law, a separate office from that of sheriff, and, it being an office established by the constitution, that an act of the legislature requiring the incumbent of such office to perform its duties without compensation, or reducing the compensation therefor to such an extent as to make it impracticable to secure the performance of the duties of the office, thereby, in effect, abolishing the office, would be beyond the power of the legislature, and void. *Powell v. Durden*, 61 Ark. 21, 31 S. W. 740; *Reid v. Smoulter*, 128 Pa. St. 324, 18 Atl. 445. But we do not have a case of this kind before us. The collector is allowed by the act a salary of \$1,200. The evidence in this case shows that it costs the sheriff from about \$950 to \$1,200 to collect the taxes of said county each year. This cost, as shown by the evidence, is composed almost entirely of clerk hire and board of the sheriff and his clerks while collecting the taxes. The evidence does not show that the sheriff himself collected the taxes, or that all this expense would be net-

essary to one who attended to the duties of the office of collector alone. As we understand the evidence and finding of the circuit court, it only amounts to saying that the sheriff, having to employ clerks and collect taxes, made no profit out of the office of collector. The court did not find, nor does the evidence convince us, that the salary provided is so low and insufficient as to render it impossible for the public thereby to secure the performance of the duties of such office. It is not clear to us that, if the sheriff was to decline to execute bond as collector, and the office should become vacant, no one competent to discharge the duties of said office would accept it for the salary provided. The salary may or may not be insufficient to secure the highest grade of official service; it may or may not be unnecessarily small, considering the duties required of such officers. But those are matters which concern the wisdom and policy of such legislation, with which, it must be remembered, we have nothing to do. The constitution of the state having conferred on the legislature the discretion and power to fix the compensation for such office, it is obvious that the courts cannot interfere with such discretion, unless the act of the legislature clearly reduces the compensation to such an extent as practically to abolish the office. In that event, the act, being in conflict with the provision of the constitution establishing the office, is void, and the courts have a right to so declare. *Powell v. Durden*, 61 Ark. 21, 31 S. W. 740; *Reid v. Smoulter*, 128 Pa. St. 324, 18 Atl. 445. But it is plain that the legislature did not intend by this act to abolish the office of collector of Sebastian county, nor does the evidence or the finding of the circuit court thereon satisfy us that such will be its effect. It follows, therefore, that the judgment of the circuit court holding such act to be valid must be affirmed, and it is so ordered.

#### SHERWOOD et al. v. SWIFT et al.

(Supreme Court of Arkansas. Dec. 18, 1897.)

##### USURIOUS LOAN—COMMISSIONS TO AGENT.

A trust deed given as security for a loan will not be held void for usury as against the lender, by reason of commissions retained by the agent of the lender, where the lender is shown to have had no knowledge of the commissions, and there are no circumstances shown from which knowledge could be presumed.

Appeal from circuit court, Monroe county; James S. Thomas, Judge.

Complaint by J. K. O. Sherwood, trustee, and the Dundee Investment Company, against Emma Lou Swift and others. From a decree in favor of defendants, plaintiffs appeal. Reversed.

W. J. Mayo and Norton & Prewett, for appellants. M. J. Manning and J. P. Lee, for appellees.

GRACE, Special Judge. Appellants filed their complaint in equity, asking foreclosure

of a deed of trust enacted on the 4th of September, 1884, by William C. Swift and his wife, Ella B., since deceased, by which they conveyed to J. K. O. Sherwood, as trustee for the Dundee Investment Company, certain lands in Monroe county, Ark., to secure payment of their promissory note for \$650, due in five years, with interest from date at 8 per cent. per annum, payable annually. Appellees answered, setting up the defense of usury. They allege that, out of the loan of \$650, appellants' agents retained a bonus of 20 per cent., or \$130; that, in fact, they only received \$520, and out of this sum were required to pay the sum of \$18 for abstract of title, examining the property, and recording the trust deed; that this bonus was a mere device on the part of appellants to cover a usurious agreement to take unlawful interest; and that the note and deed were therefore void. The answer was made a cross complaint, and prayed that the securities be surrendered and canceled. Appellants answered the cross complaint, denying the usury alleged, and denying that, at the time of the loan and the execution of the deed and note, the lender, the Dundee Investment Company, had any knowledge of the retention of such illegal bonus by its agents, or of any facts sufficient to put it on inquiry in relation thereto. The cause was heard upon the pleadings and proofs, and a decree in favor of appellees in accordance with the prayer of their answer and cross complaint was entered by the chancellor. The Dundee Investment Company appealed.

The law which must govern in the decision of this cause is well settled by repeated adjudications of this court, and nothing is left for us except to determine whether the facts presented in this record bring it within the established rules heretofore laid down. In *Vahlberg v. Keaton*, 51 Ark. 534, 11 S. W. 878, this court, per Mr. Justice Hemingway, announced the doctrine governing this class of cases in these words: "The lender may receive for the forbearance of money ten per cent. per annum, and no more. In excess of that, his agent can receive no bonus from the borrower. If the agent does receive from the borrower a bonus in excess of the highest lawful interest, either with his knowledge, or under circumstances from which the law will presume that he had knowledge, then the transaction is usurious; while, if the agent received the excessive bonus without his knowledge, and under circumstances from which his knowledge could not be reasonably presumed, the transaction would not be usurious. What circumstances will raise the presumption of knowledge must be determined, in each case, in accordance with the principles by which knowledge is imputed to persons in controversies generally." Again, in *Banks v. Flint*, 54 Ark. 50, 14 S. W. 772, and 16 S. W. 477, it was held: "To sustain the plea of usury, it must appear that excessive interest was paid

to the lender, or that a bonus or commission was paid to the agent of the lender with his knowledge, or under circumstances which his knowledge will be presumed, when added to the interest, or to be paid the lender, would exceed the lawful rate." The doctrine here announced has been repeatedly affirmed by this court. See *Scruggs v. Mortgage Co.*, 54 Ark. 50, 10 S. W. 563; *Holt v. Kirby*, 57 Ark. 256, 12 S. W. 432; *Sherwood v. Haney*, 63 Ark. 215, 15 S. W. 15. It would serve no useful purpose to discuss the evidence at length in this case. It is sufficient to say that, in our judgment, it wholly fails to sustain the contention of appellees, under the rules above announced. It is therefore considered that the decree of the court below herein be, and the same is hereby, reversed and set aside, and the cause is remanded, with instructions to enter judgment for the amount of the notes sued on, with interest, and for foreclosure of the trust, and such other proceedings as may be necessary and consistent with this order.

RIDDICK, J., disqualified.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. HANNIG.

(Supreme Court of Texas. Dec. 20, 1900.)

#### NEGLIGENCE—MEASURE OF DAMAGES—PERSONAL INJURY—SERVANT—ASSUMPTION OF RISK—EVIDENCE.

1. In an action for personal injuries, to allow the plaintiff to testify that his agent had no means of support, except her own labor, is the fact that the plaintiff was a laborer at the time of the injury, and earned but a few dollars a day, does not show that they had no other resources, and thus render the error harmless.

2. A definition of "negligence," that "omission to do something which 'a reasonable man' would do, 'or doing something which a reasonable and prudent man would not do,'" is accurate, as "a reasonable man" may be understood differently from "a reasonably prudent man."

3. A charge that, in assessing damages for personal injury, the jury should consider the plaintiff's "personal injury," his "pain and suffering" in consequence of his injury, and "permanent injury sustained by him," is not criticism, as calculated to confuse the jury, but to induce them to give damages twice the same loss.

4. The duty of exercising common observation and ordinary prudence to ascertain the incident to the work he is assigned, whether it is directed to be done so as to avoid such danger, is not imposed upon a servant who has a right to rely upon the assumption of the master that the business is conducted in a reasonably safe manner.

Error to court of civil appeals of supreme judicial district.

Action for negligent personal injury by William Hannig against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff was affirmed by court of civil appeals (41 S. W. 196). Defendant brings error. Reversed.

Eldridge & Gardner, for plaintiff.  
L. C. Barrett, for defendant in error.

GAINES, C. J. This suit was brought by the defendant in error against the plaintiff in error to recover damages for personal injuries. The conclusions of fact found by the court of civil appeals indicate in a general way the issues made upon the trial, and are as follows: "On March 18, 1896, the appellee was a section hand in the employment of the appellant. He was under the directions of William Newman, as a vice principal. He was engaged, with three others (William Newman, the foreman; J. K. Dean and Henry Bachman, the last two his fellow servants), in unloading some switch points from one of the appellant's cars. These switch points were heavy, and the strength of four men was required to lift them. The appellee and William Newman were at one end of the switch points, and Dean and Bachman at the other end. Newman ordered the appellee to seize and help him lift the end of the fourth and last switch point; indicating to the plaintiff, and inducing him to believe, that he would be assisted by the foreman in lifting it. Newman, however, negligently failed to render the assistance, and the entire weight of the switch point was thus cast upon the appellee, from which, as approximate result of the negligence of Newman, he sustained injury, consisting in inguinal hernia. For this injury he recovered in this suit a verdict and judgment in the sum of \$1,200, not complained of as excessive."

During the progress of the trial, the plaintiff, being upon the stand as a witness in his own behalf, was asked to state whether or not he was a married man. The defendant, by counsel, objected to the question, and its objection was overruled, whereupon the witness answered that he had a wife. The witness also was permitted to answer, over the objection of the defendant, that his wife had no means of support, except her own labor. The ruling of the court in admitting this testimony was assigned as error in the court of civil appeals, and is also assigned in this court. The court of civil appeals held that the admission of the evidence was error, but concluded that the error was harmless. We concur in their ruling that so much of the testimony as merely showed that he had a wife was not injurious to the defendant, from the fact that the wife was a witness in the case, and the jury must therefore have known that the plaintiff had a wife. But we cannot agree that the mere fact that the plaintiff was a laboring man, and was earning at the time of the accident but a dollar per day, showed that he had no other resources. In the case of Railroad Co. v. Lyde, 57 Tex. 505, the court say: "Whatever may be the rule in cases of slander and breach of promise of marriage, yet, in this character of case, where the suit is by the party himself for injuries received, although the plaintiff may show the nature of his business, and the value of his services in conducting it, as a ground for estimating damages, yet his wealth or poverty is an immate-

rial issue, calculated to unduly influence the verdict." The same rule was applied in the case of Railroad Co. v. Harrington, 62 Tex. 597. There the court say: "That evidence was not admissible in this case, and was calculated to prejudice the rights of appellant. \* \* \* As this evidence was improperly admitted over the objections of appellant, properly interposed, and as it cannot be determined that appellant was not injured thereby, the judgment ought to be reversed." There the wife and children were suing for damages for injuries resulting in the death of the husband and father. The court placed their ruling upon the ground that the husband was bound to support the wife and children, and that, therefore, the question of their wealth or poverty could not affect the amount of the recovery. The evidence in question in this case threw no light upon any issue properly involved in it, and was calculated solely to awaken the sympathy of the jury, and thereby to swell the damages to be awarded by the verdict. Counsel for the plaintiff evidently thought it would have some effect in plaintiff's favor, else he would not have insisted upon its admission over the objection urged on part of the defendant. The true rule is that in such a case, in order to hold that the error does not require a reversal of the judgment, it ought clearly to appear that no injury could have resulted from the admission of the evidence. Since it does not so appear with reference to the testimony in question, the judgment must be set aside, and a new trial awarded.

It is also complained that the court, in its charge, erred in defining "negligence." The definition in question is as follows: "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do." The conduct of a man of ordinary prudence, under all the circumstances of the case, is the standard by which the law tests the question of ordinary negligence. "A reasonably prudent man" may mean the same as "an ordinarily prudent man." But a different signification may be attached to the words "a reasonable man." A man may possess ordinary reasoning powers, and yet he may have less caution than a man of ordinary prudence. The definition is not accurate, and we incline to think it erroneous.

Again, it seems to us that the charge of the court upon the measure of damages may be subject to the criticism made upon it in the plaintiff in error's assignment. To charge that, in assessing the damages, they should consider the plaintiff's "personal injury," his "pain and suffering" in consequence of his injuries, and "the permanent injury sustained by him," is, we think, calculated to confuse the jury, and to induce them to give damages twice for the same loss.

We think the other assignments of error on

part of the plaintiff in error were correctly disposed of in the opinion of the court of civil appeals.

Since the case is to be reversed, it is proper to pass upon a cross assignment of error made in the court of civil appeals by the appellee (the defendant in error in this court). He complains that the court erred in giving the following charge at the request of the defendant: "If you find from the evidence that it was part of the duty of the plaintiff and his co-laborers to unload switch points, and the number of men to handle the same, and the danger incident to handling same, was a matter open and patent to the common observation, and the plaintiff could have known these facts by the use of ordinary care, and no act of negligence on the part of defendant's foreman, Wm. Newman, contributed to said injury, he assumed the risk incident to his employment, and cannot recover; and, if you so find, you will find for defendant." The ground of complaint is that the instruction is a practical repetition of one paragraph in the main charge. This may not occur upon another trial, and is hardly a matter which requires consideration at our hands at this stage of the proceedings. However, in view of another trial, we deem it proper to say that both the charges in question embody a proposition of law which is not correct. We understand the law to be that, when the servant enters the employment of the master, he has the right to rely upon the assumption that the machinery, tools, and appliances with which he is called upon to work are reasonably safe, and that the business is conducted in a reasonably safe manner. He is not required to use ordinary care to see whether this has been done or not. He does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or, in the ordinary discharge of his own duty, must necessarily have acquired the knowledge. *Bonnet v. Railway Co.*, 89 Tex. 72, 33 S. W. 834; *Railroad Co. v. Bingle*, 42 S. W. 971. For the error of the trial court in admitting testimony that the wife had no resources, except the labor of her husband (the plaintiff), the judgment of that court, and that of the court of civil appeals, are reversed, and the cause remanded.

#### TEXAS & P. RY. CO. v. EBERHART et al.

(Supreme Court of Texas. Dec. 13, 1897.)

APPEAL—RECORD—REVIEW—TRIAL—INSTRUCTIONS—MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—RAILROADS—RULES.

1. Where a party excepts to a charge, to justify the giving of which there must be evidence on two propositions, and in his assignment of error he questions the existence of evidence as to only one proposition, the court will not, under Ct. Civ. App. Rule 29 (20 S. W. viii.), providing that each assignment of error that is not accompanied by its appropriate propositions and statements shall be regarded as abandoned, consider

whether there was evidence upon the other point.

2. Where there is evidence of several groups of facts, any one of which, if true, would require a verdict for defendant, the fact that the court tells the jury to find for defendant if they believe that one of said groups exists, without telling them to so find if either of the other groups exists, is not error, in the absence of a request for a further charge.

3. A railway employé does not assume more than the ordinary risks pertaining to the service.

4. In an action for the death of a car repairer, defendant requested two charges,—one that if deceased knew of the manner in which entries of cars were made on the repair tracks, where he was liable to be at work, plaintiff could not recover by reason of the manner in which any entry was made; and the other, that although defendant had failed to perform its duty with reference to the establishment of rules as to entries, and as a consequence deceased was left exposed to danger, still if he knew this, or could have known of it by exercising ordinary care, plaintiff could not recover. *Held*, that both were properly refused, since they would have prevented a recovery, even if defendant was guilty of negligence, regardless of the question whether it had made proper rules.

5. An employé of a railway company need not exercise care to ascertain whether it has established proper rules for conducting its business so as to afford its servants protection, since he has a right to presume it has done so.

Error to court of civil appeals of Second supreme judicial district.

Action by Charlotte Eberhart and others against the Texas & Pacific Railway Company to recover damages for the death of plaintiff's husband, caused by defendant's negligence. From a judgment for plaintiffs, which was affirmed by the court of civil appeals (40 S. W. 1060), defendant brings error. Affirmed.

T. J. Freeman and Stanley, Spoons & Thompson, for plaintiff in error. Ball, Wynne & McCart, for defendants in error.

DENMAN, J. This suit was brought by Charlotte Thedens, now Eberhart, to recover damages for the death of her husband, Martin Thedens, who was killed while in the service of defendant repairing a car on the repair track, on the 24th day of February, 1888. She charges that defendant was guilty of negligence contributing to the death of Thedens in the following particulars: (1) In running a car onto the repair track, and allowing same to collide with the one on which Thedens was working, without giving him notice thereof; and (2) in not adopting proper rules calculated to secure the giving of notice to the car repairers of the entry of cars on the repair tracks.

Error is assigned upon the giving by the trial court of the following charge: "Or if you find from the evidence that, according to and under the method of doing business in connection with the repair track, and the entering and moving of cars thereon, it was the duty of one Blythe to give notice of the approach of cars on the repair track, and that said Blythe was the foreman of the car-repairing department, and was in control of the car repairers, and that said Blythe was negli-

gent in not giving notice to Martin Thedens at the time in question, and do not find that said Thedens was guilty of negligence causing, or contributing to cause, his death, then you will find for the plaintiff." The undisputed evidence shows that Blythe was foreman of the car-repairing department in which Thedens was working. In order to justify this charge, under the doctrine laid down in *Railway Co. v. Williams*, 75 Tex. 4, 12 S. W. 835, there should be evidence (1) tending to prove that Blythe was guilty of negligence in not giving notice, and (2) showing conclusively that he had authority to employ and discharge, since the charge assumes that he was a vice principal. In appellant's brief, under this assignment, the following is the only proposition made: "There was no evidence tending to show that Blythe was negligent in failing to give any notice to Thedens at the time of the accident, and the charge submitted an issue not made by the evidence." The court of civil appeals, as we think, correctly held that there was evidence of such negligence, but did not advert to the question as to whether there was evidence showing that Blythe had power to employ and discharge. They evidently considered that, since the only proposition presented under the assignment did not question the existence of evidence showing such power, all objection to the charge on that ground that might be involved in the assignment was waived, and that, therefore, they were not called upon to examine the record for such evidence. In this we think they were correct. The court, having gone to the record, and found evidence justifying the charge upon the point presented by the proposition, was not called upon to look for evidence supporting it upon the other point upon which it was not attacked. As to that the assignment must be held to have been abandoned. Ct. Civ. App. Rule 29 (20 S. W. viii.). We therefore find no error in overruling same.

The giving of the following charge is assigned as error: "If you believe from the evidence that said Martin Thedens knew what rules and regulations, if any, or what method or custom of giving notice, if any, were in force or relied upon with reference to the entry and moving of cars on said repair tracks, and that he was guilty of negligence in remaining at work in said car-repairing service, then you will find for defendant." This was a charge instructing the jury to find for defendant upon a certain state of facts. If there was any other group of facts which would have authorized a finding for defendant, it should have asked a charge presenting such issue. The defendant could not have been prejudiced by the charge as far as it went. If there was any other portion of the charge which was prejudicial to defendant, it should have been assigned as error. We are therefore of opinion that the court of civil appeals correctly overruled this assignment.

It is urged that the court erred in refusing

to give the following charge asked by defendant: "The Texas & Pacific Railway Company, defendant, requests the court to instruct the jury as follows: The jury are instructed that the deceased, Martin Thedens, in accepting service as a car repairer, took the position subject to all risks pertaining to such service; and if he knew of the custom or manner in which entry was made upon the repair tracks, where he was liable to be at work, then, in such event, he is held to have assumed all risks incident to the manner of making entry on said track, and plaintiff in this case would not be entitled to recover by reason of the manner in which the entry was made." This charge is not a correct statement of the law, in that (1) Thedens cannot be held to have assumed more than the ordinary risks pertaining to the service; and (2) it would have prevented a recovery if the facts stated therein were found to be true, though the jury might have believed that defendant was guilty of negligence in running the car onto the repair track without reference to the question as to whether it had made proper rules. Being of opinion that, for these reasons, the charge was correctly refused, we do not deem it necessary to determine the validity of other objections made thereto by appellee.

It is urged that the court erred in refusing to give the following charge requested by defendant: "Though the jury should find that those operating the railway had failed to perform the duty defined with reference to the establishment of rules," etc., "and that as a consequence the employes engaged as deceased were left unprotected and exposed to danger, still, if it should also appear that Martin Thedens knew this, or by the exercise of ordinary care could have known of it, and still continued in the employ, he could not recover." This charge is incorrect in two respects: (1) It imposed upon Thedens the duty of exercising care to ascertain whether the defendant had established proper rules, whereas, under the law, he had the right to assume that it had done so (*Railway Co. v. Lehmberg*, 75 Tex. 67, 12 S. W. 838; *Bonnet v. Railway Co.*, 89 Tex. 76, 33 S. W. 334); and (2) it is subject to the second objection, above stated, to the next preceding charge. This charge is taken from the case of *Railway Co. v. Hall*, 78 Tex. 860, 15 S. W. 108. We do not understand that it was the intention of the court to express an opinion as to the correctness of that part of the charge which stated that plaintiff could not recover if he, "by the use of ordinary care, might have known" of the failure of defendant to provide rules. No objection was there made by the plaintiff to that portion of the charge as is here made, and therefore the question was not before the court. The language of the opinion shows that the approval related to that portion of the charge there quoted which undertook to inform the jury of defendant's duty. There was no error in overruling this assignment.

Having disposed of all the assignments upon which we granted the writ of error adversely to plaintiff in error, and being of opinion that the other numerous assignments made here are not well taken, it is ordered that they be overruled, and the judgment affirmed.

### MAGEE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

#### CRIMINAL LAW—IMPEACHING EVIDENCE—ASSIGNMENT OF ERROR.

1. Where testimony is introduced simply to impeach defendant's witness, and without attempting to prove that such witness had made statements of criminating facts against the accused, it is not necessary to instruct that the testimony is to be restricted to the purpose for which it was admitted.

2. Under Acts 25th Leg. p. 17, which requires that the exception shall be reserved at the time the charge is given or brought forward in the motion for a new trial, an assignment of error that the court failed to give an instruction in his charge cannot be maintained in a case tried since the passage of such act, where no exception was reserved to the charge when given, or presented in the motion for a new trial.

On motion for rehearing. Denied.  
For former report, see 43 S. W. 98.

HENDERSON, J. This case was affirmed at a previous day of this term, and now comes before us on motion for rehearing. Counsel for appellant complains because this court did not consider an assignment of error in the original opinion: "That the court below erred in failing to limit and restrict the testimony of H. L. Robb, Will Dawson, T. B. Walker, Mrs. E. B. Bond, Joe Clark, and J. R. Collin, in his charge to the jury, for the purpose for which it was admitted." This testimony could have been used for but one purpose, to wit, for the impeachment of the witnesses. This is not a case in which the state introduced a witness for the purpose of impeaching another witness, and proves by said witness that the defendant's witness had made statements of criminative facts against defendant. This is simply a case in which the state introduced evidence for the purpose of impeaching the defendant's witnesses, without proof that the witnesses sought to be impeached had made statements of criminative facts against the accused; and, as before stated, the jury could not have used it for any other purpose. But, concede all that is contended for by counsel for appellant, there was no exception reserved to the charge when given, nor was there exception presented in the motion for a new trial. This case was tried after the act of the 25th legislature on this subject had gone into effect. That act requires that the exception shall be reserved at the time the charge is given, or brought forward in the motion for a new trial. See Acts 25th Leg. p. 17. The motion for rehearing is overruled.

### SIMNACHER v. STATE.

(Court of Criminal Appeals of Texas. 1897.)

#### THEFT—NEW TRIAL—DILIGENCE—INSTRUCTION.

1. Where the newly-discovered evidence which one convicted of crime moves for trial, goes only to disprove facts which defendant was bound to know that the state attempt to prove, and is only cumulative motion is properly denied.

2. That a defendant did not pay his a sufficient fee to enable him to hunt testimony is not such an excuse for a lack of diligence in finding it that a new trial will be granted upon finding it after conviction.

3. That a defendant was surprised by the denial of his own witness is not ground for a new trial.

4. Where, in a prosecution for theft, no issue as to the consent of the owner in taking of the stolen goods, an omission in the court, when he came to apply the law to the facts, to include the want of consent of the owner, having properly defined theft in the charge, is not error.

Appeal from district court, Bastrop; Ed. R. Sinks, Judge.

Thomas Simmacher was convicted of theft, and he appeals. Affirmed.

J. E. B. Laird and J. P. Fowler, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of theft of personal property of value of \$50, and given three years in the penitentiary, and prosecutes this appeal.

The first and second errors assigned by appellant are to the charge of the court, to wit, circumstantial evidence, and the failure of the court to give the charge requested by appellant. The charge of the court on this subject was full, and in accordance with approved forms, and covered the matter contained in appellant's requested specifications.

Appellant contends that the court erred in having given him a new trial because the cotton found in the house of appellant was not sufficiently identified as the cotton stolen from N. A. Spier. We have discussed this matter in the companion case of *Simmacher v. State* (just decided) 43 S. W. 354, and to what was there said. In our opinion the evidence of identification, though circumstantial, was complete.

Appellant also contends that the court erred in overruling his motion for a new trial on the ground of newly-discovered evidence. Appellant has a lengthy application for a new trial on this ground, and has appended thereto a great number of affidavits alleging newly-discovered evidence. From an inspection of the same, it is evident that appellant began to use diligence in looking for the evidence only after he was ready for trial after his conviction; and it evidently appears that all this testimony was not the use of reasonable diligence, might have been discovered before the trial. Appellant was bound to know that the state would insist that said cotton had been stolen from him, and had been hauled from the pros-



in a wagon, drawn by two horses, to appellant's house, some two or three miles over a rough road; and it was his then, if he proposed to show that said wagon could not be hauled by two horses over such a road, to use diligence to procure evidence to show that the same was impossible. In this case, unlike the companion case of *Simmacher v. State*, it appears that appellant contested with the state the circumstances of identification of the alleged stolen cotton by pecan leaves found among the cotton. If he showed by a number of witnesses that appellant's field had pecan leaves growing in it, thus accounting for the presence of pecan leaves among the cotton.

If he thought that he needed other testimony on this point, he should have used diligence to procure it. At least, it is not shown in the application that he used sufficient diligence to find other witnesses who could know the fact, and it is no excuse that he did not paid his lawyer a sufficient fee to procure testimony. It appears that he had attorneys engaged to defend him at a former trial of the court, and ever since; and, whether they received much or little for their services, it was equally their duty to use proper diligence in preparing their defense in this case.

Appellant complains that he was surprised by the testimony of Achille Decker to the effect that a part of his harness was broken and misplaced during the night of the theft. The state's theory appears to have been that the cotton was hauled with Decker's team, and appellant used his harness. This witness, if it occurs, was introduced by appellant, and it is singular that he was taken by surprise by the testimony of his own witness. It occurs to us that a proper interrogation of the witness by appellant would have disclosed this portion of his testimony. We do not have the time to enter into a discussion of the affidavits presented. As said before, those that appear to be material the state could have been easily discovered by the use of the least diligence on the part of appellant prior to the trial; and, in the view we take of this record, even if all of the testimony had been before the jury, it would not have affected the result reached by the jury. The evidence, though circumstantial, is strong and to the point, and with every jury there could be no question as to the guilt of appellant.

The motion for a new trial appellant complains of the charge of the court on the ground that it fails to instruct the jury that they must find that the property was taken without the consent of the owner. In the view of the court defining "theft," the jury was distinctly informed that the taking was without the consent of the owner, and the omission in the subsequent portion of the charge of this phrase could not have misled the jury. The consent of the prosecutor was not an issue in this case. The

state proved the want of consent, and appellant's defense did not put this matter in issue. His defense was based solely on the proposition that he did not take the alleged stolen property. The property that was found in his house he claimed as his own, and he insisted that the state failed to identify said seed cotton as the property of the prosecutor. In the view we take of this matter, there was no error in the omission of the court to include in the portion of his charge, when he came to apply the law to the facts of the case, the want of consent of the prosecutor. No errors appearing in the record, the judgment is affirmed.

#### Ex parte JONES.

(Court of Criminal Appeals of Texas. Dec. 23, 1897.)

#### TAXATION — CONSTITUTIONAL REQUIREMENTS—EQUALITY AND UNIFORMITY—OCCUPATION TAX LAW—VALIDITY.

1. Occupation Tax Law (25th Leg. Sp. Sess. p. 49) art. 5049, subd. 21, requiring peddlers to pay specified taxes, and, in proviso, exempting ex-soldiers and other enumerated classes of persons from payment of such tax for peddling, violates Const. art. 8, § 1, declaring that "taxation shall be equal and uniform."

2. It also violates article 8, § 2, declaring that all occupation taxes shall be equal and uniform on the same classes of subjects, and that all laws exempting property from taxation, with certain exceptions, shall be void.

3. It is also obnoxious to Bill of Rights, § 3, declaring that all free men, when they form a social compact, have equal rights, and no man or set of men is entitled to exclusive separate public emoluments or privileges, but in consideration of public services.

Appeal from Tarrant county court; J. S. Davis, Special Judge.

Application by J. F. Jones for a writ of habeas corpus for the purpose of securing his discharge from the custody of the sheriff, to which he was committed under a complaint charging him with peddling without paying the occupation tax and obtaining a license. From a judgment refusing the writ and remanding the applicant, he appeals. Reversed, and applicant discharged.

Bowlin & Scott, for applicant. Mann Trice, for the State.

HENDERSON, J. Applicant was arrested on an information based on a complaint filed in the county court of Tarrant county, charging him with pursuing the occupation of a peddler with two horses without first having paid the occupation tax due thereon. The criminal proceeding was under article 5049, subd. 21, of the act of the 25th legislature. See Laws 25th Leg. Sp. Sess. p. 49. Applicant sued out a writ of habeas corpus before the county judge. The case was tried before him, and relator remanded; and from this action of said county court he prosecutes this appeal.

The statement of facts shows that relator

was regularly arrested on a warrant issued out of the county court of Tarrant county on a complaint and information filed in said court, charging relator, in legal form, with the offense of pursuing the occupation of a peddler without a license, or without having paid his occupation tax as such peddler in the county of Tarrant and state of Texas. Said applicant had been engaged in the business of peddling vegetables, fruits, chickens, etc., in and about Ft. Worth, for a number of years, using two horses and a wagon in such business; that he would buy such articles so peddled by him on the market, and peddle them out daily from house to house, throughout the city of Ft. Worth; that neither the applicant nor his family raised or produced the articles so peddled by him; that, when the new occupation tax law went into effect, applicant refused to pay his occupation tax, and continued peddling as before, until his arrest, on the 2d of November, 1897.

The contention of appellant is that subdivision 21 of the occupation tax law of the 25th legislature is unconstitutional. Said subdivision or section is as follows: "Subd. 21. From every foot peddler, five dollars in each county in which he peddles. For every peddler with one horse or one pair of oxen, the sum of fifteen dollars in each county where he peddles; for every peddler with two horses or two pair of oxen, thirty dollars in each county in which he may pursue such occupation; for every peddler with sail or other boat in streams or along the coast or bays of this state, thirty dollars in each county in which he may pursue such occupation: provided, that any blind, deaf and dumb, or any wounded person who has lost a hand or foot shall not be required to pay any tax for peddling; provided, that all ex-Confederate and ex-Federal soldiers who, from old age or other cause, may be incapacitated to do and perform manual labor, and who are actual residents of the state of Texas, and are not inmates of any soldiers' home, or drawing any pension from the United States or any state government, be and are hereby exempted from the payment of any such peddlers' occupation tax: provided, such persons shall not be exempt from such peddlers' tax if employed in peddling for any other person or persons: nothing herein contained shall be so construed as to include traveling vendors of tin or earthen-ware: provided further, that nothing herein contained shall be so construed as to include traveling vendors of literature exclusively religious in character, or traveling vendors of poultry, vegetables or other country produce exclusively, fruit and fruit trees exclusively, if raised or produced by the vendor or his family." We understand applicant to insist that the exemptions contained in said subdivision are obnoxious to section 1 of article 8 of the constitution, which, so far as is necessary to be here con-

sidered, is as follows: "Taxation shall be equal and uniform;" and section 2 of article 8, which reads as follows: "All taxation shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes (and the necessary furniture of all schools) and donations of purely public charity; and may exempting property from taxation other than the property above mentioned, but such exemption shall not be void,"—the specific grounds of his objection being as follows: "(1) The act taxes peddlers alike according to the number of animals used, without regard to the value of the animals or the vehicle used, and without regard to the amount of business done by the peddler. (2) It taxes all peddling boats alike, without regard to the character of the boats or the amount of business done by the peddler. (3) It does not exempt from tax peddlers using more than two horses or more than two yoke of oxen. (4) It exempts from the payment of such occupation tax, blind, deaf, and dumb persons, and persons who have lost a hand or foot, ex-Confederate and ex-Federal soldiers who, from old age or other cause, are incapacitated to do and perform manual labor, and who are actual residents of the state of Texas, and are not inmates of any soldiers' home, or drawing any pension from the United States or any state government, and traveling vendors of poultry, etc., if raised or produced by the vendor or his family."

Without discussing the first three objections, it occurs to us that the exemptions enumerated in applicant's fourth subdivision make said occupation tax law (including subdivision 21) clearly obnoxious to the provisions of the constitution above mentioned. Some of the exemptions enumerated appear to have strong claims, and entitle them to consideration at the hands of the legislature, if the constitution did not prohibit and inhibit such action. In some cases exemptions have been upheld where a person exempted might be entitled to a bounty or a bounty at the hands of the government; but we believe that other constitutional provisions stand in the way of such allowance by the lawmaking power. Under the provisions of our constitution, a pension can be granted to any person except as provided in article 16, § 55, in favor of survivors of the Mexican War. Section 3 of our constitution would appear to inhibit any legislation, and is as follows: "Sec. 3. free men when they form a social compact have equal rights, and no man or set of men is entitled to exclusive separate public

ents or privileges, but in consideration of public services." A proper construction of the constitutional provisions, together with an application of same to the occupation tax provision before quoted, would appear to settle this question in favor of the appellant; for unquestionably the act exempts and exempts from taxation, and constitutes certain classes therein named, privileged classes, who are authorized to pursue the occupation of peddling without the payment of any tax or the procurement of a license. This is obviously taxation which is not equal or uniform. However, this is not a new question in this state. In *Pullman Palace-Car Co. v. State*, 64 Tex. 1, almost this exact question came before the supreme court for decision. That was the case in which suit was brought by the State of Texas against the Pullman Palace-Car Company, claiming an occupation tax on lines of railroads in the state of Texas, said cars not being owned by any of the railroad companies operating the railroad. The tax act under which this recovery was sought laid an occupation tax upon persons or corporations operating Pullman palace cars on railroads in the state of Texas, except persons or corporations who owned said railroad; and the court held that this exemption rendered the law unconstitutional and void. Among other things, Judge Stayton, who rendered that opinion, said: "If the things done constitute in one person or corporation the taxed occupation, one doing the same things can be omitted from the class taxed without a violation of the constitutional provisions, even though omitted or excepted person or corporation made do more or other things than are necessary to constitute the taxed occupation, though that done in excess may within itself constitute a distinct occupation subject to taxation, however kindred in nature the occupation may be. The legislature may classify subjects of taxation, and these classifications may, as they will be, more or less arbitrary; but, when the classification made, all must be subjected to the payment of the tax imposed who, by the existence of the facts on which the classification is based, fall within it, unless exempted under some other constitutional provision." And, to the same effect, see, also, *Cooley v. Board of Wardens*, 12 Pet. 344, 7 How. 281, 13 Pet. 344, 13 How. 281 (Ed. 1879) pp. 128, 130, 138, 139, 153; *Besty v. Tax'n*, pp. 94, 95, 122, 191, 192, 193; *City of New Orleans v. Home Mut. Ins. Co.*, 10 La. Ann. 440; *Sims v. Parish of Jackson*, 10 La. Ann. 440; *Livingston v. City Council of Albany*, 41 Ga. 21; *Lin Slug v. Washington*, 20 Cal. 534; *Sutton's Heirs v. City of Louisville*, 5 Dana, 28. We hold that said division 21 of the occupation tax act of the legislature is null and void, as being violative of our constitutional provisions on this subject. The judgment is reversed, and the relator is ordered discharged.

## PAYNE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

RAPE—INDICTMENT FOR—SUFFICIENCY—BY FORCE OR FRAUD.

1. An indictment which charges a rape by fraud, by personating the husband, must allege that the injured female is a married woman, and not the wife of the defendant.

2. Where defendant went to the bed on which the prosecuting witness was sleeping with her husband, and committed upon her the crime of rape, and she, awaking, and believing him to be her husband, made no resistance, defendant not having used any stratagem to induce her to believe that he was her husband, the crime so committed is rape by force, and not rape by fraud.

Appeal from district court, Callahan county; T. H. Conner, Judge.

Action by the state against Bunyon Payne for rape. Judgment of conviction. Defendant appeals. Reversed.

J. E. Thomas, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal. The charging part of the indictment is as follows: "That defendant did then and there by force, threats, and fraud, and without the consent of the said Jessie Winn, ravish and have carnal knowledge of the said Jessie Winn, the said Jessie Winn not being then and there the wife of the said Bunyon Payne," etc.

The evidence showed that on the night of the alleged offense there was a party at the house of one H. B. Payne, the father of the appellant. The party broke up some time after midnight, and the prosecutrix, Mrs. Jessie Winn, and her husband, stayed overnight at said house. A bed was made down for them in the main room of the house, and in the same room, on the other side from the bed of the prosecutrix and her husband, Dan Loftin and his two brothers, and the defendant and his two brothers, slept on pallets. In the kitchen, adjoining this room, Mrs. McGary and her husband slept. Some time in the night, just about daylight, Mrs. Jessie Winn awoke, and found defendant on top of her. She did not then know who he was. He had her clothes up. She tried to get him to get off, but he would not do so. He had intercourse with her. Had already commenced intercourse with her when she waked up. At the time she thought it was her husband, and called him "George." That she did not do anything but talk to him, and try to get him to get off. That at the time she was unwell with her menses, but he did not get off until he got through. While he was in the act, and when she first waked up, she put her arms around his neck, and kissed him, and said, "George, what do you mean?" That when he got off of her he crawled from the bed of the prosecutrix to his pallet on his hands and knees, and she then knew that it

was not her husband, but recognized him as Bunyon Payne. She immediately aroused her husband, and told him what defendant had done. There was also other testimony in the case; and, among other witnesses, Mrs. G. G. McGary testified to seeing defendant sitting at the head of her bed during the night, sometime before the alleged rape, after she had retired.

Appellant's first bill of exceptions is with regard to the admission of evidence that the prosecutrix was a married woman, and the wife of G. W. Winn. This was objected to, on the ground that the indictment did not allege that the injured female was a married woman. This brings in question the validity of the indictment in this case. The conviction was no doubt procured under the allegation of fraud, which, by our statute, is defined to mean "the use of some stratagem, by which the woman is induced to believe the offender is her husband; or in administering, without her knowledge or consent, some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, and committing the offense while she is under the influence of such substance." See Pen. Code 1895, art. 636. We have examined the authorities as to the form of an indictment where the rape was committed by a false personation of the husband, but we have been unable to find a case where the question of the indictment has been treated. In England, as in this country, it appears that rape is a statutory offense, and we understand that, under an ordinary indictment in England for rape by force and without the consent of the alleged injured female, the proof can be made for rape by procuring the intercourse by a false personation of the husband of the female. See *Reg. v. Young*, 38 Law T. (N. S.) 540; Whart. Cr. Law, § 561, and notes. In this state the statute above quoted was evidently passed to cover this character of offense; that is, where the alleged rape was committed by fraud. And in *Franklin v. State*, 34 Tex. Cr. R. 203, 29 S. W. 1068, we held that the indictment for an attempt to commit a rape need not set out the particular kind of fraud, whether by personating the husband or administering some substance to the female; and that the general charge of an attempt to rape by fraud is sufficient, and furnishes the basis for proof of either means stated in the statute. We also held in that case that, where the indictment alleged that the injured female was a married woman, this would authorize proof of the name of her husband, though his name was not set out in the indictment. That is as far as we feel authorized to go. We hold that an indictment, as in this case, which charges a rape by fraud in personating the husband, in order to be sufficient, must allege that the injured female is a married woman, and not the wife of the defendant. While it is not necessary to allege the name of her husband, still this allegation would be the better practice, and

it would by no means vitiate the indictment. The allegations of the indictment being defective in this respect, we hold it insufficient to sustain a conviction for rape by false personating the husband.

The question is also presented to us whether or not the facts of this case show such personation of the husband as to constitute a rape; that is, it is insisted that the course was accomplished without any guile or deception on the part of the appellant to induce the prosecutrix to believe that he was her husband. It is a feature of our constitution, and a cardinal principle in criminal law, that no one can be punished unless under a written law of this state, in which the offense has been defined. The definition above quoted from the statute, where the prosecution is based on fraud, makes it essential that the defendant employ some stratagem by which the woman is induced to believe the offender is her husband. A "stratagem" is defined to be "any scheme or trick by which some advantage is intended to be obtained." See Cent. Dict. According to our statute, it becomes absolutely necessary, in order to constitute this offense, that the defendant resort to some device, stratagem, some artifice or trick, in order to deceive the prosecutrix, and make her believe that he is her husband; and not so, but the effect of his stratagem must be to deceive and impose on her, and make her believe that he is her husband at the time the act was committed, and by this means obtain her consent to the copulation. Applying the rule to the facts as they appear in the record, we find that the prosecutrix testified that when she first awoke, the defendant was already penetrating her person, and was in the act of copulating with her. She testified that, as she was asleep at the time, it was impossible for her to know what his acts may have been in the past, and that they should have operated on her mind so as to induce her to consent to the act on the belief that he was her husband. And, in fact, over, the record fails to disclose that the defendant used any stratagem; his only action being to go to her bed, get on top of her, and begin the act of copulation while she was asleep. It was done after the act of copulation had begun, even if it could be conceded that he resorted to some stratagem to continue the operation, would not constitute this offense, but the record fails to disclose, even if it were, the continuance of the act, that he resorted to any artifice or trick to induce her to believe that he was her husband. In *Moore v. State*, 29 Tex. App. 257, 15 S. W. 77, the court held that the act of copulation with the wife of another man, while she was asleep, she being incapable of consenting at the time, was rape by fraud, and this is in accord with a number of authorities. But this was not rape by fraud. See *Reg. v. Young*, 38 Law T. (N. S.) 540; Whart. Cr. Law, § 561, and notes. It is the better practice, *Franklin v. State*, 33 Tex. Cr. R. 400, 29

the conviction in that case for rape by personating the husband was upheld on the ground that the evidence was sufficient to show that the appellant by his language, as well as conduct, induced the injured female to believe that he was her husband. In this case the evidence showed that she was deceived at the time, and consented to the act, and the belief that appellant was her husband.

But, as stated above, such is not the law in this case; and, in our opinion, the evidence is not sufficient to authorize a conviction of rape by fraud. The court in this charge submitted rape by fraud alone. In the testimony of Mrs. McGary, we are not inclined to believe that same was not admitted, but, as limited by the court, perhaps it was not calculated to injure the appellant so as to authorize a reversal of the case. For the error discussed the judgment is reversed, and the cause remanded.

#### Ex parte MEDARIS.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

##### CONVICT BOND—VALIDITY.

A bond for hiring out a convict is invalid if the convict, his principal, and the sureties on the bond resided in a county outside of the county where the conviction occurred, as, under Art. 3744, Rev. St. 1895, providing that certain persons may "be hired out to any individual within the county of conviction, to remain in said county," the hiring can be done by some one within the county of conviction.

Appeal from district court, Lee county; R. Sinks, Judge.

Application by J. S. Medaris for a writ of habeas corpus. From an order remanding to custody, he appeals. Affirmed.

R. Stringfellow and J. N. Story, for applicant. Mann Trice, for the State.

EDWARD P. J. Relator was convicted in the district court of Lee county of a misdemeanor, and fined \$100, was placed in jail, while so in jail a convict bond was given under the following circumstances, to wit: Defendant lived in Caldwell county (the conviction having occurred in Lee county), the bond for hiring out the convict (herein) was given by a party living in Lee county, and all the sureties on the bond lived in Caldwell county; in other words, defendant, his principal, and the sureties on the convict bond, all lived out of Lee county where the conviction occurred. Relator did not work for his principal, nor did the principal pay any portion of his obligation; whereupon a capias pro fine was issued, and relator placed in jail. He applied for a writ of habeas corpus. The writ was issued, the cause tried before Hon. Ed. Sinks, district judge, who, after hearing the case, remanded him to the custody of the sheriff. Relator excepted, and prosecutes appeal.

The ruling of the court no doubt was based upon the following language, contained in article 3744, Rev. St. 1895: "Any person who may be convicted of a misdemeanor or petty offense, and who shall be committed to jail in default of the payment of the fine and costs adjudged against him, may be worked upon the public roads or upon the county farms of the county in which such conviction is had, or be hired out to any individual, company or corporation within the county of conviction, to remain in said county," etc. That portion of this article which forms the basis of the decision of the trial judge is found in this portion, "or be hired out to any individual, company or corporation within the county of conviction, to remain in said county." This seems to contemplate that the hiring out can only be done by some individual, company, or corporation within the county of conviction, and binds the convict to remain in said county. This portion of the statute formerly read, "or be hired out to any individual, company or corporation;" the words, "within the county of conviction, to remain in said county," being added by amendment. Without going into the reasons why the legislature made these changes in the statute, they evidently intended that the hiring should be to a resident of the county, and that under said hiring the convict must remain in the county; and we therefore believe the construction of the trial court is correct, and that the bond was invalid. The judgment is affirmed.

#### WILLIAMS v. STATE. (No. 1,742.)

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

##### CRIMINAL APPEAL—INSUFFICIENT RECORD.

Whether the evidence was sufficient to justify a verdict of guilty cannot be reviewed on appeal, where the record does not contain the statement of facts.

Appeal from district court, Caldwell county; H. Telchmueller, Judge.

Frank Williams was convicted of theft, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of theft of various articles, amounting in the aggregate to \$698, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

There are no assignments of error in the record, and, in the motion for a new trial in the court below, appellant complains of the supposed insufficiency of the evidence to justify the conviction. The record does not contain the statement of facts; hence this matter cannot be reviewed. The judgment is affirmed.

**WILLIAMS v. STATE.** (No. 1,749.)  
(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

**CRIMINAL LAW—APPEAL—STATEMENT OF FACTS.**

The record must contain a statement of facts, to permit a review of the grounds of a motion for new trial for insufficiency of evidence.

Appeal from district court, Caldwell county; H. Telchmueller, Judge.

Frank Williams was convicted of burglary, and he appeals. Affirmed.

Mann Trice, for the State.

**DAVIDSON, J.** Appellant was convicted of burglary, and given five years in the penitentiary; hence this appeal.

This is a companion case to cause No. 1,748, Williams v. State (just decided) 43 S. W. 517. The record does not contain a statement of facts; hence we cannot review the grounds of the motion for a new trial, which set up the alleged insufficiency of the evidence to support the conviction. The judgment is affirmed.

**EMMONS v. STATE.**

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

**INDICTMENT—FORGED ORDER—VARIANCE.**

1. Where an indictment sets out a copy of a forged order, and the address of the order is written "Chelton," and the copy is written "Chilton," there is not a material variance.

2. In an indictment setting forth a copy of a forged order, the use of a capital "L" where the order uses a small "l" is no variance.

3. Where the first letter of a written word in a forged order is so peculiarly formed that it might be read "Weeks," "Meeks," or "Neeks," writing it "Weeks" in an indictment for perjury founded thereon is no variance.

Appeal from district court, Falls county; S. R. Scott, Judge.

Melvin Emons was convicted of perjury, and he appeals. Affirmed.

Mann Trice, for the State.

**HENDERSON, J.** Appellant was convicted of perjury, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

Appellant objected to the introduction in evidence of the order which is alleged to have been forged, on the ground of variance between it and the alleged copy thereof set out in the indictment; and he sends the indictment and original order with the transcript in this case for our inspection. He claims that the order, as copied in the indictment, in the address, contains the letter "l" in "Chilton," whereas the order contains the letter "e." His contention in this regard appears to be correct; but this, in our opinion, is not at all a material variance. This, in fact, constitutes no part of the order, but merely the address. The writer does not appear in the order to have dotted what may

be intended for an "l." There does appear to be the slightest variance between word "levy," as written in the order "Levy," as written in the indictment, that in the indictment the latter "Levy" to be written with a capital "L," while the order it is a small "l."

The word written in the order "Weeks" in whose favor it was drawn, may be "Neeks," "Weeks," or "Meeks," as the letter in the name is peculiarly shaped, it is sufficient to say that the indictment follows as near as practicable the form of the beginning letter of said word as in the order; and it may be called "Weeks," and "Meeks," just as one would read it. In our opinion, there is no variance between the indictment and the evidence introduced in evidence.

The court did not err in allowing Thomas Powell to testify as an expert, who sufficiently qualified himself in that regard. We have examined the record carefully, and in our opinion, the evidence supports the verdict of the jury, and the judgment is affirmed.

**INGRAM v. STATE.**

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

**HOMICIDE—INSTRUCTIONS—EVIDENCE.**

1. When there is no evidence produced by the state suggesting mutual combat, the court is not error to instruct on the law applicable to murder. 2. Evidence of statements by accused a few minutes of the killing, as to the details, is admissible as part of the res gestae.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Tom Ingram was convicted of murder in the second degree, and he appeals. Reversed.

M. M. Brooks and T. O. Thornton, for appellant. Mann Trice, for the State.

**HURT, P. J.** Appellant was convicted of murder in the second degree, and his punishment assessed at imprisonment in the penitentiary for a term of five years; hence this appeal.

Appellant excepted to that portion of the charge of the court which defines mutual combat. We think the charge was sufficient, and conforms with the decisions. See *Mann v. State*, 30 Tex. App. 129, 16 S. W. 76. Appellant's exception was also reserved to that portion of the charge of the court submitting the charge of mutual combat, which is applicable to a case of mutual combat. We have very carefully read the statement of facts, and have found no evidence in the record suggesting the doctrine of mutual combat. The testimony in this case presents two theories. That for the state, that the appellant was the aggressor, quarreling with the deceased a few minutes before he drew his pistol, and shot at the deceased twice. The deceased returned the fire, and the shooting continued until the deceased

If this be the correct theory of the appellant was evidently guilty of murder and this theory was submitted to the jury by the court. On the other hand, a number of witnesses support the following theory: Appellant was in the house, procuring a glass of water, when deceased spoke to him, telling him to get out of the house, and, after quarreling awhile, deceased began to draw his pistol, appellant telling him two or three times not to draw it, backing at the same time. Before this, he had told him that he was not his wife, and did not want trouble; whereupon deceased shot at him twice, striking him once before he returned the fire. The shooting continued from both parties until deceased fell dead. As before stated, we have examined this statement of facts a careful examination, and find nothing in it requiring the jury to submit the question of mutual combat. A charge on this subject not justified by the evidence, it was calculated to confuse and mislead the jury. They were inclined to believe, as the testimony indicated, that after the fight began defendant entered it, and fought willingly; that he would deprive him of self-defense, although he was not the aggressor. Appellant presented the following bill of exceptions on appeal: "Be it remembered that on the trial of the above-styled case the defendant produced Peter St. Clair, who testified as follows: 'I saw the defendant come into the house something like a minute after the shooting. He came into the house with blood on his shirt, and said that he was shot. We went out of the house, to where his horse was hitched, and the defendant said that he was going to die. I think his mind was all right at the time that he spoke to me. He did not seem to be very excited, but he might have been somewhat.' Thereupon the defendant asked the witness what the defendant told witness about the shooting, to which question the state objected on the ground that the same was self-serving. The court sustained said objection, and such action of the court the defendant excepted and there excepted. The witness would not state that the defendant then and there told him that he believed that he (defendant) was going to die. The witness replied to defendant to stand up; that he would die if he (defendant) got scared. Then the defendant said, 'No, stop right here. I want to tell you what it all occurred.' The defendant said to John Pine called him out to one side, and said that defendant had to take back what he (defendant) had said about him.' The defendant refused to do so. Thereupon deceased started to draw a pistol, and defendant told deceased not to draw that 'damned' pistol on him; and that defendant repeated said statement two or three times. Then deceased ran at the defendant, and grabbed defendant in the collar with his left hand, and defendant with his right hand. The defendant broke loose from deceased, and

shot at the deceased just as the deceased was in the act of shooting at the defendant the third time. Then the shooting was continued by both parties. That all of this conversation occurred within about three or four minutes after the shooting had ceased, and within about thirty feet of the scene of the difficulty. To which action of the court the defendant then and there excepted, and here tenders this his bill of exceptions," etc. The statement of the appellant under the circumstances was clearly admissible, not as a dying declaration, but as a part of the *res gestæ*. This question has been settled beyond controversy. Let us suppose that the deceased had made a statement under similar circumstances as thus shown in this bill of exceptions, would any one contend that it would not have been admissible as *res gestæ*? We think not. The circumstances under which this declaration was made clearly show that it was so closely connected with the transaction, and proximate in point of time, as that it arose spontaneously, and was a part thereof, and under all of the authorities was admissible as a part of the transaction. See *Lewis v. State*, 29 Tex. App. 201, 15 S. W. 642; *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591; *Craig v. State*, 30 Tex. App. 619, 18 S. W. 297; *Stagner v. State*, 9 Tex. App. 440; *Bradberry v. State*, 22 Tex. App. 273, 2 S. W. 592; *Castillo v. State*, 31 Tex. Cr. R. 145, 19 S. W. 892; *Lindsey v. State* (Tex. Cr. App.) 32 S. W. 768. And for authorities generally, see *White's Ann. Tex. Pen. Code*, § 1236. It is not necessary to discuss the other errors assigned by appellant, but for the errors above pointed out the judgment is reversed, and the cause remanded.

#### YOUNGMAN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

#### CRIMINAL LAW—APPEAL—PERFECTING BY GIVING NEW RECOGNIZANCE.

Where a recognizance is defective, another proper legal recognizance cannot be entered into in the court below pending the appeal, so as to perfect it.

On motion for rehearing. Overruled.

For prior report, see 42 S. W. 988.

Wynne, Greer & Smith, for appellant.  
Mann Trice, for the State.

HENDERSON, J. On a former day of this term the appeal herein was dismissed because the recognizance was defective. It is here contended that the original recognizance is a good recognizance, reciting the offense substantially. We held that the recognizance was defective because it did not contain the essential elements of the offense. The recognizance fails to recite that the sale was made after the qualified voters of said county had, at a legal election, held for that purpose in accordance with the law, determined that the sale of intoxicating liquor should be prohibited in said

precincts Nos. 1, 8, and 7; and that the commissioners' court of said county had declared the result, and legally passed an order to that effect, which order had been published as required by law. These were the essential allegations of the offense, as prescribed by statute and as has been held by this court. See *Key v. State*, 38 S. W. 773; *Gaines v. State*, 38 S. W. 774. An examination of the language of the recognizance will show that these essential elements of the offense were not embodied in the recognizance. Appellant seeks now to retain the jurisdiction of this court by virtue of another recognizance, which he appears to have entered into in the court below at a succeeding term, and since the record was filed in this court, and refers us to *Collins v. State*, 29 S. W. 275. The expressions used in that opinion, in the absence of the statement of facts, might indicate that, in our opinion, where a case had been dismissed on account of a defective recognizance, a new recognizance, complying with the law, could be taken, and in that manner the jurisdiction of the court maintained; but an examination of the statement of facts, in connection with the opinion, will show that it was not a new recognizance, but that a certiorari brought up the original recognizance, which appeared to be in sufficient legal form, the first recognizance sent up being defective on account of a clerical error in copying. We have held that, where the recognizance was defective, another proper legal recognizance could not be entered into in the court below pending the appeal, and so perfect the appeal. See *Lewis v. State*, 34 Tex. Cr. R. 123, 29 S. W. 384, 774, and 30 S. W. 231; *Quarles v. State*, 39 S. W. 669. We accordingly hold that it was not competent for appellant to enter into a new recognizance in the court below, and the motion for rehearing is overruled.

#### DICKENSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1897.)

##### STATUTES—AMENDMENT.

Const. art. 8, § 36, provides that the section or sections of a law amended shall be re-enacted and published at length. *Held*, that it is not necessary to retain the numbering of the section or sections amended.

On motion for rehearing. Overruled.  
For prior report, see 41 S. W. 759.

HENDERSON, J. Appellant was convicted under article 426 of the old Penal Code, being article 514 of the new Penal Code, for the unlawful killing of wild deer between the 20th of January and the 1st of August. This case was affirmed at the Austin term, 1897, but appellant filed a motion for rehearing.

The grounds of the motion for rehearing are to the effect that, in 1879, Nacogdoches county, together with other counties, was exempted by virtue of article 430a of the

Penal Code (which was an article of the old Code, and passed at the session of the legislature that the Code was adopted), the contention of appellant being that article 430a has never been repealed. We quote from appellant's language on this subject, as follows: "In deciding this case, the court seems to have overlooked article 430a entirely. This article exempts Nacogdoches county from the provisions of article 426 of the Penal Code, which makes it a misdemeanor to kill deer; and it has never been repealed, amended, or changed by any act of the legislature. See Acts 1879, p. 63, where this article was originally adopted. The act of 1881 (page 45), on which this court bases its opinion, amended article 430, Penal Code, but did not pretend to amend or repeal article 430a. The act of 1881, while proposing an acting clause to amend article 430a, did so at all. It was not repealed, amended, or re-enacted, and the declaration in the acting clause that article 430a was repealed could not have that effect, because the constitution prohibits it. See section 3, of the constitution, which provides that no law shall be revised or amended by reference to its title, but that in such case the act revised and section or sections amended shall be published at length. No act stated in the original opinion, article 430a was passed by the legislature in 1881, but was an amendment to the Penal Code, which was adopted at that session of the legislature. By reference to the Penal Code passed in 1879, it appears that article 430 relates to aquatic fowls, and is as follows: 'Art. 430. Aquatic fowls, wild turkeys, and wild pigeons are not included within the provisions of the preceding article.' This article exempts certain counties from the operation of certain of the preceding articles of chapter 5. In 1881 this entire chapter was before the legislature for revision. The act is entitled 'An act to amend arts. 425, 426, 427, 428, 429 and 430a, and to amend art. 428½, and to repeal art. 430, and to amend title 13, of the Penal Code of the State, for the protection of fowls and game.' It will be noted that every section or article of said chapter in the Penal Code is re-enacted, some of them with amendments, except article 430, relating to fowls, etc., which is entirely omitted. Effectually repealing said article 430; article 428½ is added to the act, as shown by the caption. The entire subject-matter of article 430a is re-enacted, but said article finds its way into the act as article 430, not 430a. The original article 430a has been repealed, its number, 430, is given to the revised article, which was formerly article 430a. As we understand it, the court is not that the legislature failed to amend the subject-matter, and publish it as amended, but that they failed to re-



number 430a. of said article in its revision. Now, we are not aware of any requirement of the constitution that would constrain the legislature to retain the number of said article so revised. The mandate of the constitution in this regard is simply that "no law shall be revived or amended by reference to title, but in such case the act revived or section or sections amended shall be re-enacted and published at length." The amendment in this case was not by its title alone, but the subject-matter proposed to be revived and amended, contained in article 430a, was all brought forward and re-enacted and published at length. When this was done, the legislature appears to have given the number of the article 430, and not 430a, originally contained in the act as amended. The legislature had at the same time repealed article 430; and, said article, with reference to aquatic fowls, no longer existed. It was entirely competent for them to bring said article forward, and give it the number of the former repealed article. This article 430 in the act of 1881, thus being the article exempting counties from the operation of certain provisions of the act in question, instead of the former number, 430a, is treated as the exempting article in all subsequent legislation on the subject. See Act 1883, p. 115; Act 1887, p. 34; Act 1889, p. 84; Act 1893, p. 45. In these acts, except the last, Nacogdoches county is mentioned in article 430 as one of the counties exempted from the operation of article 426; thus further manifesting the legislative intent and purpose to treat this article as the clause exempting counties from the provisions of the provisions of said act. In 1893, this article 430, covering the subject-matter,—that is, naming the counties exempted from certain provisions of the act,—is amended and re-enacted; and in this re-enactment Nacogdoches county is omitted from the list of those exempted from the provisions of article 426 of the act, leaving it subject to the provisions of said article as effectually as if it had been made subject to said article by affirmative positive enactment.

The view insisted on by appellant's counsel, the clause of the constitution should be construed that every amended law should not only contain the act revived or section amended, but should retain its numbering. We do not believe such contention to be a sound construction of the section of the constitution in question. On the contrary, we believe it to be entirely legitimate and proper for the legislature, in amending an article or section of a law, to bring it forward, and publish it at length as amended, and then give it such numbering as it may choose. Of course, it would be best to follow the numbering contained in the particular chapter, and in this instance, as there no longer existed article 430, because this was repealed, article 430a was amended and given the

sequent number 430. Nor do we deem it at all necessary that the legislature should in the act itself, or in the caption thereof, have set forth that this amendment was to repeal article 430, and to amend article 430a, and then, after such amendment and repeal, to change the numbering of the article 430a to article 430; yet such seems to be the contention of appellant. In our opinion, such contention is without either reason or authority to support it. There being no other ground for a rehearing presented, the motion is accordingly overruled.

### ORMAND v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

#### HOMICIDE—ACCIDENTAL KILLING—EXCEPTIONS—INSTRUCTIONS.

1. The theory of the defense was that deceased was accidentally killed by another person, who was firing at defendant. A bill of exceptions stated that defendant offered to prove, and could have proved, by two witnesses, that, if more than one shot had been fired on the night of the difficulty, they would have seen the shots, and that the state's counsel objected to this testimony, as calling for a conclusion of the witness, which objection was sustained by the court. *Held*, that the bill was too vague to be considered.

2. Where the court, in his charge, submits the respective theories of the state and of the defendant, and instructs that, if the deed was done as claimed by the defendant, the jury shall acquit defendant, there is no error in refusing to submit special instructions as to defendant's theory.

Appeal from district court, Clay county; George E. Miller, Judge.

Ransel Ormand was convicted of murder in the second degree, and appeals. Affirmed.

L. C. Barrett and Finley Weldon, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the second degree, and given five years in the penitentiary. He reserved one bill of exceptions during the trial, in which it is stated he "offered to prove, and could have proved, by Lee Perry and Jim Goodner, that, if more than one shot had been fired outside (on south side of the house) on the night of the difficulty testified about, they would have seen the shots; and the state's counsel objected to the introduction of this testimony, on the grounds that it called for a conclusion of the witness; and the court sustained the objection, and excluded the evidence, to which defendant excepted." This bill is so very vague and indefinite that it cannot be considered. It fails to state that these witnesses were in a position to see any shots if they had been fired, nor does it state that they were present, nor does it undertake to state that more than one shot was or was not fired, nor does it undertake to show what bearing the fact that one or more shots were fired on the

south side of the house would have had up on any issue upon the trial. Under the decisions, we are not authorized to draw upon the statement of facts to supply omissions in the bill of exceptions, nor are we authorized to indulge any presumption in aid of the defects in the bill.

The theory of the prosecution was that Hiram Curtis, Lem Tate, and the defendant, in pursuance of an agreement for that purpose, undertook to kill one Emmett Bentley, and that during the firing the deceased, Virgil Risley, was shot and killed by one of the three parties; the testimony indicating that it was appellant who fired the fatal shot. The theory of the defendant was that Emmett Bentley, in returning the fire of Hiram Curtis, accidentally shot and killed deceased. These theories were submitted by the court in his charge to the jury, and they were instructed that, if Emmett Bentley shot and accidentally killed deceased, the jury should acquit the defendant. Appellant asked some special instructions submitting his defensive theory, which were refused by the court. In this there was no error, as the charge given by the court covered all the requested instructions. The testimony fully justified the verdict, and the judgment is affirmed.

#### CLARK v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

THEFT—STATEMENTS OF PARTY OTHER THAN DEFENDANT—IMPEACHMENT OF WITNESSES—EXPERTS.

1. The court of criminal appeals cannot inquire upon what evidence the grand jury found an indictment.

2. Where a motion for continuance sets up that the defendant expects to prove by absent witnesses facts about which there is no controversy, and is vague and indefinite, it is not error to overrule it.

3. Evidence that the person from whom one accused of cattle theft obtained the stolen cow said, in the presence of the accused, that he had stolen many a cow, but had not stolen this cow, is not prejudicial to the accused, as the jury would not hold him responsible for the remarks of another.

4. A prejudicial remark made by the county attorney in a low tone of voice, intended only for the ear of counsel, which the judge rebuked immediately, and instructed the jury not to consider, is not error.

5. Where one accused of crime was present, and had knowledge of his brother's furnishing one of the state's witnesses with means to leave the country, it is not error for the state to prove the transaction.

6. Whether or not a brand on a cow is a "picked brand" is a matter of common observation, and need not be proved by experts.

7. One of the witnesses for the defense in a criminal prosecution denied that he had offered a party a sum of money not to testify against him on the trial. Held, that it was not error for the party attempted to be bribed to testify concerning it on behalf of the state.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

John Clark was convicted of the theft of a cow, and he appeals. Affirmed.

Jack & Jack, Gossett & Young, Lee R. Stroud, and Cunningham & Adams, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of the theft of a cow, alleged to be the property of W. B. Wright, and appeals.

The court cannot reverse a judgment because the grand jury did not have before them the witnesses for the accused. We cannot go behind the action of the grand jury to inquire as to what evidence they had or did not have before them when considering of their bill.

Appellant moved to continue the cause for the want of the testimony of Luke Woods, John Garrett, and Frank Roland. Woods was present at the trial, but was not introduced by the appellant. Defendant expected to prove by Woods and Garrett "that they knew both cows, that claimed by Wright and the one by Clark; that they resembled in color, but there was a marked difference in brand; that each of the witnesses had seen the Wright cow since the defendant killed his cow; that the Wright cow was branded E, while that of the defendant was branded G." He expected to prove by Frank Roland "that he once owned the Wright cow, and had sold the same to Wright; that her brand was a plain L, with a bar through the stem of the L." There was no controversy upon the trial as to the brand of Wright. It was a plain L, with a bar through it. The application is vague and indefinite. It does not state when and where the absent witness saw the Wright cow. We are of opinion that the court did not err in overruling the motion for a continuance.

It appears from bill of exceptions No. 2 that Tom Anderson was placed upon the stand, and testified to certain facts in regard to the hide of the stolen animal. The state proved by Anderson "that Frank Gray, in company with appellant, came to see him, and stated to him that he (Frank Gray) had stolen many a cow, but had not stolen the Wright cow." We cannot conceive how this was injurious to the appellant. If Gray had been on trial, and such proof was introduced against him, it is very doubtful whether it would have been competent; but, under the circumstances of this case, we think this evidence is clearly harmless as against the appellant, Clark. Clark claimed to have obtained the animal in controversy from Gray, and the jury would not have held Clark responsible for the remarks of Gray; that is, would not have held Gray's remarks as criminating Clark. We would further observe that Gray was not placed upon the stand as a witness; so the testimony could not have injuriously affected him as a witness.

By bill of exceptions No. 3 it appears that the state proved by Elkins that Dick Clark

brother of the defendant) had given him \$50 in money, as well as a horse, to leave and not testify in this case, etc. Defendant said witness if he had ever testified before that John Clark had ever threatened by one testifying against him in this case; whereupon the county attorney made the remark, in open court, that the witness had always made the same statement, to which remark the defendant's counsel then and there excepted, because the same was calculated to injure him, etc. The court explained the bill by stating "that the remark complained of was made by the county attorney in a low tone of voice, and that the court had reason to believe that the remark was for fear of counsel, but that the court immediately rebuked counsel for said remark, and told the jury not to consider the same, or not let it influence them in any manner whatever." We find no error in regard to this matter.

By bill of exceptions No. 4 it appears that the state proved by Elkins and Jackson that they each had a meeting with Will Byrd and Dick Clark, at the Clark premises, or close to the same; that the meeting was at the solicitation of Dick Clark (a brother of defendant); that in said meeting a horse and saddle were turned over to witness George Jackson, and that said horse and saddle was turned over to J. E. Elkins by witness George Jackson; that witness Jackson understood that the horse was intended for J. E. Elkins to leave the country on, and not testify." In this testimony the defendant excepted. We are of opinion that the evidence was admissible, because it is shown by the testimony bearing upon this subject that appellant was aware of the transaction, and, no doubt, had instigated it. He was in the yard when the horse was delivered to Elkins; heard what was said between the parties; and it was also shown that appellant inquired of Reasener if Elkins could be bribed, or to this transaction; made arrangements in regard to a debt due by Elkins to Reasener; and, after Elkins left, appellant said word to the sheriff that if he ever saw Elkins again, he could do a certain thing. Under the circumstances above stated, we think appellant was fully aware of the bribery, and instigated the same, and that there was no error in admitting this testimony.

By bill of exceptions No. 5 it appears that witnesses were permitted to give their opinions as to the brand on the piece of hide introduced in evidence. They testified that they believed the brand was a "picked brand." The bill does not exclude the idea that these witnesses were experts in regard to this matter; and it is not pretended to set aside what they stated bearing upon this question. Independent of this, it does not require an expert to give an opinion on this subject. Any witness can do this, as it is a matter of common observation.

It appears by bill of exceptions No. 6 that appellant introduced one Peter King, a negro, who testified to material facts for the defendant. Counsel for the state, on cross-examination, asked the witness "if he did not, during the trial of this case, go to Jonas Williams (a negro witness for the state), and offer to give him \$10 for the purpose of paying a fine assessed against Williams' daughter, at Scurry, Texas, if he (Williams) would not testify against him (King) at this trial." King replied that he did not do so. Afterwards Jonas Williams was placed on the stand, and testified that Peter King had offered him ten dollars, etc. Appellant objected to this testimony, and the court overruled the objections, and defendant excepted. This evidence was clearly admissible. Its object was to show the interest and anxiety of Peter King in behalf of appellant. The jury had a right to know what his feeling and interests were, so as to pass upon the credit to be given to his evidence. It was that character of testimony that would not be used by the jury for any other purpose than as going to the credit of Peter King.

We have examined the charge of the court, and find it as a whole correct, covering every material issue in the case. The judgment is affirmed.

#### WILLIAMSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

##### HOMICIDE—SUFFICIENCY OF EVIDENCE.

On the trial for murder, the testimony consisted of that of alleged accomplices, who testified that accused came to the scene of the murder at the request of one of them, while deceased, though badly wounded, still lived; that he expressed regret at not having been there sooner; that he refused to kill deceased, but gave his shotgun to another, and stood by, while deceased was shot and killed; that he helped remove and conceal the body; that the body was removed on a wagon with poles put across it, and concealed at a certain place. Other testimony showed that the body was found at the place designated, with a shotgun wound in the head; that accused had made a remark showing knowledge that deceased's husband, who was killed at the same time, would be killed, and expressed malice against him. Two other witnesses, not accomplices, testified that on the morning after the murder they saw defendant pass their house, with two of the accomplices, in a wagon with no bed on it, coming from the direction where the deceased was found, and going towards home. *Held*, that the testimony of the witnesses, not accomplices, is consistent with the testimony of the accomplices making accused a principal, and corroborates them sufficiently to connect accused with the murder, and warrant a conviction.

Appeal from district court, Wharton county; T. S. Reese, Judge.

Action by the state of Texas against George Williamson. Defendant was convicted of murder in the first degree, and he appeals. Affirmed.

Linn & Mitchell and A. D. Sparkman, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at imprisonment in the penitentiary for life: hence this appeal. This is a second appeal, appellant having previously been convicted, and the judgment of the lower court reversed by this court. See *Williamson v. State*, 35 S. W. 992. We held in the former opinion that there was not sufficient corroborative testimony of the accomplices. In that case, as in this case, Gus Colburn and Emmet Colburn and John Rickard were the principal witnesses for the state. We held that Gus Colburn and John Rickard were unquestionably accomplices, and that there was evidence suggesting that Emmet Colburn was also an accomplice, but as to him this matter was properly left to the jury by the charge of the court. But, notwithstanding the fact that under the charge the jury might have believed that Emmet Colburn was not an accomplice, still his testimony, with that of Godfrey Winzenreid (who was also a state's witness in the case), did not sufficiently corroborate the accomplices as to appellant's connection with the killing of Mrs. Nancy Jane Crocker. In the case as it is now presented, in addition to the said witnesses, we have also the testimony of Jim Rickard and Mrs. M. J. Martin, and it is not pretended that either of these witnesses were accomplices. The facts testified to by the two Colburns and John Rickard and Godfrey Winzenreid are substantially the same as testified to by them on the former trial. Appellant contends, however, that the additional evidence now before us does not corroborate the accomplices in such manner as tends to connect the appellant with the commission of the offense. In order to present this matter, we will state the case as it appears from the record on the accomplices' testimony, and then state the testimony of the two witnesses, Jim Rickard and Mrs. Martin. As before stated, the evidence of said witnesses being the same as on the former trial, we will merely restate, from the former opinion, the case as made by their evidence. It appears from the evidence that the difficulty occurred in the afternoon of the 19th of May, 1895, between Jim Williamson, Frank Martin, John Rickard, and Gus Colburn, and old man Crocker. The difficulty began between Jim Williamson, a son of the appellant in this case (George Williamson), and old man Crocker, near the house of one Emmet Colburn. After some shots were exchanged, old man Crocker retreated to the house of Emmet Colburn. Jim Williamson, Frank Martin, John Rickard, Jim Martin, and Gus Colburn appear to have surrounded said house. In a short time Mrs. Nancy Jane Crocker and little boy came from the house of Crocker, which was not a great distance away, she bringing a gun to her husband. The little boy attempted to leave the house, and they shot at him. He went back. Mrs. Crocker afterwards attempted to leave, and got off some little distance from the house before they discovered her. Jim Williamson and Frank Martin halted her, but she would not stop. She kept on, and

Frank Martin got on his horse, and pursued her. She had got some three or four hundred yards from the house, and he shot her down. The parties then appear to have laid siege to the house and fired into it. In the meantime they were of the party, Gus Colburn, after George Williamson (the defendant) who lived about one and a half from there. The defendant was at home when the messenger arrived. He returned late in the night, in company with Godfrey Winzenreid. The latter went on to the house, and the appellant then got his share and came over to the scene of the difficulty. When he got there he remarked: "Boys! I wasn't at home. I was off horse-swinging. If I had been at home, I would have been on hand when the first shot was fired. When he arrived the parties then pressed forward. They already succeeded in killing old man Crocker and the boy. Mrs. Crocker, whose body was then lying some three or four hundred yards from the house, was then thought to be mortally wounded. It was suggested that the bodies should be disposed of. A wagon was procured, and some poles placed upon it. The parties then went with the wagon down to where the body of Mrs. Crocker was lying in the prairie. When they got there George Williamson (the defendant) and Jim Martin and Frank Martin went up to where Mrs. Crocker was lying. Gus Colburn and Jim Williamson remained near the wagon, which was about 100 yards from where Mrs. Crocker was lying. Then when Gus Colburn testified at this point that when these parties went up to Mrs. Crocker, he did not hear her say anything, but that Mrs. George Williamson came back to the house, and he heard them talking about who should shoot her. The two Martins and George Williamson then went back to Mrs. Crocker. The witness heard a shot fired. Did not see who shot her. After this they placed her in the wagon, and then went back to the house and got the body of the old man and the boy, and carried them about seven miles, and concealed their bodies in a thicket. John Rickard testified on this point that he, Gus Colburn, Jim Williamson stayed at the wagon. Frank Martin, Williamson's gun was on the wagon. He got it out, and then he and Jim and Frank Martin went to where Mrs. Crocker was lying. He heard them talking about her, and he said, "Oh, Frank Martin, I know you will shoot her. Then they all came back to the wagon. They said that the woman had to be killed. There was some talk as to who should kill her. One of the Martins said to the defendant, "You have done nothing yet; you shoot her." The defendant said, "No; by God, I can't shoot a woman!" The defendant had his gun in his hand. Frank Martin then said, "Well, I'll do it!" The defendant, George Williamson, then said, "Well, here," and handed the gun to Frank Martin. Frank Martin took the gun. Williamson handed it to him, and shot Mrs. Crocker in the head. He set her hair up, and at which the defendant laughed. It was the gun that she was shot with. Emmet Colburn

ed that the shooting occurred at his e; that at the time his family were not at e. and he was there alone; that he tried revall on the crowd who were assaulting ker to leave, and not have their trouble s house; that his wife and children were ort distance off, at a neighbor's house, and aw them coming, and he went and told a to go back; that he subsequently went here Mrs. Crocker was, after he had seen a shoot her down, and she was then living, badly wounded.

e have been particular to collate the mony upon this point, because, to in- inate the appellant, George Williamson, ne death of Mrs. Crocker, he not being ent at the beginning of the difficulty, it me necessary for the state to show that was still living when he arrived, at 2 o'clock in the morning; and the court ented this view of the case in the charge ne jury. Confessedly, Gus Colburn and Rickard were accomplices, and there ome testimony in the case tending to y that Emmet Colburn may have been an mplice. The court properly submitted question as to accomplices with refer- to all of these witnesses. The witness zenreid, who was introduced by the e, testified that on the 19th of May he with the defendant hunting horses in aca county, some 15 miles distant from place where the shooting occurred; that ate supper at one Mr. Powell's, and r supper they started home; that they o Williamson's house, which was a mile a half distant from the scene of the icide, about 2 o'clock that night; that n they rode up to Williamson's house erness heard a commotion in the house,

Mr. Williamson's daughter called to (the defendant), and he (witness) sat on horse, and defendant got down and went the house. After a little while he came and said that his wife was sick, and him to go on home, and witness then t on to his father's house. This wit- also says that at some time during that t, and before they reached the defend- s home, about 2 o'clock, the defendant him that, if Crocker was killed, for him (ness) not to have a word to say about it, not to even help bury him. In addi- to this testimony, Jim Rickard testified the state that on the morning of the of May, 1895, which was the morning r the killing of the Crockers, on Sunday t, he was at his father's house, and at 8 o'clock he saw some parties pass, in a wagon and one on horseback. The on had no bed on it. The two men in wagon were Frank Martin and George amson, and the other was Jim Martin.

Martin came to the house. The others not stop. They were coming from the ction of Seymoure's pasture, where the es of the Crocker family were found. erness stated that he knew it was Frank

Martin and old man George Williamson in the wagon. Mrs. M. J. Martin testified substantially to the same effect. Both of these witnesses lived in the vicinity of Emmet Colburn's house, the place of the homicide, between half a mile and a mile distant therefrom. The proof is unquestioned, also, from outside parties, that the bodies of the three Crockers were found in Seymoure's pasture, concealed and buried in thick brush, some seven miles from the scene of the homicide.

We understand the contention of appellant to be that there is no testimony, except that of the accomplices, which places George Williamson (the defendant) at the scene of the homicide on the night of the 19th of May; and that the state's evidence, to wit, the testimony of Winzenreid, the only person, outside of the accomplices, who testifies as to the whereabouts of appellant on said night, leaves him at his home at 2 o'clock that night, about a mile and a half from the place of the homicide. We would observe, however, that we have from this witness Winzenreid an expression against old man Crocker of deep-seated malice, which indicates that he expected him to be murdered, and which would suggest, also, that he was willing to engage in such murder. This witness left the house of the appellant at 2 o'clock, noticing a commotion in the house, and at that time the appellant was still up. From here, according to the testimony of the accomplice Gus Colburn, it appears that appellant proceeded with him, carrying his gun, to the place of the homicide. Both Rickard and Gus Colburn testify that Mrs. Crocker was living when defendant came upon the ground, and they then narrate the part that he took in dispatching her, and, if their statements be true, unquestionably he was a principal in her murder. They state that deceased was dispatched by shooting her in the head with a shotgun, and that this gun was furnished to Frank Martin by defendant; and, according to the testimony of outsiders who examined the body of Mrs. Crocker, she appears to have had a shotgun wound inflicted in her head. We only know of the circumstances of the murder, of the time and manner of the death of Mrs. Crocker, through the testimony of the accomplices John Rickard and Gus Colburn. This testimony fastens appellant there at the time, and fixes his status as a principal in her murder.

Now, what are the additional circumstances that tend to connect appellant with this homicide? Naturally the person engaged in so atrocious a murder as this record shows would desire to conceal the crime. He would desire to so dispose of the bodies that they could not be found. We have the fact, from outside sources, that these bodies were found so concealed by some one in Seymoure's pasture on Pinoak, some seven miles from the scene of the homicide. The

accomplices tell us, also, that the bodies were concealed there. Now, is it not reasonable to presume that the parties who participated in this murder concealed the bodies that night? The accomplices tell us that they did this. They tell us, moreover, that George Williamson went with the bodies, and helped to bury them; that for this purpose they procured the wagon of Henry Colburn, and the horses of Emmet Colburn; and we find that early the next morning George Williamson, Jim Martin, and Frank Martin were seen returning from the direction of Seymoure's pasture, driving the wagon, which the accomplices say was used to carry away and conceal the bodies, back to the owner in the vicinity of the homicide. It is argued that this might constitute appellant an accessory, but it fails to show that he was a principal in the murder of Mrs. Crocker. In answer to this, it is only sufficient to say that we only know of the circumstances, of the place where, and time of this murder from the accomplices; and also as to how her body, with that of her husband and son, were concealed; and these accomplices show that appellant participated in the death of Mrs. Crocker. And while the fact that he was found with Frank Martin and Jim Martin returning with the wagon early the next morning from the place of the concealment of the bodies is consistent with his being merely an accessory to the murder, it is also consistent with the positive testimony of the accomplices, and tends to corroborate them, and to connect appellant as a principal in the murder of Mrs. Crocker. The accomplices tell us that he was present, and helped murder her, and that he went with others some seven miles to conceal her body, on that same night. Outsiders tell us that early on the ensuing morning he was seen returning from the place of the concealment of said bodies to the place of the homicide, and so we believe that the testimony of Jim Rickard and Mrs. Martin is corroborative of the testimony of the accomplices, and tends to connect appellant with the commission of the offense charged against him. The judgment is affirmed.

#### ROBINSON v. STATE.

(Court of Criminal Appeals of Texas. June 28, 1895.)

#### INDICTMENT—VARIANCE—ACCOMPLICE EVIDENCE—INSTRUCTIONS.

1. On the trial under an indictment for passing a forged railroad passenger ticket, the instrument offered in evidence had the following indorsement on the back: "G." "U." "R." "Fort Worth, Texas, February 7, 1894," in the outer rim of a round stamp. The stamp, with the letters, was not set out in the indictment as a part of the forged instrument, but on the face of the ticket as set out in the indictment, and also that introduced in evidence, appear the words, "Good within ten days from date of same, as stamped on back hereof." *Held*, that the omission of the

words on the back of the ticket offered in evidence from the description of the ticket in the indictment was a fatal variance.

2. It appeared on the trial of defendant's charge of uttering a forged railroad passenger ticket that defendant was a railroad ticket agent, and the blank ticket which was offered in evidence was sold to defendant by M. The defendant claimed that M. was complicit in the passing of the forged instrument, and that, as he was an important witness in the case for the state, the court, as to him, had given the jury a charge on accomplice testimony, which the court did not do. *Reversible error.*

Appeal from district court, Tarrant County, Texas. W. D. Harris, Judge.

H. S. Robinson was convicted of uttering a forged railroad passenger ticket. Appeal. Reversed.

Byron Johnson, for appellant. Manly, for the State.

DAVIDSON, J. The appellant in this case was convicted of knowingly passing a forged instrument in writing, which was set out according to its tenor in the indictment, and his punishment assessed at two years imprisonment in the penitentiary, and fine of \$100. Judgment and sentence of the lower court affirmed. The state prosecutes this appeal.

On the trial of the case the state offered in evidence the alleged forged instrument, which was set out in the indictment. The appellant objected to the introduction of same, because he claimed there was a variance between the instrument as set out in the indictment and that introduced in evidence, in that the instrument offered in evidence had an indorsement on the back of as follows, to wit: A stamp with the letters "G." "U." "R." "Fort Worth, Texas, February 7, 1894," in the outer rim of said stamp, the said letters being the first three of the last letter of the Gulf, Colorado & Santa Fé Railroad. Said stamp, with said indorsement, is not set out in the indictment as a part of the alleged forged instrument, which was a passenger ticket of the Gulf, Colorado & Santa Fé Railway Company from Ft. Worth to Galveston and return. By reference to the face of the ticket as set out, and also that introduced in evidence, appears the following indorsement: "Good within ten days from date of same, as stamped on back hereof;" so that it appears that the instrument, in order to be a complete ticket of said company for round-trip from Ft. Worth to Galveston, required to be stamped on the back, and such stamp was made part of said ticket from said round-trip contained on the face thereof. Because the stamped indorsement on the back of said ticket could be offered in evidence, it should have been set out in the indictment as a part of the alleged forged instrument, and the court should have sustained the objection to its introduction. It appears in this case that one Marple bought two genuine tickets of the Gulf, Colorado & Santa Fé Railway Company, which were properly stamped with the points of departure and destination.

written in the blanks on the face of the tickets, and with indorsements on the back of; that in tearing out said tickets from a book, the agent also tore out a third ticket filled out or indorsed on the back; that Marple sold said blank ticket to the defendant, who was a ticket broker in Ft. Worth, charging therefor the sum of one dollar. He certainly knew at the time that said ticket in that shape was of no value, was not his property, and that before it could be used by the defendant, in order to make it a valid ticket, the points of departure and destination must have to be forged in the face of the ticket and also the stamped indorsement on the back thereof. The appellant, on the trial of this case, claims that said Marple was an accomplice in the passing of the forged instrument, and that, as he was an important witness in the case for the state, the court, as it should have given the jury a charge on accomplice testimony. This the court did not do, and the defendant reserved an exception to the action of the court. In our opinion, the charge on this subject should have been given. In our opinion, it is also questionable whether the indictment in this case was sufficient for the passing of a forged instrument. The charge of the forged instrument, and in what the jury consisted, should have been more fully set out as to the face of said instrument, as to the indorsement on the back thereof, which heretofore been discussed. See *Overly v. State*, 34 Tex. Cr. R. 500, 31 S. W. 377, decided on the present term of this court, and *Daud v. State*, 34 Tex. Cr. R. 460, 31 S. W. 376. The errors pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

## BENSON v. STATE.

State of Criminal Appeals of Texas. Dec. 22, 1897.)

INDEX—CRIMINAL LAW—CONTINUANCE—DILIGENCE—DYING DECLARATION—RES GESTÆ—INSTRUCTION.

A defendant whose trial is set for 10 days after the finding of the indictment, and who delays 14 days in applying for process for a writ of habeas corpus, fails to use due diligence in issuing his writ, unless some good reason for the delay is shown.

Where it is evident that an absent witness has not sworn to the facts set out in the indictment for continuance, or, if he had, that the indictment could not be regarded as true, and where the witness was evidently a myth, there is no error in refusing a continuance.

The absence of witnesses summoned to testify in a defendant's character is not ordinarily a ground for continuance; and, where defendant produced testimony as to his good character, and was not controverted at all, there was no error in overruling the application.

Evidence as to the conduct and remarks of a defendant soon after he had received the mortal wound, showing that he was rational, and that he believed that he was going to die, and that he was going to die, and that very soon, his

declarations are admissible as dying declarations.

6. Statements of deceased made within 15 or 20 minutes after he had received the mortal wound, where he was rational, and believed that he was going to die very soon, are admissible as part of the *res gestæ*.

7. The court charged that evidence that the witness J. made to the witness C. statements different from his statements as a witness is not to be considered as showing the truth of the facts by him said to have been stated by J., but only as affecting the credibility of J., if considered at all. *Held*, that the instruction is correct except that portion which intimates that the jury might not consider the testimony of C., and that defendant could not complain of this, since it was favorable to him.

Appeal from district court, Ft. Bend county; T. S. Reese, Judge.

William F. Benson was convicted of murder in the first degree, and appeals. Affirmed.

Bryant & Montague, for appellant. Mann & Trice, for the State.

HURT, P. J. Appellant was tried and convicted of murder in the first degree, for killing George Canaday, and his punishment assessed at death.

Appellant submitted a motion to quash the indictment. We have repeatedly passed upon a similar indictment to the one presented in this case, and held it sufficient. See *Caldwell v. State*, 28 Tex. App. 566, 14 S. W. 122, and cases there cited.

A motion was made to quash the special venire. The explanation of the trial judge and affidavits of the clerk show that the motion was not well taken. The statute pertaining to this subject was complied with, and is as follows: "Whenever a special venire is ordered, all the names of all the persons selected by the jury commissioners to do jury service for the term at which such special venire is required shall be placed upon tickets of similar size and color of paper, and the tickets placed in a box and well shaken up, and from this box, the clerk in the presence of the judge in open court, shall draw the number of names required for such special venire, and shall prepare a list of such names in the order in which they are drawn from the box, and attach such list to the writ and deliver the same to the sheriff." Code Cr. Proc. 1895, art. 647. All of these things were done by the clerk, as shown by his affidavits. The motion to quash the service of the special venire is not well taken. It is not insisted that the names of the parties summoned to serve as special veniremen were not served upon the appellant. A certified copy of the writ, as well as the names of the persons summoned, were served on appellant. There is nothing in this motion worthy of our consideration.

Appellant presented a motion to continue the case, for the want of the testimony of one Henry Hughes. There is no diligence shown as to this witness. The indictment was returned on the 9th of September, 1897.

The defendant was then in custody. Process was not applied for to the district clerk of Ft. Bend county until the 23d of September, and was not issued by him until the 24th of September. It appears that said process was mailed to J. D. Bryant, of counsel for defendant, at Houston, Tex., who did not deliver the same to an officer until the 25th of September; so that the officer only had four days within which to serve said witness before the day of trial,—the 28th of September. Diligence would have required appellant to have issued his process as early after the 9th of September as possible; but no excuse is shown here for the delay. For aught that appears, the witness in the mean time may have left Harris county, although he was a resident of said county. Concede, however, that the diligence was sufficient as to this witness; we are inclined to believe, on examining the record, that, if he were present, he would not testify to the facts stated in the application. But even if he did so testify, in the light of the testimony, we could not regard the facts expected to be proved by him probably true. Again, the inquiry was made from a number of witnesses as to the presence of this absent witness at the homicide, and no one, either for the state or the defendant, intimates that he was present or was known in that community. In fact, he was never heard of by any witness on the stand, either as a stranger, or by name, as being present or in that county. We are of opinion that he was evidently a myth.

As to the witnesses resident in Robertson county, we make the same observations in regard to the diligence used for them as heretofore in reference to the witness Hughes. Besides, these witnesses were character witnesses, and a continuance will not be granted for this character of testimony except under peculiar circumstances. Appellant, however, introduced testimony as to his good character, which was not controverted at all.

The state introduced Cora Canaday, Mrs. George Canaday, A. B. McGee, Ben Swisher, George Cone, and J. F. Canaday, who testified to the conduct and remarks of the deceased soon after he received the mortal wound. This testimony was evidently admissible, for the purpose of laying the predicate for the introduction of the dying declarations of the deceased. Everything stated by each and every witness was pertinent to that subject. By the testimony of these witnesses it was established beyond any controversy that the deceased was rational, and that he believed he was going to die, and that very soon. This evidence was necessary in order to render admissible the dying declarations of the deceased, which were made within 15 or 20 minutes after he received the fatal wound. This course of procedure is to be commended.

Appellant objected to the introduction in evidence of the dying declarations of the deceased. The predicate was amply establish-

ed; that is, that the deceased was and believed that he was going to die that very soon. Again, under the circumstances of this case, if not dying declarations were evidently part of the statements, and we hold upon both grounds they were admissible.

Appellant excepted to the following of the court to the jury: "The state has produced evidence to show that the George Johnson made to the witness statements different from his statements on the stand as a witness as to where he was at the time of the alleged shooting. The testimony of the witness Cone is not to be considered as tending to show the truth of the facts by him sought to have been shown by the witness Johnson, but is to be considered as affecting the credibility of the said witness Johnson, or the weight to be attached to his testimony, if considered by you at all. Appellant has no ground upon which to complain of this charge. It is correct in particular, except that portion which intimates that the jury might not consider the testimony of Cone. This is favorable to appellant, for it was the duty of the court to consider Cone's testimony in passing credit to be given to the testimony of Johnson.

The question raised by appellant as to the legality of the term of the court for this trial occurred has been settled against appellant in the case of Nobles vs. State (decided at the present term) 42 S. W. 2d 100.

In motion for new trial, appellant claimed that the evidence is not sufficient to support the verdict, because of no proof that the deceased, Canaday, is dead. This was a question of law, and the state is to liberate murder, if the testimony of the witnesses for the state is true. That the deceased died from the wounds is placed beyond question. We deem it unnecessary to pass upon the testimony.

We are of opinion that the trial was fair and impartial, the defendant being allowed all of his rights. The court instructed the jury in regard to murder in the first degree, murder in the second degree, manslaughter, and self-defense. This, perhaps, was not the best instruction, but we are impressed with the opinion that the defendant coolly and deliberately intended to kill the deceased if he failed to take the precautions he had made; and if he had refused to submit manslaughter to the jury that appellant would have instructed the jury that appellant was guilty of murder if he intended and did kill the deceased, because he did not retract his statements, we would not have reversed the judgment because of such instruction. As before stated, all the degrees of manslaughter, and self-defense were submitted to the jury, fairly and liberally. The jury believed the state's case, and convicted appellant of murder in the first degree, assessing his punishment at death. We see no reason for disturbing their verdict. The judgment is affirmed.



PERKINS et al. v. ADAMS et al.<sup>1</sup>

Part of Civil Appeals of Texas. Nov. 17, 1897.)

ISS—QUESTION FOR JURY—LEADING QUESTIONS.

A mortgage executed by an aged father, in body and mind, by reason of threats to execute and imprison his son, is void.

Appeal from district court, Medina county, John A. Green, Jr., Special Judge.

Appeal by W. B. Adams & Co. against Melville Perkins and others. Judgment for plaintiffs and defendants appeal. Reversed.

This suit was brought by W. B. Adams & Co. against Mellie Perkins, as the wife, and other appellants, as the children and heirs of J. M. Perkins, deceased, upon a promissory note executed on the 29th day of May, 1892, by J. M. Perkins to Ivey Bros. for the sum of \$250, payable on or before the 1st day of January, 1893, with 10 per cent. interest from its date, and to foreclose a mortgage on 80 acres of land executed by J. M. Perkins and Mellie Perkins at the same time to the payees of the note, to secure its payment. Appellees alleged in their petition that they were the owners and holders of the land and mortgage, and prayed judgment for the debt, interest, and costs, as a charge on the mortgaged premises only, and foreclosure of their mortgage lien. The appellants answered by general and special exceptions to the petition, and specially admitted execution of the note and mortgage as alleged, but alleged that there was no consideration for their execution, but averred that, at the time they were executed, J. M. Perkins was aged and enfeebled in mind and body, without mental capacity to understand the nature of his act, and that Ivey Bros., the original payees, knowing of his unsound mental condition, wrongfully took advantage of him, and induced him to execute the note and mortgage without any consideration therefor; that Ivey Bros., knowing that J. M. Perkins was aged and enfeebled in mind and body, a short time prior to the execution of the note and mortgage claimed an indebtedness against said Perkins and his two sons for the amount for which the note was given, and asserted that Perkins' sons had fraudulently disposed of personal property which had been mortgaged to them for the purpose of securing their respective indebtedness, and they, the said Ivey Bros., communicated to J. M. Perkins a threat that they would prosecute his sons criminally, and send them to the penitentiary, for fraudulently disposing of mortgaged property, if he did not give them a note and give security for the amount of his and his sons' indebtedness, and that, on account of his enfeebled mental and mental condition, he was by the threat overcome by fear for his sons, and induced thereby, without consideration,

to execute said mortgage; that at the time they were executed, and prior thereto, and afterwards, until his death, J. M. Perkins was in such a weak and unsound state of mind as to be wholly unable to resist the influence brought upon his mind by the threats of Ivey Bros. against his sons; that substantially the same threats against her sons were made to Mellie Perkins by the original payees in the note, and that, through fear of their execution, she was caused to sign the mortgage executed by her husband; that J. M. Perkins, deceased, was not indebted to Ivey Bros. in the sum claimed, or in any amount whatever; and that by reason of his mental infirmity, and the influence of fear for his sons occasioned by said threats, under which the note and mortgage were executed, they were without consideration and void. Upon the trial of the cause, which was before a jury, the appellants, for the purpose of obtaining the right to open and close the argument, admitted that appellees had a good cause of action, as set forth in their petition, except in so far as it might be defeated in whole or in part by the facts alleged in their answer, constituting a good defense. The jury returned a verdict in favor of appellees for the amount, principal and interest, due on the note, but made no mention in the verdict of the mortgage given to secure it. Upon this verdict and the admission of appellants made as aforesaid, the court entered judgment against appellants, to be satisfied out of the mortgaged premises, together with foreclosure of the mortgage lien thereon, from which judgment we have this appeal.

Geo. Powell, for appellants.

NEILL, J. (after stating the facts). There was no error in the court's overruling appellants' special exception to appellees' petition. It did not seek to establish a personal obligation against Mellie Perkins, or against any of the other appellants, but only to fix the amount of the alleged indebtedness as a charge upon the mortgaged premises, and to have it satisfied therefrom by foreclosure sale. If the property mortgaged was not a part of J. M. Perkins' estate, and not claimed by appellants, they could not be affected in any way by its being subjected to appellees' demand. In the absence of allegations and proof to the contrary, it must be presumed community property of J. M. Perkins and wife, since it was possessed by them at the time their marriage was dissolved by the former's death.

The evidence tends to show: That J. M. Perkins and his adult sons, Lee and John, in 1891 and 1892 traded with Ivey Bros., a firm of merchants doing business in Devine, running accounts with said firm. That in January, 1892, J. M. Perkins and his said two sons were indebted, on their separate and individual accounts, to Ivey Bros., in the aggregate amount of \$257, of which \$64 was on account of J. M. Perkins, and the balance

on account of Lee and John. That on about the 20th day of January, 1892, Ed Ivey, a member of said firm, sent J. M. Perkins a message, by J. A. Wright, to the effect that John and Lee Perkins were indebted to his firm on accounts, and had given a mortgage on personal property to secure such indebtedness; that subsequently, with the intent to defraud their creditors, they had sold such mortgaged property; that he (J. M. Perkins) was also indebted to them; and that if he did not make Ivey Bros. a note, secured by a mortgage on land, for the entire sum due by himself and sons, they would prosecute John and Lee for fraudulently selling mortgaged property, and send them to the penitentiary. That J. M. Perkins was then about 76 years old, in feeble health, infirm of body and mind, and on that account easily excited to fear for the safety of his sons by threats of the nature embodied in the message sent him by Ed Ivey. That said message was communicated to him by Wright, and that on account of his infirmities his volition was overcome by it, and, to save his sons from the threatened prosecution, he was induced to execute the note and mortgage sued on. The evidence also tends to show that his wife, Mellie, through fear of such threat, and to relieve the anxiety of her husband, joined with him in the execution of the mortgage. Without expressing or intimating any opinion as to whether the evidence is sufficient to establish such facts, we have stated what it tends to prove, simply for the purpose of enabling us to discuss intelligibly the assignments of error relating to such evidence. The fact is uncontradicted that the note and mortgage were assigned to the appellees long after maturity. Nor is it controverted that appellants, other than Mellie Perkins, are the children and heirs at law of J. M. Perkins, deceased. The court instructed the jury that appellants by their answer sought to avoid the note and mortgage on the grounds (1) that there was no consideration for their execution; and (2) that, at the time they were executed, J. M. Perkins was not of sufficient mental capacity to make a binding contract. With reference to the first ground of avoidance stated, it charged the jury, if they believed from the evidence that J. M. Perkins was not indebted to Ivey Bros. at the time of the execution of the note and mortgage, to find for the appellants, regardless of whether his mind was sound or not at the time the note and mortgage were executed. Upon the second ground stated, it instructed the jury that if they believed from the evidence that, at the time the note and mortgage were executed, J. M. Perkins was of such unsound mind that he was unable to comprehend the nature and purpose of his act, such instruments would be void, and to find for appellants; but that it is not every state of mental imperfection that will avoid a contract, but that the contracting party, at the time the contract was made, must have

such disease, weakness, or other imperfection or derangement of the mind, as disqualifies when entering into the form of a contract to comprehend the subject thereof, and its nature and probable consequences, and the jury believed from the evidence that J. M. Perkins, at the time of the execution of the note and mortgage, had sufficient mental capacity to comprehend the subject and nature and probable consequences of his acts, to find for appellees. At the request of appellees it instructed the jury that if Ed Ivey threatened to prosecute John and Lee Perkins for fraudulently disposing of mortgaged personal property, and such threat operated to pacify J. M. Perkins, from fear and emotion thereby induced, to realize the legal force and effect of his act in executing the instruments, yet if, at the time, Perkins justly owed Ivey Bros. the sum of \$64, the note and mortgage would, to that extent, be valid. The appellants requested the court to instruct the jury, in substance, that if John and Lee Perkins were on January 22, 1892, adults, then J. M. Perkins, not, on said date, responsible for their indebtedness, and that, to become liable for the same, he must have voluntarily, while mentally incapacitated to do so, agreed in writing to pay such indebtedness, and that when he executed the note and mortgage, he did not possess sufficient mental capacity to do so, but was induced thereto by threats of Ivey Bros. to prosecute his sons, who were mentally weak as to be unable to resist the influence of such threats, then to find for the appellants. The refusal of the court to give this charge, and its omission to do so anywhere in the charge the question whether J. M. Perkins was, by reason of mental infirmity, induced by the threatened prosecution of his sons to execute said instrument, are assigned as error.

It has been held in a number of cases in which there was no element of mental infirmity, that a father may avoid a mortgage which he was induced to execute by threats of the prosecution and imprisonment of his son. *Harris v. Carmody*, 131 Mass. 380; *Schoener v. Lissauer*, 36 Hun, 102; *Id.*, 13 N. Y. 112, 13 N. E. 741. For other cases see *note to Bank v. Kusworm* (Wis.) 28 Rep. Ann. 48 (s. c. 59 N. W. 564). In a similar case (*Williams v. Bayley*, 14 Law Rep. 302), it was said by Lord Westbury: "A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract which should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether one ought to do it or not, whether it is proper to do it or not, is altogether taken away from a father when he is brought into a situation of either refusing, and leaving his son in that perilous condition, or of compelling him on himself the amount of that civil obligation." And he gave it as his opinion

er, appealed to under such circumstances with a knowledge that unless he does his son will be exposed to a criminal prosecution, with the certainty of a conviction, cannot be regarded as a free and voluntary agent. The principle underlying this of cases is that whenever a party is so seduced as to exercise a controlling influence over the will, conduct, and interest of another, contracts thus made will be set aside. *Perkins v. Bank*, 116 N. Y. 606, 23 N. E. 7. The question as to whether a father may ordinarily avoid a contract which he was induced to make by threats of prosecution and imprisonment of his son has never, so far as we are informed, been directly decided in this state. But it has been said by the supreme court, in cases where the threat of prosecution and imprisonment was made against the party sought to be held by the contract, that the rule to be deduced from the great weight of authority is that mere threats of criminal prosecution are not sufficient to avoid a contract, but there must be a reasonable ground for creating an apprehension in the mind of a man of ordinary age and firmness that the threats will be carried into execution, and it must also appear that the threats operated directly on the mind of the party, so as to overcome his will. *Obert v. Landa*, 59 Tex. 475. It is not necessary to a disposition of this question as to decide whether a threat made by a father to prosecute and imprison his son will in any case be sufficient to avoid a contract induced by it. The question here is whether such a threat, made to one who is weak and infirm of body and mind, and who, because of such infirmity, was excited to avoid a contract that he was impelled to make by reason of his fear of the execution of a threat to prosecute and imprison his son? It seems to us that, in cases of this character, regard should be had to the condition of mind of the person acted on by the threat, and his age, disposition, and intellect should be taken into consideration. A weak and weak in body and mind should be left to the mercy of an unscrupulous person who operates upon his fear, by threats which he is not able to withstand, by reason of his infirmity, to extort money or a contract, without any consideration from him. *Perkins v. Sowle*, 87 Mich. 347, 49 N. W. 101. It is said by the supreme court of Michigan: "Truly, to such an action as this the defendant, who, without semblance of any moral or moral right or claim, has scared the plaintiff out of an old man, cannot well set up the defense of the policy of the law, that it is the duty of the injured party to have recourse to the courts in the first place, or to have withstood the threat of being taken into custody until proceedings were actually begun, and defend himself from the extortion. Nor is it the true policy of the law to establish an arbitrary and unyielding rule in

such cases, to apply to all alike, without regard to age, sex, or condition of mind. Weak and cowardly people, and old and ignorant persons, are the ones that need the protection of the courts, and they are the ones usually operated upon and influenced by threats and menaces." The law must have some regard for the infirmity, the fear, the solicitude, of an old man, when they are preyed upon by the unscrupulous to extort an unconscionable contract. Who can tell what any man, who has nature in him, will not do to save his sons from a threatened prosecution for a felony, and his name and family from disgrace? And, in our opinion, if an old man is too weak, by reason of mental infirmity, to withstand a threat which involves the imprisonment of his boys and the degradation of his family, the law should assert its strength, and save him from the consequences of a contract extorted from him by such a threat. We think, therefore, that the court erred in not submitting in its charge the question as to whether J. M. Perkins was, by reason of mental infirmity, induced by the alleged threatened prosecution of his sons to execute the instruments sued on, and, if he was so induced, in failing to instruct the jury, as requested by appellants, to find a verdict in their favor.

On the trial of the case, appellees' counsel, on his direct examination, asked Ed Ivey: "Did your message to J. M. Perkins, deceased, touching a settlement of your account with him and his sons, involve any threats of a criminal prosecution if said accounts were not settled at once?" This question was objected to upon the ground that it was leading. The objection was overruled, and the witness answered: "No; my message did not contain threats of a criminal prosecution if said accounts were not secured at once by said Perkins." Permitting the witness to answer over the objection is assigned as error. Ordinarily courts will not review the action of a trial court in permitting leading questions to be asked a witness, since it is a matter addressed to the sound discretion of the court. As the judgment will be reversed on other grounds, it is not necessary for us to say whether the ruling of the court on the question, as it is presented by the assignment, should be reviewed in this case. But, in view of another trial, we will say that the question was improper, in that it called for the opinion of the witness as to the import of the message. The witness should have been required to state the language in which the message was expressed, or as nearly its language as he could recollect, and the jury left to determine its import and meaning.

We do not believe the other errors assigned, not involving the questions we have considered, are well taken. Because of the errors indicated, the judgment of the district court is reversed, and the cause remanded.

**KELLY v. WESTERN UNION TEL. CO.<sup>1</sup>**  
(Court of Civil Appeals of Texas. Nov. 24, 1897.)

**JURISDICTION—LIMITATIONS.**

1. Action against a telegraph company for mental anguish, disappointment, sorrow, etc., resulting from the nondelivery of a telegram, must be brought within one year.

2. Action against a telegraph company to recover the toll paid for a message which was not delivered need not be brought within one year.

3. Where the court had jurisdiction of the amount as originally asserted in the petition, it will not lose jurisdiction for the reason that, when one cause of action is dismissed on account of the statute of limitations, the amount left in controversy is not within its original jurisdiction.

Appeal from district court, El Paso county; C. N. Buckler, Judge.

Action by Thomas Kelly against the Western Union Telegraph Company. Action dismissed; and plaintiff appeals. Reversed.

W. B. Brack and Millard Patterson, for appellant. Beall & Kemp, for appellee.

**JAMES, C. J.** This is an action for damages for negligence in the delivery of certain telegrams. The damages alleged consist of five dollars paid as tolls, and of "mental anguish, disappointment, sorrow, and affliction," as the result of the company's violation of its agreements to deliver the messages. The action was brought more than one year after the occurrences charged, but within two years. The court sustained a demurrer on the ground of limitations, and dismissed the action. We are of opinion that the ruling was correct so far as the petition sought to recover damages to the person, and we regard mental anguish, disappointment, sorrow, and affliction as of that class. Thus, as is common in cases of carriers of passengers, there was a contract of carriage from which the company's duty arose; but the wrong complained of was, in substance and in fact, the infliction of injury to the person by negligence. It is immaterial, so far as the question before us is concerned, whether the act or omission from which the injury results violates a duty incident to a contract or not. The statute interposes the bar of one year to damages for injuries done to the person of another, as distinguished from injuries done to the estate or property of another. This is the test. So far, therefore, as the petition seeks damages for injury to the mind or body; it presents a case within the statute of one year. See *Martin v. Telegraph Co.*, 6 Tex. Civ. App. 619, 20 S. W. 136; also *Railway Co. v. Roemer*, 1 Tex. Civ. App. 191, 20 S. W. 843. But we think it was error to apply this rule to the claim for tolls paid. This pertained to the estate of plaintiff. It appears to be the argument of appellee that, when the damages claimed for mental distress are eliminated from the case, the amount left would not be within the jurisdiction of the court. This view is fallacious. There can be no doubt that the court has jurisdiction to render judgment in respect to all the damages asserted in the petition, whether or not the amount claimed would have proceeded to do so, had the statute of limitations not been appealed to. The case is not that plaintiff stated no cause of action for the total amount claimed, and that defendant unsuccessfully presented a defense to a portion thereof. This would tend to deprive the court of the jurisdiction it had obtained to adjudicate in respect to any damage embraced in the petition. The case is unlike *Rowell v. Telegraph Co.*, 26 Tex. 26, 12 S. W. 534, where it was held that only damage really pleaded was recoverable. We therefore conclude that the court erred in dismissing the action. The second and third assignments are without merit. Reversed and remanded.

**WHITE v. CROSBY.<sup>1</sup>**

(Court of Civil Appeals of Texas. Nov. 24, 1897.)

**SUBSCRIPTIONS—DELIVERY AND ACCEPTANCE.**

1. There must be delivery and acceptance, actual or constructive, of a subscription list if it may be enforced against the subscriber.

2. Though a subscription list for aid in the construction of a railroad is placed in the hands of the committee of the citizens by whom it is made, with authority to deliver it to the payee, performance of certain conditions, which are afterwards performed, the subscribers will not be liable, where there had been a tender of the amount to an agent of the payee, and he had refused to accept it.

Appeal from El Paso county court; R. Harper, Judge.

Action by J. F. Crosby against Z. T. White. Judgment for plaintiff, and defendant appeals. Reversed.

Turney & Burges, for appellant. Clark and Edwards & Edwards, for appellee.

**FLY, J.** This suit originated in the district court, and was appealed to the county court. In both courts, appellee recovered judgment for the sum of \$200, the amount for which the suit was instituted. We gather from the statement of facts that a meeting was called by citizens of El Paso for the purpose of raising money to aid in forwarding a projected railroad from Juarez to Corralitos, Mexico, of which appellee was a promoter. The matter was placed in the hands of a committee, to whom was confided the power to proceed in the manner best calculated to accomplish the end desired. The committee prepared, and circulated for signature, the following subscription list: "El Paso, October 4, 1895. We, the undersigned, hereby agree to pay the railroad company, being organized for the construction of a railroad from Juarez, Mexico, to Corralitos, Mexico, of which Judge J. F. Crosby is a

<sup>1</sup> Application for writ of error dismissed for want of jurisdiction.

<sup>1</sup> Rehearing denied.

the promoters, the sum of \$200 each, when the construction of said railroad shall be commenced at and from Juarez, Mexico; said road to be commenced at and from Juarez, Mexico. Said road to be commenced within twelve months from this date, or above is null and void." The list was signed by 25 citizens, appellant being of the number. Appellant was also a member of the committee. There was testimony to the effect that the committee presented the subscription list to E. B. Wood, who said: "There is no use of you getting up the subscription. They won't accept that thing at all. It's no use going any further with that thing." Wood was a son-in-law of appellee, and was acting in these matters as the agent of appellee. Wood had also been written to by appellee in regard to the subscription, and had been empowered to collect it. When this refusal on the part of Wood was made known to the full committee, the paper was placed in the hands of one of their number, to be held subject to their order. Crosby was never notified by the committee of the existence of the list. The testimony does not show that the construction of the road was begun and prosecuted on the faith of the subscription list. The court instructed the jury that if it was found that appellant signed the subscription list, and the conditions in it were performed by railroad promoters, and the list had been transferred to appellee, a verdict should be returned for the appellee.

It is well settled in Texas that the payment of a voluntary subscription, on the faith of which expenses are incurred or legal liabilities assumed, may be enforced. *Hopkins v. Uphur*, 20 Tex. 60; *Doyle v. Glascock*, 24 Tex. 200; *McGriffin v. Cooper*, 27 Tex. 113; *Williams v. Rogan*, 59 Tex. 438; *Railway Co. v. Neely*, 64 Tex. 844. While that doctrine is well established, in none of the cases cited was there been a contravention of the rule that delivery is essential to render any written contract effective. On the other hand, the decisions proceed on the basis of a delivery and acceptance on the part of those to reap the benefit of the subscription, and the facts in most of the cases show a delivery and acceptance. The acceptance of the instrument would doubtless be sufficiently shown by action on the faith of an instrument, but back of such acceptance there must be a delivery, either actual or constructive, of the instrument. Under the charge of the court in this case, if the list had never been delivered to appellee, and he had never heard of it until after the railroad had been completed, he could have successfully prosecuted his suit for a recovery of the amounts therein specified. There is no authority for any such proposition. If the subscription list was placed in the hands of the committee, with the authority, expressed or implied, to deliver it to the payee upon the performance of certain conditions, and the conditions were performed, the subscribers would be liable

for the respective amounts subscribed, unless there had been a tender of the list to an agent of appellee, who had refused to accept the same. The evidence was sufficient to raise the question of Wood's agency, and his rejection of the subscription list, and that question should have been submitted, as an issue of fact, to the jury. It was unnecessary to give the voluminous statement of the case to the jury as embodied in the first charge requested by appellant. We deem it unnecessary to discuss the numerous assignments of error. The judgment will be reversed, and the cause remanded.

SANNER v. ATCHISON, T. & S. F. RY. CO.<sup>1</sup>  
(Court of Civil Appeals of Texas. Nov. 24, 1897.)

**INJURY TO EMPLOYE—NEGLIGENCE OF FELLOW SERVANTS—RULES FOR EMPLOYEES.**

1. A brakeman in a freight train and a foreman of the switch engine, engaged in making up said freight train in the yards at Las Vegas, N. M., are fellow servants, and the railway company is not responsible for an injury happening to the brakeman by reason of the negligence of the foreman.

2. There being no statute on the subject of fellow servants in New Mexico, the common law governs.

3. A railroad company does not owe it as a duty to its employes to provide rules for protecting trains, that have been made up in the yards ready for engines, from interference by other trains or cars while brakemen are in the act of coupling them to their engines, unless the operations are of a complex, unusual, or extra hazardous character, and the danger would probably occur, and is to be anticipated, from the character of the work.

Appeal from district court, El Paso county; C. N. Buckler, Judge.

Action by Edward Sanner against the Atchison, Topeka & Santa Fé Railway Company to recover damages for personal injuries. Judgment for defendant. Affirmed.

W. B. Brack and Millard Patterson, for appellant. J. W. Terry, for appellee.

**JAMES, C. J.** The material facts relative to the issue of fellow servant were as follows: Sanner was brakeman of one of appellant's freight trains, which was preparing to leave the yards at Las Vegas, N. M. He had gotten the engine from the roundhouse, and was in the act of attaching it to the train (which was in the performance of his duty), when by the act of the foreman of the switch engine the train was struck from behind by other cars running upon the track upon which the freight train was standing, and appellant's hand was crushed. Appellant was not under the control of the said foreman. His duties were in connection with the train, and he was subject to the orders of its conductor. The injury occurred in New Mexico, and our statutes upon the subject of fellow servant have no application. It was agreed that

<sup>1</sup> Writ of error denied by supreme court.

there were no such statutes in force in New Mexico, and that the case is controlled by the rules of the common law. The common law, as understood and administered in this state prior to our fellow servant statutes, clearly settles this issue in favor of the existence of the relation. It seems to be urged that the foreman of the switch engine, being charged with the duty of moving cars in the yards of appellee, as to such acts stood in the place of appellee, and his negligence was the master's. He would, if he had the power to employ and discharge the men under him (which the evidence shows he did not have), have been deemed the vice principal as to them. *Campbell v. Cook*, 86 Tex. 635, 26 S. W. 486; *Railway Co. v. Williams*, 75 Tex. 4, 12 S. W. 835; *Railway Co. v. Smith*, 76 Tex. 618, 13 S. W. 562; *Railway Co. v. Reed*, 88 Tex. 439, 31 S. W. 1085. It is not conceivable how, if he was not vice principal as to his crew, he could be considered such as to an outside employé. The case here is one in which the foreman sought to be charged as vice principal had no authority of any kind over the employés injured, and we hold that as to him there was no relation that did away with the rule of fellow servant.

It is further contended that when plaintiff's train was ready, and he was notified by the switch foreman to get the engine and attach it to the train, the company owed him the duty of protection against the train being moved. There are certain duties which are incumbent upon a railway company to perform, with reference to the safety of its servants, which it cannot absolve itself from by imposing them upon its servants. The duty to furnish a safe track, the duty of inspection, to employ competent servants, and the like, are of this class. *Railway Co. v. Reed*, *supra*. In special cases the law also imposes the duty of adopting and enforcing rules for the government of its employés, and this, being the subject of a separate assignment, will be considered later. The mere handling of trains and cars upon its road or yards it may commit to its employés, and in respect to such work it does not owe its employés the duty of seeing that cars are safely handled, or that no servant is negligent, and it is not liable in such cases to one employé for the negligence of the other, so long as it has performed its duty in the employment of the latter, or in prescribing rules, where the same are required.

The court in this case charged the jury to return a verdict for the defendant. Appellant insists that the court erred in withdrawing from the jury the question whether or not defendant was negligent in not providing, by rules, for protecting trains that had been made up, ready for engines, from interference by other trains or cars while brakemen were in the act of coupling them to their engines. Assuming that this form of negligence—the failure to make and enforce a rule as indicated in the above assignment—

was an issue within the pleadings, we are of opinion that the evidence was not such as required its submission. It was in evidence that the railroad tracks at Las Vegas would hold about 700 cars, and that there are 24 side tracks and spurs in the yard. Aside from this, there is nothing to show that the operations there conducted were ever of a complex or unusual character. It appears that at the time of this event there was but this one switch engine in use in the yard, viz. the one that made up this train. There is no evidence that it was the practice of railways for rules to be promulgated for the government of employés about yards, and there is nothing in the evidence from which it would appear that the character of work done in this yard involved extra hazard to the employés, and therefore that occasion existed for the making of rules. *Railway Co. v. Echols*, 87 Tex. 344, 27 S. W. 60, and 28 S. W. 517. It is required of the master that he make and enforce reasonable rules in certain cases for the conduct of his business by his employés, looking to their protection against accidents. In the case just cited the conditions that render rules necessary are stated, and from that decision and others the rule appears to be that when the operations engaged in are of a complex nature, or such as to expose the servant to unusual or extra hazard, the duty to make rules devolves on the master. It would seem that, to impose this duty, the danger to be guarded against must be one that would probably occur, and is to be anticipated, from the character of the work. Here the evidence fails to show that operations at these yards were at the time of this occurrence, or ever, of complex character, or that the risk which plaintiff was exposed to on this occasion was in any respect greater or different from that he was usually exposed to in the dangerous service he engaged in. The position taken by appellant is that the train had been made up by the foreman, and the appellant notified by him that the train was ready for the engine. After the train crew thus took charge of the train it was contrary to the plainest conception of ordinary care for it to be moved by the switch engine. The foreman, it appears, knew this; for in his testimony he states that the train was not ready, and he had not informed the brakeman that it was, and was still engaged in making up the train when plaintiff was injured. It thus plainly appears that upon the facts as claimed by appellant, and upon which he predicates the necessity or propriety of a rule in view of that state of facts, the foreman knew that he should not allow the train to be moved by his engine after it was made up and turned over to the trainmen. He knew this, as any person of ordinary capacity would, from a common instinct of prudence. The injury, under the circumstances in evidence, was not reasonably to be anticipated from the conduct or nature of the business, and did not

demand the adoption of a rule to guard against it. The facts do not show the necessity or utility of such rule as contended for sufficiently to authorize the issue to be submitted. The judgment is affirmed.

### SMITH v. PATRICK.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 24, 1897.)

#### NEW TRIAL—BROKERS—SUIT FOR COMPENSATION.

1. After the adjournment of the term in which judgment against him was rendered, plaintiff filed a petition for a new trial, setting up that without his knowledge defendant had dismissed the suit for want of prosecution, and set out due diligence, that the judgment was obtained by mistake, and that he had a meritorious cause of action. The facts set out in the petition were uncontroverted. *Held*, that whether the question as to a new trial under the circumstances was one of law or fact, and whether, the question having been submitted to the jury, it was presented to them under proper instructions or not, was immaterial, as the facts would have justified a peremptory instruction in favor of the plaintiff.

2. Where plaintiff shows that he was employed by defendant to sell certain lands, the only condition being that the price obtained should amount to \$26,000; that he reported sales to defendant of about half of the land, amounting to \$21,450; that the best part of the land remained unsold; that he procured purchasers, who were ready to purchase the land at prices satisfactory to the defendant,—it made a case sufficient to sustain a verdict in his favor for the commissions on the sales.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Action by W. A. Patrick against Francis Smith and another. From a judgment for plaintiff, defendant Smith appeals. Affirmed.

Upsom, Bergstrom & Newton, for appellant. Martin & Eddins, J. A. Buckler, and W. A. Patrick, for appellee.

FLY, J. Appellee instituted suit in November, 1892, against Francis Smith and H. P. Drought to recover commissions for negotiating the sale of certain land in Falls county, Tex., the commissions amounting to the sum of \$1,072.50. Afterwards, on April 22, 1893, appellee filed a petition setting up, in addition to his cause of action, that in February, 1893, without his knowledge and consent, appellant had dismissed said suit for want of prosecution, and set out in detail his diligence in the matter; that the judgment was obtained by mistake and accident; and that he had a meritorious cause of action. H. P. Drought denied the partnership under oath,—a partnership between himself and Francis Smith. The trial was by jury, and resulted in a verdict and judgment for appellee for the amount sued for, with interest at 6 per cent. from January 12, 1891, against appellant. Nothing was recovered of H. P. Drought. This is a second appeal of this case. The opinion of this court on that appeal is found in 36 S. W. 762. The supreme court granted a writ

and affirmed the decision of this court in every particular except as to rendition of judgment, and remanded the cause for another trial. 38 S. W. 17. We find as facts that appellant employed appellee to sell certain lands for him in Falls county on which he had a mortgage, and which he intended to buy at the foreclosure sale, the only condition of the sale being that the land should pay off the debt, interest, and costs, taxes, and expenses. On November 4, 1890, the land was sold at trustee's sale, and appellant became the purchaser, and appellee reported to him sales that he had made of about half of the land, amounting to \$21,450; appellant's debt being in the sum of \$26,000. The best part of the land remained unsold. We find that appellee procured purchasers who were ready, able, and willing to purchase the land, and that they were satisfactory to appellant, and that appellee earned the commissions sued for. It has been repeatedly held in Texas that a new trial may be granted after the adjournment of the term at which it was rendered, when the party seeking such equitable relief shows that judgment has been rendered against him by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part, and also shows the injustice of the judgment, and that there is good ground to suppose a different result will be reached on another trial. *Vardeman v. Edwards*, 21 Tex. 740; *Plummer v. Power*, 29 Tex. 7; *Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254; *Weaver v. Vandervanter*, 84 Tex. 691, 19 S. W. 889. If the question of granting new trials when application is made after adjournment of the term at which judgment was rendered is one to be submitted to a jury, and not to be determined by the court, still, the facts in regard to the issue being uncontroverted, an erroneous presentation of the matter to the jury would be immaterial. The facts would have justified a peremptory instruction in favor of appellee on the issue.

The second assignment of error has no merit. There was no controversy about the fact that the foreclosure sale took place, and it was after that sale that appellee swore that appellant expressed perfect satisfaction with the sales made by appellee. The charge complained of is a clear presentation of the law.

The facts are sufficient to sustain the verdict. In his letter of September 10, 1890, appellant expressed his satisfaction with the employment of appellee to make the sales if the land brought sufficient to pay principal, interest, taxes, and expenses. On November 4, 1890, when the foreclosure sale was made, appellant expressed full satisfaction with the sales, and promised to execute the proper deeds. About one-half the land was contracted to be sold for \$21,450. The debt due on the land, with interest, was about \$26,000. Over 1,300 acres remained unsold, and it was better than that contracted to be sold. A large part of the land not contracted to be sold was in cultivation, and was afterwards

<sup>1</sup> Writ of error denied by supreme court.

sold by appellant at \$30 per acre. These facts did not appear on the former appeal. The judgment will be affirmed.

**GALVESTON, H. & S. A. RY. CO. v. PARRISH.<sup>1</sup>**

(Court of Civil Appeals of Texas. Nov. 24, 1897.)

**OPINION EVIDENCE—INJURY TO EMPLOYE—INCOMPETENCY OF FELLOW SERVANT—HARMLESS ERROR—CONTRIBUTORY NEGLIGENCE—DAMAGES.**

1. A witness who is acquainted with a party, and knows what his occupation has been, may be allowed to testify that he "did not have any experience in stopping hand cars with brakes."

2. Testimony of a witness, that he thought that he had told the foreman of his inexperience is to be taken to be testimony as to what witness remembered.

3. Where, in a suit for damages against a railroad company, the issue is the incompetency of a fellow servant, and two witnesses swear that such servant was inexperienced, and he himself testifies that he thinks that he informed the foreman of his inexperience, and it was established that plaintiff was not aware of these facts, there is sufficient evidence to justify a refusal to instruct the jury to find for defendant.

4. A refusal to present an issue of fact in an instruction will not avail appellant, when the issue, if presented, would have been in favor of appellant.

5. The burden of proving contributory negligence rests upon the party charging it.

6. It is not error to instruct the jury to consider the decreased earning capacity of plaintiff, in assessing damages, when there is evidence that presents that phase of damages.

7. An expert witness may express an opinion as to the character of the injury suffered.

8. Where injuries were such as to cause a young man to be a cripple for life,—one leg being partially paralyzed, and considerably shorter than the other,—a verdict for \$5,000 is not excessive.

Appeal from district court, Medina county; John A. Green, Jr., Special Judge.

Action by James B. Parrish against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Clark & Guinn, for appellant. H. C. Carter and S. B. Easley, for appellee.

**FLY, J.** Appellee instituted suit against appellant to recover damages arising from personal injuries alleged to have been inflicted by the negligence of appellant in having a defective brake shoe on a certain hand car, from which appellee was precipitated, and in having in its employ an incompetent servant, who was, at the time of the injury, working the brake on the hand car. The case was tried by a jury, and resulted in a verdict and judgment for appellee for \$5,000. On a former appeal of this case the judgment was reversed, and the cause remanded, on account of a defect in the charge of the court. 40 S. W. 191.

But one issue of negligence was presented to the jury, namely, the incompetency of Solda-

nia, the servant of appellant. We find, in deference to the verdict of the jury (there being some evidence to sustain it), that appellee, a young man of 26 years, healthy and robust, was permanently injured through the incompetency of a servant of appellant; said incompetency being known to appellant at the time the injury was inflicted, and unknown to appellee.

The first, second, third, and fourth assignments of error are not well taken. Both of the Bernses swore to their acquaintance with Soldania, in Mexico, before the accident, and that they knew what his occupation had been; and it was permissible to allow the witnesses to testify, "Soldania did not have any experience in stopping hand cars with brakes." It was a fact that the witnesses were testifying to, and not a mere conclusion.

The witness Soldania testified that he thought he told the foreman when he was employed, the day before the accident, of his inexperience as a section hand; and this forms the basis of the fifth assignment of error. This was decided adversely to appellant on the former appeal, and is supported by other authority which holds that "I think" amounted to what the witness remembered. *Harris v. Nations*, 79 Tex. 400, 15 S. W. 262. We may say, in this connection, that there was no denial upon the part of the foreman who employed Soldania of the fact that the latter did not tell of his inexperience, although he testified in the case. Holding, as we do, that there was evidence to establish the incompetency of the servant, Soldania, and that, while appellee knew nothing of it, appellant was notified of the fact, it follows that it was not error for the court to refuse to instruct the jury that the incompetency, and other facts necessary to make it effective to appellee, had not been proved, and to find a verdict for appellant.

The issue as to the defective brake was not submitted to the jury, and it is insisted that a special charge directing a verdict for appellant on that issue should have been given. If there is any ground of complaint for failure to present the issue, it belongs to appellee, and not appellant; for there was testimony on the issue, upon which the jury might well have been allowed to pass. It was not error to charge the jury in this case that the burden of establishing contributory negligence rested upon appellant. It is the general rule in Texas that the burden of proof rests upon the party charging contributory negligence to establish that fact, to which there are but two exceptions, neither of which is applicable to this case. *Railway Co. v. Shieder*, 88 Tex. 153, 30 S. W. 902; *Lee v. Railway Co.*, 89 Tex. 563, 36 S. W. 68.

There is no merit whatever in the ninth assignment, which attacks the fourth paragraph of the charge. The criticised paragraph refers to, and should be construed in connection with, the fifth paragraph. When this is read, there is clear and full presentation of the law as to incompetent servants.

<sup>1</sup> Writ of error denied by supreme court.



It was not error to instruct the jury that in assessing the damages the decreased earning capacity of appellee might be considered. There was evidence that presented that phase of damages.

The objections to the interrogatories propounded to Dr. Largen and Dr. Shropshire, and their answers thereto, were properly overruled. The questions were not leading, and the witnesses, being placed on the stand as experts, were properly permitted to give their opinions as to the character of appellee's injuries.

The thirteenth assignment of error attacks the sufficiency of the testimony to uphold the verdict. As indicated by the conclusions of fact, this court is of the opinion that there is testimony to sustain the verdict. The testimony indicates that the incompetency of the servant, Soldania, was at least an efficient concurring cause in inflicting the injury upon appellee, and there is no evidence of contributory negligence. The injury was shown to have been a serious and permanent one. Appellee is a young man, and his injuries will cause him to be a cripple through life; his leg and foot being partially paralyzed, as testified by Dr. Largen, and being considerably shorter than the other. It is true that the railroad physician testified that the leg was shortened by the position in which it was held by appellee while in the hospital, and that he offered to straighten it some four or five months after appellee had received the injury, but that appellee had refused to allow stretchers put on the leg; but it would seem that proper treatment of appellee while in the hospital required that means should have been used by the surgeon to prevent appellee from bending his leg, especially when appellee told him that he could not hold his leg straight. Appellee was in the railroad hospital, and was treated by a servant of appellant. An eminent surgeon introduced by appellant would not state that, if the leg had been put in stretchers after it had been permitted to become crooked, it would have been straightened, and also stated that it was not proper to allow the leg to remain in a crooked position while the man was being treated. Appellant did not ask that the matter of the refusal of appellee to allow his leg to be put in stretchers after he had left the hospital be submitted to the jury, and, if it had been submitted, there was testimony from which the conclusion might be legitimately drawn that the leg was not made crooked through any fault of appellee. The verdict is not excessive. The judgment is affirmed.

SAN ANTONIO & A. P. RY. CO. v. CHOATE.<sup>1</sup>  
(Court of Civil Appeals of Texas. Nov. 10,  
1897.)

CARRIERS—INJURY TO PASSENGER—NEGLECT—  
SUFFICIENCY OF EVIDENCE.

In an action for injury through defendant's negligence, plaintiff testified that he had gone from his seat in a car to the platform as the train

<sup>1</sup> Application for writ of error dismissed by supreme court.

was about to stop, and was thrown off by the starting of the train by a jerk, and injured. In a deposition that had been taken in the cause, plaintiff stated that, after he was thrown from the car, he was drawn under the wheels by the draught created by the moving train. There was no evidence that he was bruised or otherwise injured by such fall; nor was there any proof of negligence on the part of defendant, unless it be inferred from the happening of the event. Held insufficient to sustain a verdict for plaintiff.

Appeal from district court, Karnes county; James C. Wilson, Judge.

Action by F. B. Choate against the San Antonio & Aransas Pass Railway Company. There was verdict and judgment for plaintiff, and defendant appeals. Reversed.

Proctors, for appellant. Chas. H. Mayfield, for appellee.

FLY, J. Appellee sued to recover damages resulting from personal injuries sustained by him through the alleged negligence of appellant. The judgment appealed from is for \$5,000, and is founded upon the verdict of a jury. This is a second appeal of this case, the former being published in 35 S. W. 180. Upon the former appeal the judgment was reversed by this court, on the ground that the testimony did not support, and was opposed to, the finding of the jury; and it was ordered that the district court instruct a verdict for defendant if the testimony was the same on another trial. Choate applied to the supreme court for a writ of error, upon the ground that the decision of this court practically settled the case. Under the statute, the granting of the writ followed, and it was decided that "the court of civil appeals rightly held that, under the same evidence, the trial court ought to instruct the jury for the defendant." 36 S. W. 248. Afterwards a rehearing was granted, and it was held that the case should be remanded to the district court, to be tried "in accordance with this opinion." 37 S. W. 819. In the last opinion it is said: "Upon a careful re-examination of this case, we have concluded that there was error in the former judgment of this court, in so far as we held that there was no evidence upon which to submit the issue of negligence to a jury. We think that the evidence is not such as to preclude a difference of opinion upon the question of negligence on the part of defendant, and that the court of civil appeals erred in the direction that it gave to the trial court, as above stated." In the case of Wallace v. Oil Co., 40 S. W. 400, the supreme court gives as a reason why it did not reverse the judgment of the court of civil appeals in that case that it could not reverse a finding of the court of civil appeals to the effect that there was no evidence to sustain the verdict. We suppose that reason prevailed in this case when before that court. The supreme court obtained jurisdiction of this case only because it was stated in the application that the decision of this court practically settled the case, and

by the provisions of the statute which gave the jurisdiction, "If the supreme court affirms the decision of the court of civil appeals, it shall also render final judgment." The decision of this court was that there was no evidence to sustain the verdict, and the supreme court holds that it was upon a question of fact, and that it could not be reversed. It should therefore have been conclusive, and, being conclusive, the supreme court, we think, should not have reversed a part of the judgment, but should have proceeded to render a judgment in favor of the defendant, and thus carried out the intention of the statute under which it obtained jurisdiction, and have ended this litigation. In other words, the decision of this court being only on a question of fact, it should have been as conclusive with the supreme court as the law delivered by that court is conclusive with this court. If the supreme court had no authority to reverse the judgment upon a question of fact, we are at a loss to understand under what authority the judgment of this court was reviewed by that court, and its judgment in part reversed. This court held that there was an entire absence of testimony to sustain the verdict, and in such case the trial court should have instructed a verdict for the defendant; and we know of no authority that would deny the power to the appellate court to order an instruction for the defendant in case the evidence should be the same on another trial. This has long been the practice in Texas. If a court of civil appeals has the authority to render such a judgment when there is an entire absence of testimony to sustain the verdict, and its finding that there is such lack of testimony is conclusive, it is apparent that the supreme court cannot review any part of such judgment. That the supreme court did review the finding of this court that there was no evidence to sustain the verdict is fully apparent from the quotation above made from its last opinion, and the judgment of this court was reversed because that court differed from this on a question of fact. We have proceeded upon the theory advanced by the supreme court, that our finding was one purely of fact, and that it was not a legal deduction from testimony; and, under such assumption, we are forced to the conclusion that, while the supreme court has no authority to review a judgment of a court of civil appeals on a question of fact, it has by indirect means reversed a judgment of this court on a question of fact. This court held that there was no evidence to sustain the verdict. The supreme court said: "We think that the evidence is not such as to preclude a difference of opinion upon the question of negligence on the part of the defendant, and that the court of civil appeals erred in the direction that it gave to the trial court as above stated." The reversal of the judgment of this court was clearly the outcome of a difference of opinion on a question of fact, but it is provided in the consti-

tution that the decision of courts of civil appeals "shall be conclusive on all questions of fact brought before them on appeal or error." The result of the difference of opinion on a question of fact, which under the constitution should not have arisen, has been that on practically the same facts a jury has again returned a verdict for the appellee, and the trial court necessarily refused a new trial, and the case is again before this court. We adhere to the opinion that there is a total lack of testimony to sustain the verdict of the jury. The contradictory testimony given by appellee, the only witness to the circumstances surrounding the injury, the fact that no bruises or injuries were received by a fall which must have been violent, and the improbability of the whole account of the affair, would justify this court in the conclusion that the evidence was utterly insufficient to sustain a verdict. In addition to that, there was no proof of negligence, unless it be inferred from the happening of the event, which the supreme court held in its first opinion in this case cannot be done. In that case it was said: "There is no evidence to show that the 'jerk,' as it is called by the witnesses, was anything unusual in stopping and starting a train under ordinary circumstances; and the evidence wholly fails to show that the defendant was guilty of any negligence either in stopping or starting its train on the occasion of plaintiff's injury." We adhere to the opinion that this court has the authority and power to give such orders to lower courts as will terminate useless and protracted litigation; but the supreme court has held otherwise, and that holding is the law of this case, and the judgment of the district court is therefore reversed and remanded, without instructions in case the evidence should be the same on another trial as it was on this.

RALEY et al. v. ABRIGHT et al. (SUMMERLIN et al., Interveners).<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 24, 1897.)

REVIEW ON APPEAL—FINDINGS OF FACT—EXECUTION SALE.

1. The decision of the trial court, on conflicting evidence, of a question of fact, is conclusive on the court of appeals.

2. Where the purchaser of land on execution against a husband had notice that the land was the separate property of the wife, the sale did not affect the wife's interest, though the title was in the husband's name.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by James Raley and others against R. W. Abright and another to recover land, wherein Elizabeth Summerlin and another intervened. From a judgment for Intervener Summerlin, plaintiff Raley and others appeal. Affirmed.

<sup>1</sup> Writ of error denied by supreme court.

Duval West and James Rayley, for appellants. John H. Clark, for appellees.

NEILL, J. This is an action in the statutory form of trespass to try title, brought on May 2, 1896, by appellants, James Rayley, J. W. Maddox, and T. L. Wren, against appellees R. W. Abright and J. E. Hamilton, to recover 50 feet of land fronting on North Flores street, in the city of San Antonio, Tex. On December 8, 1896, the appellee Abright answered by a plea of not guilty. J. E. Hamilton did not answer. On April 27, 1897, the appellee Elizabeth Summerlin, joined by her husband, R. L. Summerlin, by leave of the court, filed her petition of intervention against the plaintiffs and defendants, in the ordinary form of trespass to try title, to recover from them the land in controversy, on the ground that it is the separate property of intervener. On the 29th day of June, 1897, the case was tried by the court, without a jury; and the trial resulted in a judgment in favor of the intervener Elizabeth Summerlin, against the plaintiffs and defendants, for the premises in controversy, and for all costs of suit. From this judgment, Rayley, Maddox, and Wren have appealed.

#### Conclusions of Fact.

On the 6th day of December, 1892, John W. Maddox and T. L. Wren, in a suit then pending in the district court of Bexar county, against George W. Angle & Co., a firm composed of George W. Angle, R. H. McCracken, Robert L. Summerlin, and Joe W. Maddox, recovered a judgment against said firm, and each of its members, for \$3,696.00%, with interest thereon from its date at the rate of 6 per cent. per annum. On April 1, 1893, an execution was issued upon this judgment, and afterwards returned "No property found." An alias execution was issued on the 10th of March, 1896, and levied by the sheriff upon a parcel of land, in which was included that in controversy, as the property of the defendants in said execution. By virtue of this execution and levy, the property was sold, and a deed executed by the sheriff on May 7, 1896, to James Rayley, trustee. James Rayley was the attorney for J. W. Maddox and T. L. Wren, who directed the levy and bid in the property for them at the sale. R. L. Summerlin testified upon the trial that, after the levy and prior to the sale of the property, he notified Mr. Rayley that the property levied upon was the separate property of his wife, Elizabeth, who is the intervener in this cause. Mr. Rayley testified that he received no notice from Summerlin, or any one else, prior to or at the time of the sale, that the property in controversy was the separate property of Mrs. Summerlin. It is our duty to decide this conflict of testimony in favor of the finding of the trial judge, and we therefore find that James Rayley had notice at the time he purchased the property at said sale

that it was the separate estate of the intervener. The intervener married R. L. Summerlin on the 23d day of June, 1886, and a few days prior to her marriage received \$8,000 from her deceased father's estate; and about three years afterwards she received from said estate about \$2,000 more. This money she turned over to her husband to invest, and be used by her consent and approval. On the 16th day of May, 1890, the intervener purchased from S. G. Newton and wife the property bought by Rayley at said execution sale, which includes the lot in controversy. The consideration was \$8,000, \$1,000 of which was paid in cash, with funds from the separate estate of the intervener, and the balance was evidenced by a promissory note for \$5,000, bearing interest at 10 per cent. per annum, and payable on the 16th day of May, 1895, to the order of Bettie H. Newton, and executed by R. L. Summerlin, to whom the deed to the property was executed. The evidence warrants the conclusion that it was the intention and understanding, at the time of the purchase, of Mrs. Summerlin, to pay the balance of the purchase money evidenced by the note out of her separate estate; and the evidence tends to show that the deed was made to, and the note executed by, R. L. Summerlin, because he did not want his wife's name to the note. At the time the deed was drawn, Mr. Summerlin stated to the attorney who drew it that the property was purchased from Newton and wife with his wife's separate money. A day or two after this purchase, Mr. Summerlin, by his deed, conveyed the south two-thirds of the property so purchased to the intervener, retaining the deed to the remaining portion, which is the property in controversy in his name. A short time after this transaction, three houses were built on the land conveyed by Newton and wife, one of them on the property in controversy. These houses were all built and paid for out of the separate money of the intervener, and cost about \$2,200 each. On April 5, 1892, R. L. Summerlin, by his deed of that date, which recited the consideration of \$6,000,—\$500 cash, and a promissory note for \$5,500, reserving a vendor's lien, payable three years after date,—conveyed that part of the Newton property involved in this suit to Gregory Herman. On April 5, 1892, Gregory Herman conveyed it to Glen Raymond, by a deed which expresses a consideration of \$5,500, to be paid by the payment of a note for that amount made by the grantor to R. L. Summerlin. On October 4, 1894, Glen Raymond, by attorney in fact, R. L. Summerlin, by deed expressing a cash consideration of \$5,000, conveyed the property in controversy to the appellee R. W. Abright. The intervener knew nothing of these conveyances until this suit was instituted. Without reciting the evidence upon which we base the conclusion, we deem it sufficient to warrant us in saying that no consideration in fact ever passed between the parties to the three instruments last men-

tioned; and, if the wife's separate property could be the subject of a fraudulent conveyance by a husband, we would say without hesitation that the conveyances were made by Summerlin, Herman, and Raymond for the purpose of defrauding his (R. L. Summerlin's) creditors.

#### Conclusions of Law.

As the evidence shows the property in controversy is the separate estate of intervener, and as appellants had notice, when it was levied upon and sold under the execution, that it was hers, judgment was properly rendered in her favor. *Sinsheimer v. Kahn*, 24 S. W. 538, 6 Tex. Civ. App. 143; *Parker v. Coop*, 66 Tex. 112; *McKamey v. Thorp*, 61 Tex. 648; *Yoe v. Montgomery*, 68 Tex. 388, 4 S. W. 622; *Rogers v. Bradford*, 56 Tex. 630; *Evans v. Welborn*, 74 Tex. 580, 12 S. W. 230. The costs were properly adjudged in favor of the intervener against the appellants and the other appellees. There is no error in the judgment, and it is affirmed.

#### INTERNATIONAL & G. N. RY. CO. v. DAVIS.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 24, 1897.)

##### CARRIERS—INJURY TO MAIL CLERK—DEMURRER.

1. It is the duty of a railroad company to keep its mail car so heated as to be safe and comfortable for the mail clerk while in the discharge of his duties.

2. To establish a liability of a railroad company for injuries to a United States mail clerk, it is not necessary to show a written contract to carry mail between the company and the United States.

3. Where the evidence fully establishes plaintiff's cause of action, it is not error to overrule defendant's demurrer to the evidence.

4. A demurrer to evidence waives all objection to the admissibility of such evidence.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Orin Davis against the International & Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Floyd McGown and F. C. Davis, for appellant. J. A. Buckler, for appellee.

NEILL, J. This action was brought by the appellee to recover from appellant damages sustained by him by reason of appellant's negligent failure to have a car properly heated, upon which the appellee was traveling in the employment of the United States government as its postal clerk. As his cause of action, the appellee, among other things, alleged that on September 28, 1896, he was a duly-commissioned and regularly acting United States postal clerk or route agent, employed by the United States government, and by it assigned to the duty of accompanying

mails carried upon the cars of defendant from the city of San Antonio to Longview, in the state of Texas; that under the law and its contract with the government, it was the duty of said defendant to carry said mails upon its cars, and also to carry some one in charge of said mails, free from any compensation other than it received from the United States government; that it was its further duty to provide sufficient cars, with suitable rooms therein, with proper fixtures and furniture, and properly heated and lighted, for the use of route agents or postal clerks, and to enable them comfortably to occupy said cars, and distribute the mails, without any specific charge therefor. The appellant answered (1) by general demurrer; (2) by specially excepting upon the ground that the allegations in the petition did not show that in September ordinary care required defendant to provide a heated car; (3) by general denial; (4) that appellee was a trespasser upon the car of defendant, and it owed no duty to him; and (5) contributory negligence, in that the appellee failed to provide himself with an overcoat or wrap to protect him from the cold, after he discovered that the car was not heated. The appellant (defendant below) demurred to plaintiff's evidence, and, the demurrer being overruled, the issue as to the amount of damages was alone submitted to the jury, who returned a verdict in favor of the appellee for \$870, upon which the judgment was entered from which this appeal is prosecuted.

#### Conclusions of Fact.

The uncontradicted evidence shows: (1) That on the 28th day of September, 1896, the appellee was, and had been for two years prior thereto, in the service of the United States government as a postal clerk, employed in the discharge of his duties upon the trains of appellant, in carrying the mail from the city of San Antonio to Longview, Tex. (2) That upon said day, and for two years prior thereto, the appellee was recognized and received by appellant upon its mail coach running between the cities aforesaid, as a United States postal clerk, and was entitled to be carried as such in discharge of his duty on said train. (3) On the 28th day of September, 1896, the appellee was assigned by the United States government to the duty of accompanying the mails carried upon appellant's cars from the city of San Antonio to Longview, and to take care of said mail, and see that it was properly distributed at the various post offices on the line of said road between said points, and to perform generally all the duties required by law of United States postal clerks or route agents. (4) The 28th day of September, 1896, was a cold and damp day, and the car of appellant in which the appellee was riding in the discharge of his duties as postal clerk was not heated in any manner. The appellee notified the appellant that the car

<sup>1</sup> Writ of error denied by supreme court.

was unheated, and through its conductor in charge of the train, informed it that it was uncomfortable and disagreeable for him to ride in the car on account of its being so cold, and requested appellant to provide it with heat, so as to make it comfortable. (5) The appellant, after having been so informed and requested, negligently failed to heat said car. (6) That by reason of said negligence of appellant, the appellee contracted a severe cold, and became sick and suffered thereby great pain and discomfort, and incurred medical expenses to his damage in the amount found by the jury. (7) The appellee was guilty of no negligence contributing to the injury thus occasioned him by the negligence of appellant.

#### Conclusions of Law.

1. The petition of appellee stated a good cause of action as against the demurrer and exception of appellant.

2. It was the duty of appellant to appellee to keep the car in which the latter was discharging his duty so heated as to make it safe and comfortable for him, for the road, having accepted the appellee and received him on its cars as a United States postal clerk, owed him the same duty it owed to a passenger on its train (*Railway Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280; *Taylor v. Railway Co.* [Mo. Sup.] 38 S. W. 304; *Railway Co. v. Hyatt* [Tex. Civ. App.] 34 S. W. 477; *Hastings v. Railway Co.*, 53 Fed. 224; *Railway Co. v. Ketcham* [Ind. Sup.] 33 N. E. 116; 2 Am. & Eng. Enc. Law, 744; *Hutch. Carr.* [Mechem's Ed. 1891] § 515d); and it was not necessary for the appellee to show a written contract between appellant and the United States to carry their mail. The fact that it carried and had been carrying such mail continuously for a number of years was sufficient proof of the contract.

3. There was no error in the court's overruling appellant's demurrer to the evidence. The evidence not only tended to but established fully the appellee's cause of action. *Railway Co. v. Templeton*, 87 Tex. 46, 28 S. W. 1066; *Id.* (Tex. Civ. App.) 25 S. W. 135; *Dangerfield v. Paschal*, 11 Tex. 579; *Bradbury v. Reed*, 23 Tex. 260; *Pitt v. Storage Co.*, 4 Willson, Civ. Cas. Ct. App. § 295, 18 S. W. 465; *Hollimon v. Griffin*, 37 Tex. 453. The 6th, 7th, 8th, 10th, 13th, 14th, 15th, 17th, 18th, 19th, 20th, 21st, 22d, 23d, and 25th assignments of error complain of the admission of testimony over appellant's objection. If these assignments were not waived by the demurrer to the evidence, we should hold that none of them is well taken, for, even if the evidence excepted to had gone before the jury, the appellant could not have been prejudiced by it, though it should be conceded it was erroneously admitted. It seems, however, upon principle and authority, that a demurrer waives all objection to the admissibility of the evidence to which it is addressed, and amounts to an admission

that such evidence is complete, that the witnesses are entitled to credit, and that all inferences favorable to the opposite party which may reasonably be drawn from the evidence are true. *Railway Co. v. Templeton*, supra; 44 Cent. Law J. 514; *Chapman v. Bane*, 1 Bibb, 613; *Miller v. Porter*, 71 Ind. 523. There is no error in the judgment appealed from, and it is affirmed.

#### DUVENECK v. KUTZER.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

FRAUDULENT CONVEYANCES — CONSIDERATION — PAROL EVIDENCE — FATHER AND CHILD — WAGES OF CHILD.

1. J. and R., being indebted to plaintiff on a note, but before the note became due, each conveyed all of his real estate, except the homestead, to defendant, who was a nephew of J. and son of R., by separate deeds, each deed expressing a pecuniary consideration. No cash passed from defendant in the transaction, but he assumed to pay, and afterwards paid, certain debts due from both. The transaction was entered into by defendant in good faith, he being unaware of the note to plaintiff. *Held*, that the deeds were valid, there being a sufficient consideration therefor.

2. Where a deed expresses a pecuniary consideration, parol evidence is admissible to show how said consideration was actually paid.

3. Where a son had been released by his father at the age of 18 years, and his father promises to pay him, for his labor, wages at an agreed rate from said age, such wages are a valid claim by the son against the father.

Appeal from district court, Kendall county; Charles J. Gillespie, Special Judge.

Action by G. Duveneck against Albert Kutzer in trespass to try title. Verdict for defendant. Plaintiff appeals. Affirmed.

Tarleton & Jones, for appellant. George Powell, for appellee.

NEILL, J. This is an action of trespass to try title brought by appellant against the appellee to recover certain parcels of land. The appellant, plaintiff below, alleged in his petition that appellee, defendant below, claims subdivision 14 of original lot No. 2, in the town of Boerne, under a deed from Reinhard J. Kutzer, and subdivisions 11, 13, and 15, on James street, in Boerne, a part of original lot No. 3, of survey No. 180, through a deed from Reinhold Kutzer, which deeds are described in our conclusions of fact; that when said deeds were executed plaintiff was a creditor of the several grantors, who were then insolvent, and without property subject to execution, save the lands by them conveyed to defendant; that their insolvency was known to defendant, and that said deeds were made by the grantors therein for the purpose of hindering, delaying, and defrauding their creditors; that after said deeds were executed plaintiff sued Reinhard J. Kutzer and Reinhold Kutzer on his several

<sup>1</sup> Writ of error denied by supreme court.

demands against them, attached the property, obtained judgments against them foreclosing his attachment liens, had the property sold under process issued on his judgments, and bought it in under execution, receiving deeds of the sheriff thereto. Plaintiff asked judgment canceling the alleged fraudulent deeds, and for restitution of the premises. The defendant answered by a general demurrer and a plea of not guilty. The case was tried by a jury, and a verdict returned for defendant, upon which the judgment appealed from was entered.

#### Conclusions of Fact.

On the 21st day of March, 1895, Reinhard J. Kutzer, as principal, and Reinhold Kutzer, as surety, made their promissory note to appellant, G. Duveneck, for \$500, payable 12 months after date, with interest at the rate of 9 per cent. per annum. This note was given in lieu of an older note for money borrowed three years before, which was two years past due when this one was executed. The appellant sued on the note, and on the 21st day of April, 1896, recovered judgment thereon against the makers in the district court of Kendall county. On the 10th day of June, 1896, execution was issued on the judgment, and levied upon the lands in controversy,—subdivision 14 of original lot No. 2, as the property of Reinhold Kutzer; and subdivisions 10 and 12, in original lot No. 2, and subdivisions 11, 13, and 15, of original lot No. 3, survey 180, as the property of Reinhard J. Kutzer. By virtue of said execution and levy the property was sold by the sheriff of Kendall county, and bid in by the appellant, on the first Tuesday in July, 1896. The deeds of the sheriff bear date July 7, 1896. They were duly acknowledged on September 5, 1896, and filed for record two days after. On December 12, 1895, Reinhard J. Kutzer conveyed, by his deed of that date, to his nephew Albert Kutzer, subdivision 14 of original lot No. 2 in the town of Boerne. The deed recites a consideration of \$825 cash, and it was duly filed for record on the 14th day of December, 1895, and recorded on the 28th day of February, 1896. The grantor had no other property after he made this deed except his homestead and exempt personal property. This conveyance left him insolvent. On December 10, 1895, Reinhold Kutzer conveyed to his son Albert, the appellee, subdivisions 10 and 12 of original lot No. 2, in the town of Boerne, and subdivisions 11, 13, and 15, on James street, in said town. The deed recites a cash consideration of \$2,500. This instrument was filed for record on the 14th day of December, 1895, and duly recorded on the 28th day of February, 1896. On December 30, 1895, Reinhold Kutzer conveyed another tract of about 15 acres, situated in Boerne, to his son Otto, who is younger than Albert. This deed recites a consideration of \$500 cash. These two deeds

and personal, except his exemptions and homestead. Therefore, from the dates of the deeds to the time this cause was tried, he has been insolvent. In June, 1895, Reinhold Kutzer was indebted to the appellee in the sum of \$1,035. (The origin and nature of this debt will hereinafter be fully stated.) At the same time he was indebted as follows: To Otto Rush, \$200; to Mrs. Pfeiffer, \$200; to Anton Koch, \$100; to Ed Muertz, \$100; to John Heine, \$100; to Walter Tips, \$550; and to John Sipple, \$250. Reinhard J. Kutzer then owed the Alamo National Bank a note made by him as principal, and Reinhold Kutzer as surety, to the Fifth National Bank of San Antonio, Tex., for \$825. At that time, the appellee being desirous of purchasing from his father and uncle the property in controversy, it was agreed that appellee should have the property in consideration of the cancellation of the debt due him from his father, provided that he would assume and satisfactorily arrange with the creditors the payment of the other indebtedness stated above. The appellee having, in pursuance to the understanding, assumed the payment of said indebtedness, and made satisfactory arrangements with all the creditors except John Sipple for the payment of said debts, and canceled the debt due by his father, the deeds to the property were afterwards, on their dates, executed in consideration thereof, there being no money paid. The reason why appellee made no arrangement with Sipple for the payment of his debt is that Sipple was not in the country and could not be seen. But, as is stated, appellee assumed its payment. Now, as to the debt of \$1,035, owed appellee by his father and canceled in the transaction: On October 8, 1889, the appellee was 18 years old, and released by his father from his control, and, being then about to leave home to work for himself, his father promised to board, cloth, and pay him \$15 per month if he would stay at home and work for him. This appellee assented to, and remained with and worked for his father under the agreement until June, 1895, thereby earning wages, at the rate agreed upon, for 69 months, amounting in the aggregate to \$1,035. The debts due the other parties were assumed, and payments made or arranged, in the following manner: The debts Reinhold Kutzer owed Rush, Pfeiffer, Koch, Muertz, and Heine were settled by appellee giving his notes in lieu of his father's to the several parties for the respective amounts due them. This settlement was perfectly satisfactory to each of said creditors. The debt to Walter Tips was paid off entirely and fully discharged by appellee. The note due by Reinhard J. Kutzer to the Alamo National Bank was also paid and discharged by him. In January, 1896, appellee not having seen John Sipple, he being out of the country, in reference to the debt he had promised his father to assume, appellee, at the request of his father, for the purpose of enabling him to pay

a debt he was due the Fifth National Bank of San Antonio, borrowed \$200, and paid it to his father, and let him have a wheat separator worth \$60 or \$70; in consideration of which appellee's father reassumed the Sipple debt, and with the money received from appellee, together with \$75 more, paid his debt to the Fifth National Bank, which debt he owed when he sold the premises in controversy to appellee. When Reinhold Kutzer sold the premises in controversy to this appellee the debts assumed by his son were all he owed, except the one to the Fifth National Bank, above mentioned, and the one to appellant, for which he was surety, which was not due when the sale was made. The appellee knew nothing of the debts owed by his father and uncle, except the ones assumed by him, when he purchased the property in controversy; and he made the purchase in good faith, without knowledge of the fact (if it be a fact) that the conveyances were made to defraud the grantors' creditors, or of any fact that would put him upon inquiry as to whether the conveyances were made for that purpose. The lands in controversy were not worth exceeding the sums expressed as the considerations in the respective deeds by which they were conveyed to the appellee.

#### Conclusions of Law.

All the evidence introduced by the appellee to show how the consideration for the land was actually paid was objected to by the appellant upon the ground that the vendee could not contradict, vary, or alter the considerations expressed in his deeds. The action of the court in overruling the exceptions and admitting the testimony is assigned as error. When an instrument is assailed by creditors, the amount and character of the consideration becomes material; and in such controversies the rule seems to be that no evidence is admissible in favor of the grantee which contradicts or changes the character of the deed (*Bump, Fraud. Conv. § 604*), e. g. when the deed expresses a monetary consideration, the grantee will not be permitted to show that the consideration was a marriage contract (*Betts v. Bank, 1 Har. & G. 175*); or, when he claims through a voluntary conveyance, he will not be heard to set up a different pecuniary consideration (*Hildreth v. Sands, 2 Johns. Ch. 35*; *Bean v. Smith, 2 Mason, 290, Fed. Cas. No. 1,174*; *Hubbard v. Allen, 59 Ala. 283*). But, so far as we know, it has never been held, when it expresses a pecuniary consideration, that it cannot be shown, as is contended by appellant in this case, how such consideration was actually paid. The testimony complained of did not vary the consideration recited in the deed, or change the nature of the contract between the parties, but was proof of the character of the consideration expressed, and of the manner of its payment. Therefore the court did not err in overruling appellant's objections to its admission.

It is well settled that a sale for a fair price,

to one who agrees to pay the consideration upon certain specified debts of the vendor, is not fraudulent against the latter's creditors. *Sweeney v. Conley, 71 Tex. 543, 9 S. W. 548*; *Bank v. Clare, 76 Tex. 47, 13 S. W. 183*. A pre-existing indebtedness of the grantor to the grantee which is canceled by the transaction is a sufficient consideration to support a purchase of real estate, and the person so purchasing will be regarded as a bona fide purchaser, provided the property is not worth more than is reasonably sufficient to satisfy his debt, or, if it exceeds in value the amount of the debt, he sees that the excess is applied to the payment of other creditors. *Elser v. Graber, 69 Tex. 222, 6 S. W. 560*; *Ellis v. Valentine, 65 Tex. 549*. But it is contended by appellant that the \$1,035 debt which was taken as part of the consideration was, in so much as earned during appellee's minority, fictitious and fraudulent. When a child is released from parental control he becomes entitled to his time and earnings, and to property purchased with his earnings, free from any claim of his parent or his parent's creditors. *Schuster v. Jewelry Co., 79 Tex. 183, 15 S. W. 259*; *Furh v. McKnight, 6 Tex. Civ. App. 584, 26 S. W. 95*; *Tiff. Pers. & Dom. Rel. § 127*. Not only may a parent emancipate his child, so as to entitle it to receive its earnings from third persons, but it has been held that emancipation may be implied, even when the minor resides at home and works for his father, from a promise on the part of the father to pay him for his services during minority, so that the minor may maintain an action against the father for his services. *Id. p. 260*; *Wood, Mast. & S. § 25*. Therefore, the facts showing that appellee was released from parental control when he was 18 years old, and that he earned the amount by laboring under contract with his father afterwards, the debt was valid, and he had as much right to take property from his father in payment of it as any other bona fide creditor has to take property from his debtor in settlement of the debt.

The court in the third paragraph of its charge instructed the jury that, should they find from the evidence that R. J. & R. Kutzer made the conveyances to appellee with the intent to hinder, delay, or defraud their creditors, yet that, if appellee paid a valuable consideration for the land, such intent on the part of the grantors would not alone make the sale void. But, in order to invalidate the deeds, it must appear from the evidence that appellee, at the time he bought and paid for the land, had notice of such intent on the part of his grantors, or had knowledge of such facts or circumstances as would put an ordinary prudent man on inquiry which, by proper diligence on his part, would have led to a knowledge of such fraudulent intent. This part of the charge is assigned as error upon the ground that "the standard or measure of fact or circumstances is not such fact or circumstances as would put an ordinary prudent man on inquiry, but such as would put a reasonably prudent person upon

inquiry, and the court stopped short of saying that a failure to make such inquiry would have charged appellee with notice of such fraud, if by the use of such diligence it might have been discovered." While it would perhaps have been more accurate to have used the words "reasonably prudent person" instead of "ordinary prudent person," where they appear in the charge, yet we think it would, in this particular case, be trifling with law and justice to reverse the judgment because "reasonably" was not used instead of "ordinary." The law does not impose upon the vendee the duty of exercising any diligence unless and until he has knowledge of some fact or circumstance sufficient to put a reasonably prudent person upon inquiry; for, in the absence of such knowledge, he has the right to assume good faith on the part of the vendor. *Railway v. Shirley*, 89 Tex. 95, 31 S. W. 291. No fact or circumstance is pointed out or disclosed by the record which would in the least indicate a fraudulent purpose in the grantors in making the deeds sought to be avoided; and, in the absence of such fact or circumstance, a reasonably prudent person, or any other kind of person, could not have been put upon inquiry. In view of this, the supposed verbal inaccuracy in the charge could not have injured the appellant. If the transactions between appellee and his vendors were not in their inception and consummation known by appellee, from his participation in them, to be fraudulent, they must be held to be bona fide. When a debtor sells his property for the purpose of satisfying debts in amount equal to its value, and from the transaction itself his vendee knows such to be his purpose, and carries out that purpose by paying such debts, such a sale cannot be fraudulent. If the court in the part of the charge complained of "stopped short in saying that a failure to make such inquiry would have charged appellee with notice of fraud, if the jury believed that by the use of such diligence it might have been discovered," the appellant should by a special charge have asked the court to go on and measure to him the full length of the law. We believe, however, it was fully meted out to him.

The eighth paragraph of the charge is as follows: "The law allows an insolvent debtor to prefer his creditors in his discretion, and a sale by an insolvent debtor to a creditor of property sufficient to pay his debt to such creditor would be valid, even though the creditor knew at the time he took the property of the intent of the grantor to prefer him, and place the property out of the reach of other creditors; and in addition to his son, if you find his son was a creditor, R. Kutzer had a right to prefer other creditors; and if you find from the evidence that he did convey to his son the property in controversy, in consideration of the payment by A. Kutzer of debts due him to his preferred creditors, and that the price paid by A. Kutzer was a fair and reasonable price for the lands

conveyed, then find for the defendant, and so state by your verdict." The following objections are made by appellant to this paragraph: (1) "It assumes Albert Kutzer was a creditor of R. Kutzer, and that the latter had other creditors for whose benefit he conveyed his property to appellee, thereby charging on the weight of the evidence and invading the province of the jury." (2) "It peremptorily instructed the jury, if the transfer to Albert Kutzer was made for the purpose of preferring creditors,—himself and others,—and was for a fair and reasonable price, to return a verdict for him, thereby assuming good faith on the part of appellee in said conveyance to him, and withdrew from the jury all questions of the effect upon the transaction of an intention on the part of the purchaser of aiding the debtor in hindering, delaying, and defrauding his creditors, and of the effect upon said purchaser of notice, actual or constructive, by the grantee of the grantor's fraudulent intent." In regard to the first objection, the charge does not assume that appellee was a creditor of R. Kutzer, but it leaves it to the jury to determine from the evidence whether he was a creditor. The evidence is undisputed which shows R. Kutzer had other creditors, and from it the court had the right to assume it in the charge as a fact proven. It, however, does not assume that the conveyance was made for the benefit of such creditors, but leaves it for the jury to determine from the evidence whether the conveyance was made for their benefit. In regard to the second objection, we have to say that, when the part of the charge complained of is read and construed in connection with the entire charge, the objection amounts to nothing. Nor do we think there is any merit in the assignment which complains because the charge placed the burden on the appellant of proving that the conveyances were fraudulent. This is the burden the law imposed upon him, and it could not be error for the court to so inform the jury. That the appellee could not see and arrange with John Sipple for the payment of his grantor's debt to him, his father having reassumed the debt in consideration of appellee's letting him have money and property sufficient to pay another debt existing when the deed was made equal in amount to the one owed Sipple, and such debt having been paid with the money and proceeds of the property, does not vitiate the sale. No debtor was defrauded, for the one actually paid with the proceeds of sale was as valid as the one due Sipple, and, while Sipple might perhaps complain that his debt was not paid by appellee in accordance with his agreement with the grantor, appellant cannot; for it can make no difference with him whether Sipple or the bank was paid, for they were both creditors of equal standing of the grantor, and the payment of either could not be in fraud of creditors. There is, in our opinion, no error complained of which requires a reversal of the judgment, and it is affirmed.



**HART v. PATTERSON et al.<sup>1</sup>**

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

**DEEDS—DEFECTIVE RECORDATION—NOTICE.**

A trust deed of land was given to secure a debt, and it provided that, should the trustee appointed therein fail to make sale of the land as provided, then the grantee should have power to appoint another trustee with like powers. The clause granting power to appoint a substitute trustee was omitted from the record of the deed. Subsequently a creditor of the grantor attached the land, and sold the same, taking a sheriff's deed. *Held*, that the omission from the record was not sufficient to render the record inoperative as notice to the creditor of the lien therein set forth.

Appeal from district court, El Paso county; A. G. Wilcox, Special Judge.

Action by Millard Patterson, George E. Fitzgerald, and C. N. Buckler against Juan S. Hart. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

Davis, Beall & Kemp, for appellant. W. B. Brack and Millard Patterson, for appellees.

**FLY, J.** This is an action of trespass to try title, brought by Millard Patterson, George E. Fitzgerald, and C. N. Buckler, to recover of appellant a certain tract of land in the city of El Paso. Appellant pleaded not guilty, and specially pleaded his title as coming through a sheriff's sale, made by virtue of an order of sale issued in a certain suit numbered 991, and styled "Juan S. Hart v. C. C. Fitzgerald," said sale having taken place on April 5, 1892. It was also alleged that prior to July 19, 1888,—date of the levy of his attachment on the land,—to wit, on June 30, 1888, C. C. Fitzgerald had executed a deed of trust on the land in question to secure one O. T. Bassett in the payment of a promissory note for \$1,000; that in March, 1889, said note was fully paid off by C. C. Fitzgerald, and was fraudulently transferred to J. A. Buckler, and that he had one C. N. Buckler substituted as trustee in place of C. R. Morehead, who was the original trustee named in the mortgage; that afterwards a sale was made by the substitute, and J. A. Buckler purchased the same for C. C. Fitzgerald, and afterwards fraudulently transferred the same, at the instance of C. C. Fitzgerald, to the International Smelting Company, of which Fitzgerald was the president and a shareholder. It was also alleged that there was no authority in said deed of trust for a trustee being substituted, and that said sale was void, because made by the substitute trustee. Appellant prayed that, if his title through the sheriff's deed should be held defective, his judgment lien be recognized, and his rights established. The case was tried by jury, and a verdict was returned in favor of appellees. It was proved that on June 30, 1888, C. C. Fitzgerald exe-

cuted to C. R. Morehead, trustee, a deed of trust on the land in controversy to secure O. T. Bassett in the payment of a promissory note for \$1,000, and that there was the following provision in the deed of trust: "It is hereby specially provided that, should the said C. R. Morehead, from any cause whatever, fail or refuse to act, or become disqualified from acting, as such trustee, then the said O. T. Bassett shall have full power to appoint a substitute in writing, who shall have the same powers as are hereby delegated to the said C. R. Morehead," etc. The deed of trust was deposited for record on date of its execution, and, as recorded, read: "Should the said C. R. Morehead, from any cause whatever, fail or refuse to act, or become disqualified from acting, as such trustee, then the said O. T. Bassett shall have the same powers as are hereby delegated to the said C. R. Morehead." In other words, the language in the deed of trust giving to Bassett the power to appoint a substitute was omitted from the record, and it was contended by appellant that he was affected with notice only of those parts of the deed of trust that were recorded, and that, although the power of substitution was really given in the deed of trust, yet, being omitted from the record, the sale by the substitute was, as to him, void, he being a creditor of C. C. Fitzgerald, who had obtained a lien by attachment. The other point raised in the answer—that Fitzgerald had, in point of fact, paid off and discharged the debt due by him to Bassett before the sale by the substituted trustee—was properly submitted to the jury, and found adversely to appellant. Therefore the disposition of this cause hinges upon the conclusion reached on the question of whether the omission in the registration of the deed of trust rendered the sale by the substituted trustee invalid as to a lien creditor. It is provided by the statute (article 4640, Rev. St. 1895) that "all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk to be recorded as required by law, but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall nevertheless be valid and binding." It is settled by a number of decisions that the creditors referred to are those who have obtained a lien upon the property, and that they are only affected with notice of facts shown by the record; "and while it is a conclusion of law which cannot be disputed that subsequent purchasers and creditors are charged with notice of all the facts shown or exhibited by the record, it has never been held that they were bound or affected by a record which does not give notice of a valid conveyance of the property in question, but

<sup>1</sup> Rehearing denied.

merely gives information which, if in fact communicated to such creditor or purchaser, might have been reasonably sufficient to put him on inquiry, though, had such inquiry been made, the existence of a prior incumbrance, not properly recorded, might have been ascertained. It is therefore held that a deed not properly acknowledged or proved for record, although in fact duly executed, will not operate as notice of such deed; and, though it may have been duly proved or acknowledged for record, if in some material respect it has been improperly recorded, the same result follows from such omission, and the record will only give notice of the existence of such an instrument as that exhibited by it." *Taylor v. Harrison*, 47 Tex. 454; *McLouth v. Hurt*, 51 Tex. 115. The same doctrine is enunciated in text-books and decisions of other states under similar statutes to ours. *Jones*, Real Prop. § 1469, and authorities cited; *Devl. Deeds*, § 685; 2 *Pom. Eq. Jur.* § 654. It will be noted that the error in the record must be as to some material matter, and the doctrine is based upon the principle that it is better that the party who has attempted to have an instrument recorded, and has failed, should suffer, rather than others who may consult the records. Let the test be applied to the facts in this case. When the attachment lien was obtained by appellant, there was on record in El Paso county a duly-executed and duly-acknowledged deed of trust, which recited a lien upon the property attached, and gave full notice that a power of sale was given; the description of the property was clear and explicit. How was it material to appellant whether the deed of trust was to be executed by the trustee, by the beneficiary, or a substitute? How could the manner of execution of the trust, or the identity of the trustee, affect his interests in any manner? He was constructively apprised of every vital fact in connection with the subject-matter. If he desired to be present at the sale, and bid on the land, so as to make it sell for enough to cover his lien, he could have done it, just as well with *C. N. Buckler* selling it as with *C. R. Morehead* doing it. Appellant was not misled by the omission from the record, for he was given constructive notice of the power to sell in the deed of trust, and could not have obtained his lien with reference to the acts of a substitute who had not been appointed. The rule, as laid down by *Pomeroy* in the section above cited, is that "the record will not be a notice unless it and the original instrument of which it is a copy correctly and sufficiently describe the premises which are affected, and correctly and sufficiently state all the other provisions which are material to the rights and interests of subsequent parties"; and that rule is not contravened in holding that this record was sufficient. The position appellant occupied in relation to the lien was in no wise affected by the omission in the record of the deed of trust,

and, the jury having found for appellees on the question of fraud, it follows that the sale under the trust deed was a valid one, and title passed to appellees. This view of the case renders a discussion of the other points raised unnecessary, and the judgment will be affirmed.

NEILL, J., entered his disqualification.

#### MISSOURI GLASS CO. v. MARSH.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 8, 1897.)

#### DEED OF TRUST—ACCEPTANCE—ATTORNEY'S FEES—COSTS.

1. A failure of a creditor to accept under a deed of trust to goods will not impair his lien on said goods for rent.

2. Where the attorney who wrote a deed of trust was paid to perform that service, and also "to support it," the trustee should not be allowed an attorney's fee for the services of the attorney in writing an answer in a garnishment proceeding.

Appeal from Smith county court; George W. Cross, Judge.

Garnishment proceedings by the Missouri Glass Company against Bryan Marsh. Judgment for garnishee, with allowance of attorney's fee, and plaintiff appeals. Attorney's fee disallowed, and affirmed as to the rest.

Lindsey & Butler, for appellant. T. O. Woldert and Jas. M. Edwards, for appellee.

FLY, J. This is a suit in which the trustee in a deed of trust was served with a writ of garnishment to ascertain his indebtedness to one N. J. Dobbs, the maker of the mortgage. The mortgage was on a stock of goods, and, some two hours after it had been registered, appellant obtained a writ of garnishment, and had the same served on the trustee. The case was tried by the court, and judgment was rendered in favor of the garnishee; an attorney's fee of five dollars being allowed, as part of the costs. The issue was as to the acceptance on the part of the several preferred creditors. The question of acceptance was one of fact, and was determined by the court in favor of appellee, and there is evidence to sustain the finding. *Wimberly*, one of the preferred creditors, had a claim for rent, which was by law a lien on the goods of Dobbs; and a failure on *Wimberly's* part to accept under the deed of trust did not impair his lien. Neither would his acceptance under the mortgage, as the first preferred creditor, be any waiver of his rights under his lien, and it would not give the party suing out the writ of garnishment a preference over him. We think there was evidence that tended to show an acceptance on the part of *Woldert* before the writ was served.

We cannot see that any damage resulted to appellant from the burden having been placed

<sup>1</sup> Rehearing denied.

on it to show nonacceptance by the creditors, even if it were right in its contention that the burden should have fallen on appellee. The attorney who wrote the deed of trust was given \$200 by Dobbs to perform that service, and also, as he expressed it, "to support it," and "to see that the terms of the deed of trust were executed and carried out as it was written"; and the court should not have allowed the garnishee the fee of five dollars for the service of the attorney in writing the answer. He had already been paid to render that service, and the garnishee should not have incurred any such expense. The judgment will be reformed so as to omit the fee for five dollars, and, as reformed, will be affirmed.

### CASWELL v. HOPSON.

(Court of Civil Appeals of Texas. Dec. 4, 1897.)

#### APPELLATE COURTS—RULES—STATEMENT OF FACTS—ESTOPPEL—ERROR CURED.

1. A statement of facts consisting of the testimony as taken by the stenographer, except that the questions have been left off, and the answers adjusted to that change, shows such a gross violation of the rule prohibiting the filing of the stenographer's notes, and requiring the statement to be condensed, that it will be stricken out.

2. Appellee is not estopped from moving to strike out a statement of facts, which shows a violation of the rule requiring its condensation, because he agreed to the statement, as the rule was made for the benefit of appellate courts.

3. An appellant's violation of the rule requiring condensation of the statement of facts, is not cured by a compliance by him with the rule requiring a statement of the material facts in his brief.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by D. H. Caswell against A. H. Hopson. From a judgment for defendant, plaintiff appealed. Plaintiff moves that the court reconsider its action in striking out the statement of facts. Overruled.

West & Cochran and Lancaster, Beall & Gammon, for appellant. F. M. Cunyus and Templeton & Harding, for appellee.

FINLEY, C. J. At a former day of the term, on motion of appellee, this court entered an order striking out the statement of facts contained in the record, and appellant has filed a motion asking us to reconsider our action and vacate the order. We have thoroughly considered the motion, and are of the opinion that we should adhere to our former action. As this action involves quite an important matter of practice, we have decided to put our views in writing, so that they may be brought to the attention of the members of the bar generally, and afford a fresh admonition to them that this court will enforce the rules governing the preparation of cases for submission upon appeal.

The motion to strike out the statement of facts is based upon the proposition that the

statement of facts was not prepared in accordance with the rules which govern the making up of statements of fact. Rules 72 to 78, inclusive (84 Tex. 718, 20 S. W. xvi.), prescribe how statements of fact shall be made up on appeal of causes to this court. These rules are intended to secure a statement of the facts proven upon the trial, as distinguished from a detailed statement of the testimony introduced on the trial. Under well-established principles, conflicts in the evidence, the weight to be given the testimony, the credibility of witnesses, and the preponderance of the evidence, are all matters resting in the prerogative of the trial court, and are ordinarily concluded by the verdict and judgment of that court. In view of these principles, no good purpose can be subserved by embracing in the statement of facts long detailed statements of all the evidence introduced on the trial; and to do so burdens the record with useless matter, unnecessarily increases the cost of appeal, augments the labor of the appellate court, and renders difficult a clear apprehension of the issues involved upon appeal. Hence it will be seen that the purposes to be subserved by these rules are of grave importance, and should therefore be fairly observed by counsel, and the courts should not allow them to be set at naught or disregarded at will. We have said this much to express the estimate we place upon these particular rules, relating to statements of fact, and to indicate the reason and spirit which will guide us in their enforcement.

The statement of facts here in question is a flagrant violation of the rules. It contains 102 pages, and consists manifestly of a detailed statement of all the evidence introduced on the trial, and abounds in repetitions of the testimony of witnesses as to the same matter, as brought out by the direct examination, cross-examination, redirect examination, and, in some instances, recross-examinations. Had the rules been observed in the preparation of the statement, we hardly think the statement would have covered one-fifth as many pages of the transcript as are here devoted to that object. It is reasonably clear to us that the testimony as taken by a stenographer has been bodily incorporated in the transcript, except that the questions have been left off, and the answers merely adjusted to that change. This is a positive violation of rule 78, which reads as follows: "Neither the notes of a stenographer taken upon the trial, nor a copy thereof made at length, shall be filed as a statement of facts; but the statement made therefrom shall be condensed throughout, in accordance with the spirit of the foregoing rules upon this subject." The statement was prepared and agreed to by counsel, and is not a statement of the facts prepared by the court; and it cannot therefore be truthfully said that counsel are not responsible for the manner in which the statement was made up.

It is insisted that appellee's counsel are es-

topped to object to the manner in which the statement was prepared, by reason of the fact that they agreed to the statement. The rules in question were not made for the convenience and benefit of counsel, but were intended to facilitate the correct and orderly dispatch of business in the appellate courts. The court could strike out and disregard such a statement of facts upon its own motion. The doctrine of estoppel, therefore, has no application. To strike out the statement of facts is a severe method of enforcing the rules governing the preparation of such statements; but we have been unable to fall upon any other effectual way of enforcing their due observance. To tax the costs of the statement against appellant, or order the printing of the record, would not secure the object intended by the rules.

The contention of appellant's counsel that the due observance of rule 30 (87 Tex. xi, 31 S. W. vii.), which requires appellant's brief to contain a statement of the material facts proven upon the trial, will furnish relief to this court against the labor of going through and analyzing such a statement of facts as we have under consideration, cannot successfully be maintained. Rule 30 is intended as merely auxiliary to the other rules, and it is only where the statement therein contemplated is not objected to by opposing counsel that the appellate court is exempted from the duty of examining the statement of facts contained in the record. The due observance of all these rules was deemed necessary by our supreme court, or they would not have been prescribed and put in force for the government of judicial proceedings.

There is no reasonable ground of excuse for the failure to observe the rules in the preparation of the statement of facts in this case, and their violation is so gross that we feel we would be putting aside the rules ourselves were we to uphold this statement of facts. Where it is made to appear that there has been a bona fide effort to comply with the rules, we do not think the statement of facts should be stricken out; but, where the rules are grossly disregarded, such penalty should be pronounced. The motion is overruled, and the former order striking out the statement of facts will be adhered to.

#### TEXAS BREWING CO. v. WALTERS.

(Court of Civil Appeals of Texas. Nov. 27, 1897.)

CONTRACT OF EMPLOYMENT—CONSTRUCTION—STATE OF FRAUDS—PLEADINGS—EVIDENCE—INSTRUCTIONS—MISCONDUCT OF COUNSEL—REVIEW.

1. Plaintiff agreed orally to work for defendant for a term of five years, at different stipulated sums for each year; and, after working more than a year, he was discharged, after entering on another year's work. In an action for wages for the unexpired year, the oral agreement was excluded from the evidence, and it was shown that a subsequent agreement was made, by which the yearly salary was changed; and the managing officer of defendant testified that plain-

tiff's year began December 15th, and that his salary was paid monthly. *Held*, that the facts warranted a finding that the employment was by the year, and not by the month.

2. In an action on an oral contract, where the petition does not disclose that the contract is oral, defendant, in order to avail himself of the statute of frauds as a defense, must prove the contract; and hence it is not prejudicial error to allow plaintiff to prove the contract.

3. Since the defense of statute of frauds to a parol contract of employment for five years must be specially interposed, where the petition does not show the contract to be within the statute the exclusion of the evidence of the contract, on special objection under a general denial, will not defeat recovery, if sufficient evidence remains to show an implied contract by the year. The statute must, in such case, be specially pleaded, and the plea sustained by proof.

4. Where the instructions in an action to recover on an implied contract of yearly hiring are complained of as making the question of yearly hiring too prominent, an objection should be interposed at the time the instructions were given.

5. Where defendant pleaded in reconvention damages for the loss of certain beer, claimed to have been caused by the incompetence and negligence of plaintiff, who was suing for wages, and the evidence was conflicting, but tended to show that the beer lost was due to the kind of water accessible, rather than to want of skill or care, a finding for plaintiff will be sustained.

6. In an action for wages, where incompetency and negligence were set up in justification of plaintiff's discharge, and in support of a counterclaim, the jury was instructed that if plaintiff was shown to have been incompetent or negligent, and defendant thereby suffered loss, then plaintiff would be liable for the loss, unless the incompetency was known to defendant before the loss, or by ordinary diligence could have been discovered. *Held*, that whether such instruction was correct or not was immaterial, where the jury found that neither incompetency nor negligence had been proved.

7. Where incompetency to make bottle beer was set up in justification of the discharge of an employé, and the question of negligence was also involved by evidence of the employer, it was proper not to confine the evidence exclusively to the employé's capacity to brew and bottle beer.

8. To prove incompetency of plaintiff as a brewer, in justification of his discharge, defendant offered expert testimony as to the quality of beer made, derived by witness from other experts, employed by him, but not shown to have made their investigations in his presence. *Held*, that the evidence was properly excluded.

9. In an action by an employé against his employer for wages, he has the right to plead so as to anticipate every possible phase of the evidence, and it is not error to refuse to require him to elect on which count of his petition he will stand.

10. Counsel, in his argument, said: "I belong to that class of people that have some confidence in human nature; that believe in their fellow man; that have no suspicion so great and so deep and so overwhelming, in his heart, that he cannot credit an honest thought to his fellow man." \* \* \* I have confidence in this jury, that no word I shall say to them outside of the evidence and law \* \* \* shall influence them in the least. I have a contempt for a man that would be so influenced, and the contempt is overwhelming; and the contempt that comes from a man's heart that would think so is equally overwhelming." *Held* not such improper conduct as to warrant a reversal of the judgment.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Action by George Walters against the Texas Brewing Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

W. R. Sawyers, for appellant. John W. Wray, for appellee.

### Conclusions.

STEPHENS, J. Appellee entered the service of appellant company as brew master about the 27th day of December, 1890 (though his term of employment seems to have dated from the 15th day of December, 1890), and remained in that service until April 12, 1895, when he was discharged; the letter of dismissal reading: "Fort Worth, Texas, April 12, 1895. Mr. Geo. Walters, City—Dear Sir: Having been a director of this company for the past two years, you are doubtless fully familiar with the affairs, which render retrenchment in every direction an imperative necessity, if unpleasant results are to be averted. Acting on this line of general reduction of expense, the directory of this company has decided to employ but one brew master in the future, and, at a meeting held yesterday, appointed Mr. Chas. H. Ringler to fill that position. You are therefore notified that from and after May 1, 1895, your services will be no longer required. Mr. Ringler assumes charge under date of to-day. Yours, very truly, Texas Brewing Co., Zane Cetti, Pres." Accepting this letter as a discharge from its date, he at once quit the service, and, failing to find other employment, recovered damages for the rest of the year, up to December 15th, at the rate of \$3,600 per annum, which was shown to have been at least the reasonable value of his services, as well as the price paid him for like services rendered during the preceding years. His chief contention, as appears both from his pleadings and his testimony (first admitted, and then excluded), was that in October, 1890, he had engaged himself to appellant, as brew master, for a term of five years, beginning December 15, 1890, at \$3,000 for the first year, \$3,500 for the second, \$4,000 for the third, \$4,500 for the fourth, and \$5,000 for the fifth year. Against this contract the appellant pleaded the statute of frauds, and also objected upon that ground to the introduction of evidence to prove the contract. This objection was overruled, and the evidence admitted, but in the charge the court instructed the jury to entirely exclude the evidence from their consideration. From the evidence not so excluded, but one deduction remained, and that was that appellee, when discharged, had entered upon another year's service, just as he had entered upon the last three preceding. It seems perfectly clear from the record so restricted, and a finding to the contrary would not be sustained, that appellee, though his salary was paid in monthly installments, was engaged in serving appellant by the year, and not by the month; the managing officer of the company testifying that appellee's years began on the 15th day of December. Exclude, then, the evidence of the oral contract made in October, 1890, and

nothing is left in the record, except the bare fact of monthly payment, to even suggest a hiring other than by the year. It would seem to be unreasonable that a brew master would engage himself for so short a period as a month, the employment being in its nature permanent. Besides, it is manifest that appellee immigrated to this state, upon the invitation of the appellant company, solely for the purpose of such employment; it having just established its brewery in Ft. Worth. If, however, the proof of the oral contract had not been excluded, it might have been deemed sufficient by the jury to rebut the inference otherwise obtaining of a hiring by the year, in that they might have ascribed his continuance in the service after December 15, 1895, to the original employment for a period of five years, made before that period began, which, it seems, would have brought the case within the statute of frauds. *Moody v. Jones* (Tex. Civ. App.) 37 S. W. 879. However, there was evidence tending to show a hiring by the year, notwithstanding the original contract of employment testified to by appellee, in that after the expiration of the first year a uniform salary of \$3,600 per year seems to have been substituted by mutual consent for the original contract, from which, and other circumstances, it might be argued that the original contract had been abandoned, or practically interpreted as a yearly hiring. For an instructive discussion of what will justify an inference of a yearly hiring, see the New York case of *Adams v. Fitzpatrick* (N. Y. App.) 26 N. E. 144. Be this as it may, it seems to us that the error in admitting the evidence in the first instance, over the objection of appellant, was not to its prejudice; but on the contrary, in order to sustain its defense, the appellant should, so far from objecting to the evidence, have insisted upon its introduction. True, in most cases, where the petition does not disclose that the contract declared on comes within the statute, it might be sufficient to interpose the defense by objecting to the evidence, and thus preventing the plaintiff from making out his case. But the case at bar, as already seen, is a peculiar one,—so much so that appellant, in order to avail itself of the statute, was under the necessity both of pleading and proving a contract in violation of it; the pleadings of appellee not disclosing that the contract was oral. This defense must always, in some form, be specially interposed; and where, from the manner of alleging the cause of action on the part of the plaintiff, this cannot be done by exception to the petition, and where, as in the case at bar, the exclusion of the evidence on special objection under the general denial will not necessarily defeat a recovery, the evidence remaining being sufficient to show an implied contract of hiring by the year, the only course left is, not merely to plead the statute specially, as was done in this case, but also to sustain the plea by proof. Without such proof, the de-

fense is not made out. No error is assigned to the charge (second paragraph) excluding the evidence, and that action is not before us for revision.

The fourth, fifth, and sixth paragraphs of the court's charge are complained of, as making too prominent, by repetition, the question of a yearly hiring; but, as already seen, as a finding of a monthly hiring would not have been sustained, and that of a yearly hiring was the only legitimate deduction from the record as it stood with the evidence of the original oral contract excluded, the objection urged to these paragraphs of the charge would not require the judgment to be reversed. However, it seems that the court undertook to submit in these charges the theory, first, of an express contract entered into December 15, 1895, and also of an implied contract of a hiring for the year, and this seems to have led to the repetition of which complaint is made. If objection had been made to the charge that there was no evidence justifying the submission of the theory of an express contract, it might have been a serious one, but no such objection is presented. Disposing of the one urged, we find no reversible error in the charges complained of.

The main defense interposed to the merits was that of appellee's incompetency as a brewer of bottle beer, together with his negligence, upon which ground appellant undertook to justify its discharge of him, denying at the same time that it had discharged him. Appellant company also pleaded in reconvention for damages for the loss from time to time of a large quantity of bottle beer, running through the four or five years in question; claiming that, through said incompetency and negligence, this loss had been sustained. The evidence upon this issue of fact, whether relied on under the one plea or the other was conflicting; but the finding thereon in favor of appellee is sustained,—that supporting the verdict tending to show that the bad beer was due to the kind of water accessible, rather than to want of skill or care on the part of appellee. Error is assigned to the eighth paragraph of the charge, submitting this issue, which reads: "If you believe from the evidence that plaintiff was not reasonably well qualified and competent to perform the duties of brew master for the defendant, in the manufacturing and caring for bottle beer, or that he was negligent in manufacturing and caring for such bottle beer made by him for defendant, and that by reason of such incompetency or negligence, if any, of plaintiff, certain bottle beer was lost to defendant, then you will find for defendant, against plaintiff, on its counterclaim set out in its answer, the reasonable value of such beer so lost, if any, as is set out in said counterclaim; said value to be measured by the original cost said bottle beer so lost when ready for ment, with interest thereon from the

date of said loss to the present time at the rate of six per cent. per annum: provided, however, that if you believe from the evidence that said incompetency of plaintiff which caused said loss, if you believe it was such cause, was known to defendant before said beer was lost, or that by the use of ordinary diligence on the part of defendant it could have known of such incompetency before said loss, then you will find against the defendant as to the beer so lost. The burden is upon the defendant to prove such incompetency or negligence of plaintiff, and the loss of the beer thereby, as alleged in its counterclaim, and the value of same, by a preponderance of the evidence; and, unless it has done so, you will find for the plaintiff as to the same." The objection to this charge is thus stated in the assignment (the fifth): "Because the said charge does not instruct the jury that the defendant must have known, or by use of reasonable diligence must have known, of the incompetency and negligence of plaintiff a sufficient length of time prior to said loss to have prevented the same, and because the court confined, by its said charge, the jury to such a time that, if defendant had known of said incompetency and negligence of plaintiff, that it would have been at such time that it would or might have been impossible for defendant to have prevented said loss, or at least a part thereof." As the jury, in determining the main issue of incompetency and negligence alleged in justification of appellee's discharge, must have found that neither incompetency nor negligence had been proven, a contrary finding upon the reconvention for damages, involving in another form the same issue of fact, could not be sustained. It matters not, then, whether the proviso in the above-quoted charge, to which the objection quoted in the assignment was evidently intended to apply, embodied a correct proposition or not. But if the issue of incompetency, excluding that of negligence, was the only issue thus determined under the plea of justification, the proviso in question would still be harmless; for it will be noted that it does not, in terms, apply to any loss claimed on account of appellee's negligence, but only to that arising from incompetency, which was undoubtedly a conspicuous feature of the main defense, and covered by the verdict. The question of condonation urged by appellee in reply to this assignment was not submitted to the jury, and we do not consider it.

Appellant objected to much evidence admitted to show appellee's competency and experience as a brew master, because it was not confined exclusively to his capacity to brew bottle beer; but the issue of negligence was also involved, and the evidence took a wide range,—appellant first offering testimony tending to show that appellee had been discharged, on account of negligence, by the Gerke Brewing Company, at Cincin-

nati, and that the plant at Ft. Worth, while in appellee's charge, was found, on inspection, to be in bad or unclean condition, etc. Max Henius testified for appellant, by deposition, as an expert brewer, and was permitted to give the result of his own preliminary examination of various samples of bottle beer made at the Ft. Worth brewery while appellee was brew master; but, over the objection of appellant, so much of his deposition was excluded as undertook to state the detail examinations of microscopists and chemists, made at his instance, but not shown to have been made in his presence. The court declined to permit appellant's witness Bohmrich, though an expert, to state, from his investigation at appellant's brewery, that, in his opinion, appellee was absolutely incompetent as a brewer of export bottle beer. As authority for this ruling, appellee cites the following Missouri case: *Boettger v. Iron Co.* (Mo. Sup.) 38 S. W. 298, which seems to be in point. All these rulings, as well as others not necessary to notice, upon the admission and exclusion of evidence, we approve.

There was no error in the court's refusal to grant appellant's motion to require appellee to elect upon which count of his petition he would rely. He had the right to so plead as to anticipate every possible phase of the evidence. Nor do we find merit in any of the exceptions to the petition. However, as recovery was had under the count upon the implied contract of yearly hiring, we need not pass upon exceptions addressed to other portions of the petition.

Appellant complains not a little at the misbehavior of appellee's attorney in the course of the trial below, in that while the evidence was being introduced he persisted in repeating objectionable questions, and in injecting several little speeches, of which the following may serve as a sample: "I belong to that class of people, if your honor please, that have some confidence in human nature; that believe in their fellow man; that have no suspicion so great and so deep and so overwhelming, in his heart, that he cannot credit an honest thought to his fellow man. I have confidence in my fellow men, and I have confidence in this jury, that no word I shall say to them outside of the evidence and law that I shall read, outside of that that falls from this court, shall influence them in the least particle. I have a contempt for a man that would be so influenced, and the contempt is overwhelming; and the contempt that comes from a man's heart that would think so is equally overwhelming." We are very far from approving such a method of advocacy, but assuming, as we must, that the jury was composed of men of ordinary intelligence and self-esteem, we hardly think the conduct, and particularly the speeches, complained of, could have had any appreciable weight with the jury, unless, possibly, both the at-

torney so acting and his cause were thereby prejudiced. The misbehavior of an attorney in the court house, though designed to benefit his client, does not always have that effect, but frequently the attempt to gain an undue advantage hurts, rather than helps. At all events, the matters complained of in this case do not, in our opinion, warrant a reversal of the judgment.

These conclusions sufficiently cover, we think, the complaints made by appellant's assignments of error, numbering more than 60, all of which, though not discussed serially, have been carefully read and considered in consultation. It follows that the judgment must be affirmed.

#### TEXAS & N. O. R. CO. v. SYFAN.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 4, 1897.)

#### RAILROADS — FRIGHTENING HORSES — TRIAL — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE.

1. Where plaintiff, by an amended petition, improperly pleaded a new cause of action for injuries resulting from the operation of a railroad too near a road, it was proper to refuse to charge the jury to disregard all evidence on such new cause of action, where the evidence to support it was the same as that to support the original cause, and the court charged that no recovery could be had, unless it was proved that the employees frightened plaintiff's horse by allowing steam to escape, as alleged in the original petition.

2. Steam emitted from an engine that had approached behind plaintiff, who was driving near the track, struck plaintiff's horse, and it ran away, injuring plaintiff. Plaintiff testified that when he heard the engine, he looked back, and saw a person looking out of the cab window, laughing at him. Four switchmen, who were on the engine, testified that they saw plaintiff or his horse and buggy, but the engineer and fireman denied seeing plaintiff, or of having any knowledge of his accident. *Held* to justify a finding that the engineer or fireman were guilty of negligence.

3. Plaintiff, 49 years of age, was injured in his face and arm, but not seriously, and his leg was broken. He was confined to his bed six weeks, and lost five months' time, when he went to work as cabinet maker, with wages of \$20 per week, which he was earning before the injury. His leg is shortened three-fourths of an inch. *Held*, that \$5,561 was excessive, but \$3,500 was allowed.

4. A charge on negligence should not select certain of the facts bearing upon the question, and impress them on the jury as entitled to special weight.

5. The fact that plaintiff improvidently drove his horse in a private lane near a railroad track, while an engine was approaching, does not prevent recovery, where the horse was frightened by the intentional throwing of steam by the engineer.

6. Where the court charged that, before rendering a verdict for plaintiff, the jury must find that his horse was frightened at the escape of steam, and the question was simply one as to the credibility of witnesses, it was not necessary to charge that the burden was on plaintiff to prove such fact.

7. Evidence that there were no obstructions between an approaching engine and plaintiff was

<sup>1</sup> Writ of error granted by supreme court.

admissible to show that the engineer and fireman saw him before steam was emitted from the engine.

Appeal from district court, Harris county; S. H. Brashear, Judge.

Action by Charles E. Syfan against the Texas & New Orleans Railroad Company. From a judgment for plaintiff, defendant appeals. Modified.

Baker, Botts, Baker & Lovett, for appellant. W. C. Oliver and Schwander & Buffington, for appellee.

WILLIAMS, J. Appellee recovered a verdict and judgment below against appellant for \$5,561, as damages for personal injuries caused by defendant's servants. By his original petition, filed September 7, 1895, appellant alleged the date of his injuries to have been March 9, 1895, and alleged the wrong of defendant's servants to have consisted in the running of an engine up behind and opposite the horse hitched to the buggy in which he was riding along a public road which ran parallel with a spur track of defendant, and between it and a fence, and the intentional and negligent throwing of steam upon the horse, thereby frightening and causing it to run away, and throw plaintiff out of his buggy, and inflict the injuries complained of. By an amended petition, filed June 13, 1896, the same cause of action was set up, but additional allegations were made, explaining the situation of the road, fence, and spur track in their relation to each other, and charging that the defendant had constructed its spur track so close to the public road as to make it negligent for it to operate its engine over such track while persons were traveling along the road. It is also charged that the engineer and fireman were guilty of negligence in not slowing up or stopping the engine for a short time, to allow plaintiff to pass out of the narrow lane in which he was traveling, which, he alleged, he could have done by going 30 feet beyond the point where he was overtaken. The defendant filed special exceptions to the new allegations of negligence as setting up a new cause of action barred by limitation, but the exceptions were not urged. Defendant also pleaded the statute of limitations against the cause of action set up for the first time by the amendment.

The original petition stated as the only cause of action the wrongful manner of operating the engine. In so far as the amendment based the action upon negligence of the engineer and fireman in the running of the engine, it simply elaborated the allegations of the original petition, and did not set up a distinct cause of action. Thus the charge that the employes were guilty of negligence in not slowing up or stopping the engine after seeing plaintiff simply stated an additional fact germane to the cause of action originally asserted; that is, negligence

in operating the engine. But, if the allegations showed any cause of action growing out of the mere construction and use of the track so near the road, it was an entirely new one. It did not depend upon the manner of running the engine by those in control of it, but rested upon an alleged negligence of defendant in so constructing its road, and using it while persons were traveling the public road. This negligence, if any was shown, consisted in so using the spur track at all. The only way, however, in which this question was raised in the lower court or on the appeal is by requested instructions directing the jury to disregard all evidence tending to establish the new cause of action. No objection was made to any of the evidence, and the portions of it which were designed or tended to prove such cause of action were not and are not pointed out. So far as we have been able to see, all of the testimony which could be held pertinent to this issue was equally pertinent to that made in the original petition. The charge of the court very plainly and unmistakably made plaintiff's right to recover depend on proof that the engineer and fireman saw plaintiff, and that they threw the steam upon him with intention to frighten his horse, or when they knew, or had reason to believe, that the noise would frighten the horse, and probably cause the injuries. The special instructions were unnecessary, and might very well have confused the jury in applying the evidence to the issue submitted by the court. Appellant was not prejudiced by their refusal. Besides the plea of limitation, defendant also answered by general denial and special plea that plaintiff was guilty of contributory negligence—First, in driving along a narrow lane so close to the track, when he knew of the operations of engines and trains over it; second, in so driving while intoxicated; third, in beating and jerking his horse after it shied from the engine; fourth, assumption of risk by driving along the lane, knowing the conditions existing.

The plaintiff introduced evidence tending to establish his case as alleged in his original petition, except that the evidence shows that the roadway was a private one. The situation where the casualty occurred was proved to be as alleged, and plaintiff and another witness testified to the occurrence substantially as it was alleged. On most material points there was a conflict of evidence.—that of plaintiff tending to show that steam was thrown on his horse, as at first alleged, and that this, alone, caused the horse to run, and throw plaintiff from his buggy; while that of defendant tends to show that plaintiff passed the narrow lane in safety, and that, his horse being restive, he caused it to run by whipping and jerking it. Upon all of these points the evidence was sufficient to sustain the verdict of the jury, adopting plaintiff's version. The main contention upon the facts is that the evidence does not show



that the engineer or fireman saw plaintiff, or knew of his presence, as the charge of the court required. The plaintiff testified that, hearing the noise of the engine behind him, he looked back, and saw it approaching, and that a man was seated at the left side of the cab of the engine, looking out of the window at plaintiff, and laughing at him. He saw no one else on the engine, and did not know that the person was the engineer or fireman, or that he caused the engine to throw off the steam. He and other witnesses testified that for a considerable distance before the engine reached the place in question the ground was level, and the view from the engine unobstructed. Plaintiff was traveling in the same direction pursued by the engine, and was all the time near the track, and gradually getting nearer to it as the space between it and the fence became narrower. Three persons on the other side of the track saw plaintiff. On the engine, besides the engineer and fireman, were the switching crew of four men. All of these were produced by defendant, and all admitted seeing either plaintiff or his horse and buggy on the occasion, but testified that he had passed the lane before the horse ran or he was thrown out, and that his misfortunes resulted from other causes than that assigned by him. If the testimony of plaintiff and some of the witnesses be true, that of these witnesses was not. The only persons who are shown to have been near, either on the engine or off of it, who claim that they did not see plaintiff, and knew nothing of the occurrence, are the engineer and fireman. We will state their evidence as it is given by appellant. The engineer testified as follows: "I have no recollection of seeing Mr. Syfan, or any other man, injured by a runaway down by the new press. \* \* \* If my engine frightened Mr. Syfan's horse, and made it run away, on March 9, 1895, down in the vicinity of the new press, I know nothing about it. I saw no runaway down there that day, and knew nothing about it until they wanted to subpoena me in this case." The fireman testified as follows: "On the 9th day of March, 1895, I was switch fireman. Kreft was engineer. The number of our engine was 595. \* \* \* Do not remember of any time, on said date, of operating an engine down near the new press, and causing a horse to run away. If I had seen anything of that kind, I would have remembered it. I am positive I saw nothing of it. Don't remember anything of it." We are thus minute in stating the evidence on this point because it is strongly urged that the jury were not justified in finding, in opposition to the testimony of these witnesses, that they saw plaintiff before the steam was allowed to escape. We think it is true that juries cannot arbitrarily, and without reason in the evidence, either circumstantial or direct, to warrant them in doing so, disregard the positive testimony of unimpeached witnesses.

But when there is circumstantial evidence sufficient to justify the inference of the fact sought to be disproved by the witnesses, especially if there are circumstances throwing doubt upon their statements, the question of their credibility is a proper subject for the determination of the jury. Such, we think, was the case here. It is not suggested that there was anything to distract the attention of this engineer and fireman from looking ahead along the track, as they are expected to do. Let it be conceded that the law charged them with no duty to look out for persons situated as was plaintiff. It was their duty to keep such lookout along the track as their other duties permitted. If they did so, as it may be presumed they did, the jury might well have found that plaintiff was in their range of vision, and that so prominent an object as a horse and buggy, moving so nearly in front of them, as were these, must have been seen by them. If plaintiff's evidence is true, it is proven that one person on the engine did see him before he was overtaken, and that person occupied a station where one of those employes might have been looked for. If defendant's witnesses all speak truly, none of them saw plaintiff at the time spoken of by him. If the engineer and fireman, in effect, deny that either of them was the person described by plaintiff, the switchmen make a like denial as to themselves. Here is a conflict which the jury had to resolve. If one of the employes was looking and laughing at plaintiff, which one was the jury to find it was? If they found that plaintiff testified truly, they must have found that one, at least, of those on the engine did not. The engineer and fireman were the ones whose special duty it was to keep a lookout ahead, and who would, therefore, more probably be doing so than the others. The fact that a horse was frightened so near the track, ran away, threw out and disabled its owner, all in full view, and that every one else about the engine saw something of it, makes it somewhat remarkable that these two witnesses saw and heard and knew nothing whatever about the occurrence.

In considering all of these circumstances and resolving conflicts in evidence, and determining the credibility of witnesses, we cannot hold that the jury could not properly find that the engineer or fireman saw plaintiff before the steam was allowed to escape. The jury was likewise warranted in finding that plaintiff was not guilty of negligence in driving his horse along the road, or in his manner of driving. We conclude, therefore, as the jury under the charge must have found, that the engineer or fireman was guilty of negligence, as found by the jury, in unnecessarily throwing the steam upon plaintiff's horse, after they saw him, and had good reason to know that this would frighten the horse, and that the injury which followed was a proximate consequence which

defendant's servants could reasonably have foreseen. After carefully considering the evidence as to the character of the injuries, we are, however, of the opinion that the amount of damages allowed was too much, and that the sum of \$3,500 is as large a sum as the evidence will warrant. Plaintiff, when hurt, was 49 years and 6 months of age. His face was skinned, and his arm hurt, but not seriously. The bone of the upper part of the right thigh was broken. He was confined to his bed six weeks, and lost five months' time in all, after which he went back to work at the same wages he was earning before he was hurt, \$20 per week, and has continued in the same employment at same wages. While in bed, two bed sores formed on his back, and from these and his broken limb he suffered great pain, and still suffers when the weather changes. His trade was that of cabinet maker, and he cannot climb a ladder as well as he did before, and cannot lift any great weight. His right leg is shortened three-fourths of an inch, but is otherwise perfectly healed. His doctor's and drug bills amounted to \$111.50. This is his own statement of his injuries, but his doctor hardly sustains him in some respects.

#### Conclusions of Law.

1. That the court did not err in submitting the case to the jury, and in refusing to direct a verdict for the defendant.
2. That the court did not err in refusing to give the sixth special charge. It was argumentative, and misleading, in that, in submitting the question whether or not the plaintiff was guilty of negligence in traveling the road, it called especial attention to the facts that it was a private, and not a public, road, and that plaintiff well knew that engines and trains were constantly passing and re-passing. The court may submit to the jury whether or not the conduct of the party alleged to have been negligent occurred, and whether it constituted negligence, and should particularize the act or omission relied on as constituting negligence; but cannot select certain of the facts bearing upon the question, and impress them upon the jury as entitled to especial weight. But the charge was not correct in law. If the employees saw plaintiff, and intentionally threw steam upon his horse, the fact that plaintiff had acted imprudently in going there would not prevent him from recovering, for the reason that the intentional, intervening act would be the proximate cause. The court gave general and correct instructions on contributory negligence, and the proposition that the requested charge, though incorrect, was sufficient to call the court's attention to the subject, is inapplicable. Of the refusal of the first special charge upon the burden of proof it may be said that by charge No. 3, which was given, the burden was placed upon plaintiff to prove every fact mentioned in charge No.

1 except the first,—“that the horse was frightened at the escape of steam, and that plaintiff was injured in consequence of said fright.” That fact the court had required the jury to find, before they could render a verdict for plaintiff, but had not instructed that the burden was on plaintiff to prove it. The court is not always required to charge on the burden of proof. The propriety of doing so depends on the state of the evidence. Here there was conflicting evidence as to the fact in question, and, if the jury believed plaintiff's witnesses, the plaintiff had discharged his burden. The question was one as to the credibility of witnesses, simply, and as to that the court instructed. *Railway Co. v. Gelger*, 79 Tex. 13, 15 S. W. 214.

Considering all the charges together, we think it clear that no injury was done appellant by the refusal of the first special charge. The charges given, in effect embraced all of the propositions contained in special charge No. 11. There is nothing more in the requested instruction upon the subject of proximate cause than is found in the charges given. This requested charge is somewhat confused and contradictory in its different parts, in that in one sentence it seems to impose on plaintiff the burden of showing that defendant's employees intentionally frightened the horse, while in other parts it admits the right of recovery if such employees caused the noise, having reason to believe it would frighten the horse. Taken all together, it may be sufficient, as it was so held in *Hargis v. Railway Co.*, 75 Tex. 20, 21, 12 S. W. 953, but the instructions given were free from the objection, and were sufficient upon the points embraced in the special instruction. The evidence of Syfan, Athlete, and Edmondson that there were no obstructions between the point from which the engine started and that where it overtook appellee, was admissible upon the issue as to whether or not the engineer and fireman saw appellee before the steam was emitted from the engine. If appellee will remit the sum of \$2,061 of the judgment recovered, judgment for \$3,500 will be rendered in his favor, and costs of appeal adjudged against him; otherwise the judgment will be reversed, and the cause remanded.

#### LYNN et al. v. SIMS et al.

(Court of Civil Appeals of Texas. Dec. 4, 1897.)

#### MORTGAGES — DEED OPERATING AS MORTGAGE — BONA FIDE PURCHASER.

The fact that a deed absolute on its face was intended only as a mortgage is not binding upon a good-faith purchaser for value without notice.

Appeal from district court, Freestone county; L. B. Cobb, Judge.

Trespass to try title by J. H. Sims and another against Josie Lynn and others. From a

judgment for plaintiffs, the defendants appeal. Affirmed.

W. R. Boyd, for appellants.

FINLEY, C. J. This is an action of trespass to try title to 66 $\frac{1}{4}$  acres of land, a part of the John Lawrence survey, situated in Freestone county, Tex., brought to the February term, 1897, of the district court of Freestone county, by appellees, J. H. Sims and F. F. Sims, composing the firm of J. H. Sims & Co., against Josie Lynn, Caroline Lynn (Cyrus) and James and Joseph Lynn, said James and Joseph Lynn being minors, without a legally appointed guardian. The defendants Josie Lynn and Caroline Cyrus answered, first, by general exception; and defendant Caroline Lynn also filed her plea in abatement, setting up her marriage with one Joe Cyrus. Plaintiffs thereupon amended their original petition, making Joe Cyrus a party defendant, and prayed judgment for five-sixths of the land in controversy, and for partition. Josie Lynn and Caroline Cyrus answered, specially, that the property sued for was the community homestead of defendant Josie Lynn and her deceased husband, James Lynn, Sr., who died about January 9, 1885; that about August 24, 1892, one Sam Wallace, the agent of J. H. Oliver, a merchant, called at their home, and fraudulently induced defendants and others, children of defendant Josie Lynn, to execute to said J. H. Oliver a deed of conveyance to their said homestead, for a consideration of \$96.91, same being a debt due J. H. Oliver for goods, wares, and merchandise purchased by one Henry Lynn, adult son of defendant Josie Lynn, said Wallace, agent of said Oliver, stating at the time to defendants, and other children of defendant Josie Lynn, that said Henry Lynn had executed a chattel mortgage to said Oliver upon certain personal property not owned by said Henry Lynn, and that, unless defendant Josie and her children did execute a deed to their homestead to secure said Oliver in the payment of the said debt of \$96.91, said Henry Lynn would be prosecuted and sent to the penitentiary; that, in order to save said Henry from prosecution, said Josie Lynn and her children executed to said J. H. Oliver an instrument in form a deed to the land in controversy; that it was fully agreed and understood by all parties then concerned that this instrument was only a mortgage to secure said \$96.91, and that said Oliver would reconvey their said homestead upon payment of same; that defendant Josie Lynn and her said children, Caroline, James, and Joseph Lynn, who were at the time of the execution of said deed to Oliver minors, had continuously occupied said premises as their homestead since the death of said James Lynn, and said Josie, James, and Joseph are now in possession of same, claiming it as their homestead; that plaintiffs, J. H. Sims & Co., purchased said land from Oliver with full notice of all the facts, and with

actual notice that the deed to Oliver was only intended as a mortgage, and with the understanding that they (plaintiffs) would pay off the \$96.91 due Oliver by Henry Lynn, and \$50 due Oliver by one Bob Henderson, a son-in-law of defendant Josie Lynn, and that plaintiffs should have the control and management of the rents from said premises, and should apply the rents collected by them annually until they were paid or reimbursed in full, at which time plaintiffs were to reconvey said premises to defendants; that plaintiffs had had the control and management and had collected rents from the premises during the years 1893, 1894, 1895, and 1896, and had collected an amount largely in excess of the debt due them. Defendants prayed that the deeds to Oliver and Sims & Co. be canceled, and for costs. W. R. Boyd was appointed guardian ad litem for the minors James and Joseph Lynn, and qualified by giving the required bond and taking the oath as prescribed by law; and thereupon, on February 9, 1897, filed his answer for the minor defendants, in all things adopting the answer of defendants Josie and Caroline. Defendant Joe Cyrus also answered, adopting the answer of his wife, Caroline, and defendant Josie Lynn. On February 10, 1897, the cause came on for trial, a jury was waived, and the cause submitted to the court, who, after hearing the cause, on February 10, 1897, rendered its judgment for plaintiffs, J. H. Sims & Co., for nine-twelfths of the land, and in favor of defendants Caroline Cyrus and James and Joseph Lynn one-twelfth each, or three-twelfths, of the land in controversy, and for partition, appointing commissioners to divide the land in accordance with the judgment of the court; to which judgment of the court the defendant Josie Lynn, by her attorney, and the minor defendants, James and Joseph Lynn, by their guardian ad litem, W. R. Boyd, excepted in open court, gave notice of appeal, and have duly perfected the same to this court. Upon request of defendant Josie Lynn and W. R. Boyd, guardian ad litem for the minors James and Joseph Lynn, the court filed its conclusions of law and fact in this case. The conclusions of the trial judge are as follows:

#### Conclusions of Fact.

"(1) The property in controversy was the homestead of defendant Josie Lynn and her deceased husband, James Lynn, at the time of his death, and was their community estate. At the date of the conveyance to J. H. Oliver, said property was occupied by said Josie and her children, they being also the children of her said husband, and was the homestead of said Josie and children, some of whom were minors.

"(2) The conveyance to Oliver was intended by the parties not as a deed, but as a mortgage to secure a debt of about \$96 due by Henry Lynn, one of the grantors, an adult son of said Josie, to Oliver, and at the time

of the conveyance it was agreed between the parties that Oliver should reconvey to defendants upon the payment of said debt.

"(3) The plaintiffs, at the time they purchased from Oliver, knew that Oliver did not pay money for the land, and that he gave therefor only the said debt due him by Henry Lynn. Plaintiffs also knew that the property was the homestead of defendants before they conveyed to Oliver.

"(4) The defendant Josie and her children were occupying the land as tenants of Oliver at the time plaintiffs purchased.

"(5) Plaintiffs did not have notice of the parol agreement of Oliver to reconvey the land to defendants before they (plaintiffs) purchased the land.

"(6) Plaintiffs paid Oliver \$150 cash for the land, and acquired three-fourths interest in the land, which interest was worth about \$200.

"(7) The defendant Caroline Cyrus was a minor when the deed was made to Oliver, and she, being one of six children of her parents, is the owner of one-twelfth interest in the land. The minor defendants Joseph and James each own one-twelfth, and the plaintiffs own nine-twelfths, interest in said land."

#### Conclusions of Law.

"(1) A deed absolute on its face may be shown by parol to be a mortgage by proof to the effect that the instrument was intended merely to secure a debt. In such case the onus is on the party asserting such parol condition. Such parol condition is of no force as to an innocent purchaser for value, without notice of the parol agreement.

"(2) It is immaterial that the debt secured by the deed in this case was not the debt of the grantors in the deed, and that plaintiffs knew such fact, plaintiffs having no knowledge or notice of the facts that converted said deed into a mortgage.

"(3) Plaintiffs are entitled to partition as against the defendants Caroline, James, and Joseph, and there is no homestead right remaining in defendants."

There is no statement of facts in the record. We are of opinion that the legal conclusion reached by the trial judge upon the facts found by him, and the judgment rendered thereon, are correct. *Eylar v. Eylar*, 60 Tex. 315. Judgment affirmed.

#### SPENCER v. JAMES.

(Court of Civil Appeals of Texas. April 29, 1895.)

#### APPEAL—ASSIGNMENTS OF ERROR.

An assignment of error, alleging that the conclusions of fact by the court below were insufficient to justify the judgment, cannot be considered, where no request was made for fuller and more specific conclusions.

On motion for rehearing. Denied.

For former opinion, see 31 S. W. 540.

**TARLTON, C. J.** We deem it proper to advert only to the first ground of this motion, in which complaint is made with reference to our action regarding the purported bill of exceptions to the conclusions of the court. The assignment of error predicated upon this instrument is as follows: "There is no finding of fact upon which judgment should be rendered directing the bank to issue the certificate of stock to James, nor to enjoin W. J. Spencer in the premises, in any manner whatever. The court fails to find when the stock was issued to R. S. Kelley. He fails to find when it went into the hands of appellant, W. J. Spencer, or, indeed, that it ever went into his hands at all. He fails to find that Spencer was setting up any claim to it in any manner. He fails to find that Spencer held the stock in collusion with McFarlin, or for his benefit. He fails to find any value to the stock. In fact, he fails to find anything, except judgment for James." If we be in error with reference to the character of the instrument alluded to in this connection in our original opinion, we must adhere to the conclusion there reached in regard to the disposition of the assignment of error. We think that the findings of fact were sufficient to justify the judgment directing the issuance of the certificate of stock to James, and enjoining W. J. Spencer. If the findings were defective on account of the matters of omission referred to in the assignment, a request for fuller and more specific conclusions should have been presented to the court, and an exception reserved to its refusal to grant the request. This was not done. The following authorities are regarded as decisive of the necessity of such action on the part of the appellant: *Fitzhugh v. Land Co.*, 81 Tex. 313, 16 S. W. 1078; *Railway Co. v. Fossett*, 66 Tex. 338, 1 S. W. 259; *Cattle Co. v. Burns*, 82 Tex. 58, 17 S. W. 1043. The motion is overruled. Overruled.

#### ESTES v. MCKINNEY et al.

(Court of Civil Appeals of Texas. Nov. 27, 1897.)

#### LANDLORD AND TENANT—RENT—CHattel MORTGAGES—LIENS.

1. Under Rev. St. 1895, art. 3235, giving a landlord a lien on the crop raised on rented land, which continues in force as long as the products remain on the premises and for one month thereafter, the landlord has no lien on the proceeds arising from a voluntary sale of the crop by the tenant.

2. A mortgagee of chattels has no lien on the proceeds arising from the voluntary sale of the chattels by the mortgagor.

Appeal from Collin county court; M. G. Abernathy, Judge.

Action by Ben Estes against W. H. Bruce, in which there was a judgment for plaintiff, and Joe D. McKinney was summoned as garnishee. The garnishee answered admitting an indebtedness to defendant, and R. H. Logan and D. E. Morrison intervened, and each claimed the money in the garnishee's hands.

From a judgment in favor of the interveners, plaintiff appeals. Reversed and rendered.

Garnett & Jones, for appellant. Abernathy & Beverly, for appellees.

FINLEY, C. J. Appellant, Ben Estes, held a judgment against W. H. Bruce for the sum of \$150.40, and he sued out a garnishment against Joe D. McKinney, and caused it to be served upon him. McKinney answered in the suit that he held in his hands for W. H. Bruce the sum of \$129.65. R. H. Logan intervened, and claimed to have a lien upon the money, upon the ground that the money was the proceeds of a crop raised upon his lands, for which the rent was due, and to secure which the landlord's lien had attached upon the crop. D. E. Morrison also intervened, claiming a lien upon the money by reason of the fact that he had a mortgage upon the crop, from the sale of which the money was realized. The facts showed that Bruce rented the land from Logan, sublet it to one Duncan without Logan's consent, and Duncan raised a crop upon the land. Bruce owed Logan \$65 for rent, and owed Morrison \$74, to secure which he had given a mortgage on the crop raised upon the land. Bruce sued out a distress warrant against Duncan, to whom he had sublet the land, and caused it to be levied upon the crop while in Duncan's possession. On the same day of this levy Bruce and Duncan settled their controversy, and dismissed the distress suit. It was agreed between them that Duncan should sell the cotton and pay Bruce \$129.65, and pay the costs of suit out of the proceeds, and he (Duncan) to retain the balance. Duncan sold the cotton, paid the costs of the suit, paid \$129.65 to Joe D. McKinney, with instructions to him to pay it over to Bruce, and he retained the balance of the proceeds. While McKinney had the money in his possession for Bruce, appellant's writ of garnishment was served upon him. The only question involved in the case is whether the landlord's lien existing upon the crop in favor of Logan, and the mortgage lien upon the crop in favor of Morrison, attached to the proceeds arising from the voluntary sale of the cotton by Duncan. By force of the statute (Rev. St. 1895, art. 3235), the landlord is given a lien upon the crop raised upon the rented premises, which continues in force as long as the products remain upon the premises and for one month thereafter. The lien is given upon the agricultural products raised upon the rented land, and is not extended to the proceeds of the sale of such products. Such sale did not displace his lien. He could have foreclosed his lien upon the cotton in the hands of the purchaser, and procured the sale of the cotton to satisfy his lien, or he could have held the purchaser for the value of the cotton. *Zapp v. Johnson*, 87 Tex. 641, 30 S. W. 861. The mortgage lien, likewise, was upon the agricultural products, and did

not extend to the proceeds of the sale of the cotton in the hands of the garnishee. The judgment of the court below should have been in favor of the appellant, subjecting the \$129.65 in the hands of the garnishee to payment upon appellant's judgment debt against Bruce. The judgment of the court below is reversed, and judgment will be here rendered for appellant. Revised and rendered.

#### GULF, C. & S. F. RY. CO. v. BAUGH.

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

#### FIRES SET BY LOCOMOTIVES—VERDICT—EVIDENCE—QUESTION FOR JURY.

1. Although the evidence fails to connect the defendant railroad company with one of the two fires charged in the complaint, when the verdict finds damages corresponding to the value of the property burned at the other fire as established by the evidence, there is no error.

2. When there is direct testimony that all the engines on a line are equipped with spark arresters, it is harmless error to exclude evidence, the only purpose of which would be to lay a foundation for the identification of the engine charged with setting the fire, in order to prove that it was so equipped.

3. The inspectors of defendant railroad testified that the engines were equipped with spark arresters. The only contradiction to this testimony was evidence of circumstances showing that the engines did emit sparks. Held to be for the jury whether the engines were so equipped.

Motion for a rehearing. Overruled.

For former opinion, see 42 S. W. 245.

J. W. Terry, for appellant. A. M. Monteith, for appellee.

FISHER, C. J. So much of the complaint as to the verdict of the jury awarding damages for the value of the sod is met by a remittitur which we find in the record, wherein the appellee remits all of the damages found on that branch of the case. There is evidence of circumstances in the record, which, in our opinion, shows that one of the engines of appellant set out the fire that occurred on September 24th. As to the other fire, which occurred later, in October, there is no evidence showing that it was occasioned by any locomotive of the appellant, nor is there any evidence connecting appellant with that fire; but it is clear from the verdict of the jury that they did not consider any burn but that of September 24th. The verdict finds the value of the grass, which is in accord with evidence as to that burn, and finds interest upon that amount, running from the 24th day of September. It is clear from this that in estimating the damages they did not consider the burn that occurred in October, but the verdict was based solely upon the burn that occurred on September 24th, which was established by sufficient evidence.

If there was error in the ruling of the court in refusing to permit the introduction of the evidence of witnesses Corbett, Nettleton, Fancher, and Hayes, it is abstract. Their testimony, if it had been admitted, would only

become important as laying the predicate for the introduction of evidence showing that the engines in operation on the line of appellant's road where the fire occurred were equipped with appliances to prevent the escape of fire. The testimony of these witnesses, together with the records kept by them as train dispatchers, locating the whereabouts of certain trains and engines on the line of road, could only have become important when followed up by testimony showing that the engines which were in operation on the road near where the fire occurred were equipped with approved appliances for preventing the escape of fire. And on the question of identifying these engines that were in operation upon that part of appellant's line we are not prepared to hold that these records, and the evidence of these witnesses, sought to be introduced, were not admissible; but it is unimportant that we should rule upon that question, for it is abundantly shown by the facts in the record, so far as that fact may be established by the evidence of witnesses upon behalf of appellant, that the engines in operation upon the line of appellant's road were equipped with the best appliances for arresting the escape of fire. If this excluded evidence had been admitted, we are of opinion, from what appears in the record, that the evidence on this branch of the case could not have been made any stronger. The only contradiction there is to the evidence of the inspectors of engines on appellant's road as to their being equipped with the most approved appliances is the evidence of circumstances showing that the engines in fact did permit the escape of fire or sparks. The question then becomes a question of fact for the jury as to whether they would believe the evidence of the inspectors, introduced by the appellant, or rely upon the physical fact that fire did escape, which, within itself, may have led the jury to believe was more reliable evidence upon that question than the testimony of the inspectors. The motion is overruled.

#### FIRST NAT. BANK OF CROCKETT v. EAST et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 11, 1897.)

#### APPEAL—ASSIGNMENT OF ERROR—CROSS ASSIGNMENT—JURISDICTION—JOINDER.

1. On appeal by the owner of a note from the action of the trial court in dismissing a garnishment proceeding which was joined with the action on the note, and in sustaining the plea of privilege of certain defendants, the judgment debtors in the action on the note cannot, by simply filing cross assignments in the supreme court, bring the judgment on the note before the court for review.

2. Though, by reason of the fact that the note sued on was made payable in the county in which suit was brought, the court acquired jurisdiction, in that action, of the makers of the note, who were nonresidents of the county, it did not have jurisdiction of the defendants, over their plea of privilege, to determine a garnishment proceeding joined with said action on the note.

<sup>1</sup> Writ of error denied by supreme court.

Appeal from district court, Houston county; J. R. Burnett, Judge.

Action by the First National Bank of Crockett against E. H. East and others. From a judgment dismissing a garnishment, plaintiff appeals. Affirmed.

Nunn & Nunn, for appellant. Ross & Terrell and F. E. Dycus, for appellees E. B. and M. Harrold. R. M. Wynne, for appellees W. Scott and S. B. Burnett.

PLEASANTS, J. The appellant instituted suit in the district court of Houston county to recover of appellees E. H. East and M. Harrold an indebtedness of about \$7,000; appellant alleging in its petition that said debt was due primarily by appellee East, and that appellee M. Harrold was liable therefor as the surety of said East; that said indebtedness was evidenced by two certain promissory notes, executed jointly by said appellees, and made payable to appellant, in the town of Crockett, in the county of Houston; that one of the notes was past due; and that the other was not due. The plaintiff further alleged that, since the debt for which said notes were given was contracted by the said East, he had made an assignment of his property for the benefit of his creditors, without preference to any; that the said Harrold was the assignee; that the said East fraudulently conveyed his property to said Harrold with the intent to defraud and hinder and delay his creditors; that the said Harrold qualified as assignee, and gave bond, as by law required, and that W. Scott and S. B. Burnett were sureties on said bond; that the estate was being administered in Tarrant county, while the residence of said East was in Archer county; that the said East was not insolvent, nor was there any necessity for the assignment, and that same was made in furtherance of a conspiracy between the said East, M. Harrold, and one E. B. Harrold to place his property beyond the reach of the creditors of the said East, and to vest the title thereof in the said M. Harrold for the benefit of himself, the said E. B. Harrold, and the said East; that the value of the estate assigned, consisting of lands, cattle, and horses, exceeded over \$237,000, and that the debts found against the assignor amounted to about \$2,200; that the said assignee had disposed of the horses and cattle, the same being about the value of \$136,000; and that after allowing for all claims proved against said estate, and the costs of the administration, there should be in the hands of said receiver, subject to plaintiff's claim, about \$60,000 or \$70,000. Petitioner further charged waste by the assignee; alleged that, after qualifying as aforesaid, he had permitted the said East to take possession of, and dispose of, a large portion of said property at his pleasure; that said E. B. Harrold claimed to be a creditor of said East to the amount of \$31,000 or \$32,000, and that he was assert-

ing a mortgage lien on cattle and on land to secure said debt; that said E. B. Harrold and other large creditors had not proved their claims, but that the said M. Harrold had sold cattle, and applied the proceeds to payment of the claims of said creditors; and that the said E. B. Harrold, notwithstanding, was selling lands of great value. Plaintiff prayed for an attachment to be levied on lands of the said East, situated in Archer county, and garnishment against M. Harrold, and that said East, who resides in Archer county, and the said E. B. Harrold, M. Harrold, and the said W. Scott, and S. B. Burnett, all of whom reside in Tarrant county, be made parties defendant, and, upon final hearing, it have judgment for its debt against the said East and the said M. Harrold, and that the said E. B. Harrold be enjoined from selling the lands of the said East, and that plaintiff also have judgment against M. Harrold and his sureties, the said Scott and the said Burnett, and that it also have all other such orders and decrees as in equity and good conscience it might be entitled to. The defendants E. B. Harrold, Scott, and Burnett, and also the defendant M. Harrold, so far as the plaintiff sought relief against him as assignee, pleaded to the jurisdiction of the court over their persons, and claimed the privilege of being sued in the county of their residence. Defendants East and M. Harrold also answered to the merits of the suit so far as it sought to recover upon the notes, and they also moved to quash levy of attachment writs.

Upon hearing and trial of the case, the pleas of privilege of the several defendants were sustained, and they were dismissed from the suit, with their costs, to which judgment the plaintiff excepted; and the motion of the defendants East and M. Harrold to quash and vacate the writ of attachment sued out by plaintiff, together with the levy of the same upon certain lands of said East, described in the return of said writs by the sheriff of Archer county, was refused, and to which judgment the defendants the said M. Harrold and East excepted; and, a jury being waived, the court gave judgment for plaintiff on the notes sued on, and decreed a foreclosure of the attachment lien on lands described in the judgment, the property of East, and directed a sale of so much thereof as might be necessary to satisfy such judgment, to which judgment both plaintiff and defendants East and M. Harrold excepted, and gave notice of appeal; but the plaintiff alone perfected an appeal to this court, and has assigned errors only as to the action of the court in sustaining the pleas of privilege of defendants E. B. Harrold and Scott and Burnett and M. Harrold, and in denying to the plaintiff in this suit any relief under its garnishment as a nonconsenting creditor of the defendant East, and in denying plaintiff also the right in the suit to have the said E. B. Harrold enjoined from disposing of lands belonging to the said East.

In this state of the record, this court is of the opinion that the defendants East and M. Harrold cannot have the judgment rendered against them on the notes declared on by plaintiff reversed by this court, by simply filing cross assignments here. Had the plaintiff appealed from the judgment rendered for it against them, they might have presented for revision here any part of the judgment of which they might complain, by cross assignments. It is to be observed that plaintiff brought suit against these defendants on their joint promissory notes, to recover of them their indebtedness, and also to establish an attachment lien on lands of defendant East, upon alleged ground that said lands had been fraudulently conveyed by East to M. Harrold; and plaintiff also sought relief, by garnishment, against M. Harrold and his sureties, as the assignee of East, plaintiff being a nonconsenting creditor of East. Upon plaintiff's first cause of action judgment was rendered for it. Upon the plaintiff's second cause of action the judgment of the court was for the defendants, upon their pleas of privilege; and from that judgment plaintiff appealed, but from the judgment rendered for plaintiff neither plaintiff nor defendants have appealed, though notice of appeal was given by defendants. Vide *Railway Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001.

The contention of the appellant that inasmuch as the court had acquired jurisdiction over defendant M. Harrold, by reason of his having executed with the defendant East the notes sued on, therefore the court had jurisdiction to hear and determine any other cause of action which plaintiff might have against him, and which might be properly joined with the action on the notes, is, we think, not tenable. It was solely by reason of the fact that the notes were made payable in Crockett that the plaintiff could sue either East or M. Harrold in Houston county. The authorities cited by appellant in support of its contention do not, we think, go to the extent of holding that when a court acquires jurisdiction over the person of a defendant, for the purpose of hearing and determining one cause of action alleged against him, it may assume jurisdiction, notwithstanding his plea of privilege over him, for the purpose of deciding any other cause of action properly joined with that which authorized the plaintiff to sue the defendant in a county other than that of his residence. The basis of this contention is that the policy of the law is to prevent a multiplicity of suits. But policy cannot be permitted to defeat the obvious purpose of an express statute, which secures a valuable privilege to parties defendant. The only case cited which speaks to the proposition contended for by appellant is that of *Middlebrook v. David Bradley Mfg. Co.*, 96 Tex. 706, 26 S. W. 935; and that case seems to us to be sui generis, and we are not disposed to follow it one step further than we are compelled to do. In that

case the consideration of the note which named no place for its payment was a credit indorsed on one of the notes which were made payable in the county in which the suit was brought; so that, in fact, each of the notes may have been by the supreme court considered as a fractional part of the same debt. It not being permissible for us to consider the cross assignments of defendant East and Harrold, and discovering no error in the judgment sustaining the several pleas of privilege filed by E. B. Harrold, W. Scott, and S. B. Burnett, and of the defendant M. Harrold in his capacity as assignee of the defendant East, and in dismissing plaintiff's suit as to them, the judgment is affirmed. Affirmed.

INTERNATIONAL & G. N. R. CO. v. TURNER et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 2, 1897.)

INJURY TO RAILROAD EMPLOYEE—NEGLIGENCE—DEFECTIVE FROG—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

1. Where it appeared, in an action for the death of a yard master, that decedent was killed while uncoupling cars, by reason of having his foot caught and held in the frog of a switch, in consequence of such frog being out of repair, and that, when it was in a proper state of repair, it would not permit the foot to enter between the rails, the evidence was sufficient to sustain a finding that such defect was the proximate cause of such death.

2. Whether decedent, who was a yard master, thoroughly competent, cognizant of his duties, and fully acquainted with the yard in which he worked, was guilty of contributory negligence in going between the cars, while they were slowly moving, to uncouple them, and walking along the track, between them, until he came to the frog of a switch, which was defective, was a proper question for the jury, where it was shown to be customary to perform such acts in that manner, and it appeared that one might, with proper care, walk safely over such place, if in a proper state of repair.

Appeal from district court, Leon county; J. M. Smither, Judge.

Action by Katie W. Turner and others against the International & Great Northern Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

G. H. Gould, for appellant. Harris, Etheridge & Knight and B. D. Dashiell, for appellees.

WILLIAMS, J. Lee W. Turner, the husband of appellee Katie Turner, and the father of the other appellees, minors, for whose use she sues, was killed at Willis, on the 5th day of October, 1888, while engaged in an effort to uncouple cars, in the discharge of his duty as yard master of appellant at that place, and this action was brought to recover damages resulting to appellees from his death. The case was before this court on a former appeal, and the decision is reported in 23 S. W. 146. At the last trial, plaintiffs recovered judgment for \$10,000. The decision of this appeal depends

almost wholly upon questions of fact. At the trial, all grounds of recovery relied on by plaintiffs were eliminated by the charge of the court, except that sought to be established by allegation and proof that defendant had been guilty of negligence in allowing the frog of a switch to be out of repair and defective, and that Turner's death was caused by such condition. The questions now presented to us all grow out of the evidence and the charge of the court. It appears that, about 5 o'clock of the morning when he received his fatal injuries, Turner, with the switching crew under his control, was engaged in executing orders for the placing of cars upon a side track in the Willis yard; that a train composed of 15 or 20 cars was being backed along the track, and over the switch, in order that the rear portion might be uncoupled, and allowed to move to the proper place on the side track. Turner went between two of the cars, while they were moving as fast as a slow walk, for the purpose of uncoupling them, and, finding the pin tight, walked along for a short distance between them, trying to loosen the pin; and, while so doing, his foot was caught between the two short rails forming part of the frog of the switch, and he was knocked down, run over, and killed. About two hours after the accident, a witness, who is uncontradicted, examined the frog, and found that one of the bolts which had passed through the two rails, to hold them in position, was out of place. The nut which had been upon one end of it had come off, and the threads were gone, so that it had worked out of one of the rails, and the end of it was upon the ground. This witness watched the rails as the cars passed over them, and found that the weight would cause the end of one of them to rise up until, at the point where Turner's foot was caught, the web, or thin part between the ball and the flange, was even with the top of the other rail. The effect of this was to make room enough for the foot to be caught between the rails, while, with them in their proper position, the space between them at that point was not sufficient to admit a foot as large as Turner's. In other words, at that place, if the sole of the foot were placed upon the top of the two rails it could not enter between them, if they were stationary, but, when one of them was pressed up as indicated, the foot could be caught. We conclude that the evidence shows a defective and dangerous condition of the frog, and that it was of such a nature that defendant, with ordinary care, could have discovered and corrected it before Turner was hurt. There is no evidence that Turner knew, or ought to have known, of this state of things; his duty not requiring him to inspect the tracks and switches, or keep them in order. That duty was devolved on other employees. We also conclude that the evidence was sufficient to sustain the finding that, but for the defect in the frog, Turner's foot would not have been caught, and, consequently, that it was the proximate cause of his death.

<sup>1</sup> Writ of error denied by supreme court.



The most serious question in the case is whether or not the evidence imperatively required a finding that deceased was guilty of contributory negligence in going between the cars while they were in motion, and in remaining after he found that the pin was tight, and walking along the track until he came to the frog of the switch. It is shown to be customary for brakemen and switchmen to go between cars, to couple and uncouple them, while they are slowly moving. The road master states that ordinarily there is no danger of getting the foot caught in walking over switches and frogs. But he and other witnesses state that it is dangerous and rash to remain between moving cars to couple them, and to thus walk along with them while passing over frogs and guard rails of switches. It was shown that Turner was fully acquainted with the yard at Willis, and that he was a very competent, prudent, and faithful servant. He had often warned his subordinates of the danger of getting caught in the frogs, and cautioned them to be careful, but it does not appear that he or others were prohibited from pursuing the course which he did on this occasion. We infer that this caution to his men was not that it should not be done at all, but should be done with care. The question which arises is this: In view of the fact that one might, with proper care, walk safely over such places; that Turner was thoroughly competent, careful, and cognizant of his duties; that he was acquainted with the track and switches, and that he had a right to assume that they were not rendered additionally dangerous by defects; that the speed of the cars was so slow as to allow him to walk with care,—is the conclusion that he was guilty of contributory negligence so obvious that this court must set aside the action of the jury and the trial judge, based on a different view? We do not so regard it. The circumstances indicated presented a question for the judgment of a jury, and one on which, in our opinion, their judgment should be respected. If deceased was not imprudent in going and remaining between the cars, as he did, until the frog was reached, there is nothing to indicate that he was guilty of carelessness while there. The circumstances sufficiently prove that he conducted himself with care, and avoided the spaces where there was danger of having his foot fastened, with the switch in its proper condition, and was caught by the displacement of the rails at a point where he could otherwise have stepped with safety. The case is essentially different from that of *Crawford v. Railroad Co.* (Tex. Sup.) 38 S. W. 584. There was no defect in the switch in that case. The conditions which Crawford claimed caused his injury were all known to himself at the time, and he voluntarily exposed himself to the danger. It was not held in that case, nor in any other that is cited, that the mere walking between moving cars, on a switch supposed to be in a proper condition, is such negligence as to preclude a recovery for injuries which were caused by a

defect in the appliances, and which the party would not have suffered but for such defects. That is the proposition here. It follows that the court properly refused to instruct the jury to return a verdict for defendant.

Complaint is made that the court submitted issues to the jury not raised by the evidence, in defining the duty of defendant to keep its tracks, switches, main rails, and guard rails in proper repair. The rails of the frog were part of the track and of the switch. There was no evidence of any defect in the main rails or the guard rails, but there is no likelihood that this part of the charge misled the jury. The instructions complained of were general definitions of the duty of defendant, and the charge, as a whole, when applied to the evidence, could have left no doubt in the mind of a jury as to the point on which their verdict must depend. The defendant itself committed much the same error in one of the special charges asked. The charge of the court does not, as claimed in the eighth assignment, authorize a verdict for plaintiff upon proof only that he was not guilty of contributory negligence, without proof of negligence on the part of defendant. The other assignments raise questions which are already disposed of. Affirmed.

#### HOUSE v. KOUNTZE et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 2, 1897.)

BANKS—CHECK AGAINST DEPOSIT—ASSIGNMENTS—RIGHT OF ACTION.

An unaccepted check does not constitute an equitable assignment, pro tanto, of the fund against which it is drawn, and therefore will not support an action by the holder against the drawee.

Garrett, C. J., dissenting.

Appeal from district court, Smith county; Felix J. McCord, Judge.

Action by T. W. House against Bonner & Bonner, as drawers, and Kountze Bros., as drawees, of a check in his favor, and also against the City National Bank, as an attaching creditor of said Bonner & Bonner. From a judgment in favor of Kountze Bros. and the City National Bank, plaintiff appeals. Affirmed.

H. M. Whitaker and Frank Andrews, for appellant. W. S. Herndon & Son and Ben B. Cain, for appellees.

GARRETT, C. J. On November 12, 1891, Bonner & Bonner, who were bankers doing business in the city of Tyler, Tex., drew a check, payable to T. W. House, a banker of Houston, Tex., on Kountze Bros., who were bankers, doing business as such in the city of New York, for the sum of \$5,000, as follows: "Bonner & Bonner, Bankers. No. 14,163. Tyler, Texas, Nov. 12, 1891. Pay to the order of T. W. House \$5,000.00 (five thousand dol-

<sup>1</sup> Writ of error denied by supreme court.

lars). [Sgd] Bonner & Bonner, Cotnam. To Kountze Bros., 120 Broadway, New York, N. Y." Two days afterwards, to wit, November 14, 1891, Bonner & Bonner became insolvent, and made a deed of assignment for the benefit of their creditors. The City National Bank of Dallas, Tex., brought a suit against them in the supreme court of the city of New York upon an indebtedness in its favor, and sued out a writ of garnishment or attachment against Kountze Bros., which was served on the latter November 16, 1891. Next day (on November 17, 1891), the check drawn in favor of T. W. House was presented to Kountze Bros. for payment, which was refused. At the time of the presentment of the check, Kountze Bros. had on deposit in their bank, to the credit of Bonner & Bonner, the sum of \$7,246.49, which within a few days was increased to \$8,019.29 by remittances which were then in transit. Kountze Bros. were the correspondents of Bonner & Bonner in the city of New York, for the transaction of their banking business, and the payment of such drafts or checks as they might draw on them in favor of their customers, for which purpose the money to the credit of Bonner & Bonner with Kountze Bros. at the time the check was drawn and presented had been deposited. They did business in the usual manner of bankers, and had no special undertaking or agreement with respect to the payment of the check drawn in favor of T. W. House, and it was drawn and delivered to House in the usual course of business. There was no agreement that the deposit was a special one, to meet any particular draft or drafts; nor was there any agreement between House and Bonner & Bonner, other than the check, and such as may be inferred from it and the usual course of the business of banking; and there were no facts or circumstances which would indicate that there was otherwise any intention to assign or set apart for the use of House any particular sum of money on deposit with Kountze Bros., against whom the check was drawn, other than the mere fact that the check was drawn, for a valuable consideration, in the usual course of business. At the time that Bonner & Bonner failed and suspended business, they were indebted to Kountze Bros. on three promissory notes; and among them was a note for \$15,000, due November 23, 1891. Two of the notes were immediately paid with the proceeds of collateral securities attached to them, and an excess of the collaterals amounting to \$1,402.45, after the payment of the two notes, was credited on the \$15,000 note. This note was also credited with \$3,990, the proceeds of one of the collateral notes attached to it. Other collaterals attached to the \$15,000 note were a note of John Durst for the sum of \$4,350, and a note of J. H. Brown & Co. for the sum of \$10,000, to which was also attached certain preferred stock of a compress company, amounting to \$10,000. Nothing has been collected on either of these notes. There was evidence to the effect that John Durst was solvent when

the note matured, but a suit brought by Kountze Bros. was pending against him for the amount of his note at the time of the trial below. The evidence showed that J. H. Brown & Co. were insolvent, but there was testimony to the effect that the compress stock for \$10,000 could have been sold at the time of the failure of Bonner & Bonner for \$6,500, but that Kountze Bros. had mislaid the stock, and did not know until some time afterwards that it had been attached to the J. H. Brown & Co. note. The stock at the time of the trial below was worth about 25 cents on the dollar, and a suit brought by Kountze Bros. to foreclose their lien upon it was then pending. The amount due the City National Bank of Dallas was \$3,805.35. T. W. House brought suit against Bonner & Bonner, as the drawers, and Kountze Bros., on their obligation to accept and pay the check above mentioned, for the recovery of the amount thereof; making the City National Bank also a party defendant, in order to adjudicate its rights under the garnishment. Kountze Bros. answered the petition by a demurrer that no liability was created against them on the unaccepted check sued on by the plaintiff. They further answered by general denial, and a special plea setting up the indebtedness of Bonner & Bonner to them, and claimed a lien on the collateral in their hands, as well as the deposit to the credit of Bonner & Bonner, for the payment of said indebtedness. They also set up the garnishment proceedings against them by the City National Bank, and claimed that the fund or deposit was in custodia legis, and that there was not more than enough in their hands to satisfy their own claims and that of the City National Bank. They also pleaded their failure to collect the collaterals to secure the note from Bonner & Bonner. Upon the trial below, the court, trying the case without a jury, held that there was no assignment of the fund, and that, as the check had never been accepted by Kountze Bros., the plaintiff had no cause of action against them, and rendered judgment in favor of Kountze Bros. and the City National Bank, but against Bonner & Bonner, in favor of House, for the full amount of the indebtedness sued for.

Appellant's contention is that the drawing of the check operated as an assignment to him, pro tanto, of the amount of the funds deposited to the credit of Bonner & Bonner with Kountze Bros., and gave him a right of action against Kountze Bros., although the check was never accepted by them. It is well settled that a bank deposit is a debt owed by the banker to the depositor, and that a part of a chose in action may be assigned, and suit maintained against the debtor for the part so assigned. *Harris Co. v. Campbell*, 68 Tex. 27, 3 S. W. 243. But there is a difference of opinion about the right of a holder of a check drawn by a depositor against money deposited by him in a bank, and never accepted by the bank, to maintain a suit thereon against the bank. The weight of authority is that

such a suit cannot be maintained. This is the rule in England,—made so by an act of parliament codifying the law upon the subject of bills of exchange, and the decisions of the English courts before that time. But the act does not extend to Scotland, where the bill operates as an assignment from the time that it is presented to the drawee. 4 Eng. Rul. Cas. 169. The act referred to defines a check to be “a bill of exchange drawn on a banker payable on demand.” It is also the rule adopted by the supreme court of the United States and many other courts in this country. On the other hand quite a number of the states have adopted the contrary rule, and hold the drawing of a check by a banker, against funds upon deposit, is an assignment pro tanto of the fund in the hands of the banker, to the drawee of the check, or at least, if there is no assignment, that the check holder has such a privity of contract with the banker as to authorize him to maintain the action against the bank, upon an implied promise to pay the check of the depositor. For a collation of the authorities, pro and con, see 5 Am. & Eng. Enc. Law (2d Ed.) p. 1061 et seq. and page 1065 et seq. and notes; also for a collation and discussion of the authorities, 2 Morse, Banks (3d Ed.) § 513 et seq. and section 528 et seq. Notes citing the English and American cases upon the question will be found in 3 Eng. Rul. Cas., at pages 757 and 760. The courts holding that the drawee of an unaccepted check has no right of action against the banker do so upon the grounds that the contract is with the depositor, and the bank owes no duty to the check holder, and therefore can maintain no action, for the want of privity of contract; that the check is simply an order that may be countermanded at any time, and does not operate as an assignment, legal or equitable, of the deposit upon which it is drawn, or create a lien thereon, at law or in equity; that the contract of the bank with the depositor is entire, and the drawer of the check may not split up his cause of action against it; and that to allow the check holder to sue would be to give the right of action to two persons for the same thing. These courts, however, have recognized the principle that there may be an assignment of the fund in the bank to the drawee of the check, growing out of the intention of the parties, and the circumstances of the case. There are quite a number of cases in the supreme court of the United States, and other courts, illustrating this principle; and they are easily distinguished from, and in no wise conflict with, the cases holding to the general doctrine that no action can be maintained. The leading case relied upon in support of the rule that the check holder cannot maintain an action against the bank is *Bank v. Millard*, 10 Wall. 152. In that case a paymaster of the army drew a check on the bank, in favor of Capt. Millard, in payment of a balance due him by the government. The check fell into the hands of another per-

son, and the bank paid it on a forged indorsement. Millard recovered the check, and sued the bank. The court held that in the absence of proof that the check had been accepted by the bank, or charged against the drawer in a settlement with the bank, Millard could not maintain a suit against the bank; and this rule has been adhered to in all the subsequent decisions of that court, whenever the question has been raised. But, as above stated, there are cases in which the court has held that there was an assignment of the fund to the deposit of the drawer in the bank, in favor of the drawee of the check, arising out of the particular transaction. A case illustrating this principle is that of *Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, from which it appears that the president of the Keystone National Bank of Philadelphia solicited the Fourth Street Bank to give his bank \$25,000 in gold certificates to meet its balance at the clearing house. He represented that his bank had about that sum on deposit with the Tradesmen's National Bank of New York, and exhibited a memorandum showing that to be the case, and offered his check for the amount. The check was taken, and the gold certificates delivered. On the next morning, before the check was presented to the New York Bank, the Keystone National Bank was closed, by the order of the United States comptroller of the currency. The suit was a bill in equity to subject the money which had been paid to the receiver to the payment of the check; and it was held that the rule that the check holder cannot sue the bank upon which his check is drawn was recognized, but that the transaction showed an assignment of the particular fund on deposit with the New York bank to the credit of the drawer. So there is no conflict of decision in the supreme court of the United States upon this question. The same principle is recognized by the other courts which hold that the check holder has no right to sue the bank upon an unaccepted draft. There are two leading cases in support of the contrary doctrine, which allows the check holder to sue, decided about the same time. They are *Fogarties v. Bank*, 12 Rich. Law, 518, and *Munn v. Burch*, 25 Ill. 35. The supreme court of South Carolina, in *Fogarties v. Bank*, in the well-considered opinion delivered by Judge Johnson, in sustaining the right of a check holder to sue, bases it upon the implied contract between the holder of the check and the bank. In *Munn v. Burch* the supreme court of Illinois holds that there is not only an implied contract to pay, but an equitable assignment, pro tanto, of so much of the fund on deposit in the bank as the check amounts to, in favor of the drawee of the check. The authorities are quite numerous on both sides of the question, and reasons are given by judges delivering the opinions of the courts, in support of their views, which are cogent to sustain the position taken. The text writers, in discussing the question, uniformly favor the rule giv-

ing the check holder the right to sue. Tiedeman, who is more conservative than Morse, says: "The cases which deny the right of the check holder to sue the bank are by far more numerous than those which recognize his right. And although it is not difficult to demonstrate that the ruling of the minority of the courts is more rational, and more consistent with the general principles of the law, in order to secure the much-desired uniformity of rules throughout the United States, in respect to commercial law, it may be best for the minority to yield to the majority, on the ground that communis error facit jus." Tied. Com. Paper, § 452. In this state the question may be said to be *res integra*, since our supreme court has never passed on it. It came before the court of civil appeals for the Fourth district, and that court, in an opinion by Chief Justice James, sustained the right to sue. *Doty v. Caldwell* (Tex. Civ. App.) 38 S. W. 1025. The old court of appeals held also to the same effect. *Bank v. Randall, White & W. Civ. Cas. Ct. App.* § 975.

Counsel for the appellees Kountze Bros. contend that the law of New York should control the question as presented in this case, because the check was drawn on a bank in New York, to be paid out of a deposit there. It may be conceded that the position is correct. *Abt v. Bank* (Ill. Sup.) 42 N. E. 856. Yet there was no proof of what the law of New York is. But, as this is a question of the law merchant, the court might, perhaps, take judicial notice of the law merchant as prevailing in the state of New York, in absence of proof to the contrary. *Whart. Ev.* § 298. The court, however, must inform itself as to the state of the law, and, in doing so, finds that there is a hopeless conflict in the decisions, and, in the absence of proof of any statute of New York upon the question, must at last decide it upon general principles. The decisions of the New York courts cannot be more than persuasive, because they cannot be noticed judicially, as furnishing evidence of what the law of New York really is.

After a careful examination of the authorities, and a full consideration of the reasons in favor of and against the right to sue, a majority of the court are of the opinion that the weight of reason, as well as of authority, is in support of the rule that the suit cannot be maintained. The writer has reached the opposite conclusion, and is of the opinion that, while the weight of authority is against the rule authorizing the suit, yet, as stated by the text writers, the weight of reason is with those courts which hold that the check holder has the right to sue the bank, although his check has never been accepted.

In view of the conclusion reached by the majority of the court, it becomes unnecessary to pass upon the right of Kountze Bros. to set off the deposit against the note of Bonner & Bonner, or to determine the effect of the garnishment. The judgment of the court below will be affirmed. Affirmed.

# TEXAS-MEXICAN RY. CO. et al. v. BALDEZ.

(Court of Civil Appeals of Texas. Dec. 9, 1897.)

## INJURY BY CARS—LIABILITY—EVIDENCE—REASONABLE CARE.

1. On an issue as to whether a locomotive bell was ringing, a number of witnesses testified that it was; and only one, who was engaged in shoveling stone from a flat car, testified that he did not hear it. *Held* that there was not enough contradictory testimony to require the submission of the question to the jury.

2. When a locomotive, in backing onto a siding, moves a line of cars, which have been standing for several weeks at a point where footpaths cross the tracks, while it is the duty of the employees of the company to keep a lookout, to avoid injuring persons who may be crossing, the company is not liable for an injury to a child playing under the cars.

Appeal from district court, Nueces county; J. C. Russell, Judge.

Action by Martin Baldez against the Texas-Mexican Railway Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Dodd & Mullally, for appellants.

WILLIAMS, J. The appellee was run over and injured by a car of the appellant on the 24th day of October, 1896, and this action was brought to recover damages. Appellant's road runs through the town of Alice, where it has a yard, consisting of main track and several sidings. Upon one of these sidings, 16 or 18 flat cars had been standing for six or eight weeks prior to the day when appellee received his injuries. On the day in question there was an engine engaged in doing work upon this yard, and, about the time when the passenger train was due, this engine was backed in upon the side track upon which the cars stood, in order to clear the main track for the passage of the passenger train. To do this, it was necessary that these stationary cars should be moved a short distance, so as to give room upon the side track for the engine. Appellee, a child five years of age, without the knowledge of the employees of the appellant, had gone between two of the stationary cars, and was there at play. The engine was moved against one of these cars, at some distance from where the appellee was, and pushed back the line of cars a distance of about eight feet, knocking the child down and causing the injuries complained of. In going upon the siding, those operating the engine were keeping proper lookout ahead, and were ringing the bell. There is nothing to indicate the omission of any ordinary precaution on their part. It was the habit of persons living south of the road to cross the tracks in the yard, in going from one part of the town to another. There were beaten pathways, thus used, which crossed the tracks at a short distance from where the child was. It was also a common thing for people and children to

cross the tracks at any point in the yard where they found it most convenient, but, on the occasion in question, it does not appear that any one was attempting to cross the tracks, or that there was anything to indicate the presence of this child, or of any one else, about the cars, or upon the tracks. The watchout kept by the employes of the appellant seems to have been sufficient to have discovered any one attempting to cross the tracks in the ordinary way. As before stated, none of the employes knew of the presence of the child upon the grounds in time to have saved him from injury. The section foreman was seated north of the track, at a point about opposite to that where the child was playing, and his attention was attracted to the child by its outcry just as the car moved. He at once gave the signal for the engine to stop, and this was done as soon as possible. The section foreman had nothing to do with the operation of the engine or the cars, but his signal was nevertheless obeyed by the engineer. We have stated that the bell was being rung as the engine moved. Such is the positive testimony of quite a number of witnesses, and it is not directly disputed. One witness (the uncle of the appellee) testified on direct examination that the bell was not ringing, but on cross-examination he stated that he was engaged in shoveling rock from one of the flat cars, and did not hear the bell. Whether he was paying heed, in such a way as to make it probable that he would have heard or noticed the sound of the bell, or not, is not shown. The testimony of the other witnesses is clear and explicit that the bell was ringing. Under the circumstances, we do not think that the evidence, on the point, of this one witness, raises a conflict in the testimony. It may be considered entirely consistent with that of the other witnesses, and is not enough, in our opinion, to require the submission of this question to a jury. The only thing which the evidence suggests that the employes failed to do was to look under the cars to see if any one was there. If the judgment in favor of appellee is to be sustained, it must be upon the assumption that it was their duty to make such a search, and that, in the omission to do so, they were guilty of negligence. No authority that we know of goes to this extent. The tracks and cars were the property of the appellant, and they had a right to the unobstructed use of them. No person has a right to be on the track, and between the cars, in such a situation as that occupied by the child. The fact that persons might be looked for, crossing the tracks in the yard, made it the duty of those operating engines to use ordinary care, by keeping proper lookout, to avoid injuring them. *Railway Co. v. Smith*, 87 Tex. 348, 28 S. W. 520. This is the appellant's servants did. This is as far as our supreme court has ever gone in defining the duty of railroad companies in this particular, and is as far as, in our judg-

ment, it is permissible to go. *Railway Co. v. Crosnoe*, 72 Tex. 84, 10 S. W. 342. We know of no principle which would authorize the recovery for the damages sued for by the plaintiff. We might have stated in our summary of the facts that this string of cars had been moved a short distance upon the siding the same day the accident occurred, and before it happened, and nothing occurred to indicate danger to any one. The occurrence is an unfortunate one, but it is not of that character which makes appellant responsible for its consequences. The judgment of the district court is reversed, and judgment will be here rendered for appellant, that plaintiff take nothing by his suit. Reversed and rendered.

#### NATIONAL BANK OF DENISON v. KILGORE et al.

(Court of Civil Appeals of Texas. Dec. 11, 1897.)

##### RES JUDICATA—EXEMPTIONS.

1. Where the court below, on motion of plaintiff, enters judgment on foreclosure in his favor in all respects except as to certain property which is conceded by the motion to be exempt, plaintiff is estopped from again raising any question as to the exemption of such property.

2. A block of real estate being exempt as part of defendant's homestead, the rental value thereof, allowed him by the jury by way of damages during a wrongful seizure and detention, is also exempt.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Suit by the National Bank of Denison against S. C. Kilgore and others to foreclose a mortgage. From a judgment excepting part of the property as exempt, plaintiff appeals. Affirmed.

N. H. L. Decker and Maughs & Peck, for appellant. R. R. Hazlewood and Standifer & Eppstein, for appellees.

HUNTER, J. The district court, upon the motion of appellant, and by consent of appellees, entered judgment in this cause in appellant's favor in all respects except as to \$300 rental value of block 86, which, in effect, by the motion, was conceded to be exempt from forced sale as part of appellee Kilgore's homestead. This \$300 was awarded Kilgore by the jury as the rental value of block 86 during the time which appellant held the block under a writ of sequestration pending suit to foreclose a mortgage thereon, which mortgage was void because the block was a part of Kilgore's homestead at the time of its execution. There are numerous assignments of error complaining of the action of the district court on the trial of the cause, all of which we overrule, because by appellant's said motion the court granted the judgment it prayed for in the motion in every particular except as to allowing this \$300 to be applied in satisfaction pro tanto of a \$2,051.50 judgment it ob-

tained by the same motion against Kilgore on a note, the judgment declaring the said \$300 as exempt from the debts of Kilgore. Now, whether it was exempt is the only question in this case. Appellant, in effect, admitted in its motion that the block was not subject to its mortgage. The only reason claimed for the exemption was that it was part of Kilgore's homestead. It raises the question of the exemption of this block again by its assignments of error, and raised it in the court below by its motion for a new trial; but we think it was estopped by the record from raising the question again after procuring the court to grant its motion aforesaid, wherein it waived its right to foreclose on this block by reason of its homestead character. If the block was part of Kilgore's homestead, and thus exempt from seizure for the payment of his debts, we think the money allowed him by the jury and court for the rental value of the block by way of damages during a wrongful seizure and detention of it would be exempt also. The exemption would be of little value if creditors can seize the business homestead, as in this case, turn out the head of the family, and thus deprive him of the means of supporting his family, and hold and use it until the rental value thereof is sufficient to pay their debts, by setting them off against the claim for rents and damages when sued for their wrongful and oppressive seizures. The judgment in this cause is in all things affirmed.

#### HENDERSON v. STITH.

(Court of Civil Appeals of Texas. Jan. 5, 1898.)

#### DEEDS—PAROL EVIDENCE—SETTLEMENT BETWEEN PARTNERS.

Where a deed is uncertain and ambiguous in its terms as to whether it was intended as a settlement between partners or to satisfy an indebtedness, parol evidence is admissible to show what was the intention of the parties.

Error from district court, Llano county; W. M. Allison, Judge.

Suit by J. W. Henderson against Knight Stith to cancel power of attorney. From a judgment for defendant, the plaintiff brings error. Affirmed.

This suit was brought by J. W. Henderson, plaintiff in error, against Knight Stith, defendant in error, to cancel and revoke a power of attorney executed by the former to the latter on the 26th day of April, 1890, authorizing the attorney to sell a certain 320 acres of land. The answer of defendant need not be set out. It is sufficient to say that its averments provided for the proof of the defense, which will be better understood by the facts, which will be stated. The court below, trying the case without a jury, rendered judgment for plaintiff, revoking the power of attorney, and for defendant against the

plaintiff for \$250, and foreclosing lien upon plaintiff's one-third interest in the land. Plaintiff has brought the case to this court, and asks a reversal of the judgment rendered against him. Defendant, Stith, was in the land-agency business in Llano, Tex., and negotiated for plaintiff the purchase of 320 acres of land from one Forbes. The deed was executed by Forbes, by his attorney, W. G. Hughes, April 14, 1890, for a consideration expressed of \$800 cash and \$800 by vendor's lien note on the land conveyed, payable one year after date. The deed was sent by the vendor to the Iron City National Bank, to be delivered to the vendee when the cash price was paid, and the note signed. Plaintiff had only \$200 in cash, and applied to Stith for the remainder. Stith furnished \$600, and plaintiff \$200. The note was signed by Henderson, and the deed delivered. Stith then took up the \$800 note, paying \$800 for it. On the 16th day of December, 1890, Stith indorsed the note as follows: "I have received payment in full of this note at or about the time it was dated, and all lien acquired by me by paying this note is released and transferred to J. W. Henderson." Prior to this indorsement,—that is, on the 26th day of April, 1890,—Henderson executed to Stith a power of attorney, authorizing him to sell the entire tract of land bought of Forbes, and to execute general warranty deeds. The following language is contained in the power: "This power of attorney is exclusive of every other authority, my own included, to sell said land." It also contained the following: "And in consideration rendered and to be rendered, and money expended and to be expended, by said attorney, or his substitute, in the execution of these presents, I hereby declare these, this letter of attorney, coupled with an interest,—one-half interest,—and irrevocable." On the same date—the 26th day of April, 1890—Henderson and Stith entered into the following agreement: "The State of Texas, County of Llano. The following agreement or contract is this day made and entered into by and between J. W. Henderson, party of the first part, and Knight Stith, party of the second part, witnesseth: Whereas, the party of the first part has this day executed to the party of the second part a power of attorney authorizing said Knight Stith, as agent and attorney of the party of the first part, to sell certain real property in said power of attorney named and described, which said power of attorney is irrevocable, the said party of the first part hereby agrees and binds himself that, should said party of the second part sell said property, to pay the said party of the second part, as compensation for his services, as follows: The said J. W. Henderson is to have two hundred dollars paid to him as part purchase money, the said Stith to have fourteen hundred dollars paid to him as part purchase money, and the profits over and above sixteen hundred dollars is to be divided equally between them; and, if C. O. McClure be

comes a one-third owner in said property before sale, then each of the three parties is to have one-third of the profits above sixteen hundred dollars; and, in consideration of party of first part having placed said property in the hands of said second party, he pledges himself to use all his energy in selling same." On the same date Forbes executed a release of the vendor's lien secured by the \$800 note to Henderson. April 28, 1890, Henderson executed a warranty deed to C. C. McClure, conveying to him a one-third undivided interest in the 320 acres of land for a consideration of \$700 in cash. The \$700 was paid by McClure to Stith. Stith, on application of McClure, paid back to the latter \$166.66, and took his order on Henderson for the amount to be paid when Stith sold the land. On December 2, 1890, Henderson executed to Stith a warranty deed to a one-third undivided interest in the 320 acres of land, in which the consideration is stated: "\$800 to me in hand paid by Knight Stith, which said amount was paid as part purchase money to John W. Forbes in our purchase from him on April 11th, 1890." The deed also contains the following: "It is understood that this deed conveys to Knight Stith an undivided one-third interest; that the grantor herein, J. W. Henderson, retains an undivided one-third interest; and that the other one-third was heretofore conveyed to C. C. McClure by the grantor herein, J. W. Henderson, and the said Knight Stith, by deed dated May the 27th, 1890." McClure, on June 18, 1890, conveyed by warranty deed to A. C. Hunter an undivided one-sixth of the 320 acres of land for \$740 consideration, and on June 20, 1890, conveyed by warranty deed his remaining sixth of the entire tract of 320 acres to M. D. Slaton and J. H. McLean for a consideration of \$650. Stith, in December, 1890, executed on his one-third interest in the 320 acres of land a mortgage to secure payment of \$1,900, which mortgage has been foreclosed, and his interest sold under the foreclosure, thus divesting him of his one-third interest in the land held by his deed. Stith testified that: "We [meaning himself, Henderson, and McClure] were simply to be equal owners in the transaction or land, and, when sold, each to have back his purchase money and one-third of the profits." Stith also testified (and we give credit to the facts stated) that he and Henderson had never had any settlement of the business, that they had had several conversations about it, and that Henderson had never disputed his right to sell his interest, or to reserve the extra amount of \$333.33. He further testified that Henderson agreed to deed the one-third interest of himself and McClure, which agreement was in accordance with the terms of the separate written contract, and not in satisfaction; and that the deed to him was not to have any effect upon the power of attorney or contract, so far as Henderson's interest was concerned. We adopt the findings of fact as filed by the trial judge as true, and refer to the same in the transcript, except as modified in the fore-

going, made by this court, which gives, in some respects, with more particularity, the facts.

Lauderdale & Linden, for plaintiff in error.

COLLARD, J. (after stating the facts). The only assignment of error we deem it necessary to discuss is the second; the other two, not requiring discussion, being overruled. The second assignment is to the effect that the court ought to have held that the deed of Henderson to Stith for an undivided one-third of the land originally bought, expressing a consideration paid by Stith of \$800, was a payment to Stith of \$800 of the original \$1,400 advanced by him in the purchase, and erred in not holding that all the indebtedness of Henderson to Stith was not thereby settled and extinguished. The deed of Henderson to Stith does not, in terms, show that it was made in settlement of the business, nor that it was to satisfy the indebtedness of Henderson to Stith. The terms of the instrument are uncertain and ambiguous as to its effect in the particular claimed, and, this being true, parol proof was admissible—and it was admitted without objection—to show that it was not the intention of the parties to finally or partially settle the business by the deed and the consideration therein expressed. When the deed was made to Stith, charging him with the full amount received from McClure, he had paid out on the land \$700, and Henderson had paid out only \$200, leaving a balance due Stith by both himself and Henderson of \$500, which was to come out of Henderson's interest in the land. Stith's interest cost him \$533.33, and Henderson's the same amount. Evidently the court was correct in adjusting the account between the parties Henderson and Stith according to their rights, the deed to Stith not evidencing an adjustment between themselves. We find no error as assigned, and the judgment of the lower court is affirmed. Affirmed.

#### STONE v. STONE.<sup>1</sup>

(Court of Civil Appeals of Texas. Jan. 5, 1898.)

#### APPEAL AND ERROR—FINAL JUDGMENT—REVERSAL—TRIAL—JURISDICTION OF COURTS.

1. Under Rev. St. 1895, art. 1383, an appeal lies to the court of civil appeals from an interlocutory order appointing a receiver to take charge of property involved in a suit for divorce and partition.

2. Under Rev. St. 1895, art. 996, the judgment of the court of civil appeals upon an appeal from an interlocutory order appointing a receiver to take charge of property involved in a suit for divorce and partition is final.

3. Under Rev. St. 1895, art. 1465, a receiver may be appointed to take charge of property involved in a suit for divorce and partition.

4. An application to the supreme court for a writ of error to review a judgment of the court of civil appeals, reversing and remanding a cause, does not oust the trial court of jurisdiction to

<sup>1</sup> Application for writ of error dismissed for want of jurisdiction. Digitized by Google

proceed with the case unless it appears that the supreme court has jurisdiction, under Rev. St. 1895, art. 996, to grant the writ.

**Appeal from district court, Bell county; Marshall Surratt, Judge.**

Action for divorce, partition, and alimony by Mattie E. Stone against W. J. Stone. Upon a reversal of the decree for partition (40 S. W. 1022) a receiver was appointed, and the defendant appeals. Affirmed.

**Henry & Stribbling and A. M. Montelth, for appellant. Harris & Saunders, for appellee.**

**KEY, J.** This is an appeal from an interlocutory order appointing a receiver to take charge of certain property involved in a suit brought by appellee for a divorce and for partition of said property. The appeal is authorized by statute, and the judgment of this court is final. Rev. St. 1895, arts. 1383, 996. After due consideration, our conclusion is that the pleadings and evidence bring the case within the first subdivision of article 1465 of the Revised Statutes of this state, which authorizes the appointment of a receiver at the request of a party jointly owning or interested in the property or fund, and where it is shown that such property or fund is in danger of being lost, removed, or materially injured. The main case had been once tried, and judgment rendered granting appellee a divorce, and fixing the rights of the parties as to the property. From that judgment appellant appealed to this court, where the judgment was affirmed in so far as it granted the divorce, but was reversed and remanded for another trial as to property rights. 40 S. W. 1022. Appellant applied to the supreme court for a writ of error, and his application was pending in that court when the receiver was appointed; hence he contends that the trial court had no jurisdiction to appoint a receiver. We do not think this position is tenable. If it be conceded (which we do not decide) that a trial court has no jurisdiction to appoint a receiver, pending an appeal, we think that, to deprive it of such jurisdiction, it must clearly appear that the case is pending in an appellate court that has jurisdiction thereof. As to the divorce branch of the case, the jurisdiction of this court is final; and so, also, is it final where the judgment of the trial court is reversed, and the cause remanded for another trial, except in certain specified instances. Rev. St. 1895, art. 996. Therefore the supreme court had no jurisdiction to revise the action of this court on the divorce branch of the case; and as the case was reversed and remanded as to property rights, and as it was not shown that it comes within one of the exceptions to the statute, which makes the judgment of this court reversing and remanding a cause final, it was not made to appear that the supreme court had jurisdiction of the

case. Any party to a suit in any court may file an application in the supreme court for a writ of error; but, unless that court has jurisdiction to grant the writ, such filing of an application does not affect the jurisdiction of any other court over the case. No reversible error is assigned, and the judgment is affirmed. Affirmed.

**FORD et al. v. DENTON.**  
(Court of Civil Appeals of Texas. Jan. 5, 1898.)

**APPEAL—CONFLICTING EVIDENCE.**

A judgment of the trial court, based on conflicting evidence, will not be disturbed.

**Error from Bell county court; F. C. Humphries, Judge.**

Action by G. Denton against S. B. Ford and others on a promissory note. Judgment for plaintiff, and defendants bring error. Affirmed.

**J. K. Freeman and A. M. Montelth, for plaintiffs in error. Banks & Cochran, for defendant in error.**

**FISHER, C. J.** The following concise statement as to the nature of the suit and the issues involved is taken from the brief of defendant in error: "Defendant in error brought suit against plaintiffs in error to recover upon a promissory note for \$650. The defense was that the note had been given for a part of the purchase money for two tracts of land conveyed, and secured to be conveyed, by the plaintiff below to the defendants below. The pleadings, evidence, and judgment of the court show the controversy to be as follows: Prior to the time of the execution of the note sued on by the plaintiff, he owned a tract of land containing 5 acres, in or near the corporate limits of the city of Temple, Texas, and held and owned an option and contract to buy 8 3/4 acres of land adjoining it at the rate of \$150 per acre; that he sold the defendants a two-thirds undivided interest in the 5 acres he owned, and the option he had in the 8 3/4 acres, and the controversy arises over the contract price. The plaintiff claimed that he was to receive a bonus of \$650, for which the note was given, as the condition upon which the defendants were allowed to participate in his investments; that is to say, he was to get a bonus of \$50 per acre, less the fractional three-eighths of an acre, to let the defendants in on his purchase. On the other hand, the defendants claim that they were only to pay a bonus of \$50 per acre upon the two-thirds interest in both tracts of the land which they bought, and that, while the note was given for \$650, it should have been for \$440, and that they signed it through a mistake of the amount really due upon the transaction. The court found for plaintiff."

The facts in evidence furnished by the



plaintiff below clearly establish the liability of the defendants for \$650, the full amount of the note sued upon. The court below, it is true, found that the defendants, in executing this note, did not intend to become liable for more than \$440, and that they signed it under a mistake of fact as to the amount for which it was drawn. But, upon the other hand, the findings of the court are to the effect, and the facts clearly show, when viewed in the light of the testimony furnished by the plaintiff, that there was no mistake made in preparing the note and in stating the amount for which the plaintiffs in error were liable. The sole question is simply one of conflict in testimony, and, as there is evidence to support the judgment below, we must, to be in accord with the practice that prevails here, affirm the judgment. We find no error in the record, and the judgment is accordingly affirmed. Affirmed.

**PARLIN & ORENDORFF CO. et al. v.  
WEBSTER et al.**

(Court of Civil Appeals of Texas. Dec. 4, 1897.)

**GUARDIAN AND WARD — CULTIVATING WARD'S  
REALTY — LIABILITY OF GUARDIAN — PARENT  
AND CHILD — RIGHT TO CHILD'S WAGES.**

1. Where a guardian, without an order of the court, cultivates a farm belonging to the ward's estate, appropriating the proceeds to his own use, he is liable to the estate for the reasonable rental value of such farm.

2. The proceeds of the farm are the personal property of the guardian, even though in cultivating the farm he employs the labor of his own minor children, who are his wards; it not being shown that he has failed to maintain and educate such children, and thereby lost his parental right to their wages.

Appeal from Collin county court; M. G. Abernathy, Judge.

Action by C. W. Webster, as guardian, against J. L. Moulden, sheriff, and others, for the wrongful conversion of personal property. The sheriff justified under a writ of attachment, and, on his motion, the principal on the indemnity bond was impleaded as defendant. Plaintiff recovered judgment against the sheriff, who had judgment against the principal, Parlin & Orendorff Company, from which judgment the latter appeals. Reversed.

Harris, Etheridge & Knight, for appellant. De Armond & Church, for appellees.

**RAINEY, J.** This suit was instituted by C. W. Webster, guardian of Thomas W., Charles E., Owen B., and Josie Webster, his minor children, against J. L. Moulden, sheriff of Collin county, Tex., and the sureties on his official bond, to recover the sum of \$550 damages for the wrongful conversion by him of six bales of cotton alleged to be the property of said minors. Said Moulden answered, alleging that he seized said

property by virtue of a writ of attachment issued out of the district court, Forty-Fourth judicial district of Texas, Dallas county, and that before making the levy Parlin & Orendorff Company executed to him an indemnity bond, with William M. Roberts and T. J. Clark as sureties, and prayed that they be made parties, and that if judgment was recovered against him he should have judgment over against said parties. Parlin & Orendorff Company answered, denying that said wards had any interest in said cotton, and setting up said attachment proceedings; and also that it had recovered judgment against the said C. W. Webster for the amount of its debt, with foreclosure of its attachment lien on said cotton, and that said cotton was duly sold, and the proceeds applied to said judgment, leaving a balance still due of \$600. Upon trial before a jury, plaintiff Webster recovered judgment for the sum of \$249.26 against said sheriff, and judgment was also entered in favor of the sheriff and his bondsmen against appellant, Parlin & Orendorff Company, from which judgment this appeal is prosecuted.

The facts show that C. W. Webster was the duly-appointed guardian of his said minor children, and that as said guardian, under order of the probate court, he purchased 88 acres of land with funds belonging to said minors, and the title was taken in their name. The cotton levied on was raised on said land, and was produced by the joint labor of C. W. Webster and his minor children, most of the work being done by the children, said guardian not being able to do much more than to superintend and manage. When the sheriff went to levy upon said cotton there were seven bales lying in the yard. Said C. W. Webster claimed that five bales of the cotton were his, and that two bales belonged to his children. He claimed the cotton as exempt, because raised on his homestead. The levy was made upon the five bales claimed by him, and also one other bale, which was at the gin. On the trial Webster testified that the cotton belonged to his children, because it was raised on the children's land and raised by them. The crops raised on the premises for 1890, 1891, 1892, 1894, 1895, and 1896 were used by said Webster in supporting himself and family, the crop for 1893 being the one levied upon. No order of the county court was ever made authorizing C. W. Webster, as guardian, to cultivate the farm, nor did he ever account to said court for any of the crops raised upon said premises. The money invested in said farm was inherited by said children from their maternal grandfather some time in 1888. At that time their mother was dead, and, besides the children heretofore mentioned, C. W. Webster and wife had a son living whose name was Grover C. Webster. This son died, however, before the money was invested in said land. C. W. Webster filed an annual report

as guardian, September 1, 1893, but in it he makes no mention of any cotton as a part of the assets of said wards' estate, and he stated in said report that he reported everything that he considered his children owned.

The main question in the case is whether or not the cotton levied upon was subject to the individual debts of C. W. Webster. The contention of appellants is that the proceeds of the labor of the minor children belong to the father, and the creditors of the father may proceed against such proceeds as against any other property of the debtor; and, further, "where a guardian, without an order of court, appropriates to his own use or rents to another improved land of his wards, he is only required to account to the estate of his wards for the reasonable value of the rent of such property during the time the same was so used;" while, on the other hand, appellees contend that where a guardian, without an order of court, does not rent the land of his wards, and the same is worked by them, they are entitled to the fruits of their labor, and, further, that it is the duty of the father, as the natural guardian, to maintain and educate his children at his own expense, and that he has no right to shift the cost of these duties on the estate of his wards, etc.

The duty of a guardian in relation to the management of a farm and renting of real estate is found in title 51, c. 9, Rev. St. 1895. Article 2633 provides: "If there be a farm, plantation, manufactory or business belonging to the estate, and if the same be not required to be at once sold for the payment of debts, it shall be the duty of the guardian of such estate, upon an order of the court, to carry on such farm, plantation, manufactory or business or rent the same, as shall appear for the best interest of the estate. \* \* \*" This is the only article that authorizes a guardian to carry on or rent a farm for his wards. It will be noted that, in order for him to do so, it must be upon an order of the court authorizing him to so act. Article 2635, Rev. St. 1895, provides: "The guardian may rent the improved property of the ward, other than such property as is named in article 2633, without an order of the court authorizing him to do so, and either at public or private renting, but when he rents without an order of court, he shall be required to account to the estate of the ward for the reasonable value of the rent of such property for the time the same was so rented." Article 2558, Id., provides: "The provisions, rules and regulations which govern estates of decedents shall apply to and govern such guardianships, whenever the same are applicable and not inconsistent with any of the provisions of this title." Article 2107, Id., provides: "When an executor or administrator hires or rents property belonging to an estate without an order of the court authorizing him to do so, he shall be held responsi-

ble to the estate for the reasonable value of the hire or rent of such property, to be ascertained by the court by satisfactory evidence."

There is no provision of the statute which specifically prescribes the measure of a guardian's or administrator's liability where the farm is not rented, but appropriated by said guardian or administrator for his own individual use. It seems to us, however, that the liability should be the reasonable rental value of said farm. No authority has been cited by either party, nor have we been able to find any by the courts of this state, prescribing a rule of liability in such cases. In the case of *Oglesby v. Forman*, 77 Tex. 647, 14 S. W. 244, it is held that an administrator who leases a farm without authority of an order of court is liable for the reasonable value of the rents. This, however, is nothing more than what the statute prescribes in such cases. We are not without authority, however, from other states on this question. In the states of Wisconsin and Georgia it is held that an administrator using the real property of the estate is responsible for the reasonable value of the rents thereof. *Willis v. Fox*, 25 Wis. 646. See, also, *Royston v. Royston*, 29 Ga. 82.

As contended for by appellants, the father is entitled to the proceeds of the labor of his minor children, so long as he maintains and educates them. There is no evidence in this case showing that the father did not maintain and educate his children, although they were required to labor for him. So the fact of their laboring to produce the cotton in question does not form any basis for the claim that it was their property. We think the title to the property rests upon the same basis as if the guardian had employed labor other than his children, and paid other expenses incident thereto, and raised the crop on said land. Under such circumstances, we think the cotton so raised would be the personal property of the guardian, and subject to his debts; and especially is this so where the guardian cultivated the land on his own account, no pretense being made that it was being cultivated by him as guardian of his wards' estate. The policy of the law is that a guardian or administrator shall not endanger the estate of his ward or intestate, in carrying on any business in behalf of said estate, without an order of the probate court. When he does so, he and his bondsmen become responsible to the estate for the reasonable rental value of the property, and losses incurred under such circumstances can in no sense be a charge against the estate. Of course, under certain circumstances, where the property of the estate has been used, they may be required to account for any profits that may have been made by the use thereof. But it is not necessary to enter into a discussion here of this question. Confining ourselves to the facts in this case, we

think the guardian is liable to the wards for the reasonable rental value of the land in question, and that the cotton was subject to the levy of appellants' writ of attachment. From what we have said, we deem it unnecessary to discuss in detail the other assignments of error made by appellants. For the reasons above given the judgment of the court below is reversed, and the cause remanded.

### SANTLEBEN v. FROBOESE.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 10, 1897.)

**LIMITATIONS—SET-OFF—UNLIQUIDATED DEMAND—PARTNERSHIP ACCOUNTING—CONTRACTS—ILLEGALITY—PLEADING—ORIGINAL SUIT—ABANDONMENT.**

1. In an action originally commenced for a partnership accounting, but the character of which was changed by two amended complaints, subsequently filed, in which plaintiff prayed for a specific judgment, instead of an accounting, limitations will run as against the items set up in the amended complaints up to the time the amended complaints were filed, and will not stop with the filing of the original complaint.

2. In an action brought to have the transfer of certain shares of stock set aside and canceled on the ground that defendant had, by fraud, induced plaintiff to transfer the stock to him, and to have said stock reconveyed to plaintiff, or, in lieu thereof, for judgment for its value, the defendant cannot plead in his answer, as an offset, two promissory notes given by plaintiff to defendant, it being an attempt to offset a liquidated demand to a claim for unliquidated damages.

#### On Rehearing.

1. A claim for an amount that one partner agreed to pay another for extra labor that devolved upon the latter by reason of the former's being engaged in business outside of the partnership cannot be maintained in a partnership accounting, as it is not a partnership affair.

2. The agreement of a partner, on being elected county treasurer, to pay into the firm's funds all salaries and commissions derived from his office, is void as against public policy.

3. In his original petition plaintiff sued for a partnership accounting. In two amended petitions he set out certain items, and asked for judgment thereon; but in neither of which did he pray for a partnership accounting. In the third petition he alleged that the partnership books erroneously contained charges against him, and omitted credits in his favor. On trial he refused to produce the books, though they were in his possession. *Held*, he had abandoned his suit for partnership accounting.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by August Santleben against Edward Froboese, Sr. Judgment for defendant, and plaintiff appeals. Reversed.

C. A. Keller and Mason Williams, for appellant. Leo Tarleton and Geo. C. Altgelt, for appellee.

FLY, J. This suit was instituted by appellant on July 19, 1895, and in his petition he prayed for a settlement of partnership affairs between him and appellee, alleging that upon a just settlement of the partnership matters appellant was entitled to a balance of \$18,000. It

was also alleged, in a separate count, that in February, 1894, appellee had, by fraud, induced appellant to transfer to him 50 shares of stock in the Merchants' Transfer Company, and had converted the same to his own use. The prayer was for a partnership accounting, and an offer to pay whatever might be due to the partnership by appellant. In the second amended petition, filed on September 15, 1896, appellant sets out a number of items upon which appellee was indebted to him, and in his prayer does not ask for a partnership accounting, but prays for judgment "for his debt and damages in the several amounts above named." In the third amended petition, filed March 1, 1897, it was alleged that the partnership of Froboese & Santleben continued from August 25, 1881, until April 24, 1894; that no final settlement of accounts had ever taken place between them; that for a long time he could not obtain access to the partnership books, but, having finally obtained them, he found they had not been properly kept; that appellee had charged appellant with many items for which he was not liable, and had omitted many items of credits to which he was entitled; and that there were many errors in the books, which would be particularly set forth. It was further alleged that while the partnership was in existence appellee was the county treasurer of Bexar county, and, in consideration of the greater portion of his time being taken up with the duties of his office, appellee had agreed with appellant "that all salaries, commissions, perquisites, profits, or emoluments growing out of his said office of county treasurer should be paid into the funds of the said firm, and become a part of its assets," but had failed to pay in not only the salary for several years, but also certain interest arising from the loan of the county's money to different individuals, and certain commissions obtained by him for the sale of county bonds. The item for conversion of the stock was also set forth, and there was pleaded an additional item, which had not before been pleaded, that appellee had, in consideration for the extra labor that devolved upon appellant, agreed to pay him the sum of \$1,000 per annum, which he had failed to do. The prayer was as follows: "Wherefore, defendant having been heretofore duly cited, and having answered herein, plaintiff prays that the transfer of said fifty shares of stock be set aside and canceled, and that an order be issued commanding the defendant to reconvey to plaintiff said shares of stock, or if, for any reason, this cannot be done, that he have judgment for the value of said stock; and for further judgment for his debt and damages in the several amounts above named, and for costs of suit, and for general and special relief." Appellee excepted to the petition on the ground that the several items were barred by limitation, and that the agreement as to the salary, interest, and commissions was contrary to public policy. Two notes were pleaded in offset to appellant's demands. The exceptions were sustained to all the petition except the portion setting up

<sup>1</sup> Writ of error denied by supreme court.

the conversion of the stock. Appellant, in a supplemental petition, excepted to the answer on the ground that the items pleaded in reconvention were barred by limitation, and on the ground that the answer attempted to offset a certain and liquidated demand against an uncertain and unliquidated claim for damages. The last exception was filed after the exceptions to the petition had been sustained, and appellant's demand had been narrowed down to a suit for conversion of certain stock. Upon a trial on the merits, the court rendered judgment for \$889.80 in favor of appellee.

Unless the claims of appellant can be sustained upon the ground that the action was one against a co-partner for the settlement of the partnership accounts, the whole of appellant's demand, with the exception of the claim for conversion of the stock, was barred by limitation. It was clearly the intention in the first petition to obtain at the hands of the court a settlement of partnership affairs; but that idea was abandoned in the second amended petition, which was filed more than two years after the dissolution of the partnership, and consequently more than two years after the cause of action had accrued. The abandonment of the plea for a partnership settlement is indicated not only by the prayer and statements of the indebtedness due him by appellee, but also by the fact that it was shown by the allegations that there were other members of the partnership, and that a settlement was impossible without joining them in the suit. The first petition indicated that there was only one matter that it was desired to adjudicate between the partners, and that was in connection with the conversion of the stock; the other claims, which were in no manner connected with each other, not being pleaded until after the expiration of two years, and in connection with an abandonment of the plea for a settlement of the partnership affairs. Had the suit for settlement of partnership matters been adhered to, doubtless any matters growing out of the partnership could have been added by an amendment, and limitation would run only to the time of the filing of the original suit; but that part of the suit was abandoned, and new matters pleaded had nothing to connect and blend them into a harmonious demand. If it could be held that the suit was for a settlement of partnership affairs, it does not appear from the allegations that the matter in regard to the payment of the \$1,000 per annum had any connection with the partnership, but that one of four partners agreed to pay another \$1,000 per annum to attend to duties which he could not meet on account of the duties of his office. That item, not having been set up until 1897, and not being connected with the settlement of partnership affairs, would have been barred had the suit never been abandoned for a settlement of partnership accounts. Under our view of the case, it becomes unnecessary to pass on the question as to whether appellant would be debarred from a recovery of the gains arising from an illegal transaction.

We are of the opinion that the demurrer of

appellant to that part of the answer setting up the amount of two promissory notes in offset to the claim for damages for a tort should have been sustained. The claim of appellant was an uncertain amount, growing out of an alleged tort; and the claim of appellee grew out of a contract, the amount being definitely agreed to by the parties. The amount claimed by appellant depended upon the evidence of witnesses, and had not been fixed by the agreement nor by the operation of law. *Howard v. Randolph*, 73 Tex. 454, 11 S. W. 495; *Jones v. Hunt*, 74 Tex. 857, 12 S. W. 832. It is insisted by appellee that "appellant should not be permitted to deprive appellee of the right to plead his debts in reconvention by improperly joining by amendment, with his action for debt, one sounding in tort, and then, when exceptions are sustained to his action for debt, but those relating to the tort are improperly overruled, seek to deprive appellee of his right to plead his debt in reconvention." There can be no merit in this contention. Appellee had obtained from the court a ruling that the matters relating to debt should be stricken out, and, when that was done, any matters pleaded that could apply only to the matters stricken would necessarily go down with them. After the exceptions were sustained, the case then stood as a demand for unliquidated damages; and it does not matter under what cover the counterclaim on a liquidated demand got into the answer, it then had no standing in court. It follows that none of the cross assignments is well taken.

The testimony of appellee showed that appellant sold the stock to appellee at its face value, to wit, \$1,250, and it was agreed that it should be placed to the credit of appellant, on debts due by him to appellee, and it was done. We therefore, in deference to the finding of the trial judge, find that those statements were true, and that there was no conversion of the property by appellee. The judgment of the district court will be reversed in so far as it gave judgment on the counterclaim in favor of appellee, and will be affirmed in other particulars.

#### On Motion for Rehearing.

(Dec. 23, 1897.)

We find that the allegations of the petition did not show, as stated in our former opinion, that there were four partners, but only two. We were led into this misapprehension by the allegation in the petition that a part of the business had been sold out, but this referred to the transfer business. By the sale of their transfer business, appellant and appellee each obtained 50 shares in a company known as the Merchants' Transfer Company, and the stock alleged to have been converted had no connection whatever with the partnership affairs of appellant and appellee. How stock in a private corporation, alleged to have been converted by one who was a partner in another business, has any connection with an accounting between the members of such partnership, we fail to comprehend. The proof shows that the

affair of the shares had no connection whatever with the partnership.

If it should be held that the petition asked for an accounting between the partners, there was no error in deciding against the claims of appellant, for the reason that the pleadings showed that the transaction in regard to the \$1,000 was one by which one partner was to pay another for services performed for him, and was not a partnership affair; and the matters growing out of an attempt to create a partnership in the county treasurer's office was contrary to public policy, and utterly void. The idea that an officer elected by the people can put his office in as part of the assets of a partnership is utterly repugnant to public policy, and the courts will utterly refuse to enforce any such contract. The \$1,000 salary and the gains from the treasurer's office being eliminated, there remained nothing for the court to pass upon except the matter of conversion of the stock, and upon that issue the evidence was against appellant. We adhere, however, to the opinion that appellant had abandoned his suit for partnership accounting, and that the claims, except for the conversion of the stock, were barred by limitation. That appellant was not seeking for a general partnership accounting is clearly evidenced, not only by the prayer, but by the fact that he sued for certain items as being the matters he wished settled, and by the further fact that, although he had possession of the partnership books, he refused to produce them when they were demanded. He had the books which he alleged were not properly kept, but when, on the trial, he was asked to produce the books, he failed to do so. This action, taken with his pleadings, clearly shows that no accounting was desired. The motion is overruled.

**SOUTHWESTERN MFG. CO. v. SWAN.<sup>1</sup>**  
(Court of Civil Appeals of Texas. Nov. 20,  
1897.)

**DIVORCE—COMMUNITY PROPERTY—RIGHTS OF PARTIES—JUDGMENT—LIEN.**

1. On rendition of a divorce decree making no disposition of community property, but awarding to the wife the custody of minor children, who, with the mother, continue to reside on the land, the husband and wife become tenants in common, with a homestead right in the wife co-extensive with her community interest.

2. The lien of a prior judgment against the husband will thereupon attach to his interest therein.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Action by the Southwestern Manufacturing Company against Mrs. L. C. Swan. Judgment for defendant. Plaintiff appeals. Reversed.

On November 30, 1890, J. T. Swan and L. C. Swan were husband and wife, and had a family consisting of three minor children; and on that date they purchased 100 acres of land in Kaufman county, Tex., from Sarah

E. Roberts and her husband, A. L. Roberts. The deed was made to Louisa C. Swan, and recited a consideration of \$875, cash in hand paid by Louisa C. Swan out of her separate estate, and the further consideration that she was to pay off a balance due on certain notes held against said property executed by A. L. Roberts, payable to G. B. Davis, said balance being \$350. J. T. Swan moved with his family upon said land, built a house and barn thereon, dug a well and cistern, and made other improvements, and lived thereon as his homestead. On February 9, 1894, the North Texas National Bank of Dallas recovered a judgment in the district court of Kaufman county, Tex., against J. T. Swan, for the sum of \$1,665.95. An abstract of this judgment was duly filed, recorded, and indexed in Kaufman county on March 6, 1894. This judgment was transferred by the North Texas National Bank to plaintiff, Southwestern Manufacturing Company, on December 25, 1894. On August 21, 1894, L. C. Swan filed suit in the district court of Kaufman county against J. T. Swan for divorce; and on September 13, 1894, a decree was entered, granting a divorce, and awarding the sole care and custody of their children, Josia, Claude, and Edna, to Mrs. L. C. Swan. There was no disposition whatever made of any property by the decree. Mrs. L. C. Swan and the children remained in possession of the homestead, cultivating and using it as their own. J. T. Swan removed to Houston in March, 1894, and lived there until August, 1896. He claimed an interest in the property by reason of its having been purchased with community funds and improved by the community estate. On November 2, 1896, it was agreed between J. T. Swan and Mrs. L. C. Swan that, for the purpose of settling whatever interest J. T. Swan had in the property, she (Mrs. L. C. Swan) would execute a deed to him for 45 acres, reciting a cash consideration of \$1,250, and that J. T. Swan was to immediately deed it back for the recited consideration of \$750 cash, and a note for \$500 to be executed by Mrs. L. C. Swan, J. T. Swan retaining a vendor's lien on the 45 acres of land, which note was to be accepted by J. T. Swan for his interest in the 100 acres. This agreement was carried out. The deed was made by Mrs. Swan to J. T. Swan on November 2, 1896, for 45 acres of land; and at the same time the deed was made by J. T. Swan, conveying the same property back to L. C. Swan, the deed reciting a cash consideration of \$750 and the promissory note of Mrs. Swan for \$500. These deeds were acknowledged and delivered on the same day. No cash was paid in this transaction. On December 11, 1896, plaintiff below (appellant here) caused an execution to be issued on its judgment, the same having been kept alive by the issuing of an execution within a year, and caused the same to be levied upon the 45 acres of land described in the deed from Mrs. Swan to J. T. Swan, of November 2, 1896. The land was duly adver-

<sup>1</sup> For corrected opinion, see 43 S. W. 813.

tised and sold by the sheriff on the first Tuesday in January, 1897, and bid in by the appellant. The amount of the bid, less the costs, was credited upon its judgment.

Huffmaster & Huffmaster, for appellant. J. S. Woods, for appellee.

BOOKHOUT, J. (after stating the facts). This is an action of trespass to try title, instituted by appellant against Mrs. L. C. Swan, to recover the 45 acres of land. The defendant pleaded a general denial, not guilty, and that the same was the homestead of herself and her divorced husband, and not subject to levy, and alleging that the land was paid for out of community funds of herself and her divorced husband, and that the recitation contained in the deed from Roberts and wife that the same was paid for out of her separate property is not true, and further alleged that J. T. Swan never abandoned his homestead interest in said property, either before or since the divorce, and since the decree has worked upon and aided in improving said tract of land, and contributed to it by the use of his means and labor, and that she and her divorced husband had the right to partition and divide their homestead rights and equities in said land free from any liability arising therefrom. Plaintiff filed a supplemental petition, alleging that the property was purchased with the separate means of Mrs. Swan, and that, if J. T. Swan ever had any homestead interest in the same, he abandoned the same long prior to the time that plaintiff acquired its rights therein; also set up the divorce proceedings, and alleged that, after the granting of the divorce, J. T. Swan abandoned his family and his said home. There was a trial with the aid of a jury, and a verdict for the defendant, upon which judgment was duly entered. Plaintiff filed its motion for new trial, which being overruled, it excepted, and prosecutes its appeal to this court. The facts above set out were proven upon the trial.

Under our view of the law of this case, we deem it unnecessary to pass upon but one assignment of error presented by appellant. Appellant's fourteenth assignment of error is as follows: "The court erred in instructing the jury as follows: 'The jury are further instructed that if they believe from a preponderance of the evidence that the land in question was occupied and improved by Mrs. L. C. Swan and her husband, John T. Swan, and formed a part of their homestead prior to the time they were divorced, September 13, 1894; and if the jury further believe from the evidence that after said divorce was granted, that it was agreed by and between defendant L. C. Swan and her husband, John T. Swan, that she (defendant) should continue to use and occupy said land as a part of their homestead, and support their minor children, and that she continued to use said land as a part of said homestead until November 2, 1896; and if the jury further believe from the evi-

dence that on November 2, 1896, when she conveyed said land to John T. Swan, that it was understood and agreed between said parties that he should immediately reconvey same to her, and that said arrangement was made for the purpose of adjusting the equity rights of John T. Swan in said homestead, and to make defendant L. C. Swan the sole owner of the same for the purpose of supporting and maintaining their minor children, —then and in that event the jury are instructed that the judgment lien claimed by plaintiff did not attach to said land when it was conveyed to John T. Swan by defendant; and, if such is the case, the deed of John T. Swan, dated November 2, 1896, placed the title in him to said land, and you should find for defendant.' " The principle announced in the foregoing charge of the court is in direct conflict with the decision of our supreme court in the case of Kirkwood v. Domnan, 80 Tex. 647, 16 S. W. 428. That was a suit brought by the purchaser from a divorced husband of his interest in the community homestead of himself and divorced wife, against the divorced wife and her husband (she having married again after the divorce). In the divorce proceedings in that case between G. W. Allen and Bettie Allen there was no disposition made of their property. There were minor children, and they remained with their mother upon the community homestead. She supported them without the assistance of her divorced husband. Allen, the divorced husband, executed a deed of trust to secure a debt he owed. The debt not being paid, the deed of trust was foreclosed, and the property bought in by appellee. In that case, Associate Justice Henry, speaking for the court, said: "Allen and wife, while their marriage subsisted, each owned an undivided one-half interest in the property in controversy. It was in the power of the court that decreed the divorce, under the statute, not only to make such a decree with regard to the use of the homestead as would properly protect the wife in its use, but it might also have provided for its protection and use by the minor children of the marriage, subject only to the prohibiting clause that the decree should not have the effect, in form or in substance, of divesting the husband of his title to one-half. We think, however, that the husband's interest in the property can be so charged only in the divorce suit, and as a part of the decree of divorce. It not having been then done, the former husband and wife stood towards each other after the decree of divorce as if they had never borne that relation to each other. They then owned the property as tenants in common, and subject to all the rules and regulations of strangers, bearing to each other that relation." We think the law announced in the case above is applicable to the facts in the case before us. It is true that J. T. Swan, after the divorce, contributed small amounts towards the education of the minor children. He returned to the property, and worked

thereon a short time in 1896, but in the capacity of an employé of one of the tenants. Under the law as announced above, the decree for divorce not having made any disposition of the property, J. T. Swan and L. C. Swan, after the divorce, were tenants in common in their community property. The decree of divorce having awarded the custody of the minor children to Mrs. L. C. Swan, and they having resided with her upon the property, she had a homestead therein to the extent of her community interest. 80 Tex. 648, 16 S. W. 428. The appellant's judgment lien attached upon the interest of J. T. Swan in the property, and it was entitled to enforce its lien by levy of execution and sale. As there may be a question about the partition of the property, and equities to adjust which the appellee would be entitled to have submitted to a jury, we think the cause should be sent back for another trial. For the reasons above stated, the judgment is reversed, and the cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. JAHN.

(Court of Civil Appeals of Texas. Jan. 5, 1898.)

CARRIERS—INJURY TO DROVER—NEGLIGENCE.

1. Where a drover, in charge of stock on a train, is told by the conductor that he will have time to punch up the cattle that are down, and in the performance of his duties he assumes a dangerous position, and is injured by the sudden starting of the train, the company is liable, although, if he had been watching, he would have seen that the train was about to start.

2. Where a stock train is made up of cars of stock belonging to several owners, each of whom has a drover, and all the drovers, with the knowledge and acquiescence of the conductor of the train, are under the direction of one of the men, and attend to all the stock indiscriminately, the company is liable for an injury to one of the drovers, although at the time he was attending to stock which did not belong to his employer.

Appeal from district court, Caldwell county; H. Teichmueller, Judge.

Action by F. C. Jahn against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

A. B. Storey, for appellant. Burgess & Hopkins, for appellee.

KEY, J. Appellee brought this suit to recover damages for personal injuries, and obtained a verdict and judgment for \$823. The first assignment of error presents two questions of fact, viz. that the defendant was not guilty of any negligence, and that the plaintiff was guilty of contributory negligence. The testimony shows that a train of live stock, consisting of about 15 cars, was shipped from Gonzales, Tex., to St. Louis, Mo.; that the cattle in two of the cars belonged to one Cardwell; that the plaintiff, in order to obtain transportation to St. Louis, went along to look after Cardwell's cattle, and traveled

on a drover's pass, indorsed on the back of the contract under which Cardwell's cattle were shipped. The train was made up of live stock belonging to several different owners, and the testimony shows that one M. P. Evans was in charge of all the stock on the entire train; that the plaintiff and other persons, serving in similar capacities, were under his direction, and were to look after the stock generally, without regard to any particular car, or who owned the stock. Their duties were to look after the stock, and "punch them up" when they found them down. The testimony also shows that Cardwell's cattle were in cars at the rear of the train, and were not in either of the cars between which the plaintiff was caught and injured. Among other things, the plaintiff testified as follows: "I went with a cattle train in May, '95. Left Gonzales on the 18th day of May. I went with Mr. Cardwell's cattle. Mr. Evans had charge of the train. We had fifteen cars when we left Gonzales. Three more cars were attached at Waco, but were detached at Hillsboro. At Denton we had the original fifteen with which we started. I traveled on Mr. Cardwell's cattle contract, as the man in charge of his two cars, and my duties were to assist Mr. Evans to look after the train of cattle, and get them up when they got down. Just before we got to Denton, a brakeman came in, and told the conductor there was some cattle down, and the conductor said to us: 'There are some cattle down. We will stop at Denton, and you will have time to get out and get them up.' When the train stopped, we got out, and went to work. I got out on the west side of the train. Some of the men stopped to get up some cattle, and I went on towards the front end of the train. I do not know exactly where Mr. Cardwell's cattle were in the train. I saw a cow down on the opposite side of the car from where I was, and I started to go between the cars, and just as I started across they ran the engine back, and caught my foot, I think between the drawheads. At that time I was trying to get over, to get the animal up I had seen down. At that time I did not know where the engine was. I supposed it was where it belonged. There were no signals given. I think I would have heard it if they had been given. I was a new hand, and was a little bit scared, and was only a short distance from the engine. I was right between the fifth and sixth car. When I got caught, two men lifted me down, and carried me to the depot. My foot was caught and mashed between the drawheads. When I got it out, it was not as wide as my thumb. \* \* \* I do not know exactly where the Cardwell cars of cattle were. I do not think they were together. One of them was toward the head end of the train. I do not think it was the third car from the engine. Mr. Evans' cattle were at the head of the train, and he wanted to ship his through to Chicago, and I am not sure if it was the fourth car from the en-

gine. I do not really know now where they were. I had assisted before that in getting up the cattle all along the road. When we got out at Denton, our party divided. Mr. Evans, Frank Stephens, and Mr. Harndon were on the opposite side of the train from me. I had not gotten up any cattle at the time I was hurt. Mr. Potts got up the only one we found down on our side. I went from Mr. Potts on down the train, when I found the one down on the opposite side. I think it was Mr. Cardwell's cow. \* \* \* I saw the animal down. I put my punch rod down, and caught hold of the brake bars at the end of the train, and swung myself up. I got both feet up there on that wooden thing at the end of the train, and before I could balance to jump they struck the train, and it nearly threw me flat. In trying to regain my balance, I got my foot caught. I do not know whether it was between the drawheads or between the iron and the wood. As the car was struck, my hand slipped off the brake bar. I do not know which hand I had the prod pole in, or which hand I had hold of the bar. I do not know whether I was standing on the car towards the front, or on the one towards the rear of the train. I fell backward. Before going between the cars, I looked toward the head of the train, but did not see the engine. I could see the head of the train plainly. I did not notice about the engine. I was depending on what the conductor said that there would be no trouble. Before we got to Denton, he said: 'Now, boys, there are some cattle down, and you will have time to get them up. We will stop there for some time, and you will have plenty of time in which to work.' That was all he said. When I started in between the cars, I did not look to see where the engine was. I stopped and listened for the bell. I did not hear any. I did not listen for the whistle. I satisfied myself that the bell was not ringing, and I went in between the cars." He also testified that the engine struck the train hard. The conductor in charge of the movement of the train testified that the men with the cattle were Mr. Jahn, Mr. Harndon, Mr. Potts, a negro, and Mr. Evans; and Evans was in control. It was also shown that when the train stopped at Denton the engine was disconnected, and carried to the coal chute, about 300 yards from the depot, its supply of coal replenished, and the engine carried back, and reconnected with the train; and it was in making this connection that the train was suddenly thrown into motion, which caused the plaintiff to lose his balance, and get his foot caught between the drawheads. It was further shown that, if the plaintiff had been watching, he could have seen the engine as it left, and as it returned to the train.

In the case of *Railway Co. v. Armstrong*, 23 S. W. 236, this court had occasion to consider the duties which a carrier of live stock owes to the shipper, or his agent, traveling with such live stock; and it was there held that

where a trainman in authority tells a shipper of live stock that the train will remain standing for some time at a certain point, and directs him to look after the stock at that time, he may rely on it that the train will not be moved without notice to him, as it is customary for shippers to assume dangerous positions when caring for their stock. We see no reason for changing the views expressed in that case, and therefore hold that the testimony in this case warrants the conclusion (and in support of the verdict we so find) that appellant's employes in charge of the train were guilty of negligence, as charged in appellee's petition, and that he was not guilty of contributory negligence.

The point is made that, as appellee was not engaged in any work with or about the Cardwell cattle, but was passing between cars loaded with stock that did not belong to, and for the purpose of attending to an animal that was not owned by, Cardwell, therefore he was guilty of contributory negligence. In our opinion, this position is untenable. It appears from the testimony that the employes sent along by the several shippers were placed under the supervision and control of Evans, and that he had the authority to, and in effect did, direct each employe to "punch up" any animal that he saw down, regardless of who might be its owner; and this arrangement among the shippers was known to and acquiesced in by the conductor in charge of the train. Such being the case, we think it is immaterial whether the animal appellee was attempting to relieve belonged to Cardwell or to one of the other shippers.

This disposes of the most important questions presented in this court. The other matters referred to in appellant's brief have been considered, but our conclusion is that no reversible error is disclosed, and therefore the judgment will be affirmed. Affirmed.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. RUSSELL.

(Court of Civil Appeals of Texas. Dec. 4, 1897.)

#### RAILROADS—INJURIES TO ANIMALS ON TRACK—GROSS NEGLIGENCE.

City ordinances prohibited stock from running at large, and also prohibited the running of trains faster than 6 miles per hour, within the city limits. Defendant railroad company's engine, while running 20 miles per hour, within said city limits, killed plaintiff's mules, which were running at large. At the place they were killed, the track was not fenced, and it was about 1½ miles from the depot. No signal was given. No effort was made to stop the train. There was no evidence that defendant's servants saw the mules before they were struck. *Held*, that as the mules were unlawfully at large, and no gross negligence was shown, defendant was not liable.

Appeal from Grayson county court; J. H. Wood, Judge.

Action by Levi Russell against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plain-



tiff, defendant appeals. Reversed and remanded.

T. S. Miller and Head, Dillard & Muse, for appellant. Cummins & Mathis, for appellee.

**RAINEY, J.** This suit was instituted by appellee against appellant to recover the value of two mules alleged to have been killed through the negligence of appellant's servants in the operation of appellant's locomotive and cars. The evidence shows that said mules were killed within the corporate limits of the city of Denison. There was an ordinance of said city prohibiting the running at large of stock within the limits thereof. There was also an ordinance prohibiting the running of trains within said city limits at a rate of speed exceeding 6 miles per hour. The engine which ran over and killed said mules was running at a speed of from 20 to 25 miles per hour. At the place where the mules were killed, appellant's track was not fenced, and it was about 1½ miles from defendant's depot in the city of Denison. At that place the track is straight and upgrade for about 2 miles. The mules were on the track, and there was no bell rung or whistle blown, and no effort made to stop the train before it struck the mules. There is no evidence that the appellant's servants saw the mules on the track until they were struck.

The controlling question in the case is whether or not, under these circumstances, appellant's servants were guilty of gross negligence. If so, the judgment should stand; otherwise, it should be reversed. The leading case on this question is *Railway Co. v. Cocke*, 64 Tex. 157. In that case, Justice Stayton used the following language: "If, however, there be a valid ordinance of a city, or a statute, in force at the time and place where the injury occurs, by which the running at large of animals is made unlawful, then the entry of the animals upon a railway track or other inclosed lands is a trespass. In such case a railway company will not be responsible to owners for injury done by its cars to animals entering upon its track, unless the conduct of its employes amounts to gross negligence as heretofore defined; for, under such circumstances, railway companies are entitled to presume that all persons will comply with the law which forbids the owner to permit his animals to run at large, hence are excused from the exercise of that care which will not be necessary if the owner complies with the law,—are excused from the exercise of such care as they would exercise were it lawful for animals to be at large, and therefore expected to be so;" and, further, if stock unlawfully "enter upon a railway track, it is enough that the employes of the company use such care, after the danger becomes known, as a prudent man would under the same circumstances to avoid injury." *Railroad Co. v. Jones* (Tex. Civ. App.) 40 S. W. 745. This is the same rule that applies to persons who

are trespassers upon a railway track. There being no proof that appellant's servants saw the mules on the track in time to have prevented the injury, we are of the opinion that the evidence is not sufficient to warrant the conclusion that said mules were seen by said employes in time to have prevented the injury. Such being the state of the evidence, we think it is insufficient to show gross negligence. Consequently, the judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

#### TEXAS BREWING CO. v. DICKEY.

(Court of Civil Appeals of Texas. Oct. 30, 1897.)

**EVIDENCE—INCOMPETENCY—IMPEACHMENT OF WITNESS—APPEAL—HARMLESS ERROR—SUFFICIENCY OF OBJECTION.**

1. Evidence that a charge for embezzlement was pending against a witness, and that an indictment had been presented by the grand jury charging him with theft, was not competent to affect his credibility, where it was not drawn out on cross-examination.

2. Where appellant had nine witnesses to support a question of fact, one of whom was partially discredited, and appellee had eight, it cannot be said that the erroneous admission of evidence showing that another of appellee's witnesses had been charged with theft and embezzlement was not prejudicial.

#### On Rehearing.

Where evidence that a witness had been accused of crime was offered to impeach him, without drawing it out on cross-examination, an objection "because said evidence was not permissible under the rules of evidence" was sufficient, where the trial court understood what he was to decide.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action by R. C. Dickey against the Texas Brewing Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. R. Sawyers, for appellant. W. R. Parker, for appellee.

**STEPHENS, J.** Appellee sustained personal injuries and the loss of his buggy in a collision with one of appellant's beer wagons, in the city of Ft. Worth. While the driver was delivering a keg of beer in Potter's saloon, on Houston street, the team started off in a walk up that street, but soon turned down Fourteenth street in a lope, running towards appellee, who was sitting in his buggy about the middle of the street, talking to a friend, and facing east, the direction the horses were running. Before he had time to get out of the way, "the horses," to quote from an eyewitness, "jumped right on top of him, and crushed his buggy right down on the ground. Plaintiff went down under the buggy, the buggy on top of him, the wagon on top of the buggy." The driver testified that, when he went into the saloon to deliver the beer, he left the team "fastened to a weight by a long strap"; an ordinance of the

city requiring horses in such cases to be "well and securely fastened to a post firmly set in the ground or sidewalk, or to a ring and staple securely placed in the sidewalk for that purpose, or to an iron weight with a ring attached, weighing not less than 25 pounds." Appellee, on the examination in chief and in rebuttal, introduced eight witnesses whose testimony tended to show that the driver did not throw out his weight, as testified by him. On the other hand, appellant offered, besides that of the driver, the testimony of eight witnesses which tended to show that the horses ran off dragging the weight. This was the main controverted issue of fact raised before the jury.

Of the nine witnesses relied on by appellant to sustain its contention upon this issue, L. P. Goodel, who testified by deposition, was one. In order to affect his credibility, appellee was permitted, over the objection of appellant, to which action error is now assigned, to prove by Warren Henderson that a charge for embezzlement was pending against L. P. Goodel in the county court of Tarrant county, and also to introduce in evidence an indictment charging him with theft of cattle, presented by the grand jury of Tarrant county July 20, 1894, though this case had been subsequently dismissed upon motion of the county attorney, for want of evidence to sustain the charge. No effort had been made to elicit any such testimony on cross-examination of the witness Goodel. Though there is conflict in the decisions upon the admissibility of such evidence, even when drawn out on cross-examination, all the cases seem to agree that it is only admissible when so drawn out. The witness has the right to an explanation. *Carroll v. State* (Tex. Civ. App.) 24 S. W. 100, and several subsequent decisions of our court of criminal appeals; *Coal Co. v. Lawson*, 31 S. W. 843; *Linz v. Skinner*, 32 S. W. 915 (last two by this court); *State v. Taylor* (Mo. Sup.) 24 S. W. 449; *Ryan v. State* (Tenn. Sup.) 36 S. W. 930; *Oxier v. U. S.* (Indian Ter.) 38 S. W. 331, and authorities there cited. See the able opinion of Judge Lewis in the case last cited, for an interesting discussion of the question. The Tennessee case above cited also holds that evidence of a criminal charge is not admissible even on cross-examination, after there has been an acquittal or nolle prosequi. That the ruling complained of was erroneous does not therefore seem to admit of serious controversy.

It is, however, insisted that no prejudice resulted therefrom; but the case presented by this record does not warrant us in so holding. There was about an equal number of witnesses on each side, appellant having a majority of one. Besides Goodel, some discredit was thrown by appellee's witness Maben upon appellant's witness Steve Glenn, one of the nine, to say nothing of conflicting statements among the several witnesses. In such state of the evidence, the least cloud cast upon the character of a witness might

be sufficient in the minds of the jury to turn the scale and determine the issue. This conclusion leads to a reversal of the judgment, upon the twenty-eighth and twenty-ninth assignments of error. We need not pass upon any other of the 30 assignments, further than to say that nearly all of them are too palpably wanting in merit to justify incumbering the record and briefs with them. Judgment reversed and cause remanded.

On Rehearing.

(Dec. 31, 1897.)

We are urged to reconsider the disposition made of this appeal, upon the ground that the bills of exception do not support the two assignments of error which we sustained, in that the objections to the evidence were too general; and the contention is not without seeming force. The proposition submitted under these assignments reads: "A witness can be impeached by general evidence only, and not by evidence as to particular facts." Had the objection been stated in this form when the evidence was offered, it would undoubtedly have been sufficient, as it would have invoked the general rule on the subject, under which the testimony must have been excluded, unless brought within the exception to that rule which permits such evidence to be drawn out on cross-examination. *Wallace v. Howard* (Tex. Civ. App.) 30 S. W. 711, and cases there cited. The question to be determined, then, is whether the objections set out in the bills of exception were not equivalent to the one contained in the proposition quoted. It appears from these bills that the testimony was offered to affect the credibility of the witness Goodel, and that it was objected to "because said evidence was not permissible under the rules of evidence, and was calculated to prejudice the minds of the jury against the testimony of said Goodel." In *Railway Co. v. Gay*, 27 S. W. 742, decided by this court, an objection that the evidence offered was not "competent" was thought to be too general, though the decision did not turn upon this point, and our court of criminal appeals has several times so held, some of which cases appellee cites, and the authorities cited and reasons given by that court seem to sustain the ruling; but our supreme court, while our decision in the *Gay* Case was affirmed, expressed on this question a contrary opinion. 30 S. W. 543-545. If there be any material difference between "incompetent" and "not permissible under the rules of evidence," it is not quite apparent to us, the precise ground or reason for the incompetency or inadmissibility not being stated in either case. In deference, therefore, to the view expressed by our supreme court, and because in this case it is apparent that the court must have understood the objection to be that the rules of evidence did not permit a witness to be impeached in that way, we cannot disregard the assignments in question.

The object of the rule requiring the particular objection to be stated is to inform the trial court of what he is to decide, and, as that was apparent in this case, we would not be warranted in captiously avoiding a revision of the erroneous rulings complained of. Motion for rehearing overruled.

### WILCOX et al. v. WALKER.

(Court of Civil Appeals of Texas. Dec. 18, 1897.)

#### CONTRACTS—BREACH—LIQUIDATED DAMAGES—PENALTIES.

Where a lessee agreed to keep the premises insured in a certain sum, and in case he failed so to do, and the premises were destroyed by fire, to pay the lessor that amount, in an action on the lease therefor, evidence that the premises were practically worthless at the time they were destroyed was admissible, since courts will not treat as liquidated damages a sum named as such when it does not bear such proportion to the actual damages that it may reasonably be presumed to have been arrived at upon a fair estimation by the parties of the compensation to be paid for the prospective loss.

Appeal from district court, Collin county; J. G. Russell, Judge.

Action by W. J. Walker against J. M. Wilcox & Son and others. From a judgment entered on a verdict for plaintiff, defendants appeal. Reversed.

Garnett, Jones & Merritt and Abernathy & Beverly, for appellants. Jenkins & Pearson and J. R. Gough, for appellee.

HUNTER, J. The original petition in this case was filed on the 4th day of March, 1896. The amended petition was filed September 15, 1896. The latter alleged, and the contract of lease proved, that on the 1st day of February, 1891, the plaintiff, W. J. Walker, appellee here, leased to J. F. Stivers & Co. a certain block of land in the city of McKinney, Tex., by written lease, for the full term of seven years from said date, at the price and sum of \$450 per annum, to be paid quarterly in advance "during the entire term of seven years." The contract of lease also provided that Stivers & Co. should keep the house on the premises insured for the benefit of Walker, in the sum of \$950, during the entire term of the lease; "and in case they fail or refuse to keep said premises insured, as above set forth, they are to be personally responsible to the said Walker for the sum of \$950 in case of the destruction of said house by fire." The said lessees were, by the terms of the lease, to have the right to sublet the premises to others who might use the same for any purpose "except for the purposes of a livery stable"; the said lessees, however, always to be responsible for the rent, according to the terms above expressed. It was also provided that a failure to pay the rent as stipulated for 30 days after demand for payment made in writing should entitle the lessor to enter and take possession of the premises; but in that event the

lessees were still to be responsible to Walker "for the rent of said premises for the balance of the unexpired term of said lease, by way of damages for failing to comply with said contract." It was also stipulated that the said lessees would, at the expiration of said lease, return said premises to Walker "in as good condition as they were when received by them, reasonable wear and tear excepted." The premises were used for a lumber yard. The record shows that about December, 1896, Stivers & Co. sublet the premises to J. M. Wilcox & Son, to whom they transferred the lease contract, by writing on the back of the copy held by them these words: "For value received, and the consideration of said J. M. Wilcox & Son agreeing to pay the rent as called for, we hereby assign and transfer the within lease to J. M. Wilcox & Son. This December 27, 1896. [Signed] J. F. Stivers & Co. J. F. Stivers. F. E. Wilcox." Wilcox & Son took possession of the premises at once, and wrote Walker, who resided at Cisco, Tex., on January 12, 1896, as follows: "Dear Sir: The undersigned having bought J. F. Stivers & Co., and assumed contract for lease of lot upon which their lumber was situated, you will hereafter draw upon us when rents are due. And you will please state in said draft what months you are drawing rents for. [Signed] Very truly, J. M. Wilcox & Son." On October 24, 1896, the house on the premises was totally destroyed by fire, as well as about \$20,000 worth of lumber belonging to Wilcox & Son, all without their fault or negligence. The house was not insured, and had not been for some time. The insurance company had canceled its policy thereon, and had refused to take a risk on it. The rents were paid by Wilcox & Son up to the date of the fire, and they refused to pay afterwards unless Walker would rebuild the house, which he could not have done with wood, as originally constructed, on account of an ordinance of the city council of the city having been passed prohibiting wooden buildings to be placed thereon, and the council also prohibited the lot being used for a lumber yard again. This suit was brought by Walker to recover from J. M. Wilcox & Son, and from Stivers & Co., \$950 and interest, the amount claimed as damages for failing to have the house insured when it burned, and for rents at the rate of \$450 a year for the unexpired term of the lease; and it seems that, at the time the plaintiff's amended petition was filed, there was \$337.50 of the rents past due and unpaid, unless the burning of the premises and the failure and refusal of Walker to restore the house would release the tenants from payment of rents at the rates reserved in the contract of lease. The verdict of the jury gave Walker \$1,030.75, damages against Stivers & Co. for the value of the house, and interest from the date of its destruction, and \$270 as rent, and also found in favor of Stivers & Co., against Wilcox & Son, for \$270 for rent. On the trial of the cause, the court

sustained a demurrer to Stivers & Co.'s answer, in which it was alleged that the house was old and rotten, decayed, and worthless, and also excluded evidence tending to prove that the house at the time of its destruction was in a decayed and worthless condition, and was not worth as much as \$950, nor anything approximating said amount. This action of the court was excepted to in both instances, and made the grounds for a motion for a new trial, and is assigned as error here.

We think the court erred in sustaining exceptions to the answer, and also erred in excluding the evidence offered to prove the condition and real value of the property. The general rule seems to be that "where the agreement is to pay a fixed sum as damages for nonperformance of a contract, where the loss or injury might without it be easily determined by proof of market value, or by a precise pecuniary standard, it is subject to nearly the same criticism as a contract to liquidate damages for nonpayment of money." 1 *Suth. Dam.* (2d Ed.) § 239. Continuing in the same section, that distinguished author says: "But when parties contract for the same thing in advance as damages for a considerable excess above the customary rate of interest, or the market value of property or other thing, the agreement will raise the inquiry whether such excessive sum was intended to be paid, or whether, even if it was, it is not a penalty. It would be such if not intended to be paid in case of default. It would be such if not fixed on the basis of compensation. \* \* \* If the intention, however, is clear to liquidate damages, and the amount is either not greatly above or below the sum which would otherwise be recoverable, or, if above, was fixed specially to contemplate consequential losses, not provable under legal rules, and is not an unreasonable provision therefor, the sum fixed may be sustained as liquidated damages. But if the intention be doubtful, or the amount materially vary from a just estimate of compensation, the stated sum will be considered a penalty." In the case of *Collier v. Betterton*, 87 Tex. 442, 29 S. W. 468, Chief Justice Gaines, it seems to us, has laid down the rule as clearly as we have been able to find it anywhere stated. After admitting the difficulties arising out of the subject, and discussing its various phases somewhat, he states the supreme court's conclusion as follows: "Therefore the principle would appear to be that, although a sum be named as 'liquidated damages' the courts will not so treat it, unless it bear such proportion to the actual damages that it may reasonably be presumed to have been arrived at upon a fair estimation by the parties of the compensation to be paid for the prospective loss. If the supposed stipulation greatly exceed the actual loss,—if there be no approximation between them, and this be made to appear by the evidence,—then it seems to us, and then only, should the actual damages be the measure of recovery." See, also, *Jennings v. Wil-*

*ler* (Tex. Civ. App.) 32 S. W. 27. Applying the rule above enunciated, it is clear that the allegation was proper, and the evidence should also have been admitted, and the question of the intention of the parties, considered in the light of the value of the property in its condition at the time the contract was made, as well as when it was destroyed, should have been submitted to the jury, under proper instructions, to be considered in determining the amount of damages justly due to the plaintiff.

There are many other assignments of error, but, in view of what we have said on what we consider the principal issue in the case, it is not likely that the same questions will all arise on another trial, and therefore we do not think it necessary to pass upon them. For the reasons given, the judgment in this case is reversed, and the cause remanded for a new trial.

#### MEXICAN CENT. RY. CO. v. GOODMAN.

(Court of Civil Appeals of Texas. Nov. 10, 1897.)

CARRIERS—TICKETS—AUTHORITY OF AGENT—EVIDENCE—TRIAL—APPEAL—JUDGMENT FOR CO-DEFENDANT—COMMERCE—PLEADING.

1. A charge that there could be a recovery though a certain person intended to defraud defendant railway company in selling plaintiff tickets that defendant had refused to accept, unless plaintiff knew that such person had acted with intent to defraud defendant, and had participated in it, or knew that such person had acted as defendant's agent, without authority so to do, was erroneous, in that the jury might have been led to believe that plaintiff's knowledge of want of authority was not alone sufficient to defeat a recovery.

2. The T. Ry. Co., whose line ran from F. to E., was authorized by defendant company, whose line ran from E. to M., to sell tickets from F. through E. to M. at a less rate than defendant's regular fare from E. to M. Plaintiff, a citizen of E., applied to T.'s agent at E. for tickets from F. through E. to M., and asked him if he could not telegraph to F. for them. Soon afterwards he bought two tickets from the agent, who had not telegraphed for them, but had made them up in his office in E. They indicated a journey from F. to M., stamped "Exchanged," indicating that they were given at E. in exchange for others that were surrendered by the holder at E. *Held*, that the court could not assume that plaintiff knew the tickets were issued without authority and fraudulently.

3. A carrier is bound to accept a ticket providing that it must be signed by the person intending to use it, though tendered by a wife whose husband signed it in his own name, where it was sold to the husband for the wife by an agent, who told the husband that his wife's signature was unnecessary, and that he could sign it.

4. Where a husband bought for his wife a railroad ticket providing that it must be signed by the person intending to use it, and he signed his own name to it, on being told by the agent that his wife's signature was unnecessary, and that he could sign it, he must plead such facts, in order to prove them in an action by him for damages sustained by his wife from the company's refusal to accept the ticket.

5. A defendant cannot object that no judgment was rendered against a co-defendant where it had no pleading as against the co-defendant, and asked for no judgment against it.

6. A railroad ticket from Ft. Worth through El Paso to the City of Mexico, purchased at El Paso by a citizen thereof, at a less price than the regular fare from El Paso to the City of Mexico, is not void as being in violation of the United States interstate commerce act, though the purchaser and the ticket agent had knowledge of the facts.

7. Where one sues for a wrongful expulsion from a train while he held a ticket, and proves sickness resulting therefrom, evidence that he was sick before he entered the train, and that he started on his journey against the advice of his physician, is admissible under a general denial.

On Motion for Rehearing.

A request for a charge should be refused where the substance of it was embraced in the charge given.

Appeal from district court, El Paso county; C. N. Buckler, Judge.

Action by Samuel Goodman against the Mexican Central Railway Company and another. From a judgment against the Mexican Central Railway Company, it appeals. Reversed.

Falvey & Davis, for appellant. Beall & Kemp, for appellee.

JAMES, C. J. Appellee sued to recover damages of appellant and of the Texas & Pacific Railway Company in the sum of \$14,406.15, for injuries and losses claimed to have been sustained by him and his wife on account of appellant refusing to honor certain tickets issued by the Texas & Pacific Railway Company, and ejecting them from its train. Verdict in favor of the Texas & Pacific Railway Company, and against the Mexican Central, for \$2,000. It appears that the Texas & Pacific Railway Company had authority to issue tickets from Ft. Worth to the City of Mexico and return, over appellant's line, which connected with that of the Texas & Pacific Railway Company at El Paso. In reference to such tickets the fare was less than the regular fare over its line from El Paso to the city of Mexico and return. The purpose of appellant of this reduction in respect to travel from Ft. Worth was to compete with the Laredo route to the City of Mexico. There was an issue in the evidence as to whether or not the Texas & Pacific Railway Company had the right to sell such tickets at El Paso, or at any other point except Ft. Worth. It appears also that Goodman, residing at El Paso, intending to go from there to Mexico City, applied to the Texas & Pacific Railway Company's agent at El Paso for tickets from Ft. Worth to said city, and return to Ft. Worth, and was informed that they would cost \$50.90. He then asked the agent if he could wire to Ft. Worth and get the tickets for himself and his wife. Soon afterwards, on August 17, 1896, he inquired for the tickets, and the agent handed him two tickets, which he signed and paid for. It also appears that the agent had not wired to Ft. Worth, but made up the tickets in his office at El Paso.

In appearance they were tickets indicating a journey from Ft. Worth to the City of Mexico, and return to Ft. Worth, stamped "Exchanged," which indicated that the ticket was given at El Paso in exchange for another that, for some reason, was surrendered by the holder at El Paso, and taken up. It appears also that Goodman signed both tickets on being informed by the agent that he could sign for his wife, and that her name need not appear on either one of the tickets. Before reaching Ahumada, a station near El Paso, appellant's conductor refused to accept the tickets, claiming that they were scalper's tickets, and, on their not paying fare, required them to leave the train.

The sixteenth assignment of error is that the court erred in charging as follows: But although you may believe from the evidence that it was the intention of the Texas & Pacific Railway Company to deceive and defraud the Mexican Central, and that the former had no authority from the latter to issue the tickets from the place and in the manner these tickets were issued, such intent to defraud and want of authority would not prevent plaintiff from recovering in this case against the Mexican Central Railway, unless you further believe that S. Goodman knew of such fraudulent intent, and participated in it, or knew of such want of authority at the time he purchased the tickets. It seems clear that if the Texas & Pacific Railway Company had authority or apparent authority to issue the tickets at the place and in the manner issued, and plaintiff did not know of a want of authority for their issuance, and was not chargeable by the facts and circumstances therewith, he acquired the right to be carried on the tickets. By "apparent authority" we mean the existence of some relation of business between the companies from which one would reasonably be led to believe that the authority existed. There is a needless and confusing distinction drawn in the charges between plaintiff's knowledge of the unauthorized issue of tickets and his knowledge of a fraud in their issuance and his participation in the fraud. If plaintiff knew of a want of authority, he cannot recover in this case. Such knowledge would of itself be knowledge of a fraudulent act, and his attempting to use them under such circumstances would be participation therein. From the charges the jury may have been led to believe that, in order to find for the defendant, it was not enough that plaintiff knew that the agent's act was without authority, and therefore they were prejudicial to defendant.

The third, fourth, fifth, eighth, ninth, tenth, and eleventh assignments are all based on the assumption, substantially, that the evidence showed that the tickets were without authority and fraudulent, and that plaintiff was charged with knowledge thereof. The evidence was such as would not warrant the court in assuming these facts.

The fourteenth assignment is as follows: "The court erred in refusing a new trial, for the reason that the evidence showed that the ticket by virtue of which Mrs. Cora Goodman was trying to take passage on appellant's train was signed by S. Goodman in his own name as the original purchaser; that there is printed on said ticket, as part of the contract, in large letters, just above plaintiff's (S. Goodman's) signature, the following stipulations, viz.: 'This contract must be signed in manuscript with ink by the person who is to use this ticket, and not by another for him.' 'This ticket is not transferable.' 'No agent, on any of the lines of road named in this ticket, has authority to waive, change, or modify any of the conditions of the ticket in any manner.' 'It may be taken up, and full fare collected, if presented at any time for passage by another person.' Such ticket would not entitle Mrs. Cora Goodman to passage by the terms of the contract on the ticket, which contract was based on the consideration of a reduced rate; and the verdict allowing plaintiff damages against appellant for ejecting Mrs. Goodman was error, and should have been set aside by the court." There exists no doubt, from the authorities, that the ticket in question constituted prima facie the contract between the company and Goodman, and, as between Mrs. Goodman and the conductor, the fact that she was not the signer of the ticket would have warranted the latter in not accepting it if he was not apprised of facts which nevertheless entitled her to use it. But, if such facts exist, the company is charged with knowledge of them, and is liable if the ticket be rejected. The contract evidenced by the ticket was not conclusive of the contract that was entered into. The evidence shows that plaintiff was told by the agent selling him the tickets that it was not necessary for his wife to sign to entitle her to use it, and that he could sign his name to her ticket; and it appears that, relying on this, he did so sign and offer the ticket for passage. The reason for requiring the purchaser to sign the ticket is to provide a means of his identification, in order that it may not be used by another than the purchaser. Here the ticket had not been transferred, but was in the hands of the one for whom the seller intended it, and to whom it was in fact sold. The carrier is chargeable with the misrepresentations or mistakes of its agent, and the purchaser of a ticket may show that the real contract was different from the one signed, if he signed it by reason of some fraud or unfair means of deception practiced by the agent. *Abram v. Railway Co.*, 83 Tex. 65, 18 S. W. 321; *Railway Co. v. Martino*, 2 Tex. Civ. App. 642, 18 S. W. 1066, and 21 S. W. 781, and cases cited. Goodman, it would appear, knew of the requirement that the ticket was to be signed by the purchaser, and refrained from having her sign it, because of the assurance of the agent that his signature to the ticket would

do for her. It was the agent's duty, in issuing the ticket, to see that it was properly signed; and if he procured the signature of Goodman to the ticket destined and sold for the use of his wife, and in this form issued it, his principal would not be permitted to say that it was void in her hands. Goodman's version of this transaction is all that there is in evidence on this subject, and it was sufficient to warrant the court in assuming that she was entitled to use the ticket.

In this connection, the seventeenth assignment complains of a charge wherein it was declared that the ticket would entitle plaintiff to recover damages sustained by his wife, the ground being that plaintiff had not pleaded facts that would authorize going behind the contract shown by the ticket. It is well settled that such matter should be pleaded, and we think the petition is deficient in this respect.

The fifteenth assignment misconstrues or misstates the charge complained of. This charge (first paragraph of the court's charge) declared a correct rule of law.

There is no merit in the nineteenth and twentieth assignments.

In view of another trial, it is not necessary for us to discuss the subjects referred to in the first and second assignments.

The sixth, twelfth, and eighteenth assignments relate to the liability of the Texas & Pacific Railway Company. This company was sued jointly with appellant, and the verdict and judgment were in its favor. Appellant has no pleading as against the Texas & Pacific Railway Company, and asks for no adjudication against it. Under these circumstances we are of opinion that the judgment in favor of the Texas & Pacific should not be disturbed.

The thirteenth assignment is that a new trial should have been granted, because the purchase of the tickets held by plaintiff was in violation of the United States interstate commerce act, and void; plaintiff having purchased the same for less than all other persons could purchase tickets for like transportation, with full knowledge of that fact by him and by the agent selling him the ticket. The evidence was such as would not require a new trial upon this ground.

In reference to the seventh assignment, plaintiff had testified that, when he started on this trip, he had just gotten up out of a sick bed, and left against the advice of his physician. Sickness resulting from the expulsion from the train was one of the items of damage sued for. Defendant asked a charge to the effect that if plaintiff had been sick just before leaving, and left against the advice of his physician, and the trip contributed to his subsequent sickness, then, in estimating his damages, the jury should not consider the effect such trip may have had on him outside of said acts of defendant Mexican Central Railway Company in putting him off the train, and the inconvenience of remaining

at said station. This charge was a proper one, and so recognized by the court, but it was refused because contributory negligence was not pleaded. This was not an action based on negligence, and the rule requiring contributory negligence to be pleaded does not, we think, apply. The evidence tended to explain and diminish the apparent damages and was admissible under the general denial. *Railway Co. v. Godair*, 3 Tex. Civ. App. 516, 22 S. W. 777. Affirmed as to the Texas & Pacific Railway Company. Reversed and remanded as to the Mexican Central Railway Company.

On Rehearing.  
(Dec. 22, 1897.)

Referring to what we have said in the opinion on the seventeenth assignment, upon further consideration, we conclude that the petition contained allegations that were sufficient, at least in the absence of special demurrer. As to the seventh assignment, the charge in question was claimed by appellee to have been properly refused, because contributory negligence was not pleaded, and because the evidence did not warrant. The charge was, as said in the opinion, a proper one, but, of course, may and should have been refused if, as now stated, the substance of it was embraced in the charges given. We see no good reason for changing our views in reference to the sixteenth assignment of error. The motion is overruled.

GULF, C. & S. F. RY. CO. v. JOHNSON et al.<sup>1</sup>  
(Court of Civil Appeals of Texas. Dec. 22, 1897.)

MEASURE OF DAMAGES—LOSS OF SERVICES—PERSONAL INJURIES—INSTRUCTIONS.

1. In an action by a mother for the loss of services of her son, the petition alleged that the son was 6 years old, while the evidence showed him to be 10 years old. In stating the case to the jury in its charge, the court virtually quoted from the petition. Defendant assigned as error that the jury were misled by the instructions, and that, in computing the mother's damages, they computed on the assumption that the infant was only 6 years of age. *Held* that, since the court in effect instructed the jury that in determining the issues in the case they must be governed by the evidence, and the charge as made was not calculated to impress the jury that the allegations of the petition should be taken as proof, there was no error committed.

2. A mother sought to recover on her own behalf and on behalf of her infant son for injuries to the latter. The court instructed the jury that, if they found for the infant, they should assess his damages at such an amount as the evidence showed him to have sustained, and could consider his mental and physical pain, and his impaired condition to earn money. On behalf of the mother, the court instructed that she could recover the value of the infant's services from the time of the injury until he should become of age. *Held* that, in the absence of a refusal to give charges asked by defendant upon the question, no error was committed in failing to charge that, in computing the infant's damages, the value of his services during minority should be excluded, since it would be assumed that the jury

would understand that both the mother and the infant could not recover for his impaired capacity to earn a living during his minority.

On rehearing. Overruled.

For former opinion, see 42 S. W. 584.

J. W. Terry, for appellant. Moffett & Anderson and Monteith & Furman, for appellees.

FISHER, O. J. The evidence in the case shows that Rogers Johnson was 10 years of age at the time he was injured. The petition alleges that he was then 6 years of age. The court, in stating the case to the jury in its charge, virtually quoted from the petition, and there stated that it was averred that Rogers Johnson was 6 years of age. The appellant insists that this statement in the charge was calculated to convey to the minds of the jury that, in the opinion of the court, Rogers Johnson was 6 years of age at the time, and that, if such was the case, it would authorize the jury, in computing damages, to include the period between that time and his age as proven. The court, in charging the jury on the questions they could consider, and on the issues of law that must govern them, nowhere intimated that Rogers Johnson was 6 years of age when injured, but, upon the contrary, in effect instructed the jury that, in determining the issues in the case, they must be governed by the evidence. It was clearly not the purpose of the court, and the jury certainly did not so understand that it was, in quoting from the pleadings, that they should be governed by the age alleged, and the charge, in stating the issues, copying the averments, was not calculated to impress the jury that this should be taken as proof.

The plaintiff, Mrs. Alice Johnson, in effect sued for the value of the services of her son Rogers during his minority, and on behalf of Rogers sued to recover damages resulting from the loss of his limb, and physical pain and mental suffering sustained by him, and for his impaired capacity to earn money or to pursue an occupation in the future. The court, in charging upon this issue, instructed the jury as follows: "If you find for the plaintiff Rogers Johnson, so say by your verdict, and assess his damages at such an amount as the proof shows he sustained; and you are authorized to take into consideration such mental and physical pain and suffering, and the nature and extent and the probable duration of the injuries, and his impaired condition or capacity to earn money or pursue an occupation." And as to the claim urged by Mrs. Johnson in her own behalf the court instructed the jury that they could only find and assess her damages at the value of the services of her son from the time of his injuries to the time he shall have arrived at 21 years of age. It is contended by appellant that this charge is erroneous for the reason that it in effect allows a double recovery; that the jury, under the charge, in

<sup>1</sup> Writ of error granted by supreme court.

ascertaining the amount that Rogers Johnson was entitled to by reason of his impaired condition and capacity to earn money or pursue an occupation, could have considered the period of time prior to his reaching the age of 21 years,—the contention being that during that period the mother was entitled to the value of his services, and, in submitting the issue as to the measure of damages he was entitled to recover, it was error in the court not to exclude the time of his minority. The appellant presents no assignment of error complaining of any ruling of the court in refusing to give charges asked by it upon this question. We must assume that the jury who tried this case were men of ordinary intelligence, and, such being the case, we must impute to them an ordinary ability of discrimination. The court in effect tells the jury that during the period of the minority of Rogers Johnson his mother was entitled to the value of his services; and, when they were authorized to consider his impaired condition and capacity to earn a living, on that branch of the case wherein his mother sought to recover damages for him, the jury must have understood, as men of ordinary intelligence, that the impaired capacity to pursue an occupation or to earn a living did not embrace the period of time which they were just told the mother, in her own right, could recover for. The motion is overruled.

#### TEXAS CENT. R. CO. et al. v. FISHER et al.

(Court of Civil Appeals of Texas. Jan. 5, 1898.)

#### EVIDENCE—COMPETENCY—TRIAL—FINDINGS—APPEAL—REVIEW.

1. Testimony as to the market value of poultry at a certain time and place, based on knowledge derived from quotations sent out by commission merchants at the same time and from the same place, is competent.

2. The court need not make separate findings on each item of damages, unless so requested by counsel.

3. Where there is a conflict of evidence, the finding of the lower court as to the amount of damages will not be disturbed.

Appeal from Hamilton county court; J. C. Main, Judge.

Action by Fisher & McFatter against the Texas Central Railroad Company and others. From a judgment for plaintiffs, the company appeals. Affirmed.

This suit was instituted by Fisher & McFatter, the appellees, against the Texas Central Railroad Company, the Southern Pacific Railway Company, and the Texas & Pacific Railway Company, April 25, 1895, for \$650, damages to 900 turkeys and chickens; claiming that they were delayed 5 days at Hico, Tex., waiting for a car in which to ship the poultry, and 22 hours longer than necessary between Hico, Tex., and San Francisco, Cal. The Texas Central Railroad Company alone answered. A jury being waived, the case was tried, and

judgment was rendered the 16th day of April, 1897, for plaintiffs, against the Texas Central Railroad Company, for \$521, and judgment in favor of the Texas Central Railroad Company, over against its co-defendants, for the same amount, from which the Texas Central Railroad Company has appealed.

L. W. Campbell, for appellant. Dewey Langford, for appellees.

COLLARD, J. (after stating the facts). The second, third, fourth, and fifth assignments of error are grouped together, and but two propositions are made under them: First, "hearsay evidence is inadmissible to prove market value"; second, "parol evidence is inadmissible to prove contents of a written instrument, when the instrument itself is not shown to be lost or accounted for." The first proposition has been decided by this court adversely to appellant in the case of *Railway Co. v. Cocrenam*, 30 S. W. 1118, where it was held that a witness may testify as to market value of stock upon information obtained by conversations with other persons who had sold a great many of such stock at the time and place. The second proposition does not relate to anything mentioned in the assignments under which it is made. The second assignment is that the court erred in permitting Joel Fisher to testify as to market value of poultry in the city of San Francisco on December 17, 1894. The third assignment is that the court erred in not excluding the testimony of Fisher upon the same matter upon defendant's motion. The fourth assignment is addressed to the admission of testimony of market value of poultry in Galveston and Houston in the month of December, 1894. And the fifth assignment complains of the refusal of the court to exclude the testimony after it was admitted. These assignments are in no way connected with any ruling concerning the admission of testimony to prove the contents of a written instrument. If they do relate to such ruling, the brief of appellant does not show it. We will state, however, that the assignments of error, in our opinion, taken as propositions in themselves, are not well taken.

Appellant's counsel briefs particularly his objections to the testimony of McFatter by a statement of a part of his objectionable testimony. McFatter said: "I knew the market value of poultry in Galveston and Houston on the 17th of December, 1894, from a card they [the commission merchants] sent out every day to their merchants. They sent out quotations. I saw their quotations, and the bill for the turkeys also corresponded with their quotations when it came back. The commission merchants sent this card to Mr. Hale. This card is the only means by which I knew the market price of poultry in Galveston and Houston on that day." The witness was qualified to testify to the market value of poultry as he did.

It was not necessary for the court, in his findings, to state his estimate of damages on



each of the four items of damages separately, and he did not err in merely finding the aggregate amount of damages. If defendants were dissatisfied with the form of the court's conclusions upon the facts, special findings should have been asked.

We cannot say the judgment of the court, for \$521, was not supported by legitimate testimony upon the issues in controversy; nor can we say that the amount was excessive. The testimony was conflicting, but, accepting that offered by plaintiffs as true, it cannot be said that the amount of damages awarded was without evidence to support it. It may be greater than this court would have awarded on the trial; but the conclusion of the lower court, trying the case both upon the law and the facts, should not, as to the amount of damages, be disturbed, when there was testimony authorizing it. We find no error in the judgment, and it is affirmed. Affirmed.

DAVIS, Constable, et al. v. WASHINGTON et al.

(Court of Civil Appeals of Texas. Jan. 5, 1896.)

LANDLORD AND TENANT—LIEN—FIXTURES OF THIRD PERSONS—DISTRESS—ESTOPPEL.

1. Under Rev. St. 1879, art. 8122a, providing that a landlord "shall have a preference lien upon all the property of the tenant in" the leased building for rents due, a landlord has no lien upon furniture and fixtures used by the tenant which are the property of third persons.

2. The fact that chattels used by the tenant were on the rented premises at the time of the execution of a lease to the premises, and had been there prior to that time, will not, of itself, secure to the landlord a lien upon them for rent.

3. A landlord distrained for rent on fixtures in his store building. The fixtures were used by a tenant, but belonged to third persons. Held that, where the landlord was not led into renting the premises by any representations of the owners of the fixtures, and where it was not shown that he would not have rented the property to the tenant but for some assurance that such fixtures would be bound for the rent, the owners are not estopped to deny the landlord's lien.

4. Where fixtures owned by third persons were distrained for rent in an action against the tenant, the fact that the tenant was conducting the business for the owners of the fixtures does not estop said owners from recovering their value from the landlord, since the lien, if any, exists by operation of law.

Appeal from district court, Travis county; R. E. Brooks, Judge.

Action by Stark Washington and another against J. M. Davis, constable, and others, on an official bond. From a judgment for plaintiffs, defendants appeal. Affirmed.

"This suit was instituted by Stark Washington and L. W. Costley on the 14th of May, 1896, in the district court of Travis county, to recover from appellant J. M. Davis, constable, and appellants A. S. Walker, Jr., and Joe Koen, sureties on his (Davis') official bond as constable for the sum of \$1,224.50, the alleged market value of certain bar fixtures, wares, goods, frames, partitions,

and other property seized by Constable Davis by virtue of a distress warrant in a cause in justice's court of Justice Johnson, precinct No. 3 of Travis county, entitled 'R. H. Smith v. Solon Costley,' which property was levied upon as the property of defendant Solon Costley, appellees alleging that they were the owners of the property, and that it was not subject to the distress warrant proceeding. Appellants, Davis, Walker, and Koen, answered, setting up the proceedings in the justice's court, and that the distress warrant was levied on the property at the instance of R. H. Smith, in order to satisfy his statutory landlord's lien for the rent due by Solon Costley for certain premises known as 'No. 325, East Sixth Street,' in the city of Austin, owned by Smith. Davis set up that before the levy he obtained an indemnity bond, signed by R. H. Smith, C. W. Daniel, and D. B. Gracy, and asked that they be made parties defendant. Smith, Daniel, and Gracy accepted and adopted the answer of their co-defendant Davis—First, that Smith's claim for rent was superior to any interest or right of plaintiffs, Washington and Costley, in the property levied on by the constable, Davis; and, secondly, that Washington and Costley, plaintiffs, were estopped from claiming any interest in the property. December 10, 1896, the court sustained plaintiffs' special demurrers to so much of defendants' answer setting up that Smith had a landlord's lien upon the property. The case was tried by a jury, and on the 14th day of December, 1896, a verdict was returned in favor of plaintiffs for \$528 against Davis, Walker, and Koen, and in favor of Davis and his sureties, against R. H. Smith and the sureties on the distress warrant bond, Daniel and Gracy, for a like sum, \$528, and in favor of Daniel and Gracy in a like sum against R. H. Smith, and judgment was rendered accordingly, from which all the defendants have appealed. Appellants rely upon two points for a reversal: First. Error of the court in striking out paragraph 3 of original answer as amended by trial amendment; appellants contending that under the averments of the answer as amended R. H. Smith, by virtue of his being the landlord of the premises, had a lien on the goods levied upon, to satisfy the amount due him as rent of the premises, the property being on the premises during the time, and long prior to the time when the rent became due. Second. That the trial court erred in not submitting to the jury under the evidence the issue whether or not plaintiffs were estopped by their own conduct from claiming the damages sued for."

Appellants have, in their excellent brief, relieved the court of finding the facts supporting the judgment, conceding that they are sufficient to support the judgment, except upon the issue of estoppel set up by them, which they say ought to have been submitted to the jury in the charge, and that there was error in the failure of the court to submit

that issue under the evidence. The facts proved on this issue are as follows:

John T. Rankin and Ed Hornsby purchased the chattels levied upon by the constable from the Brunswick-Balke-Collender Company about the 28th of September, 1893. They desired to go into the saloon business, and bought the property for that purpose in San Antonio, and brought it to Austin. Rankin subsequently conveyed his interest in the property and the saloon business to Joe Jones. Afterwards Rankin bought out Jones and Hornsby, becoming the sole owner. Rankin, in the original purchase from the Brunswick-Balke-Collender Company, executed to it a chattel mortgage on the property to secure \$504.08 due the company, which was filed for record in the Travis county chattel mortgage records October 23, 1893, the chattel mortgage registration statutes being in all respects complied with. There was read in evidence a bill of sale by Rankin to Washington & Costley Bros. and Berry & Moore Bros. of the property described in plaintiffs' petition and other property as being situated in the two-story rock building No. 325 East Sixth street, belonging to R. H. Smith, and occupied by Rankin as a saloon keeper, which bill of sale was duly recorded July 23, 1894, in the county records of Travis county. The firm of Washington & Costley Bros. consisted of Stark Washington, J. L. Costley, and Lee Costley. The firm of Berry & Moore Bros. consisted of George Berry, Bell Moore, and J. B. Moore. On December 19, 1895, Washington & Costley Bros. and Berry & Moore Bros., by bill of sale, conveyed to Stark Washington and L. W. Costley the property—the bar fixtures, furniture, etc.—bought by them of John T. Rankin. This instrument is not shown to have been put on record. The distress warrant was issued and levied, as alleged by plaintiffs, at the instance of Smith, for rent due on account of Solon Costley to him for the premises in which the goods in question were situated. The levy was made January 29, 1896, in suit of Smith against Solon Costley, and the goods so levied upon were sold, and the proceeds appropriated by Smith, pursuant to his judgment against Solon Costley in the suit for rent. Defendant Smith, by written lease of date October, 1893, leased to Hornsby & Rankin the first floor of the house No. 325 East Sixth street for one year from October 1, 1893, to September 30, 1894, at \$100 per month rent. On the 21st day of July, 1894, R. H. Smith leased the same property for one year commencing October 1, 1894, and ending September 30, 1895, at \$75 per month, to T. A. Moore and Albert Costley. These last-named tenants were not members of the firm of Washington & Costley Bros., nor of the firm of Berry & Moore Bros.

By the testimony of Tom Moore—the T. A. Moore named in the lease to T. A. Moore and Albert Costley—it appears that about the date of the sale from Rankin to Berry &

Moore Bros. and Washington & Costley Bros. the two firms turned over to witness T. A. Moore and Albert Costley the business for the purpose of making a living out of it on their own responsibility. The witness says: "Thereupon Albert Costley and myself rented the property from R. H. Smith on our own account. The firm of Washington & Costley Bros. consisted of Stark Washington, J. L. Costley, and Lee Costley; the firm of Berry & Moore Bros. consisted of George Berry, Bell Moore, and John B. Moore. There was no understanding between any of these parties and Albert Costley and myself that they were to be interested in any way in this business. I am a brother of Bell and John Moore, and Albert Costley is a brother of J. L. and Lee Costley. While I was connected with the business, the rent was paid. I finally quit, and Albert took charge, until some time about March, 1895, when his brother Solon came in. I never owned this property myself, nor had I any interest in it. I merely stepped out, and was not paid anything for my interest in the business." Solon Costley testified, in substance, as Tom Moore, and, in addition, said: "I never told R. H. Smith at any time that the saloon fixtures and furniture belonged to me, or that they belonged to me and my brother Albert. On the contrary, when I first went into the saloon business, and paid the rent, I told Smith that I did not own the furniture and fixtures in the saloon, but that they were the property of Washington & Costley Bros. and Berry & Moore Bros. I refer to the property that the distress warrant was run on. I told Smith this twice,—both times before July, 1895. Stark Washington and L. W. Costley both knew of my connection with the business, and both firms knew that I was running the business, and knew that the property was in Smith's store. I did not pay the amount of rental due on the property. I think that the amount due was about \$175. I did not have any interest whatever in the furniture, nor did Albert. \* \* \* The plaintiffs knew of my connection with the business." Albert Costley testified: "Tom Moore and myself were put in possession of this property by Washington & Costley Bros. and Berry & Moore Bros. for the purpose of running it for them. We worked for them, and they got the benefits of the business. I never told R. H. Smith that I owned this property. My understanding was that I was working for the parties who owned the saloon fixtures and furniture; and, while Tom Moore and myself, and afterwards I, paid the rent, that we paid it on their account. The two firms turned the business over to Tom Moore and myself, and we ran it for about nine months." Lee Costley testified, in substance, as did T. A. Moore in reference to the two firms being in no wise interested in the saloon business, and further stated that they never rented the building from Smith, nor did they tell him that they would pay any

rent; that they never employed Albert Costley to run the saloon business for them. "The boys were out of a job, and we wanted to help them along. We knew that the property was situated in Smith's building." Appellee Stark Washington testified: "In February, 1895, the firm of Washington & Costley Bros. dissolved. In the dissolution, this property fell to myself and L. W. Costley. I never had any conversation with Mr. R. H. Smith in reference to the property, nor did I know anything about the condition of the rent. Tom Moore and Albert Costley, and afterwards Albert and Solon Costley, and afterwards Solon, used the property with our consent. The understanding was that they were to pay the rent. I never had any conversation with Mr. Smith about the matter. We never received any proceeds from the business. We never employed Albert, Solon, or Tom to run the business for us." L. W. Costley testified that the two firms bought the property from Rankin, and let Albert Costley and Tom Moore have it, to help the boys along. "We were not running the business ourselves; had nothing whatever to do with it. I never had any conversation with Mr. Smith in reference to this property until two or three days before the suit in the justice's court was brought, about the middle of October, 1895. I knew, however, that the property was in Mr. Smith's house. Solon and Albert Costley are both brothers of mine, and nephews of Stark Washington. None of us ever put Albert Costley in the business to represent us the owners of it. He was put there in connection with Tom Moore, who is a brother of Bell and John Moore, to run the business on their own hook. Stark Washington and myself stood good for about \$250 worth of whisky bought from McDannell, but we never paid these boys' bills. All we did was to let them have the furniture and fixtures to run the business." Appellant R. H. Smith testified: "The business of leasing this property was in the hands of Messrs. Bergen, Daniel & Gracy, but Mr. C. W. Daniel, of that firm, had particular charge of leasing this building. About the 1st of May, 1895, Mr. Daniel being absent, I found out that the tenants were somewhat backward on the rent at that time. I went to see Albert Costley, who was in charge of the saloon, and called his attention to this fact, and inquired of him who owned the property (meaning the saloon fixtures and furniture) the value of which is sued for in this case. Albert stated that he and Tom Moore had originally bought the property, but that he and his brother Solon, who had taken Moore's place, still owed about \$150 on the same; that, outside of that, there was no other claim. I made this inquiry because my rent had not been paid regularly, and I expected to look to the property in the building for my rent. Solon was not running the saloon then. I understood that he had gone to Hot Springs. Upon his return—some time in July,

1895, I think—I made the same inquiry of him, and he told me that he owned the property, and that the only indebtedness against it was \$165 due for purchase money. I was not aware that Washington & Costley Bros. or Berry & Moore Bros. were claiming any interest in this property until after the distress warrant proceedings in the justice's court were begun. None of the members of these two firms, nor the plaintiffs in this case, ever notified me that they claimed any title to this property. Neither of these firms nor the plaintiffs ever rented the building or promised to pay any rent." Plaintiffs read in evidence occupation tax receipt of Moore & Costley, issued by the tax collector of Travis county, evidencing the right of Albert Costley and T. A. Moore to carry on a retail liquor business in Austin, Tex., which expired September 30, 1895. Plaintiffs also read in evidence the liquor dealers' bond of T. A. Moore and Albert Costley, dated October 6, 1894, in usual form.

From the foregoing testimony, we conclude that neither Stark Washington nor L. W. Costley represented to Smith, or said anything to him or his agents that would authorize him to believe, that Solon Costley was the owner of the chattels taken by his (Smith's) distress warrant; nor do we find that they said anything calculated to mislead him or his agents as to any such ownership by Solon Costley, or Albert Costley and T. A. Moore, or either of them. The evidence does not show that Smith was misled or relied upon any such ownership in Solon Costley, Albert Costley, or T. A. Moore. Neither does the evidence show that Smith acted upon the belief of such ownership, nor that he was deceived by plaintiffs in any respect as to the true ownership of the property taken by his distress warrant. It was never the property of the tenant Solon Costley, and plaintiffs did nothing to induce him to believe that it was his property, or that it would be liable for the rent under his tenancy, or under the tenancy of Albert Costley and T. A. Moore, neither of whom are shown to have any authority to bind plaintiffs as to the ownership of the property. Other facts found by this court have been stated.

West & Cochran, for appellants. John Dowell, for appellees.

COLLARD, J. (after stating the facts). There was no error in sustaining plaintiffs' exceptions to the third paragraph of the answer of defendants as amended by trial amendment. The fact that chattels are on the rented premises at the time of the lease, and that they were there long before the lease, will not, of itself, secure to the landlord a lien upon them for rent. No lien is given by the statute, except upon the property of the tenant on the rented premises. Rev. St. 1879, arts. 3107, 3122a; Rev. St. 1895, arts. 3235, 3251. The case of *Lehman v. Stone*, 4 Willson, Civ. Cas.

Ot. App. p. 182, 16 S. W. 784, cited by appellants, counsel say is the nearest in point to their contention in this case. In the case cited the tenant owned the furniture, and it was upon the rented premises, subject to the landlord's lien, when Mrs. Lehman purchased it a short time before it was distrained for rent, and it was still upon the rented premises when seized. The court held that it was subject to the landlord's lien, evidently upon the ground that the lien had attached while the property was on the premises, as the property of the tenant, and that the lien was not lost by the purchase of Mrs. Lehman, she having constructive notice, because of the fact that the property was on the rented premises at the time of her purchase. The same doctrine is applied in the cases of *Block v. Latham*, 63 Tex. 414, and *Marsalis v. Pitman*, 68 Tex. 628, 5 S. W. 404. In the case at bar, if we are correct in our views of the subject, the lien at no time attached to the property distrained. The statute gives the landlord a lien on the property of the tenant on the rented premises. The common-law rule that it attaches to the property of a stranger on the premises at the time of the levy is giving way in this country to the necessities of trade. In the case of *Machine Co. v. Sloan*, 87 Pa. St. 438, it was held that the common-law rule did not apply to goods held by the tenant for sale on commission, and the court quoted the language of Chief Justice Gibson approvingly, that "there is little reason to doubt that the exceptions will, in the end, eat out the rule." Goods on storage in a rented warehouse are exempt, and, where the goods are necessarily put in the possession of the tenant by those with whom he deals or by those who employ him, or left for the purposes and benefit of trade, are exempt from distress. In the case of *Connah v. Hale*, 23 Wend. 462, it was held that goods deposited "to await an opportunity of sale" by the owner, were privileged from distress. In the case cited many exceptions to the common-law rule are mentioned, and stress is laid upon the tendency of the courts in this country to construe liberally the principles of exception, and to abolish the rule. It seems that it would be more simple to reverse the rule, and make exceptions. Taylor, in his work on *Landlord and Tenant*, after stating the rule (section 583), says (section 584) that "the tendency of our decisions is, upon the whole, against the right to distraining goods not the property of the tenant, but it has been observed that to abrogate it altogether might lead to results not sufficiently adverted to." He refers to the fraud that might occur, and the power of a tenant to rent the premises to a subtenant (not for the whole term), who, not being liable to the landlord for rent, would be a stranger, whose goods on the premises would be protected. It seems to the writer that the difficulties in changing the rule could be easily met by exceptions, where applicable, in favor of the lien; as in Mississippi, where the common-law rule does not prevail, it is held that the goods of a third person are privileged from distress, except by contract to

pay the rent. *Patty v. Bogle*, 59 Miss. 491. The question has been practically settled in this state. It was held in the case of *Biesenbach v. Key*, 63 Tex. 81, that the separate estate of the wife on the premises at the time of the levy of a distress warrant was not liable unless the contract for rent was made for the benefit of herself, her children, or her separate estate. In the case cited, it was held that the property distrained was community property, and was, therefore, liable on the contract of the husband. The principle that he could not contract so as to bind the wife, except as stated, would place her in the same attitude as any other stranger,—certainly not in a less responsible position,—and, if her goods were not liable, being found on the rented premises, a stranger's goods would be exempt. He could not contract for either. The lien claimed arises from the fact that the property is on the rented premises. If such lien would not exist against the wife's property, it would not against another stranger's. Where the common-law rule prevails, it is held that chattels found on the premises, and belonging to the wife of a third party, would be subject to the lien, though there existed a constitutional provision exempting the wife's property from the debts of the husband. *Kennedy v. Lange*, 50 Md. 91. The goods of the tenant's wife or of a stranger's wife do not rank as an exception where the common-law rule is enforced. She is treated as any other stranger. So the rule laid down in this state, exempting the wife's separate property, must be the rule as to any other stranger, there being no exception in the statute in the wife's favor. As an original question at this time, it would be difficult to show a good reason why the landlord should have a lien on the property of a stranger on rented premises. It is probably due to this fact that the common-law rule is breaking down, and should break down. He is still allowed a preference lien on the property of his tenant on the premises, and this, it would seem, would be sufficient to satisfy all reasonable demands in his favor. If, as in the case before us, strangers, who supply the tenant with the means to occupy the rented premises, and carry on a business therein successfully and profitably, should be held to pledge the property so furnished to secure the landlord in the payment of rent, such a burden would be an impediment to the business, and discourage its successful operation. These are good reasons why the common-law rule should not be enforced at this time.

We find in the facts none of the elements of estoppel on the part of plaintiffs. The landlord is not shown to have been deceived, or led into the renting of the premises by any act or representation of the owners of the goods distrained; nor is it shown that he would not have rented to Solon Costley, but for some assurance that the property gratuitously furnished him by plaintiffs would be

bound for the rent. If the law does not give the landlord a lien, he has none by estoppel under the facts. No principle of equity can be invoked to create a lien in his favor under the facts. If Albert Costley and Tom Moore were put in possession of the premises and the property seized for the purpose of running the saloon for Washington & Costley Bros. and Berry & Moore Bros., and a part of the unexpired term of such occupancy was taken by Solon Costley, and the landlord distrained to collect the rent for such time, the lien would exist against the parties for whose benefit the business was carried on by operation of law, and not by estoppel. So we cannot see that the testimony of Albert Costley, to the effect that he and Tom Moore were running the business for the owners of the property seized, and for their benefit, would, if the jury had given it credit, have created the estoppel claimed by appellants. It might have shown an obligation to pay the rents by the owners of the business, and consequently established a lien upon their property as the real tenants, but not an obligation by estoppel. We find no error as assigned by appellants, and the judgment of the lower court is affirmed. Affirmed.

**PLANTERS' & MECHANICS' BANK et al. v. FLOECK.<sup>1</sup>**

(Court of Civil Appeals of Texas. Dec. 2, 1897.)

**GARNISHMENT—LIABILITY OF GARNISHEE—CONSTRUCTION OF STATUTES.**

1. The statute defining the liability of garnishees is to be strictly construed in their favor. 2. Rev. St. arts. 220, 221, 225-227, 239, 245, provide that, in garnishment proceedings, the garnishee shall answer and therein state what he is indebted to defendant, and was when the writ was served, and what effects of defendant he has in his possession, and had when the writ was served, and prohibit, generally, the garnishee, after service, from paying to the debtor any debt, and from delivering to him any effects, and provide that if the answer shows that, when served and when he answers, the garnishee owed and owes nothing to, and has no effects of, defendant, he shall be discharged, unless the answer is controverted by affidavit of plaintiff, and provide that if, in case such affidavit is made, it appears at the trial that the garnishee "is" indebted, or was so indebted when the writ was served, judgment shall be rendered against him. *Held*, that where the garnishees, when served and when they filed their answer, were not indebted to, and had in their hands no effects of, defendant, except two notes given to them for collection, the writ will not charge them with moneys collected on such notes after filing their answers.

Pleasants, J., dissenting.

Appeal from district court, Harris county; S. H. Brashear, Judge.

Action by Elizabeth P. Floeck against W. D. Alexander and others, defendants, and the Planters' & Mechanics' Bank and another, garnishees. From a judgment en-

tered on a verdict for plaintiff, defendants and garnishees appeal. Reversed.

Hutcheson, Campbell & Meyer, for appellants. E. P. Hamblen and J. M. Coleman, for appellee.

**WILLIAMS, J.** The reason which, in the opinion of the majority of the court, requires the reversal of the judgment of the district court and the discharge of the garnishees, is the fact, admitted in both pleadings and evidence, that, at the time of the service of the garnishment and of the filing of the answers of the garnishees, the latter had in their hands nothing belonging to the judgment debtor but a chose in action, held by them for collection, which was not subject to the operation of the writ. Money which they collected upon the note after they answered was not, in our opinion, reached by the writ previously served. Whether or not this is true depends upon the proper construction of our statute regulating the process. There is no general rule of the common law which gives to the writ of garnishment the effect of attaching debts or effects in the hands of the garnishees beyond those defined by the statute; and the law is to be strictly construed, and "the extent of the garnishees' liability is measured and limited by the express provisions of statutory law." *Gause v. Cone*, 73 Tex. 241, 11 S. W. 162. Equity will not extend the operation of the writ or aid in the enforcement of its objects. *Price v. Brady*, 21 Tex. 620; *Arthur v. Batte*, 42 Tex. 161. None of the decisions in this state have ever asserted that the garnishee can be charged beyond debts owed or effects held at the time of his answer. The furthest they have gone is to hold that he is chargeable with debts owed or effects held at any time between the service of the writ and the filing of the answer. *Gause v. Cone*, supra. *Tirrell v. Canada*, 25 Tex. 455. And it has been affirmatively held that he cannot be charged beyond that. *Blankenship & Blake Co. v. Moore*, 4 Wils. Civ. Cas. Ct. App. § 146. The statute does not affirmatively state the time or stage in the proceedings at which the liability of the garnishee is to be fixed, but we think it does so by necessary implication. By the writ, the garnishee is required to answer what he is indebted to the defendant and was when the writ was served, and what effects of defendant he has in his possession and had when the writ was served, and other things, as to third persons, which are inapplicable here. Rev. St. arts. 220, 221, 226. When he answers fully the questions so put to him, and shows that at the service he owed nothing and had no effects, and that, when he answers, he has and owes nothing, he is entitled to his discharge, under article 227, unless his answer is controverted "as hereinafter provided." Thus, in the absence of a controversy, the condition of things at the date of service and

<sup>1</sup> Writ of error denied by supreme court.

of the answer is made the basis of the judgment. How is it when the answer is controverted? This is answered by article 245, which provides that the plaintiff may controvert the answer "by an affidavit \* \* \* stating that he has good reason to believe, and does believe, that the answer of the garnishee is incorrect, stating in what particular he believes same is incorrect." This does not authorize the introduction of anything, not covered by the answer, as a basis for charging the garnishee, but again restricts the issue to the matters of fact stated in the answer, and allows the plaintiff only to prevent the judgment in favor of garnishee provided in article 227, by traversing some one or more of the facts sworn to by the garnishee. Article 251 provides that an issue shall be framed under the direction of the court, and tried as other issues; but it is evident that the further pleadings must be built upon the controversy raised by the answer and the controverting affidavit, as their foundation, since it is by the controverting affidavit alone that judgment in favor of the garnishee under article 227 is prevented. Article 225 prohibits, generally, the garnishee, after service, from paying to the debtor any debt, and from delivering to him any effects, without fixing the period of time during which the prohibition is to last. As it is not a perpetual restraint, its continuance must depend upon the scope given by the statute to the writ, and this provision does not control in the determination of that question. The duty imposed by it on the garnishee is intended to conserve the right of the creditor acquired by service of the writ, and is as comprehensive as that right, but not more so. The articles which define the circumstances under which the garnishee may be charged by the judgment contain language which, in the absence of other controlling provisions, might be held to warrant the construction that the condition of things existing when the judgment is rendered is to determine his liability. In a sense such condition must control. Article 239 provides: "Should it be made to appear from the answer of the garnishee, \* \* \* or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted, or was so indebted when the writ was served," judgment shall be rendered against him. The use of the present tense in the phrase "is so indebted" has reference to the time when judgment is to be rendered. But, when we look to other provisions, we see that at the trial it can only be made to appear by the answer, or otherwise, "as hereinafter provided," that the garnishee is indebted, by an admission in his answer that he was so indebted when he answered, or, if the answer has denied such indebtedness, by proof of the fact under the affidavit controverting the truth of such statement. If either answer or proof show the indebtedness to have existed when the answer was filed, it follows

that it must exist when judgment is rendered, because the garnishee, in the interval, cannot relieve himself of it. So, the use of the present tense in the statute is proper in either view that may be taken of the question before us; but it refers only to an indebtedness which existed at the date of the answer, and therefore still exists, and not to the one which has arisen since that date, as is made apparent by the other provisions. The same explanation may be made of article 240, prescribing the judgment where it appears that the garnishee has effects, and of article 242, applying to shares in incorporated or joint stock companies.

It may be said that as the statute does not limit the time in which the garnishee may file his answer, except that it must be filed on or before next default day, the construction given would enable him to file it at once, and thus relieve from the writ debts arising or effects coming into his hands between its filing and rendition of judgment. If this is true, it is an advantage or protection which the statute gives him. The statute, in making the writ reach credits or effects existing when the answer is filed, but not when the service was made, gives to it a scope greater than it originally had. Drake, *Attachm.* § 451a. Whether it should have been extended still further, and made to subject the garnishee to the duty and hazard of properly accounting for everything that comes into his hands after he has once answered, and before judgment, was a question for the legislature. If the legislature had intended to create such a duty, it would doubtless have provided for further answers and contests involving the matters subsequently arising. Applying the rule thus deduced, we find that, when the garnishees answered in this case, they disclosed nothing subject to the writ. Their answers were true, and never controverted. The subsequent pleadings of plaintiff seeking to charge them by showing that money had been collected on the chose in action, after the filing of the answer, presented an irrelevant fact. It stated matter which properly belonged to an affidavit for the issuance of a garnishment. Plaintiff could only make an issue upon which to charge the garnishees by showing the incorrectness of their answers; that is, by showing credits or effects in their hands when they answered. And it follows that she showed no ground in this case upon which to make them liable.

To sustain the judgment against them, the court would have to extend, by a most liberal construction of the statute, the operation of this writ, and this it cannot do. It is no vain thing to require that the statute be followed. It is by no other means that the garnishee can be adjudged to pay, or be protected in paying, what is in his hands. The suggestion that, as *Finnegan & Co.* are before the court, the rights of all parties in the money can be determined, and the garnishees

protected, begs the question. Plaintiff has no right to the money, and has only the right to subject it to her claim by following the statute. Until she has done so, she presents no case for adjudication. Nor can the presence of Finnegan & Co. affect the question which we have discussed. If the fund was reached by the garnishment, the court could so adjudge, though they were not parties; and, on the other hand, their becoming parties could not extend the operation of the process so as to make it fix upon the fund, if it had not already done so. It is unnecessary, perhaps, to say that unless the court, by the process issued, has acquired control of the fund, it has no right, by a mere judgment, to order it paid to the creditor, because it may be of the opinion that it could have been subjected by a proper proceeding.

PLEASANTS, J. (dissenting). The appellee, a judgment creditor of one W. D. Alexander, garnished the appellants the Planters' & Mechanics' Bank, and James A. Patton, the president of said bank, on December 5, 1891. The petition averred that the affiant had reason to believe that the said bank and Patton were indebted to the said Alexander, or that they had in their hands effects belonging to the defendant Alexander. On the 5th day of January, 1892, the said bank answered, denying any indebtedness from it to the said Alexander at the time of the service of the writ of garnishment, or since that time, or at the time of its answer. And it further averred that it did not have any effects belonging to Alexander at the time of the service of the said garnishment, or since then, or at the time of its answer, nor did it know of any one who was indebted to Alexander, or held effects belonging to him, save and except that it held for collection two certain promissory notes, executed by one G. A. Gibbons to said W. D. Alexander, one of which was for \$1,305, dated July 6, 1888, and payable one day after date, and bearing interest at rate of 10 per centum per annum from date, with a credit of \$50 indorsed; and the other was for \$1,890, and also due one day after date, and dated February 10, 1888, and bearing like interest as the first note, with a credit of \$62 indorsed, both credits being money paid upon the interest due upon the notes; that said notes were assigned to the bank on the 1st of September, 1891; and that about the 1st of October, 1891, long prior to service upon the bank of the plaintiff's writ of garnishment, it was notified that said notes had been assigned by the said Alexander to John Finnegan & Co., a mercantile firm of the city of Houston; and that an order was exhibited to the bank from said Alexander upon it, directing all collections made upon the said notes to be paid to the said Finnegan & Co.; and that thereupon the bank agreed to collect said notes for an account of the said Finnegan & Co.. And said bank further averred that it had reason to believe, and did believe,

that said notes were transferred in good faith, and for full value, to the said Finnegan & Co. The answer concluded with prayer that the garnishee be dismissed, with its costs, and prayer that the court would protect it, and offering to make any further answer or disclosure herein which to the court might seem best. The garnishee, the said Patton, on the said 4th of January, 1892, answered substantially as did the bank; and, in addition, he alleged that the payor of said notes executed to him, on the 8th day of September, 1891, a mortgage upon certain personal property, consisting of stocks of merchandise and tailor tools, situated in Houston and San Antonio, Tex., and also upon the outstanding book accounts and bills receivable, to secure the payment of said notes; that said chattel mortgage was duly executed by the said payor, the said G. A. Gibbons, and duly recorded as by law required; and that said garnishee took possession of said property and choses in action, and was proceeding to sell the same; but that on or about the 4th of October, 1891, by an order of the circuit court of United States for the Eastern district, he was compelled to turn over and deliver all of said property and choses in action to J. E. McComb and T. W. Ford, receivers appointed by said circuit court in the two suits of John Maguire against G. A. Gibbons et al. and Patrick J. Cunningham, then pending in said court. The answer concludes, as did the answer of the bank, with an offer to make other answers and disclosures, as may be required by the court, or by the plaintiff, at any time when called upon so to do, and with prayer that garnishee be protected, and that he be discharged with his costs, including a reasonable attorney's fee. On the 16th of December, 1892, the plaintiff (appellee here) filed a supplemental petition, in which she declares that the litigation referred to in garnishee Patton's answer has been settled, and that said Patton has received the sum of \$2,600.93, belonging to W. D. Alexander, the defendant in the original answer; that the order given by Alexander to Finnegan & Co., set out in garnishee's answer, was given without consideration, and with the intent on the part of said Alexander, and with knowledge of such intent on part of Finnegan & Co., to hinder and delay his creditors; and she prays that Finnegan & Co. be made parties defendant to the garnishment proceedings. On November 27, 1893, Finnegan & Co., composed of John Finnegan and Robert E. Paine, filed their answer, in which they deny the allegations of fraud in plaintiff's supplemental petition, and aver that the notes in question were transferred by Alexander to them in payment of a pre-existing indebtedness to them from Alexander, and for the further consideration of advances of money to be made by them to Alexander, from time to time, as he might need. And they aver that they did not know at the time of the transfer of said notes to them that he

had other creditors than themselves, and that they took the notes to secure the payment of a debt due them by Alexander, which debt, they allege, was due them on an account of losses sustained in the purchase and sale of wool in the year 1887, which wool was purchased on joint account for them and for Alexander, they advancing the money for the purchase and shipment of the wool, and Alexander doing the buying, the contract between them being that Alexander should share equally with them in the profits and losses of the venture; that the wool was finally sold, after having been kept on hand many months, at a large loss; that the sales of the wool were reported to and exhibited to Alexander at the time, but that he was then, as he averred, unable to pay his part of the loss, but promised to do so as soon as able; that the last of the sales was made in 1888, and that in September, 1891, Alexander reported to them that he was now able to settle for his part of the loss; and that defendants Paine and Alexander, from the books of the firm of Finnegan & Co., ascertained his share of the loss, and for which sum, with interest thereon, Alexander executed his two promissory notes in September, 1891,—one dated September 1st, for \$895.75, payable to order of Finnegan & Co., with interest at 10 per centum per annum from date, and due 30 days after date; and the second dated September 28, 1891, for \$850, payable to order of Robert E. Paine, with interest at 10 per centum per annum, and due one day after date; and that to secure the payment of these notes, and also to secure Finnegan & Co. for any advances they might thereafter make him, the said Alexander gave to them an order about the 1st of October, 1891, upon the Planters' & Mechanics' Bank, for all moneys collected by them on the notes described in said garnishee's answer. And they aver that said notes in said garnishee's answer described, and the moneys collected thereon, were absolutely assigned to said defendants. And the said defendants further aver that they did make advances to said Alexander long before the service of the writ of garnishment in this case, and which advancements and the said two notes due them from Alexander exceeded in amount the money that can be realized upon the notes in the hands of the said garnishee. On the 13th of December, 1895, the plaintiff filed her second supplemental petition, in which she denies the allegations of the defendants Finnegan & Co. that Alexander transferred to them the notes in the hands of the garnishee in consideration of an indebtedness from Alexander to them, and again charges that the assignment was made in fraud of the creditors of said Alexander, and that the said defendant Paine, of the firm of Finnegan & Co., had conspired with the said Alexander to defeat his creditors in the collection of their debts. She further avers that the suits referred to in garnishee Patton's answer, as then pending in the cir-

cuit court of the United States, have been settled, and all of the property covered by the mortgage given to secure the notes of Gibbons to Alexander has been returned to the said Patton; and that he has collected on said notes some \$2,000, and which sum is now in the Planters' & Mechanics' Bank; and that it is conceded that said money has been collected, and is now in the garnishee's possession. And plaintiff further avers that as said garnishee, the said Planters' & Mechanics' Bank, has submitted itself to the jurisdiction of the court, and has offered to make any further answer or disclosure which the court may require, the said money is subject to the order of the court, and she therefore prays for judgment for said moneys. This petition was duly sworn to by plaintiff on November 9, 1896. Garnishees moved to strike out plaintiff's second supplemental petition, assigning, among other reasons for said motion, that said supplemental petition is not a contest or traverse of garnishee's answer, and presents no legal ground why garnishee's application for disclosure should not be granted. In this motion the defendants Finnegan & Co. joined. The motion was overruled, and both garnishees and defendants excepted; and, upon trial of the cause, verdict and judgment were rendered for plaintiff, and garnishees and defendants appealed.

Upon the facts of the case as disclosed by the record, this court concludes that there is ample evidence to sustain the verdict of the jury, either upon the theory that there was no indebtedness from Alexander to Finnegan & Co. at the time of the transfer of the notes due from Gibbons to Alexander, by the latter to Finnegan & Co., or, if there was an indebtedness, the transfer was made with the fraudulent intent on the part of Alexander to defraud the plaintiff, and that this intent was known to, and participated in, by defendant Paine; that the money charged by plaintiff to have been collected by Patton upon the Gibbons notes was collected by Patton after he and his co-garnishee, the Planters' & Mechanics' Bank, had answered plaintiff's garnishment; and that the collection of such money, and the possession of the same by the bank at the time of the trial, were admitted facts; and that appellee was, as averred by her, a judgment creditor of the said W. D. Alexander.

The conclusions of this court upon the law are that there is no reversible error in the proceedings of the lower court prior to the refusal of that court to discharge the garnishees upon their answers, and that there was error in refusing to sustain the motions of the garnishees praying for their discharge, and for such error the judgment must be reversed; and this court, proceeding to render the judgment which should have been rendered by the trial court, doth adjudge and order that the garnishees, the Planters' & Mechanics' Bank and James A. Patton, be discharged upon their respective answers, and that the plaintiff, Elizabeth P. Floeck, take nothing by her garnishment, and that both the



garnishees and the defendants John Finnegan and Robert E. Paine recover their costs against plaintiff.

In the conclusion of the court upon the facts I fully concur; but I respectfully dissent from the judgment dismissing the garnishees, and denying the plaintiff the recovery of the moneys in their hands, collected on the debt due from Gibbons to Alexander, the judgment debtor of the plaintiff. It will not be denied but that the money in the hands of the bank might have been reached by another garnishment, sued out by the plaintiff. It is conceded by the findings of this court that the money was Alexander's, the defendant in the original judgment, and was not Finnegan & Co.'s. All parties were before the court, and why require another writ of garnishment? The law does not require a vain thing. As I construe the statute under which the garnishment proceedings in this case were had, I think the plaintiff was, by both the letter and the spirit of the statute, entitled to a judgment requiring the garnishee the Planters' & Mechanics' Bank to pay over the moneys collected upon the Gibbons notes to her. Article 245, Rev. St. 1895, provides that, if the plaintiff be not satisfied with the answer of the garnishee, he may controvert the same, by an affidavit in writing, signed by him, that he has good reason to believe, and does believe, that the answer is incorrect; stating in what particular he believes the answer incorrect. I submit that the sworn supplemental petition was a substantial compliance with this provision of the statute.

The garnishees had answered that they had no effects in their possession belonging to the defendant Alexander. They admitted that he had placed with them, for collection, certain promissory notes, but that afterwards he transferred said notes to Finnegan & Co., for a valuable consideration, as they were informed and believed; and that upon notice of said assignment, and the presentation to them, by Finnegan & Co., of an order from Alexander to them to pay all moneys collected upon the notes placed with them for collection to Finnegan & Co., they (the garnishees) had agreed and contracted with Finnegan & Co. to collect and pay over the moneys so collected to them, the said Finnegan & Co. The supplemental petition avers and charges that the assignment of said notes, and the order from Alexander to garnishees to pay the moneys collected on them to Finnegan & Co., were both fraudulent, and made with the intent to defraud plaintiff and other creditors of said Alexander, and that said Finnegan & Co. were parties to said fraud; and, in addition, plaintiff averred that, since the filing of the said garnishees' answers, the garnishee Patton had collected a large sum of money upon said notes, and that the same was still in the possession of the garnishees. Article 239, Rev. St., provides that "if it appear from the answer of the garnishee, \* \* \* or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted," or was so indebted at the time of

service of the garnishment, the court shall render judgment for the plaintiff against the garnishee, for the sum admitted or proved to be due from him to the defendant in the original judgment, or for so much thereof as shall be sufficient to satisfy the plaintiff's claim. The facts that the money, as charged in the supplemental petition, was collected by the garnishee Patton in October, 1892, and by him paid to the bank, the other garnishee, and that it was kept in the bank, and was never paid out to Finnegan & Co. or to any one else, and that it was in the possession of the bank at the time of the trial and judgment, are all facts established by the evidence beyond controversy, and are not denied or questioned by this court; and that the transfer to Finnegan & Co. by Alexander was fraudulent is a conclusion which this court, by its finding of facts, says is warranted by the evidence. We think there was a substantial compliance with the statute in the garnishment proceedings, and that the judgment of the lower court should be affirmed in so far as it gave judgment against the plaintiff for the money in the hands of the garnishee, and for costs against both the garnishee, the Planters & Mechanics' Bank, and the defendants Finnegan & Co. It is true that the notes in the hands of the garnishees, when the writ was served upon them were not subject to garnishment, choses in action, under a long line of decisions, not being "assets," as that term is used in statutes regulating garnishments; and it is for this reason, as I understand them, that my associates hold that the plaintiff should not recover. Proceedings in garnishment by a judgment debtor, I submit, should not be controlled by the same statutes as are proceedings in attachment or garnishment before the plaintiff has obtained judgment for his debt. In the latter case, the court, upon the affidavit of plaintiff that the statutory grounds for the writ exist, and when the allegation that the defendant is indebted to plaintiff has not yet been judicially determined, takes from the possession of the defendant his property. But, in garnishment after judgment, the writ issues to aid the plaintiff in the collection of his judgment, only after the common-law writs of execution have failed to accomplish their purpose against an insolvent, and perhaps fraudulent, debtor. Such proceedings are remedial, and should be liberally, and not strictly, construed. I confess my inability to distinguish between the principle upon which judgment was rendered for the plaintiff in the case of *Thompson v. Bank*, 66 Tex. 156, 18 S. W. 350, and that involved in this case. If, where one who is indebted, upon a negotiable note, to the plaintiff's judgment debtor at the time he is served with garnishment, answers that he is not indebted (the note not being then due), but, after the note matures, and before judgment is rendered in the garnishment, pays it to the payee, the judgment debtor is held liable for the amount so paid to the plaintiff, why may

not a trustee of the judgment debtor, who, when garnished, has in his hands for collection, notes belonging to the debtor, and who so answers, and afterwards collects the money due upon the notes, and has it in his hands when judgment is rendered in the garnishment, be required to pay the same to the plaintiff?

**BOONE et al. v. FIRST NAT. BANK OF WAXAHACHIE et al.**

(Court of Civil Appeals of Texas. Nov. 18, 1897.)

**LEASE—CONSTRUCTION — POWER TO SUBLET—EXECUTION—PROPERTY SUBJECT.**

1. The privilege given to a lessee "of subletting the premises to any responsible party in the same line of business, or in any line of business agreeable to the lessor," is a personal trust given to the lessee, and does not confer a general power to sublet.

2. A leasehold estate created by a lease which does not give the tenant general power to sublet is not subject to levy and sale under an attachment.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by First National Bank of Waxahachie and another against J. B. Boone and others. Judgment was rendered for plaintiffs, and defendants appeal. Reversed.

Templeton & Harding, for appellants. Sherrod & Singleton and Groce & Skinner, for appellees.

**BOOKHOUT, J.** This is a suit instituted by the First National Bank of Waxahachie and the Masonic Temple Association against J. B. Boone, Sarah J. Boone, M. B. Templeton, and I. H. Evans for an injunction and the appointment of a receiver. The defendants appeared, and answered, and upon the preliminary hearing the court, in chambers, granted the writ of injunction prayed for, and appointed a receiver, from which interlocutory order appointing a receiver the defendants have appealed to this court. The material facts are set out in the opinion, and it is not deemed necessary to state them more fully here.

Appellants' first assignment of error reads as follows: "The receiver in this case was appointed, as shown by the record and the petition and affidavit annexed of plaintiffs below, over the answer made by defendants below. The court erred in making the appointment of a receiver, and directing him to take charge of the leaseholds, because it is shown by the allegations of plaintiffs' petition that the leaseholds of J. B. Boone are not properly subject to execution, nor subject to sale for the payment of plaintiffs' debts, it being shown by the allegations of plaintiffs' petition that J. B. Boone was and is the lessee of the store building from the Masonic Temple Association for a term of five years, expiring December 31, 1898, and that said store building cannot be sublet

without the consent of said Masonic Temple Association, and that the Masonic Temple Association has already refused to allow said Boone to sublet it; and it being shown that J. B. Boone is a lessee from M. B. Templeton of an adjoining store building under a similar lease, and that both of said leaseholds are subject to the statutory provision as to subletting, and that said leaseholds are not subject to the processes of the court, and no valid lien thereon can be acquired by levy of attachment and execution, and no valid sale thereof can be made by any order of the court." Under this assignment appellants submit the following proposition: "Under the laws of this state a leasehold in real estate, where the owner of the property has not, by contract, waived his right of subletting, is not subject to levy of attachment or execution, and hence cannot be reached by any process of the court." In 1893, J. B. Boone entered into a written contract with the Masonic Temple Association, in which said association leased to J. B. Boone a store building in the town of Waxahachie for the term of five years, ending December 31, 1898, for the consideration of \$7,500, to be paid in monthly installments of \$125 each. By the terms of the lease Boone was given the privilege of subletting said premises to any responsible party in the same line of business, provided the same was agreeable to the Masonic Temple Association. In the year 1893 Boone entered into a similar lease with M. B. Templeton for a storeroom adjoining the one rented by him from the Masonic Temple Association for the consideration of \$6,000, payable in monthly installments of \$100 each. By the terms of this lease Boone was given the privilege of subletting the premises to any responsible party in the same line of business, or in any line of business agreeable to the lessor. Boone entered into possession of said premises by virtue of said leases as a tenant of the respective parties, conducting and carrying on a mercantile business therein until July 28, 1897, at which time, having become insolvent, he executed a chattel mortgage conveying his entire stock of goods to T. M. Holland, as trustee, for the payment of certain preferred debts. By the terms of said chattel mortgage the trustee was instructed to pay the balance due the Masonic Temple Association and M. B. Templeton on their respective lease contracts for the whole of the unexpired term of said leases, ending December 31, 1898. In August, 1897, the trustee sold the stock of goods, and, in accordance with the terms of the chattel mortgage, paid the Masonic Temple Association and M. B. Templeton the entire rent stipulated in their leases for the entire term ending December 31, 1898. The chattel mortgage executed by Boone did not purport to convey the leasehold estates. On August 16, 1897, J. B. Boone being indebted to the First National Bank of Waxahachie in the sum of \$3,000, evidenced by his promissory

note dated July 1, 1897, and maturing November 1, 1897, said bank instituted suit thereon in the district court of Ellis county, and in said suit caused a writ of attachment to issue, and had the same levied upon the leasehold estates of said J. B. Boone in said buildings. Said First National Bank and the Masonic Temple Association brought this suit against J. B. Boone, Sarah J. Boone, I. H. Evans, and M. B. Templeton, in which the bank set up Boone's indebtedness, the leases made to Boone by Templeton and the Masonic Temple Association, the making of the chattel mortgage by Boone to Holland, trustee, the sale of the property by the trustee, payment to the landlords by the trustee of the rent for the unexpired term of the leases, the insolvency of Boone, and that the only property he had was the leasehold estates in the property set up in the leases. The bank also set up its suit against Boone, and the suing out of the writ of attachment, and its levy upon the leasehold estates, and that it had acquired a lien thereon. It was further alleged that Boone had abandoned his business, and assumed to sublet the premises described in the leases to his mother, Sarah J. Boone, who is not engaged in any business, and that the premises were being advertised for rent. The Masonic Temple Association alleged that it did not consent that Boone could sublet the premises to his mother, and further alleged it feared the premises would be let to some party who would injure the same.

It is contended by appellants that J. B. Boone has no such estate in the rented premises by virtue of said leases as could be sold under execution, and therefore no lien could be created thereon by levy of a writ of attachment. It is contended by appellees that the Masonic Temple Association and M. B. Templeton, having received their rents for the entire term of their leases, are, and ought to be, estopped preventing the interest of J. B. Boone in said leasehold estates from being subjected to the payment of Boone's debts. Appellees further contend that by the terms of the lease from Templeton Boone has the unqualified right to sublet the premises embraced in that lease to any responsible party in the same line of business, or in any line of business agreeable to the lessor. It is admitted both by appellants and appellees that the paramount issue in the case is whether the levy of the writ of attachment upon the leasehold estates of J. B. Boone created a lien thereon. If the levy did not create a lien, then the court was without authority to appoint a receiver. *Carter v. Hightower*, 79 Tex. 135, 15 S. W. 223. The lease from the Masonic Temple Association gave permission to the tenant, Boone, "to sublet to any responsible party in the same line of business, provided the same is agreeable to the association." The lease may as well have said that the tenant should not sublet the premises without the permission of the landlord.

By the terms of this lease the tenant could not sublet, even in the same line of business, without the consent of the landlord. The Templeton lease stipulated that J. B. Boone should have the privilege "of subletting the premises to any responsible party in the same line of business, or in any line of business agreeable to the lessor." The appellees contend that this lease gives unqualified permission to sublet the premises to any responsible party in the same line of business, and to that extent confers an unqualified estate upon the tenant, which is subject to levy and execution.

It is insisted by the appellants that the permission given in the lease from Templeton to J. B. Boone to sublet to any responsible party in the same line of business was a limitation and personal trust reposed in Boone, and would not authorize any other person to perform such trust. That, while the landlord might be willing to extend this privilege, and trust to Boone, yet he would not be willing to extend it to a court, or any officer appointed by the court. In the case of *Boone v. Miller*, 86 Tex. 80, 23 S. W. 574, the court held a sale under a trust deed void because the deed of trust authorized the trustee to advertise and sell the property at the request of J. N. Upton, to whom the note which the deed of trust was executed to secure was payable. Upton had transferred the note, and it finally became the property of Miller. The note not being paid at maturity, Miller requested the trustee to foreclose, which he did, and Miller became the purchaser of the property. In a suit between Miller and the purchasers of the property under execution against the maker of the trust deed, the deed to Miller was held to convey no title. In that case Associate Justice Brown, speaking for the court, says: "There is no provision for the sale to be made at the request of the holder of the note, which is common in such instruments; and the fact that such provision is omitted goes far to strengthen the conclusion that the purpose was to confide the authority to put the power of sale in actual operation to Upton alone. It may be that Reiger was willing to trust to Upton, believing that he would not direct the sale under improper circumstances; but, no matter what the reason may have been, Reiger had the right to impose the limitation, and the court has no power to disregard it." So, in the case at bar, Templeton may have been willing to trust Boone to select a subtenant for him, and trust to Boone's judgment in so selecting and saying who was responsible, and yet not be willing to trust another to perform these duties. We think that permission to Boone "to sublet to any responsible party in the same line of business" was a personal trust reposed by Templeton in Boone, and neither Boone nor the court could confer this power on any other person, nor could the same be performed by any other person, without the consent of Templeton. We construe the

leases as not granting to the tenant a general power of subletting to other parties. Did Boone have such property in these leaseholds as could be seized upon by the levy of a writ of attachment? The statute referring to the character of property upon which a writ of attachment may be levied reads: "The writ of attachment may be levied on such property, and none other, as is or may be by law subject to levy under the writ of execution." Rev. St. 1895, art. 200. As to what property may be levied upon by execution is often a difficult matter to determine. In the case of Moser v. Tucker, 87 Tex. 94, 26 S. W. 1044, an insolvent tenant had conveyed his leasehold estate in certain real estate to third parties with intent to hinder, delay, and defraud his creditors. In a suit brought by a judgment creditor to set aside the transfer, and have the rents collected paid into court, the supreme court held that: "Ordinarily a person who has leased real estate for a fixed term has an estate subject to execution, but under the statutes of Texas, in the absence of a contract permitting the assignment or subletting of the leased premises, a lessee cannot pass to another the premises for the whole or a part of a term." Again, it is said: "No property or interest in property is subject to sale under execution or like process unless the debtor, if sui juris, has power to pass title to such property or interest in property by his own act." But it is contended by appellees that, although the property may not be subject to sale under execution, yet, the property not being exempt by statute, the levy created a lien thereon, and equity will interfere in behalf of the creditor, and aid in the enforcement of the lien. The lien created by the levy of a writ of attachment is purely statutory. The statute provides that the lien shall be foreclosed as in case of other liens. Rev. St. 1895, art. 214. The statutes of this state provide that "judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution." Id. art. 1340. It will be seen that the object of the levy of a writ of attachment is to create a lien in contemplation of having the same foreclosed, and the property sold as under execution. If the property be perishable, and has not been claimed or replevied, the judge or justice out of whose court the writ issued may, either in term time or in vacation, order the same to be sold (Rev. St. 1895, art. 205); but then it is sold as under execution (Id. art. 207). From the foregoing we conclude that the property upon which the writ of attachment was levied was not subject to sale as under execution, and that the levy of the writ thereon did not create a lien.

Again, it is contended by appellees that the

Masonic Temple Association has expressed a willingness to have any interest of J. B. Boone in the property leased from it subjected to the payment of his debts. The right of plaintiff in the court below to have this leasehold subjected to its debt must depend upon the capacity of Boone to assign the term, and not on the right conferred on the court or the receiver by the consent of the landlord. Such consent would create a new contract between them. The judgment of the court below in granting an injunction and appointing a receiver was error, for which the judgment is hereby reversed, and the cause remanded, and the district court instructed to enter an order dissolving the writ of injunction and discharging the receiver, and that he restore possession of the property to the party from whom he received it.

RAINEY, J., did not sit in this case.

On Motion to Reform Judgment.

(Dec. 4, 1897.)

PER CURIAM. The appellants having filed a motion to reform the judgment entered in this cause on November 13, 1897, said motion is hereby sustained. It is now ordered that the order of the district court appointing a receiver be, and is hereby, revoked and annulled, and the receiver discharged, and he is hereby directed to restore the property to the appellant J. B. Boone, together with such rents as the receiver has collected. And, our attention having been called to the fact that the injunction dissolved by our said judgment was granted at a different time from the order appointing a receiver, and is an independent proceeding not properly involved in this appeal, that part of said judgment dissolving said injunction is hereby set aside, and said judgment in all other respects will stand.

MARX et al. v. LULING CO-OP. ASS'N  
et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 2, 1897.)

AGENCY — PAROL EVIDENCE — GUARANTY — CONSTRUCTION — NOTICE OF ACCEPTANCE.

1. The manager of a corporation who, at the request of a creditor, obtained the signatures of the directors to a written guaranty of its debts, is not thereby the agent of the creditor, so as to charge it with notice of the fact that the directors affixed "As Board of Directors" to the list of their names with the intention of making only the corporation liable.

2. The manager and directors of a corporation signed a guaranty to a creditor, which in clear language created a personal liability for the payment of present and future debts. The directors placed after their names "As Board of Directors," thereby intending to create only a corporate liability. The guaranty was accepted by the creditor without notice of such intent, and with the belief that the signers were indi-

<sup>1</sup> Writ of error denied by supreme court.

vidually liable. *Held*, that the words "As Board of Directors" were descriptive, and that parol evidence was not admissible, in an action to enforce personal liability, to show the directors signed with the intent of creating only a corporate liability.

3. A guaranty for a debt was in the following language: "We hereby agree as guarantors to be responsible and liable to pay you, \* \* \* for any and all indebtedness now or hereafter owing to you by L. Co-op. Ass'n. \* \* \* We further agree that, without notice to us, said indebtedness \* \* \* may be changed in form and terms of payment, \* \* \* and the same shall still be covered by this guaranty, and that no change of partners (of the creditors or change in the debtor) shall effect this guaranty, \* \* \* until we notify you of our purpose to be no longer held as guarantors,"—and was signed by the members of the board of directors of the debtor, who affixed their names "As Board of Directors," and by the manager, who affixed "Mgr." *Held*, that the instrument was the personal obligation of the guarantors.

4. A contract of guaranty signed by several persons expressed a personal undertaking of its signers. One of the signers, who affixed "Mgr." to his signature, erased the affix after the others had signed, without their knowledge or consent. *Held*, that the erasure did not change the legal effect of the guaranty, and therefore was not a material alteration.

5. Where a contract of guaranty is given to obtain an extension of time on a debt due and further credit, and the creditor grants the extension and the credit as provided for, no further notice of the acceptance of the guaranty by the creditor is necessary.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by Marx & Blum against the Luling Co-operative Association, Ed. Dickenson, H. L. Rodenberg, J. L. Dickenson, Jr., W. P. Bell, E. P. Hill, A. Beversdorf, T. W. Pierce, and Wilson Bell. From a judgment in favor of defendants Ed. Dickenson, H. L. Rodenberg, J. L. Dickenson, Jr., W. P. Bell, E. P. Hill, A. Beversdorf, and Wilson Bell, plaintiffs appeal. Reversed.

Spencer & Kincaid, for appellants. Burgess & Hopkins and Hume & Kleberg, for appellees.

WILLIAMS, J. This action was begun on the 16th day of November, 1895, by appellants against the association, a private corporation, upon two promissory notes, of date March 29, 1895,—one for \$538.67, due October 15, 1896, and one for \$538.88, due November 10, 1895,—both bearing 8 per cent. interest from maturity, and stipulating for the payment of 10 per cent. additional, as attorneys' fees in case they were placed in the hands of attorneys for collection, and against the other appellees individually, as guarantors upon the following instrument:

"Luling, March 30th, 1895.

"Messrs. Marx & Blum, Galveston, Texas—Gents: We hereby agree, as guarantors, to be responsible and liable to pay you, at your office in Galveston, Texas, any and all indebtedness now or hereafter owing to you by the Luling Co-operative Association of Luling, Texas, whether upon open account or otherwise, secured or unsecured, principal and in-

terest, with the interest thereon at the rate of 8 per cent. per annum from this date. We further agree that, without notice to us, said indebtedness, or any part thereof, may be changed in form and terms of payment as often as may be agreed on by you with the said Luling Co-operative Association, and the same shall still be covered by this guaranty, and that no change of partners, whether by retirement or coming into your firm or in that of the said Luling Co-operative Association, shall effect this guaranty, but the same shall hold good, and be for the benefit of your firm, notwithstanding such changes, and until we notify you of our purpose to be no longer held as guarantors.

"Value received.

Yours, truly,

"Ed. Dickenson,

T. W. Pierce, Mgr.

"H. L. Rodenberg,

Wilson Bell,

"J. L. Dickenson, Jr.,

As Board of Directors.

"W. P. Bell,

"E. P. Hill,

"A. Beversdorf,"

The association and Pierce defaulted, and judgment was rendered against them. The other defendants, by their answer, set up as defenses: (1) That, with plaintiffs' knowledge and at their instance, they executed the guaranty in their collective capacity, as board of directors of the association, and not as individuals, and that their intention and purpose was not to bind themselves individually, but to more securely bind the association and its property, and that the instrument was that of the association, and not of themselves. This plea was made under oath. (2) That they were induced to sign the instrument, in the manner shown, by the representation of T. W. Pierce, the agent of plaintiffs, that plaintiffs desired them to do so only to more securely bind the association, and not to make them personally liable. (3) That they so signed, upon this express stipulation, and on condition that Pierce sign as manager of the corporation, which he did, they signing thereafter as board of directors; and that, at the instance and contrivance of plaintiffs, the instrument had been altered by the erasure of the word "Manager," affixed to Pierce's name. (4) That plaintiffs had refused to accept the guaranty so signed, and demanded that defendants sign it in their individual capacity, so as to make them personally liable, which they refused to do. (5) That the instrument was void and without consideration, for that it was made upon condition that plaintiffs would extend further credit, and grant indulgence to the association on a debt which it owed them, and that plaintiffs had never accepted the guaranty upon such condition, and had not notified them of its acceptance. (6) That the association on the 12th day of October, 1895, had made a conveyance to a trustee of all its property, to secure its creditors, and that, upon a suit brought by plaintiffs, such conveyance had been adjudged to be a deed of assignment for the benefit of all creditors, and that the estate

was being administered for their benefit; that, by such action, plaintiffs became accepting creditors, and are thereby debarred from prosecuting the suit, until such estate shall have been fully administered. The case was tried before the court, without a jury, and judgment was rendered in favor of the defendants, except Pierce and the association. Several of the assignments of error are based upon the overruling of exceptions taken by plaintiffs to the answer, but it will be more convenient to examine the merits of the defense presented under the exact facts developed by the evidence, since it is obvious that, if those facts establish a defense, the pleading is sufficient to admit proof of it.

The evidence, in which there is very little conflict, shows that the Luling Co-operative Association was engaged in the mercantile business, and that Pierce was its general manager, and the other defendants were stockholders, and composed its board of directors. Previous to the execution of the notes and guaranty, it had traded with the plaintiffs and the firm of L. & H. Blum, and was indebted to both firms in considerable sums, most of which were past due. The association applying to both firms for an extension of time, and desiring further credit from L. & H. Blum, Charles Frenkel, an agent representing the two firms, investigated its financial condition, and went to Luling, and had an interview with Pierce, and informed him that the indulgence and credit could not be granted unless the association would give a guaranty, signed by responsible parties. Frenkel states, in substance, that Pierce thereupon offered to get the members of the board of directors to sign a guaranty, to which he agreed. Pierce states that Frenkel suggested to him that the signatures of these persons be obtained, and requested and authorized him to do so. The court below seems to have accepted Pierce's version of this, and we accordingly adopt it. It was agreed between the two that, if the guaranty should be signed by the members of the board of directors, the credit and extension of time asked for should be allowed. Frenkel prepared and left with Pierce, for signature by the members of the board, the paper sued on, and, for signature by the corporation, the notes sued on, which allowed the time for payment as agreed upon; also like papers for L. & H. Blum. It was agreed between them that, as the directors lived in different parts of the county, Pierce should attend to the matter at their meeting, which was to take place on the 29th day of March. On that day Pierce presented the matter to five of the directors present at the meeting, who discussed it, and declined to become individually responsible for the debts, and at first refused to sign the instrument; but, after persuasion by Pierce and further discussion among them all, it was agreed that the instrument should be signed by Pierce as manager, and by the others as board of directors, and this was done, as ap-

pears on the guaranty. By doing this, it was understood among them all that no individual liability was assumed, and that their object was only to make the corporation responsible. All of the parties knew of the indebtedness of the corporation to plaintiffs and L. & H. Blum, and of the presence of the notes to be executed by the corporation, and that the purpose of the transaction was to secure the debts. There is no evidence that there was any misrepresentation of any fact by Pierce, or by any one else, at the meeting. Frenkel went to Luling on the same day, and Pierce showed him the guaranty signed as stated, and, upon Frenkel's inquiring as to the purpose of the affixes to the names, stated that, whenever they signed papers, he and the directors signed that way. He also stated that both he and the directors understood that they were individually liable. Two of the directors, Bell and Beversdorf, had not been present at the meeting, and had not yet signed the guaranty, and Frenkel gave it back to Pierce, with instructions to get their signatures. They signed their names along with the others above the affix. When Pierce returned with it, signed, Frenkel again asked him about the word "Manager," and he replied that it did not amount to anything, and offered to scratch it out, and did so. Thereupon Frenkel expressed himself as satisfied, and told Pierce that the time would be extended, and the goods ordered from L. & H. Blum would be forwarded, all of which was done. Frenkel and the directors did not meet. Frenkel returned to Galveston with the notes and guaranties, and delivered them to the respective firms. They were taken and kept by the firms, and the credit and extension of time were granted. The manager of L. & H. Blum raised a question as to the affixes to the signatures; and on April 20, 1895, the two firms wrote the following letter: "Galveston, Texas, April 2nd, 1895. T. W. Pierce, Mgr., Luling, Texas—Dear Sir: Our agent, Mr. Frenkel, has returned and handed us the notes you gave him for our respective amounts, payable next fall, and also a guaranty for each of us, duly signed by yourself and the several directors of your association, which is all satisfactory, and we much appreciate your kindness in the matter. We notice the word 'Manager' is written after your name, and erased, and the words 'as Board of Directors' is added to some of the other signatures, which rather complicates the meaning of it. Mr. Frenkel has explained that you and the other parties who have signed the guaranties each understand that they are personally liable for the indebtedness of the association to each of us, and, upon the good faith of this, we have granted the extension desired; but you will, of course, understand it should be entirely clear, and we kindly ask that you send us a letter signed by yourself and all the other parties who have signed the guaranties to that effect, explaining the matter fully, or it would likely be much better

and simpler to have new guaranties signed by yourself and all the parties, from which these objections are omitted, and which we would prefer. We therefore beg to inclose you new guaranties for each of us, and kindly ask that you sign them yourself, and have them signed by the several parties on the other guaranties, namely. Ed. Dickenson, H. L. Rodenberg, J. L. Dickenson, Jr., W. P. Bell, E. P. Hill, A. Beversdorf, and Wilson Bell. Mr. Frenkel stated that you also expected to have guaranties signed by Mr. Al Taylor, and left blanks with you for that purpose; but, if you can get him to join with the others in signing these, we would be glad to have you do so. We regret to put you to this trouble, but know that you will agree with our views that the matter should be in proper shape, and will very much appreciate your kind attention. Please return the guaranties to us early as possible, and with kind regard, we remain, very truly, yours, [Signed] Leon & H. Blum, Marx & Blum." A correspondence ensued, lasting until September, 1895, which is too lengthy to be inserted. It is enough to say that we do not construe it as a repudiation by plaintiffs and the Blums of the notes and guaranty, but simply as an effort on the part of the two firms to get them put into a less questionable form, to which Pierce, from time to time, responded with promises to try to have it done, without giving any intimation that the signers of the guaranty did not consider themselves personally bound. The blank guaranties were presented by Pierce to some of the directors for signature in June, and they declined to sign them, but the creditors were never notified of such refusal by Pierce. The court below held that, in the obtaining of the signatures of appellees to the guaranty sued on, Pierce acted as the agent of plaintiffs.

Besides the facts already stated, the following appears relative to the point: The evidence of Pierce was given by deposition, and the following cross-interrogatory was propounded by plaintiffs: "Is it not a fact that you did not in any of the matters referred to in either the direct or cross-interrogatories act in any manner whatsoever as the agent or representative of Marx & Blum or Leon & H. Blum? If you claim that you did act as such representative, then state fully the authority by which you so acted, and who conferred it upon you. Detail the conversation or conversations by which the authority was conferred, and with whom it was had. Do not give your conclusions about it, but state the language of the conversations by which the authority was conferred." Which the witness answered as follows: "I acted for Marx & Blum and Leon & H. Blum in getting the guaranties signed. I was authorized by Mr. Frenkel to get them signed." The directors who testified did not regard Pierce as representing the creditors, but as the representative of the corporation. Unless plaintiffs are chargeable, through Pierce, with

notice of what transpired when the guaranty was signed, they had none except such as the paper itself gave. No notice of the acceptance of the guaranty further than such as is involved in the transaction itself was given by plaintiffs to the guarantors.

We think it clear that Pierce, in the transaction in question, was not the agent of the creditors who were seeking to obtain security for their claims. He was the manager of the debtor corporation, negotiating for time in which to pay its debts, and for credit to enable it to continue its business; and, in soliciting the signatures of the guarantors, he was simply complying, in the interest of the corporation in whose success he and they were alike concerned, with the condition upon which the desired accommodation would be furnished by the creditors. We see nothing in the facts of the case to distinguish it, in this respect, from other very common transactions, in which a creditor demands that his claim be secured, and agrees beforehand with his debtor upon the security that shall be accepted. To say that by doing so he makes the debtor his agent, with power to render nugatory, by his agreements, the very security demanded, would be to distort the transaction from its real and simple character. The debtor acts for himself, or if, as is the case here, the debtor is a corporation, its agent acts for it, and not for the creditor. The statement of Pierce that Frenkel requested him, and authorized him, and that he acted for the creditors, cannot add anything to the facts which actually transpired between them. There is nothing to show that Frenkel requested or authorized him to exercise any agency for plaintiffs. At most, there was only a request to furnish a specified security, and it is wholly immaterial who first suggested it. The creditors exacted it, and the representative of the debtor undertook to procure it. Nothing whatever transpired to alter their relations towards each other; and Pierce's statement as to the capacity in which he acted is only his opinion or construction of the transaction, about the facts of which there is no material conflict in the evidence.

The court below also found that, except upon the hypothesis that Pierce represented plaintiffs, the minds of the parties never met upon the contract. As to the character of the obligation assumed by the signers of the guaranty, we shall see further on. Assuming for the present that the instrument is sufficient to fix upon them a liability according to its terms, it necessarily follows that the minds of the parties did meet; for the evidence clearly shows that Frenkel, the agent of plaintiffs, accepted it and the notes by which the extension of time was fixed, and agreed to such extension by both creditors, and to the furnishing of other goods by L. & H. Blum. Not only that, but those firms themselves took and kept both notes

and guaranties, and allowed the indulgence contracted for. Their letter shows that such was their action. They could not thereafter have held these papers, and at the same time denied to the debtor the benefit of the consideration. The fact that they endeavored to get obligations which would remove all doubt as to the capacity in which the parties bound themselves could not do away with the contract already concluded. If, for any reason, they had the right to rescind that contract, they could not exercise it by such action as they took, and did not thereby intend to do so. Of course, if the contention of appellants that they are not personally bound by the guaranty can be maintained, the minds of the parties never met; but the conclusion must result from that hypothesis, and not from any assumption that the guaranty was not accepted by plaintiffs.

This brings us to the real questions in the case, which are: First. What is the character of the undertaking ascertained by a proper interpretation of the terms of the guaranty itself? And, second, if, by such interpretation, it be found that such obligation is the personal one of the signers of the instrument, is it permissible for them to show, by parol evidence, that they did not, in fact, intend to bind themselves, but only the corporation? Many authorities have been cited by the parties, and examined by us, which discuss questions somewhat, but not entirely, like those before us. All of them involve the construction of notes, bills of exchange, or other original obligations, by which a primary or direct liability for a debt is created on the part of some one, but in which those whose names are stated as makers, by some addition to their names in the body of the instrument, or by affixes to their signatures, suggest that they may be contracting in a representative or official capacity. The question which thus arises is: Whose obligation is it? who is the real undertaker?

The authorities all recognize certain general principles applicable to such questions. If the instrument, on its face, is clearly that of the person signing it, parol evidence will not be received to exempt him from liability, on the ground that he meant to bind only his principal, though such evidence may be admitted for the purpose of charging the principal. If, on the other hand, the instrument clearly imports an undertaking on behalf of a disclosed principal, parol evidence is inadmissible, with some exceptions, to charge the agent or representative. If the suggestions furnished by the instrument render it ambiguous, so that it is uncertain whether it was intended to bind the principal or the agent, or both, parol evidence of the circumstances attending its execution is admissible to show the real understanding. We find no difference among the authorities as to the principles governing, but, in the

application of them to cases, great conflict has arisen, growing out of differences of opinion as to the meaning of the language of particular instruments. Some courts hold an instrument to belong to the first class above stated, which others hold to belong to the second, and still others to the third. Perhaps the differences of opinion in the first and second lines of decisions should serve to show that the third is correct, and that an instrument about which such conflict of opinion exists is really so ambiguous that the court should hear evidence to enable it to determine what the contract between the parties really was. The tendency of the decisions in this state has been towards the admission of such evidence as liberally as is warranted by the authorities anywhere else, and really most of the points upon which conflicts have arisen have been settled for this state by the supreme court. *Traynham v. Jackson*, 15 Tex. 170; *Latham v. Flour Mills*, 68 Tex. 127, 3 S. W. 462; *McIlhenny v. Blum*, 68 Tex. 197, 4 S. W. 367; *Cattle Co. v. Carroll*, 63 Tex. 52; *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165. By all the authorities, the rule which excludes parol evidence to vary or contradict a written contract, or to explain it where it is complete and unambiguous, is fully recognized as controlling when the instrument under consideration is of that character.

Appellees advance the following proposition, which fairly presents their contention upon this point in the case: "The rule which excludes parol testimony to contradict or vary written instruments applies to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument, or the relation of the parties to each other, and the instrument or the capacity in which they signed the instrument." The proposition is in the language of some of the authorities (*Brick v. Brick*, 98 U. S. 516), and, properly applied, is correct. But it evidently applies only in case the writing itself does not, by its own terms, state the agreement of the parties about the things which parol evidence is offered to show. Thus, as we have already shown, if the instrument shows that the maker contracted as principal, he cannot exempt himself by parol evidence that he contracted as agent; and if he contracted, in terms, for his principal, parol evidence will not be received to charge him personally. So, the inquiry as to whether or not parol evidence is receivable must come to depend on a proper determination of the effect of the instrument in question. Here the instrument is a collateral undertaking to secure the debt of another. It is not, as were all those in the cases cited, a primary obligation for a debt, presenting only the question, whose act is it? and the dependent one, whose debt is



it? The answer to these questions, in those cases where evidence was admitted, could be made either way, consistently with the terms of the writing. Can this be truly said of this instrument? We think not. To hold that this is not the obligation of the appellees is to hold that it is not an obligation at all. The writing is wholly free from ambiguity. It states the name of a principal debtor, and distinctly binds the signers by a collateral undertaking to secure that principal's debt. It assumes to fix no liability whatever on the corporation. That liability, before the instrument could take effect must have already been fixed by the transpiring of other facts; that is, the corporation must have been indebted when the guaranty was executed, or must thereafter have become indebted, through its transactions, before the guaranty could become effective. It then bound the signers to be responsible as guarantors; that is, not as principal debtor, but secondarily, for the debt created. Could a court ever ask the question, was this the undertaking of the corporation? The express terms of the writing forbid any such inquiry. The language of the body of the instrument leaves no doubt as to its meaning, but the contention is that the affix to the signatures qualifies its effect, and shows, or at least is sufficient to admit evidence to show, that the execution was for the corporation.

We think it is true that such affixes to signatures should not be always disregarded, as has been the tendency of some courts, but should be treated as part of the paper, and the whole should be considered together. But, considered all together, the language of this instrument means: "We, as board of directors, make ourselves collaterally responsible for the debt of our corporation." How could they make themselves collaterally liable, as directors, on such an instrument, otherwise than personally? The claim that the purpose was only to bind the corporation is quite inconsistent with the terms in which the obligation is defined. The instrument itself contemplates that the corporation has already bound, or will thereafter bind, itself, and the undertaking is to guaranty such obligation. By its express language, the guaranty answers every question that can be asked as to its character and the capacity in which the parties signed. Any question as to the significance of the addition to the signatures would be answered by the language of the paper, which shows that it was only descriptive. It is a settled rule, in construing instruments, that some effect, if possible, is to be given to them, and that a construction which would destroy them is not to be adopted, if avoidable. This rule applies to guaranties as well as to other documents. The evidence offered was intended to show that the guaranty did not operate against appellees, but its effect would have been to show that it

had no operation at all. It is entirely too plain and clear in its language to be allowed to suffer such a fate. Appellees' contention comes to this: Intending to bind the corporation, they signed and delivered an instrument which bound themselves. They do not pretend that there was any mistake as to the language or identity of the instrument executed, but the mistake, if there was one, was in their understanding of the effect of their act. Pierce not being plaintiffs' agent, the latter knew nothing of the state of appellees' minds, except as it was indicated by the instrument which they executed. This was accepted by plaintiffs, and as its terms bound appellees, and as it must be taken as the exclusive evidence of their undertaking, the contract was complete.

In order not to be misunderstood, we say that our decision is not based upon any mere want of notice to plaintiffs of a defense in favor of the defendants. If the facts shown had constituted an admissible defense, it may be true that the circumstances in evidence would have been sufficient to put plaintiffs upon inquiry as to its existence. But we hold that the guaranty is clear upon its face; that its language expresses a personal undertaking of its signers; and that, plaintiffs having accepted it, the contract, according to its terms, was consummated, and cannot be changed by the parol evidence admitted below. It follows from what we have said that the erasure of the addition to Pierce's name was not a material alteration of the instrument. The legal effect of the guaranty was the same after the erasure as it was before. *Burlingame v. Brewster*, 79 Ill. 515. Further notice of the acceptance of the guaranty from the plaintiffs to the guarantors was not necessary. 'When plaintiffs' proposition to extend the time, upon condition of the execution of the guaranty, was complied with, and the guaranty was delivered to and accepted by them, the rights of the parties were fixed. No further notice of acceptance was contemplated or required by the nature of the guaranty. We think the cases of *Lemp v. Armengol*, 86 Tex. 691-693, 26 S. W. 941, *Johnson v. Bailey*, 79 Tex. 517, 15 S. W. 499, and *Davis v. Wells*, 104 U. S. 159, are so conclusive on this point that we need not further discuss it.

Appellees have not, in their briefs, advanced any contention upon their allegations and evidence as to the assignment by the association, and we therefore deem it unnecessary to say more as to that than that we do not see that any defense was made to appear. The judgment of the court below will be reversed, and judgment will be here rendered against the appellees *Ed. Dickenson*, *H. L. Rodenberg*, *J. L. Dickenson, Jr.*, *W. P. Bell*, *E. P. Hill*, *A. Beversdorf*, and *Wilson Bell*, along with *T. W. Pierce*, as guarantors, for the amount due on the notes sued on, with 8 per cent. interest from their maturity. Reversed and rendered.

STRICKLAND et al. v. WILLIS et al.  
(Court of Civil Appeals of Texas. Nov. 20,  
1897.)

**SALES—FRAUD OF BUYER—DISCLOSURE OF INSOL-  
VENCY—COMMERCIAL RATINGS—INTENTION  
NOT TO PAY—INSTRUCTIONS.**

1. In an action to recover goods purchased of plaintiff by defendant, the issues were: First, whether the sale was induced by false and fraudulent representations by defendant to plaintiff's salesman; second, whether such sale was in reliance on erroneous and excessive ratings obtained by defendant from commercial agencies on false and fraudulent representations made with intent to obtain undeserved credit; and, third, whether the goods were purchased with a fraudulent intent on the part of defendant not to pay for them. *Held*, that a charge confusing such issues to an extent calculated to mislead the jury was reversible error.

2. A purchaser who knows of his insolvency, or might know of it by the exercise of reasonable care, is not bound to disclose it to his vendor, and his failure to do so will not give the vendor grounds to treat the sale as void for fraud, and recover the property.

3. If a considerable time elapses after a merchant has made a truthful representation of his standing to a commercial agency, and no new statements or representations are made, if his condition changes he is not guilty of actual fraud, unless he knows, or the circumstances are such that he should know, that the credit he obtains is extended on the strength of the rating of the commercial agency.

4. In order to avoid a sale on the ground that the buyer did not intend to pay for the goods, the intention must have been one not to pay in any event, an intention merely not to pay according to contract being insufficient.

Appeal from district court, Ellis county;  
J. E. Dillard, Judge.

Action by P. J. Willis & Bro. against J. F. Strickland & Co. to recover goods sold on the ground of fraud. Judgment for plaintiffs. Defendants appeal. Reversed.

This suit was instituted by appellee in the district court of Ellis county, Tex., January 25, 1896, to recover 74 barrels of sugar, alleged to have been sold by it to J. F. Strickland & Co., January 9, 1896, on the theory that such sugar had been purchased by J. F. Strickland & Co. under circumstances which authorized it to rescind the contract of sale. A writ of sequestration was issued and levied on 50 barrels of sugar, which were replevied by plaintiff. Appellee based the right to recover in the court below upon three distinct grounds, as follows: (1) That appellee was induced to make the sale of the sugar to J. F. Strickland & Co. by reason of oral representations made to its drummer at the time of and just before the order for the sugar was taken by its drummer, about January 9, 1896. The said representations were alleged to have been made by J. F. Strickland, a member of the firm of J. F. Strickland & Co., to the effect that J. F. Strickland & Co. were entirely solvent, and were enlarging their business, and that said firm would in a few days settle and pay off an indebtedness of \$4,500 owing appellee by J. F. Strickland & Co.—all of which were alleged to have been false, and known

by J. F. Strickland to be false when made, and which was done solely to deceive and mislead appellee and its drummer, and to cause appellee to sell the sugar in question to J. F. Strickland & Co.; and that appellee was in fact deceived thereby, and induced to sell said firm the sugar in question. Appellee alleged, also, that it was induced, among other things, to make the sale of the sugar in question by the deceitful conduct of said J. F. Strickland at the same time of said representations, and at the time of and just before the sale of the sugar in question, purposely carried on towards its drummer, Calloway, by which J. F. Strickland succeeded in causing said Calloway to believe that said firm of J. F. Strickland & Co. was solvent at this time, and to advise appellee to sell the sugar to said J. F. Strickland & Co., and that the conduct and actions of said J. F. Strickland were such as to lead a reasonably prudent man to believe Strickland & Co. to be solvent at said time, which said Calloway and appellee did believe and act on, when in fact his firm was then wholly insolvent, which was then known to J. F. Strickland. (2) That on May 1, 1895, and since then, and for years prior thereto, appellee was a regular subscriber to the commercial agencies of R. G. Dun & Co. and Bradstreet, whose business it was to give mercantile reports and information on merchants. That at different times from May 1, 1895, to January 22, 1896, appellee applied to each of said agencies for commercial reports and ratings on J. F. Strickland & Co., and R. G. Dun & Co. answered, giving said firm a rating of from \$20,000 to \$35,000 above debts and exemptions, with good credit, stating that said rating was based on a statement made by J. F. Strickland & Co. to R. G. Dun & Co., dated September 13, 1894, showing this firm's financial condition on August 1, 1894, in which it was stated that said firm was worth \$63,000 above debts and exemptions; and the Bradstreet agency replied, giving said firm a rating of from \$35,000 to \$50,000, with good credit, stating that this rating was made on a statement made by J. F. Strickland & Co. per its agent and member, J. F. Strickland, dated September 3, 1894, in which statement said firm represented itself solvent, and worth \$55,728.59 above debts and exemptions,—which statements were false, and known to be false, at said time by J. F. Strickland & Co. And that, at several times after said statements were made to said agencies, said agencies applied to said firm for other statements, when said firm stated to said agencies that there was no change from the above statements, and that said firm was worth, above debts and exemptions, the above amounts at such times,—all of which was false, and known to be so by said firm. That said statements were false when made, and have been since, and known to be so by said firm, and that said firm at date of making said

statements, and since then, have been wholly insolvent, and said statements were made to said agencies for the purpose of defrauding third parties who might call on such agencies for reports on said firm, in deciding whether to extend credit to said firm, and knowing such parties would rely on such reports made by said agencies, and extend credit to said Strickland & Co. That just before this sugar was sold appellee consulted the rating books of said agencies, and found that the ratings of said firm given by said agencies had not been changed. That said firm knew that these ratings were being given them in the rating books of these agencies, which books they knew were being circulated throughout the commercial world, and fraudulently and deceitfully remained silent, and failed to correct the same, and that appellee did not know of this fraud practiced by said firm and its member, J. F. Strickland, until after the failure of J. F. Strickland & Co. That it relied on the information furnished it by the said agencies, acted thereon, and was deceived thereby, and that said information was false, which was unknown to appellee until after said failure of said firm. (3) That J. F. Strickland & Co. bought said sugar with the fraudulent intention existing at the time of the purchase not to pay for the sugar, but with the intention to defraud appellee out of the value of the same. Appellant Crisler was alleged to claim the sugar in controversy through a chattel mortgage given thereon to him as trustee by Strickland & Co. about January 23, 1896, to secure certain pretended creditors therein named. The defendants answered by exceptions, general and special, and by general denial; and defendant Crisler asserted title in himself to the property in controversy, and prayed judgment for the value of that which had been sequestered. The case was tried before a jury, January 2, 1897, resulting in a judgment for the plaintiff for the 50 barrels of sugar sequestered, and against Strickland & Co. for \$303.03, the value of 24 barrels of sugar not found; and, a motion for new trial having been filed and overruled, the defendants below have prosecuted this appeal.

Templeton & Harding and G. C. Groce, for appellants. Sam'l R. Frost and C. M. Supple, for appellees.

FINLEY, C. J. (after stating the facts). There are seven assignments of error presented in appellants' brief, and all of them, except the seventh, are directed at the charge of the court. We here give all that part of the charge complained of, and will then consider the objections urged against it. The court charged the jury as follows: "(8) Now, if you believe from the evidence before you that, when the firm of J. F. Strickland & Co. purchased the sugar in controversy from the plaintiff, their condition of insol-

veny was not known to any member of the firm, and could not have been known by the exercise of such inquiry and examination of the condition of their business as would be made by ordinarily prudent persons engaged in the same character of business, and under the same existing circumstances, and that no misrepresentations or concealment was made of the solvent condition of said firm by any member thereof for the purpose of inducing the plaintiff to extend the firm credit, and that it was the intention of the said J. F. Strickland & Co. to pay for the sugar, then the title to the sugar was in J. F. Strickland & Co. when the said firm made its trust deed to P. T. Crisler, and passed by the transfer made by such trust deed to P. T. Crisler, as trustee, and the plaintiff, under such circumstances, would not be entitled to have such sale rescinded. (9) If, however, you believe, from the testimony before you, that when the firm of J. F. Strickland & Co. purchased the sugar from the plaintiff, P. J. Willis & Bro., any member of said firm had knowledge of its insolvency, or could have known of its condition of insolvency by the exercise of reasonable inquiry and examination into the affairs and condition of the business of the firm,—that is, by the exercise of such inquiry and examination of the business as an ordinarily prudent person would make, engaged in the same business and under the same existing circumstances,—and that such insolvent condition was concealed by the firm from P. J. Willis & Bro., or false representations were made by the firm, or any member thereof, to the effect that said firm was in a solvent condition, with the purpose to induce the plaintiff to make the sale of the sugar to J. F. Strickland & Co., and the plaintiff believed such statement to be true, and that such firm was solvent, and acted on such belief in making the sale, and that J. F. Strickland & Co. did not intend to pay for the sugar, then, under such circumstances, if you find they existed, the plaintiff is entitled to have such sale rescinded as against the firm of J. F. Strickland & Co., and is entitled to the possession of the property as against all the defendants,—the fifty barrels of sugar sequestered,—and to recover the value of the twenty-four barrels of sugar from J. F. Strickland & Co., with 6 per cent. interest from January 22, 1896. (10) In connection with the preceding instructions, you are further charged that if you believe from the evidence that on or about the 9th day of January, 1896, the firm of J. F. Strickland & Co., or any member of the firm, knew that the mercantile agencies of R. G. Dun & Co. and Bradstreet had, for a period previous thereto, and up to that time, given said firm published ratings as to its commercial and financial standing; and you further believe that the R. G. Dun & Co. agency had rated said firm as being worth from \$20,000 to \$35,000 over and above its liabilities and exemptions,

and that the Bradstreet Mercantile Agency had rated said firm as being worth \$35,000 to \$50,000 over and above its liabilities and exemptions, and that said ratings were furnished to all merchants who chose to subscribe for and purchase them, and that plaintiff was a subscriber to the same, and was furnished with the ratings given by such agencies, or either of them, of the commercial and financial standing of the firm of J. F. Strickland & Co.; and you further believe that such ratings were false, and represented said firm to be in a better condition financially than it actually was, and that the said ratings were made upon the statement and representations made by said firm, or any member thereof, to the said mercantile agencies; and you further believe that said firm, or any member thereof, knew at the time of the purchase of said sugar from P. J. Willis & Bro. that no change had been made in the published report of said ratings as they appeared on the commercial reports of said mercantile agencies; and you further believe from the evidence that the firm of J. F. Strickland & Co., or any member thereof, knew such ratings were false; and believe, further, that the sale of the sugar in controversy was induced, wholly or in part, by the belief, on the part of P. J. Willis & Bro., by reason of the ratings of the said J. F. Strickland & Co. as to their commercial standing and financial condition, as it was made to appear by the reports of said agencies, that said firm was in a solvent condition,—then, under such circumstances, if you believe them to have existed at the time of the making of such sale, and you believe further that said firm did not intend to pay for said sugar according to contract, and had no reasonable expectation of being able to pay for said sugar, would entitle the plaintiff to recover the sugar sequestered by it as against all the defendants, and also to recover the value of the twenty-four barrels of sugar at the rate of the purchase price agreed upon between plaintiff and J. F. Strickland & Co., with 6 per cent. interest thereon from January 9, 1896, to the present time, as against the defendants, J. F. Strickland & Co."

It is insisted that the charge of the court mixed and confused the issues involved in the case in such a manner and to such an extent as to render it probable that the jury were thereby confused and misled. The issues presented by plaintiff's pleadings, briefly stated, were: (1) That the sale of the sugar in controversy was induced by false and fraudulent representations by the vendees to appellee's salesman; (2) that such sale was in reliance on erroneous and excessive ratings obtained by the vendees from commercial agencies, on false and fraudulent representations made with intent to obtain undeserved credit; (3) that the sugar was purchased with a fraudulent intent on the part of the vendees not to pay for it. The charge

of the court confused these issues to an extent that was calculated to mislead the jury. The charge should have plainly and distinctly stated the law applicable to the three several grounds relied upon for a recovery, so that the jury could intelligently pass upon the real issues involved in the case.

2. It is urged that the charge of the court, in effect, erroneously instructed the jury that if J. F. Strickland & Co. knew, or by the exercise of reasonable care might have known, they were insolvent at the time they purchased the sugar, and concealed their condition from P. J. Willis & Bro., P. J. Willis & Bro. had the right to rescind the contract of sale and recover the sugar. The eighth paragraph of the charge, in a negative form, seems to convey this idea. The ninth paragraph puts the same proposition in an affirmative form, and couples onto it, "and that J. F. Strickland & Co. did not intend to pay for the sugar." It is doubtful what the court really intended to charge the jury on this line; but we think it quite probable that the jury understood the charge to mean that if Strickland & Co. knew of their insolvency at the time of the purchase, or might have known of it by the exercise of proper care, their failure to disclose the fact to P. J. Willis & Bro. rendered the sale fraudulent and void, at the election of P. J. Willis & Bro. Is it a correct proposition of law to say that an insolvent purchaser who knows of his insolvency, or might know of it by the exercise of reasonable care, must disclose his insolvency to his vendor, and upon failure to do so the vendor may treat the sale as void for fraud, and recover the property? Both reason and authority force a negative answer to this question. In *Bank v. Bamberger*, 77 Tex. 52, 13 S. W. 961, it is said that "the mere insolvency of the purchaser, where no fraudulent purpose exists, as also the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown and uncommunicated to the vendor, will not vitiate the purchase, is certainly true." *Garvin v. Armistead* (Ark.) 22 S. W. 431.

3. It is urged that under the charge as given, although the jury might have believed that the statements made to the mercantile agencies by J. F. Strickland & Co. were substantially true at the time they were made, yet if the ratings given them by such agencies had become excessive and false at the time of the purchase, and this was known to Strickland & Co., and they failed to correct such ratings or disclose their incorrectness to P. J. Willis & Bro., then the jury must treat the contract of sale as fraudulent. The charge does not expressly announce this proposition; but in paragraph 10, above quoted, the jury is, in effect, told that if the ratings of the mercantile agencies were based upon statements made by J. F. Strickland & Co., and if the ratings were false at the time of the purchase of the goods in question, and represented the firm to be in better financial condition than it really was, and the firm knew this, and permitted the continued circulation of such ratings, and did not

intend to pay for the property, etc., plaintiff was entitled to recover. In this paragraph there was a confusion of the issues. The intention not to pay, as a ground of recovery, was not dependent upon the proposition with which it was connected. It may be said that this charge required that it should be found that Strickland & Co. did not intend to pay for the sugar before the jury would be authorized under it to return a verdict for the plaintiff, and therefore error in the other proposition was not material. If we look at the charge in that view, then there would be found so much abstract and immaterial matter in it that we would be forced to the conclusion that it was calculated to confuse and mislead the jury. The appellants asked a special charge, which was sufficient to direct the mind of the court to their theory that the representations made by them to the mercantile agencies were substantially true when made, and that they were not under legal obligations to voluntarily notify such agencies of the changes occurring in their financial condition, rendering the ratings given them by the mercantile agencies excessive and untrue. When mercantile agencies base ratings upon substantially correct statements made by a merchant, and subsequent changes in the financial condition of the merchant render the ratings excessive and untrue, must such merchant voluntarily notify such agencies, and thereby correct his ratings, under penalty of having his contracts of purchase declared void on account of fraud? Our views upon this question are in accord with those of the supreme court of Michigan, as expressed in *Manufacturing Co. v. Platt*, 83 Mich. 430, 47 N. W. 334, as follows: "No fraud can be predicated upon the fact that a merchant or trader makes a representation of his standing which is truthful at the time to a commercial agency, and thereby obtains credit. If a considerable time elapses, and no new statements are made, and no representations as to his standing, it cannot be said that, if his condition has changed, he is guilty of actual fraud, unless he knows, or the circumstances are such that he should know, that the credit is extended upon the strength of the original rating of the commercial agency." See, also, *Burchinell v. Hirsh* (Colo. App.) 39 Pac. 352, which, in effect, holds that such failure of a merchant to disclose a substantial change in his financial condition affecting the correctness of his ratings fixed by mercantile agencies, upon statements made by him prior to the change, will not render his contracts of purchase voidable for fraud, at the election of the vendor. Where the original statements made by the merchant were true when made, and the rating becomes excessive and untrue only by reason of subsequent changes in his financial condition, his conduct, in relation to such rating, must practically amount to a new representation, which is at the time false in fact, in order to render his contracts of purchase voidable upon the ground that they were induced by fraud.

4. In charging upon the issue of the inten-

tion on the part of the purchaser not to pay for the goods, entertained at the time of entering into the contract, the court submitted it as an "intention not to pay according to contract." This was error. The intention not to pay must exist, and not merely an intention not to pay in a particular manner, to constitute fraud for which the contract may be treated as voidable. The special charge asked by appellants on this point should have been given. The charge is as follows: "Gentlemen of the Jury: In this case plaintiff seeks to rescind a sale of the goods in controversy herein, on the grounds that defendants J. F. Strickland & Co. had no intention of paying for said goods when they were purchased. On this issue you are instructed that plaintiff cannot recover on this claim, unless you believe from the evidence that, as a matter of fact, Strickland & Co., at the time of purchasing said goods, had a fixed intention not to pay for the same. An intent not to pay for the goods, if such there was, formed after the purchase, or an intent, if such there was, not to pay for the goods in accordance with the terms of the contract of sale, would be insufficient. Plaintiff can recover on this issue only by showing by evidence that when the goods were purchased Strickland & Co. then intended not to pay for such goods." *Tied. Sales*, § 170; *Burrill v. Stephens*, 73 Me. 395; *Bidault v. Wales*, 20 Mo. 546. We do not feel that it is necessary to discuss the questions involved in this case any further. In the light of the views herein expressed, we apprehend that the case can be fairly presented to a jury upon another trial, without difficulty. On account of errors in the charge the judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. BEALL et ux.  
(Court of Civil Appeals of Texas. Jan. 5, 1898.)

MASTER AND SERVANT—RAILROADS—NEGLIGENCE  
—EVIDENCE—PLEADING AND PROOF.

1. In an action against a railroad company for the death of an employé, evidence that the employé of the road failed to go to the place where deceased lay dead is not admissible.

2. Where the ground of negligence alleged against a railroad company is the negligence and incapacity of a certain engineer, and the character of the engine under his control, a recovery upon the grounds that others of the train crew were negligent and incapable, that the switch yard was in a faulty condition, and the failure of the company to employ careful and skillful servants generally, is error.

3. A railroad company is not required to furnish machinery and appliances as safe as are used by railroads generally, but is bound only to exercise reasonable and ordinary care in furnishing safe appliances.

Appeal from district court, Bell county; W. A. Blackburn, Judge.

Action by W. T. Beall and wife against the Gulf, Colorado & Santa Fé Railway Company for the death of a son. From a judgment for plaintiffs, the defendant appeals. Reversed.

J. W. Terry and Chas. K. Lee, for appellant.

**FISHER, C. J.** This is a suit by W. T. Beall and wife against the railway company for damages sustained on account of the death of their minor son, who was killed when engaged in the service of the appellant as a brakeman. The case was tried below upon the theory, as shown by the main features of the charge of the court and the verdict of the jury, that the appellant had wrongfully employed the minor son in a dangerous service, with knowledge of his minority, without the consent of the plaintiffs. The court submitted to the jury, as the measure of damages, the value of the services of the minor son from the time of his death to the time that he would have reached the age of 21 years. Independent of this branch of the case, there are some features of the pleadings which, in effect, attempt to state a cause of action against the appellant under our statute that authorizes those interested in the life of the deceased to sue to recover damages that may result from the negligence that causes his death. In view of the fact that the evidence shows that the minor son was instantly killed, we heretofore certified to the supreme court in this case the question whether the action of the parents for the value of his services during minority abated upon the death of the minor. On the 2d of December of this year [1897], the supreme court answered the question, to the effect that death abated the action at common law; and to the opinion there rendered reference is made for the ruling of the supreme court. 42 S. W. 1054. The recovery had by the plaintiffs below, as previously stated, was based upon the common-law remedy for the value of the services of their minor son. Therefore the opinion of the supreme court upon this question necessarily disposes of this branch of the case adversely to the plaintiffs; and but for the other features of the case, presented by the pleadings, and which have some support by evidence, tending to show that the plaintiffs might have an action under the statute to recover for the damages sustained for the death of their son, we would render judgment here in favor of the appellant; but, in view of this issue that still remains in the case, we reverse and remand.

The principal errors assigned relate to the branch of the case upon which the plaintiffs below recovered, but, as the issues there raised are eliminated altogether by the opinion of the supreme court, it is useless to notice the assignments of error that relate to that phase of the case. We will now take up such assignments as raise questions that possibly might arise upon another trial on the other issue in the case.

The evidence complained of in the twenty-third assignment of error, we think, was not admissible. The failure of James Dillon, M.

M. Lane, and others of the switching crew to go to the place where young Beall was lying dead upon the ground was conduct for which the appellant was in no wise responsible. Their conduct in this respect was after young Beall was killed, and it had no tendency whatever to throw any light upon the facts and circumstances leading up to his death.

The ground of negligence alleged was the incapacity of the engineer, and his negligence in handling his engine, and the character of engine that was then used in the service of switching.

The court, in its charge to the jury, in effect made the appellant responsible for failure to employ careful and skillful servants generally, and for the negligence of such servants, and admitted testimony tending to show that others besides the engineer, engaged as a part of the switching crew, were guilty of conduct that would have a tendency to unfit them for the careful performance of their duties, and also admitted evidence to the effect of the faulty condition of the switching yards. The ruling of the court in this respect, together with the charge noticed, was erroneous, in view of the state of the pleadings upon this question.

The charges of the court, as complained of in the fifteenth and seventeenth assignments of error, are not accurate. The railway company is not under the duty to furnish safe machinery and appliances to be used by its servants in the conduct of its business, but is only required to exercise ordinary and reasonable care in this particular. It was not proper for the court, in instructing the jury upon this question, to make as the standard of duty in this respect the character of machinery and appliances used by railroads generally, but the test is that the appellant must exercise reasonable and ordinary care in furnishing such appliances.

There are no other questions that we desire to notice, as we have pointed out all the errors which, in our opinion, were committed on the trial. The judgment is reversed, and the cause remanded. Reversed and remanded.

#### WILKINSON et al. v. STANLEY.

(Court of Civil Appeals of Texas. Oct. 30. 1897.)

RECONVENTION — PLEADING — ACTION ON SEQUESTRATION BOND — WRONGFUL EVICTION — DAMAGES.

1. Where, in a plea in reconvention on a sequestration bond, special matters of damage were alleged, which, if sustained by proof, would furnish ground for recovery, a general demurrer was properly overruled.

2. In a plea in reconvention on a sequestration bond, the affidavit on which the writ of sequestration issued need not be set out in *hæc verba*.

3. A tenant wrongfully dispossessed before the expiration of his term cannot recover the worth of the land to him during the unexpired term.

4. Depreciation in the value of a tenant's corn, resulting from his being wrongfully dispossessed, is a proper element of damage.

5. A tenant wrongfully dispossessed before the expiration of his term cannot recover, as damages, the expense, during the unexpired term, of hauling water from a distance, to supply his stock and family, though the place from which he was ejected had an abundant supply.

6. The court will not pass on a question not presented by the record.

7. In reconvention on a sequestration bond, judgment cannot be rendered against the sureties without the introduction of the bond, affidavit, and writ of sequestration, with the officer's return thereon.

8. The sureties on a sequestration bond given in proceedings to dispossess a tenant are not entitled to notice of the filing of a plea in reconvention in the original suit.

Appeal from district court, Johnson county; James W. Brown, Special Judge.

Action by Charles B. Wilkinson against G. W. Stanley to dispossess him of certain land held under a lease. In reconvention on the sequestration bond, judgment was rendered for defendant. Plaintiff and his sureties on the bond appeal. Reversed.

P. B. Ward and W. A. Bonner, for appellants. Poindexter & Fadelford, for appellee.

BOOKHOUT, J. On January 10, 1896, Charles B. Wilkinson filed suit in the district court of Johnson county, Tex., against G. W. Stanley, to recover possession of 91 acres of land described in his petition, alleging that on January 9, 1895, plaintiff, by his agent, S. M. Finley, rented the land to G. W. Stanley for the year 1895, and that the rental period had expired; that the defendant unlawfully remained in possession, and withheld the same from plaintiff. The plaintiff prayed for restitution and possession of the premises. The plaintiff, through his agent, S. M. Finley, made affidavit for sequestration, and gave bond with S. M. Finley and W. A. Bonner as sureties; whereupon a writ of sequestration issued, and was placed in the hands of the sheriff, who, by virtue of the same, dispossessed the defendant of said premises. The defendant answered on May 9, 1896. On December 2, 1896, defendant filed an amended answer, in which he pleaded a general denial and not guilty, and also reconvened against the plaintiff and the sureties on his sequestration bond for damages for the wrongful issuance and levy of the writ of sequestration, and against the plaintiff for punitive damages. The defendant alleged that he had rented and occupied the premises for the previous year, as a tenant of the plaintiff, and had again rented the premises for the year 1896 in the month of October, 1895; that he was the head of a family, and had his family, stock, and property upon the premises; and that the plaintiff and his agents (who were his bondsmen) wrongfully, illegally, maliciously, knowingly, and without probable cause ejected him. Plaintiff's general and special exceptions were overruled, and plaintiff excepted. There was a jury trial, which resulted in a

verdict for defendant for \$400 actual damages, and \$200 exemplary damages; and upon this verdict a judgment was rendered against plaintiff and his sureties, Finley and Bonner, for the actual damages, and against plaintiff alone for exemplary damages. Plaintiff and his sureties filed separate motions for new trial, which were overruled, and they excepted, gave notice of appeal, and have prosecuted their appeal to this court.

Appellants' first assignment of error complains of the action of the trial court in overruling the general demurrer to defendant's plea in reconvention. If any of the damages set up in the plea in reconvention were recoverable under said plea, then it is not subject to a general demurrer. There were special matters of damage set up in the plea in reconvention, which, if sustained by proof, furnish ground for recovery. The court did not err in overruling the general demurrer.

The second assignment of error complains of the action of the court in overruling plaintiff Wilkinson's special exception to the plea in reconvention, because it does not set out the affidavit upon which the writ of sequestration issued. This exception is based on the theory that, in a plea in reconvention upon a sequestration bond for damages resulting from the wrongful suing out of the writ, the affidavit must be set out in *hæc verba*. This contention is not correct. All that it was necessary for the defendant to do was to show, by proper allegations, what affidavit was made to obtain the writ of sequestration, and to negative the truth of the allegations therein set forth as the ground for the issuing of the writ. *Rountree v. Walker*, 46 Tex. 203.

Appellants' fourth assignment of error complains of the court's action in overruling plaintiff's third special exception to defendant's plea in reconvention,—wherein defendant alleges that the 55 acres of tillable land would have been worth to him the sum of \$600 for the year 1896, and that the pasture land would have been worth to him the sum of \$250 for the year 1896,—because the same is speculative, remote, and uncertain, and cannot form the basis of damages. This assignment will be considered in connection with appellants' thirteenth assignment of error. The thirteenth assignment complains of the action of the court in admitting evidence, over appellants' objection, as to the amount of cotton and corn defendant could have grown upon the land sequestered, during the year 1896, the exception being that the evidence was speculative, remote, and uncertain. These two assignments of error and appellants' first proposition under the same raise the question of the correctness of the measure of damages adopted in this case by the trial court. The defendant, in his plea in reconvention, alleged that the plaintiff well knew that defendant could have made, without any further expense, \$600 on said tillable land, and that plaintiff well knew that said

pasture was worth to the defendant \$250 during the year 1896. The evidence admitted over appellants' objection, and made the ground of the thirteenth assignment, was to support the above allegations in defendant's plea in reconvention. The evidence was admitted on the assumption that the defendant was entitled to recover as damages what he could have made during the year 1896 on the rented premises had he been permitted to remain in possession of the same. The writ of sequestration was sued out and executed on January 11, 1896. The general rule of the measure of damage which the tenant is entitled to recover of his landlord where he is deprived of the possession of the rented premises by the act of the landlord is the difference between the contract price and the reasonable market rental value of the premises at the time the tenant is evicted. 1 Tayl. Landl. & Ten. § 317. In addition to this, the tenant may recover such special damage as the pleadings and proof show were the proximate result of the landlord's wrongful act. *Robrecht v. Marling* (W. Va.) 2 S. E. 827. The difficulty arises in determining what damages are the proximate result of the wrong committed. As stated by our supreme court in the case of *De La Zerda v. Korn*, 25 Tex. Supp. 193, the difficulty arises in the application of the rule. In that case a charge was approved that authorized a recovery for injury to business and stock in trade. But the court held that future profits likely to accrue to plaintiff in the prosecution of his business were too remote and contingent. In the case of *Buck v. Morrow*, 2 Tex. Civ. App. 361, 21 S. W. 398, the court of civil appeals of the Second district held that the extra expense sustained by a lessee in holding his cattle on the common pending a diligent search by him for another pasture, made necessary by being unlawfully evicted by the landlord before the expiration of his lease, could be recovered as compensatory damages. The case of *Blum v. Gaines*, 57 Tex. 140, was a suit to recover damages against the principal and his sureties on his sequestration bond in an action of trespass to try title to property claimed by the plaintiff as his homestead. In that case, Associate Justice Stayton, speaking for the court, in laying down the measure of damages, says: "The court did not err in refusing to instruct the jury, in effect, that the measure of actual damages for the wrongful taking and holding possession of the premises would be the value of the rents of the premises while so held; for there were other elements of damage besides the actual rental value of the property. The forced removal to another place, inconvenience and cost attending the same, the deprivation of the comforts of a home, were the natural and proximate results of the seizure, and might be considered by the jury in estimating actual damages." It follows that the allegations contained in the plea in reconvention as to what the tillable land and what the pasture land would have

been worth to the lessee for the year 1896 are not the true measure of damages in this case, and the overruling of the special demurrer to so much of said answer as claimed damages therefor, and the overruling of exceptions to the testimony to support the same, was erroneous. *Railway Co. v. Bayliss*, 62 Tex. 570.

The sixth assignment complains of the action of the court below in overruling plaintiff's exception to defendant's pleadings, wherein defendant claimed \$100 damages for the depreciation in value of his corn. The defendant pleaded that by reason of not being able to use and utilize his 1,000 bushels of corn, and being compelled to remove the same, he has been damaged in cost and expense and in depreciation in value in the sum of \$100; and that, by reason of the trouble and expense of removing from said place, he has been damaged in the sum of \$25. The depreciation in the value of defendant's corn resulting from the moving of same, as well as the expense of moving it, were proper subjects to be proven as a basis for damages. *De La Zerda v. Korn*, supra. The depreciation in value must have been the proximate result of plaintiff's act.

It is also urged that the court erred in not sustaining plaintiff's exception to defendant's claim for hauling water for family use, and driving his stock to water, because the same is remote, speculative, and uncertain. The defendant alleged that there was an ample supply of water for his stock and family on the premises from which he was ejected, but that there was no water upon the place to which he was compelled to move, and that he had to go one mile during the whole year for the purpose of supplying himself and family with water, and that it was worth 25 cents per day; that he had to drive his stock to water, and it was worth two dollars per day for 60 days to drive his cattle to water. Testimony was admitted, over appellants' objection, to the effect that it was worth 25 cents per day to haul water for the family, and "that water in connection with the pasturing for fifty-five head of cattle and nine or ten head of horses ought to have been worth \$100 to the defendant; that it cost thirty cents per month to pasture a cow, and fifty cents per month to pasture a horse." The pleadings did not show a case that would entitle the defendant to recover, as actual damages, either the expense of hauling water for the family during the entire year, nor the expense of driving stock of defendant to water during the year 1896. These were too speculative, remote, and uncertain. For such reasonable time as defendant was compelled to haul water for his family or drive his stock to water while he was engaged in procuring and moving his family and property to another place, he was entitled to recover the reasonable value thereof. Such damage might be presumed to have been contemplated by plaintiff in



suing out and levying the writ of sequestration. But what it would cost to haul water for the family of defendant and drive his stock to water during the year could not have been contemplated, and it is too remote and speculative. Besides, this would be covered in the general measure of damages; i. e. the difference between the contract price and the market rental value of the leased premises.

Under appellants' tenth, nineteenth, and twentieth assignments of error, complaint is made of the ruling of the court in not sustaining plaintiff's exception to the pleading of the defendant in which he seeks to recover attorney's fees, costs of witnesses, and costs attending court, as exemplary damages. There is no evidence in the record as to attorney's fees and cost of witnesses. The statement in appellants' brief does not show that any evidence was admitted on either of these matters. We are asked, then, to pass upon an abstract question, as the case is now presented. Under the condition of the record, we decline to pass upon these assignments.

Appellants also submit the proposition that, "before defendant could recover exemplary damages, he must show by legal evidence that the writ of sequestration was issued and served at the instance and request of plaintiff, or that the plaintiff ratified the action of the officer in dispossessing the defendant." Unless the agent of plaintiff who made the affidavit for sequestration was actuated by malice, and the plaintiff had knowledge of and participated in said malice, or afterwards ratified, adopted, and approved of said malicious act of said agent, he would not be liable for exemplary damages. *Willis v. McNeill*, 57 Tex. 477; *Tynberg v. Cohen*, 78 Tex. 409, 13 S. W. 315; *Jacobs v. Crum*, 62 Tex. 408. In the case of *Tynberg v. Cohen*, above, the court held that it was necessary that the principal should have knowledge of such facts as showed the wrongful acts of the agent when he accepted and approved his acts in order to amount to a ratification. We refrain from discussing the evidence on this branch of the case in view of another trial.

Appellants Bonner and Finley raise the question of the sufficiency of the evidence to support the verdict against them, as sureties on the sequestration bond. The statement of facts does not show that the affidavit, writ of sequestration, or the officer's return thereon were introduced in evidence. The sureties contend that, without the introduction of these papers, no judgment could be rendered against them. It is contended by appellee that, these papers being a part of the record, it was not necessary that they should be formally introduced in evidence. It has been held that "the filing of the petition, or the reading of the same to the court, or the further fact that the petition is a matter of record in the court, will in no event

authorize the jury in considering the petition or any allegations therein or indorsements thereon as in evidence before them, unless the same has been specially offered as testimony, the same as any other written evidence." *Cotton v. Jones*, 37 Tex. 85. The sequestration bond was declared upon by the defendant, and made the basis of the recovery against the sureties *W. A. Bonner and S. M. Finley*. The affidavit was set up, and the truth of its allegations denied. The issuance of the writ and its levy were set out by defendant. It was conceived to be necessary to set out these matters in the pleading as a basis for the recovery of compensatory damages against the sureties. We think it necessary that they should be introduced in evidence. *Jordan v. Meyers* (Tex. Sup.) 84 S. W. 92; *Rountree v. Walker*, 46 Tex. 208.

The sureties further submit the proposition that a judgment against the sureties on a sequestration bond, where the defendant reconvenes in the original suit, is void without notice to the sureties. It is contended by the sureties that, upon the filing of the plea in reconvention, citation should have issued to the sureties, and that they should be served as in any other suit. The statute provides that the "party applying for a writ of sequestration shall file a bond, payable to the defendant for a sum of money not less than double the value of the property to be sequestered, \* \* \* conditioned that the plaintiff or person suing out such writ will pay to the defendant all such damages as may be awarded against him and all costs in case it shall be decided that such sequestration was wrongfully issued." Rev. St. 1895, art. 4867. The sureties upon a sequestration bond practically become parties to the suit upon the execution, approval, and filing of their bond so far as they are liable thereon, when their liability is sought to be established by reconvention in the original suit. *Rev. St. 1895, art. 4867*; *Sharp v. Schmidt*, 62 Tex. 265; *Petty v. Lang*, 81 Tex. 242, 16 S. W. 999. No citation or notice to them is necessary. By the terms of the bond, they become responsible for such actual damages as the pleading and proof show the defendant has sustained by reason of the plaintiff's wrongful act. For the errors pointed out, the judgment is reversed, and the cause remanded.

HOUSTON & T. C. R. CO. v. DUMAS et al.  
(Court of Civil Appeals of Texas. Dec. 4, 1897.)

CARRIERS—CONTRACT OF SHIPMENT—VALIDITY.

A contract between a station agent and a shipper for an interstate live-stock shipment was entered into on authority from railway headquarters, acting under the mistaken supposition that the shipment was to be within the state. The rate agreed on was less than the rate posted in the depots of the railways over which the shipment was to be made, in accordance with the law

creating the interstate commerce commission, which law (25 Stat. 857) provides that it shall be unlawful for a common carrier to charge or receive a greater or less compensation than is specified in such published schedule. *Held*, that the rate agreed on was in violation of the interstate commerce act, and the contract could not be enforced.

Appeal from Grayson county court; J. H. Wood, Judge.

Action by T. M. Dumas and others against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Beaty & Culver, for appellant. A. W. Walker, for appellees.

RAINEY, J. This suit was instituted by the appellees against appellant to recover the sum of \$109, overcharges on a shipment of hogs from Van Alstyne, Tex., to East St. Louis, Ill. Appellees made a contract for the shipment of hogs, signed by appellant's agent at Van Alstyne, agreeing that appellees should have two single-deck cars at the rate charged for one double-deck,—four single-deck cars in all; that is to say, two single-deck cars were to stand as one double-deck. But when said shipment reached its destination the delivering carrier refused to settle upon the contract rates, but insisted on collecting the rate for four single-deck cars, making a difference of \$109. A guaranteed through rate of 39 cents per 100 pounds was agreed upon. At the time the contract was entered into and the shipment made, appellant and other common carriers, including the Missouri, Kansas & Texas Railway Company, had agreed upon certain live-stock tariff and schedule of rates covering shipments of hogs from Van Alstyne, Tex., to East St. Louis, both in single and double deck cars, which had been filed and established in conformity with the law creating the interstate commerce commission, and had been duly published, printed, and posted by defendant in its depot in Van Alstyne, as by law provided in case of interstate commerce. The rate on hogs from Van Alstyne to East St. Louis, according to said schedule and tariffs, was 39 cents per 100 pounds in double-deck cars. The minimum weight for double-deck cars, 36 feet in length, was 37,000 pounds each. For single-deck cars the rate was 47 cents per 100 pounds, and the minimum weight was 17,000 pounds for each car. Before the contract of shipment was entered into, appellees asked appellant's agent at Van Alstyne if they could have two single-deck cars in place of one double-deck, and he replied that he would telegraph to headquarters, and see. He thereafter told appellees that he had heard, and that such could be done. The officer to whom appellant's agent telegraphed for instructions thought said agent was asking for instructions in reference to shipments wholly within this state. Appellant's line of railroad is wholly within this state. The contract stip-

ulated that no agent of appellant had any authority, under any circumstances, to contract for any particular class or kind of cars. The rate of freight collected was the amount due as per the rate fixed by the schedule filed with the interstate commerce commission.

Although appellant's line of road is wholly within this state, the shipment was an interstate shipment, and must be governed by the laws regulating the same. The interstate commerce act declares: "It shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation \* \* \* than is specified in such published schedule of rate, fares and charges as may at the time be in force." 25 Stat. 857. The rate agreed upon between appellant's agent and appellees being a less rate than the scheduled rates then in force, such contract was unlawful, and cannot be enforced. *Railway Co. v. Bowles* (Indian Ter.) 40 S. W. 899. See, also, *Missouri, K. & T. R. Co. v. Trinity County Lumber Co.* (Tex. Civ. App.) 21 S. W. 290; *Railway Co. v. Clark* (Tex. Civ. App.) 23 S. W. 698; *Railway Co. v. Stoner* (Tex. Civ. App.) 23 S. W. 1020; *Railway Co. v. Hefley*, 158 U. S. 97, 15 Sup. Ct. 802.

It is insisted by appellees that the appellant was a member of the Western Traffic Association, and, being such, the fixing of rates was contrary to the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and therefore of no force. *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540. There is nothing in the evidence showing that the appellant is a member of said association; and, if so, we cannot take judicial knowledge thereof. Therefore we are not in position to pass upon this question.

The evidence in the case showing that appellees are not entitled to recover, and the case having been tried by the court without the intervention of a jury, the judgment of the court below is reversed, and judgment is here rendered for appellant. Reversed and rendered.

ERWIN et al. v. HAYDEN.

(Court of Civil Appeals of Texas. Dec. 4, 1897.)

CONTRACTS—RESTRAINT OF TRADE—STATUTE OF FRAUDS—BREACH—DAMAGES—PLEADING—DEMURRER.

1. A petition for breach of contract, which alleges a purchase by plaintiff of defendant's business and good will; the value of the same; an agreement that defendant was not to engage in the same business for two years; that defendant did engage in business within such time; and plaintiff's damages caused thereby,—is sufficient on general demurrer.

2. Allegations in said petition of the value of the good will at the time of the purchase, the loss of the good will by reason of defendant's

acts, and the amount of damages sustained thereby, are a sufficient statement of the measure of damages.

3. An agreement by a merchant not to engage in the same business for two years is not void, as in violation of the trust law of Texas or as against trade.

4. A verbal agreement by a merchant not to engage in that line of business for two years was not an agreement not to be performed within a year, within the statute of frauds, as it was to be performed within one year in contingency of the death of such person.

Appeal from district court, Grayson county; D. A. Bliss, Judge.

This is a suit by T. W. Erwin, Jr., & Co., a firm composed of T. W. Erwin, Jr., and J. C. Erwin, against C. J. Hayden, to recover damages for breach of contract. The trial court sustained exceptions to the petition, and plaintiffs appealed. The facts will sufficiently appear in the opinion. Reversed.

Hazlewood & Smith and Wilkins & Vinson, for appellants. J. A. Templeton and E. F. Brown, for appellee.

BOOKHOUT, J. The appellants' first assignment of error is that "the court erred in sustaining a general demurrer to plaintiffs' petition." The material allegations in the petition are, substantially: That prior to April 1, 1895, plaintiffs and defendant, C. J. Hayden, were engaged in the retail grocery business in Sherman, Grayson county, Tex., under the firm name of C. J. Hayden Grocery Company; that they had been so associated since January 1, 1895; that the interest of plaintiffs in said firm was in fact only nominal, the said Hayden being the owner of the entire stock of goods, fixtures, horses, delivery wagons, etc., belonging to said firm; that said Hayden had been engaged in the retail grocery business at this particular corner and stand in said city for a number of years prior to April 1, 1895, and had a well-established trade, and did a large and extensive business; that on April 1, 1895, plaintiffs, for a valuable consideration, purchased from C. J. Hayden the entire stock of groceries, fixtures, horses, delivery wagons, etc., belonging to said firm of C. J. Hayden Grocery Company; that at the time of the purchase the invoice value of said stock of groceries amounted to \$2,319.31; that the fixtures, including the horses, wagons, refrigerator, shelving, counters, etc., were invoiced at \$943; that said stock of groceries was considerably run down, and was not worth in the open market, on April 1, 1895, more than 60 cents on the dollar of the invoice value; that said fixtures, as aforesaid, on April 1, 1895, were not worth in the open market more than 50 cents on the dollar of the invoice value; that plaintiffs purchased said stock of groceries, fixtures, etc., from C. J. Hayden on April 1, 1895, and that in said purchase it was agreed and expressly understood, by and between said C. J. Hayden and plaintiffs, that in the purchase of said stock of groceries and fixtures, etc., they (plaintiffs) would pay the invoice value of said stock of

groceries, amounting to \$2,319.31, and the invoice value of said fixtures, etc., amounting to \$943, and, as a part of the consideration of said purchase, plaintiffs, under the firm name of T. W. Erwin, Jr., & Co., were to have the good will of said C. J. Hayden in said grocery business for the space of two years, to which said Hayden agreed, and he was not to engage in the grocery business in the city of Sherman for two years; that said agreement was parol; that said good will at the time of said purchase, on April 1, 1895, was worth, and was so considered in said dealings to be worth, 40 cents on the dollar of the invoice value of said groceries, which was \$927.72, and on said fixtures was worth, and was so considered to be worth, in said purchase, 50 cents on the dollar of said invoice value, amounting to \$471; that said Hayden further specially agreed that if said T. W. Erwin, Jr., & Co., plaintiffs, would pay the invoice value of said groceries and fixtures aforesaid, said T. W. Erwin, Jr., & Co. should have the good will of said C. J. Hayden for a period of not less than two years, and that it was his intention and purpose to absolutely retire from said grocery business; that the city of Sherman contains about 15,000 inhabitants, and has at all times since said purchase had 10 or 12 other persons and firms engaged in the retail grocery business; that plaintiffs accepted the said proposition, and purchased said groceries and fixtures, etc., and the good will, of said C. J. Hayden, paying therefor the invoice value aforesaid; that without the good will of C. J. Hayden they would not have purchased said business, and they made the purchase expressly relying upon the agreement of said C. J. Hayden protecting them in the purchase of said good will, and remaining out of the retail grocery business for a period of not less than two years; that T. W. Erwin, Jr., & Co. after said purchase continued in the business of retailing groceries in the storeroom theretofore occupied by said C. J. Hayden; that said Hayden, notwithstanding his promises, etc., has returned into the retail grocery business in said city, on Walnut street, and not 60 feet from the place of business occupied by T. W. Erwin, Jr., & Co., and under the firm name of C. J. Hayden does a larger retail grocery business, or has a larger stock of groceries on hand, than he had prior to April 1, 1895; that he returned into said business in the month of December, 1895; that the said Hayden has taken from plaintiffs the said good will and all the patronage of said business; that in establishing himself so near the said T. W. Erwin, Jr., & Co., and making such close competition in retailing groceries at such small profit, plaintiffs could no longer successfully compete with him after being deprived of said good will, and were forced to sell out and close business, at a great loss; that by reason of the premises said plaintiffs have been damaged in the sum of \$927.72 on the invoice value of said stock of groceries, and the sum of \$471 or

the invoice value of said fixtures, making a total of \$1,398.72, being the amount paid in excess of the market value of said stock of groceries and fixtures, etc., which was the estimated value of said good will of the said C. J. Hayden at the time of said purchase, and of which good will plaintiffs have been deprived in the manner aforesaid. The petition alleged a request by plaintiffs of defendant to pay their damages, and his refusal, and concluded with a prayer for citation, and for judgment for the amount of their damages, interest, costs, and general relief.

If, under the allegations of the petition, plaintiffs were entitled to recover any sum for damages upon proof of the facts therein set forth, then the court erred in sustaining the general demurrer. *Railway v. Granger*, 85 Tex. 574, 22 S. W. 959. It is the duty of the court to give to the pleading every reasonable intendment in favor of sustaining the pleading when the same is challenged by a general demurrer. *Railway Co. v. Hinzle*, 82 Tex. 623, 18 S. W. 681; *Wynne v. Bank*, 82 Tex. 378, 17 S. W. 918; *Railway Co. v. Montier*, 61 Tex. 123; *Whetstone v. Coffey*, 48 Tex. 271. Tested by this rule, the petition was sufficient. It alleges a purchase of the stock of groceries, fixtures, etc., and good will, of the said C. J. Hayden, who was the owner of the same, and doing business under the name of C. J. Hayden Grocery Company, at the corner of Houston and Walnut streets, in the city of Sherman, for a number of years, and had a well-established trade, and did a large and extensive business, and that said good will was worth, and was so considered in said purchase to be worth, 40 cents on the dollar of said invoice value of the stock of groceries, which was \$927.72, and 50 cents on the dollar of said invoice value of the fixtures, etc., amounting to \$471, or in the aggregate to \$1,398.72; that plaintiffs were to enjoy said good will at least two years, during which time defendant was not to engage in the retail grocery business in the city of Sherman; that defendant did engage in the retail grocery business within said two years in the city of Sherman, and on Walnut street, within 60 feet of plaintiffs' said business, and by reason of close competition plaintiffs lost said good will, and were damaged in the sum of \$1,398.72. That the good will of a concern is property is now well settled. Mr. Parsons, in his work on Contracts, says: "Equity will enforce specific performance of a bargain for the sale of a good will of a trade, provided it be connected with any specific stock in trade, or with some valuable secret of trade, or with a well-established stand for business." 3 Pars. Cont. (5th Ed.) p. 368. The allegations in the petition fairly state the value of the good will of C. J. Hayden in the retail grocery business. The fair intendment of the statement that the good will was worth \$1,398.72 is that that sum was its value. The petition shows a loss of the good will, and asks for judgment for the damages. The petition was sufficient.

The first special exception of the defendant was sustained by the court, and is made the ground of appellants' second assignment of error. This exception is that the petition does not allege the correct measure of damages, and that "the consideration paid for the good will is not the measure, but the actual damages sustained by reason of the breach of the contract." It will be noted that the exception does not question the manner of stating the measure of damages, but complains that it does not state the correct rule, and maintains that the correct rule is the actual damages sustained. We have stated that the petition alleged the value of the good will at the time of the purchase. It further states it was considered to be worth \$1,398.72. It further alleged the loss of the good will by reason of the acts of the defendant, and stated the amount of damages plaintiffs had sustained. This was a sufficient statement of the measure of damages.

The fifth special exception of the defendant was sustained by the court, which action of the court is made the basis of appellants' third assignment of error. This exception is: "That it appears that the contract alleged is in violation of the law of Texas against trusts and conspiracies, and against trade, and therefore void." When the judgment was rendered in the court below, the decision of the supreme court in the case of *Gates v. Hooper* (Tex. Sup.) 39 S. W. 1079, had not been rendered, and the learned trial judge did not have that authority before him. It is sought, in both written and oral argument of the able counsel for appellee, to distinguish this case from the case of *Gates v. Hooper*, supra. After carefully considering the facts of that case, and comparing them with the facts in the case at bar, we think the law laid down in the case of *Gates v. Hooper* is applicable to this case, and that the contract is not in violation of the trust law of Texas, and the trial court erred in so holding.

The trial court overruled the sixth special exception of the defendant, to the effect that the contract is in violation of the statute of frauds, in that it is oral, and not to be performed within one year from its date. Appellee has filed a cross assignment of error, in which he insists that the court erred in overruling this exception. If the agreement is of such a character that either party thereto may perform his part within one year, then the contract is not within the statute of frauds. *Railway Co. v. Wood* (Tex. Sup.) 30 S. W. 859. In the contingency of the death of C. J. Hayden within a year, the contract would be performed, and hence the contract is not within the statute. Counsel for appellee seek to distinguish this case from the case of *Railway Co. v. Wood*, supra, in that in this case the contract was that plaintiffs should have the good will for a "period of not less than two years." It is insisted that this language affirmatively shows that the contract is not to be performed within one year. This same position was taken in the *Wood Case*, supra, and in that case

the supreme court says: "The reasoning is untenable and not justified by the statute." 30 S. W. 860. We do not think the court erred in refusing to sustain this exception. For the reasons above stated the judgment of the court below is reversed, and the cause remanded.

**FIRST NAT. BANK OF HICO et al. v.  
HAMILTON NAT. BANK.**

(Court of Civil Appeals of Texas. Dec. 22,  
1897.)

**ESTOPPEL BY REPRESENTATIONS—LIEN.**

Plaintiff advanced \$10,000 to B. to buy cotton, under an agreement that plaintiff should have a lien on the cotton purchased, to secure it for the advances. B. purchased cotton, and afterwards received from defendant a loan of \$5,000 on a portion of the cotton so purchased, transferring to defendant said portion as security, and paid the same to plaintiff on account of his debt. Before accepting the \$5,000 from B., plaintiff inquired of him and defendant whether B. had transferred to defendant any of the cotton to secure the \$5,000 advanced to B., and was informed by both B. and defendant that no such transfer had been made. *Held*, that defendant was estopped to claim a lien on the cotton as against plaintiff.

Error from district court, Hamilton county; J. S. Straughan, Judge.

Action by the Hamilton National Bank against Thomas Bell. Property was sequestered, to which the First National Bank of Hico interposed a claim. From a judgment for plaintiff, claimant and its sureties bring error. Affirmed.

C. W. Cotton, J. C. Roberts, and Lindsey & Goodson, for plaintiffs in error. J. A. Eidson, for defendant in error.

**FISHER, C. J.** On the 16th of February, 1893, the defendant in error, the Hamilton National Bank, brought suit against Thomas Bell to recover the sum of \$5,966.37, and to foreclose a lien on 238 bales of cotton. Writ of sequestration was sued out, and levied on 110 bales of the cotton. Thereupon the plaintiff in error the First National Bank of Hico filed its claimant's affidavit and bond, claiming the cotton in controversy. The court below rendered judgment in favor of the defendant in error for \$276.93, with interest at 6 per cent. per annum from the date of the claimant's bond, with a foreclosure of the lien on the 110 bales of cotton in controversy, and against plaintiff in error and the sureties on its claimant's bond, with the 10 per cent. damages allowed by statute. The real controversy in the case is as to the ownership of the 110 bales of cotton, and as to whether the plaintiff in error or the defendant in error has the superior right thereto. On the issues made up in the court below the defendant in error claimed that it had a superior right and lien upon the cotton by virtue of a contract between it and Thomas Bell, wherein it was agreed that the Hamilton National Bank

would furnish to Bell, who was a cotton buyer, money to purchase cotton, and that defendant in error should have a lien upon the cotton so purchased to secure it for the advances made; that Bell, in shipping and selling cotton, should take the bill of lading in the name of the defendant in error, and that the returns should be made to it, covering the amount advanced, together with the interest agreed upon. And it is alleged that the cotton in question was purchased by Bell under that contract, with the funds furnished by defendant in error. The plaintiff in error, in effect, alleged that the cotton in question was purchased by Bell under his contract made with the defendant in error; and, by reason of the course of dealing between Bell and the defendant in error, Bell was authorized to sell, transfer, and hypothecate the cotton so purchased, in order to raise funds to repay defendant in error the moneys advanced; and that the plaintiff in error, by an arrangement between it and Bell, did loan and advance to Bell on said cotton \$5,000, in consideration of which Bell transferred to it the cotton in controversy; that the \$5,000 was advanced for the purpose of paying the defendant in error the amount due it by Bell; and that such amount was paid to defendant in error, and was accepted by it, and that by reason thereof it has lost whatever right it ever had in the cotton in question. Defendant in error to this replied that Bell, at the time that the \$5,000 was paid, was indebted to it about \$10,872, and that the defendant in error had, by reason of the contract between it and Bell, a lien upon 238 bales of cotton, a part of which was the 110 bales in controversy; that before it accepted payment of the \$5,000 advanced to Bell by the plaintiff in error, it inquired of Bell and the cashier of the plaintiff in error bank whether Bell had transferred to it any of the 238 bales of cotton to secure the \$5,000 advanced to Bell by the plaintiff in error, and that said Bell and the plaintiff in error then and there informed the defendant in error that no such transfer had been made; and further alleges that it was not the purpose of the defendant in error to release any of its right or lien upon any of the 238 bales of cotton, and that it accepted the \$5,000 payment upon the strength of said representations and statements made to it by Bell and the cashier of plaintiff in error, and it believed such statements at the time to be true, and, if it had known otherwise, it would not have accepted the \$5,000; and from these facts in effect pleads that the plaintiff in error is estopped from setting up any right, claim, or lien to the cotton in question. It was further claimed by the plaintiff in error that when it acquired the cotton in question from Bell the 110 bales were segregated from the 238 bales, and that they were designated by marks, and set apart for the plaintiff in error. On this issue there is testimony com-

ing from the defendant in error which tends to show that such was not the case; that all of the 238 bales were together, and that there were no marks of identification on these 110 bales, distinguishing them from the balance of the cotton, and that they were not separated or set apart. We will not undertake to set out all of the facts upon which we base our conclusions, but there is abundant evidence in the record establishing all the material averments contained in the pleadings of the defendant in error. It was shown that it did have a lien upon the cotton in question, which was never released, and that it accepted the \$5,000 upon the strength of the representations made to it by the plaintiff in error that Bell had not transferred to it the cotton in question, and that it believed these representations to be true at the time, and that it would not have accepted the \$5,000 if it had known that they were not true, and that it was never the purpose of defendant in error to release any right or claim that it had in any of the 238 bales of cotton.

The plaintiff in error filed certain special exceptions, calling in question the sufficiency of the averments of the plea of estoppel urged by the defendant in error. The court overruled these demurrers, to the action of which the assignments mainly relate. The estoppel was well pleaded. It appears from the averments that the defendant in error had a superior lien upon the entire 238 bales of cotton to cover the indebtedness due it by Bell; that when the plaintiff in error paid to the defendant in error the \$5,000 it had agreed to advance to Bell on the 110 bales of cotton, the defendant in error, before it would accept and receive the same, inquired of Bell and the plaintiff in error whether this amount was secured by any transfer or lien from Bell to the plaintiff in error on any of the 238 bales of cotton. The plaintiff in error thereupon stated and represented that it had acquired no such right or transfer, and it appeared that by reason of these representations, which the defendant in error then believed to be true, it accepted from the plaintiff in error the \$5,000. These representations were of such a character as were calculated to lead a man of ordinary prudence to act upon them. And it is apparent from the facts alleged and the facts in evidence that when the defendant in error did act upon them it was misled and deceived, to its injury, about a matter that materially affected its superior right in the entire 238 bales of cotton. Estoppel does not rest solely upon the intention to mislead and deceive by the party making the representations, for, if they are innocently made about facts with which he should be acquainted, and they are calculated to mislead and deceive a man of ordinary prudence, he will be held to the effect of the representations, although he did not intend that such effect should be given them. What is here

said also disposes of the plaintiff in error's seventh and eighth assignments of error.

In reply to the first assignment of error, it may be said that, while it is true the defendant in error spoke of its right in the property as a pledgee, yet, notwithstanding it may call it by this name, the facts pleaded and the facts in evidence show that in legal effect it had a superior lien on the property in question. We find no error in the record, and the judgment is affirmed. Affirmed.

#### GALVESTON, H. & S. A. RY. CO. v. ARMSTRONG et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 1, 1897.)

CARRIERS — INTERSTATE SHIPMENT — RESTRICTION ON LIABILITY FOR INJURY.

Defendant gave a thorough bill of lading for the shipment of cattle from a point within to a point without the state, beyond the terminus of its line, which was within the state. The contract restricted defendant's liability to injuries on its own road, and provided that the shippers should give notice in writing of any claim for loss or injury before the removal of the cattle, and that no action should be maintained unless brought within 40 days after the injury occurred. *Held*, that such stipulations did not violate the statute relating to restrictions on the liabilities of carriers, as defendant's contract was for an interstate, as distinguished from a domestic, shipment.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by A. Armstrong and others against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Upson, Bergstrom & Newton, for appellant. R. B. Minor, for appellees.

JAMES, C. J. Action for damages to cattle shipped by appellees from Spofford, Tex., under a through bill of lading or contract of carriage from that point to Muscogee, Ind. T. The contract of shipment contained a provision that, in case the live stock be transferred over the road or roads of other companies, appellant should be released from liability, for anything beyond its own line, except to protect the through rate of freight agreed on, although it may appear from the contract or from notations on the same that said stock is consigned to a point beyond its lines. It also contained stipulations, in consideration of reduced rates, that the shippers, as a condition precedent to their right to recover any damages for loss or injury to the stock, should give notice in writing of their claim therefor before the stock be removed from the place of delivery of the same, and before the stock became mingled with other stock, to O. E. Flato, station agent of appellant at La Grange, Tex.; also, that no action against appellant

<sup>1</sup> Writ of error granted by supreme court.

on any claim by virtue of the contract should be sustainable unless such action be commenced within 40 days next after the damage shall have occurred. Upon the margin of the contract was written "Muscogee, I. T., via La Grange & M. K. & T." It was shown that defendant's line terminated at La Grange, where the cattle were delivered to the Missouri, Kansas & Texas Railway Company. There was evidence of injury to the cattle on defendant's line. The notice of damage stipulated, it appears, was not given, nor was the action brought within 40 days.

Defendant pleaded that it delivered the cattle at La Grange in like condition as received, and that, if any damage occurred, it was after the cattle left its hands; the failure to give notice of damages as required; and the failure to sue within the period prescribed. The court sustained demurrers to the answer in so far as the answer set up the defenses of the failure to give the said notice, or to sue within the 40 days, upon the ground that it appeared from the answer and contract annexed that said stipulations were in violation of the statute of this state relative to restrictions on carrier's liability. The first assignment of error complains of this ruling. The court construed the shipment to be a domestic one, as distinguished from an interstate shipment, on the ground, evidently, that the limitation of defendant's liability to its own line, its agreement to deliver to a connecting carrier at its terminus La Grange, and thereafter to be responsible only for the protection of the through rate of freight, was, in substance, a contract on its part to carry the stock from Spofford to La Grange. This view was erroneous. *Railway Co. v. Sherwood*, 84 Tex. 135, 19 S. W. 455; *Houston Direct Nav. Co. v. Insurance Co. of North America*, 89 Tex. 1, 32 S. W. 889. The case last mentioned leaves nothing for us to say on the subject. The judgment is reversed, and the cause remanded.

#### CITY OF SAN ANTONIO v. KREUSEL.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 8, 1897.)

**ACTION FOR PERSONAL INJURIES—INSTRUCTIONS—DAMAGES—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.**

1. In an action for injuries received by falling into a trench, an instruction to find for plaintiff, "if you believe from the evidence said trench was left open or unguarded or unlighted," cannot be taken to be an instruction to find against defendant by reason simply of the trench being left open, where the remainder of the instruction charged that it must have been left open in a manner inconsistent with ordinary care.

2. Where the petition alleges mental suffering, direct evidence on that point is unnecessary, where the injury appears to be serious, and its effect permanent.

3. A new trial will not be granted on the ground of newly-discovered evidence, where the

existence of such evidence was known to the party claiming it, before the argument was closed, and no effort was made to introduce it.

Error from district court, Bexar county; Robert B. Green, Judge.

Action by Julius Kreusel against the city of San Antonio. Judgment for plaintiff, and defendant brings error. Affirmed.

R. B. Minor, for plaintiff in error. B. L. Aycock and T. T. Vander Hoeven, for defendant in error.

**JAMES, C. J.** The action was for damages for personal injury alleged to have been received by plaintiff's wife as the result of her falling at night into a trench alleged to have been opened by the city in one of its streets. There was evidence to support a finding that the city had been negligent in respect to the condition it was left in, and that such negligence was the proximate cause of her injury, and that she was not guilty of contributory negligence.

The first and second assignments go to the third paragraph of the charge, which reads as follows: "You are instructed that, if you believe from the evidence that the defendant, its agents, servants, or employes, dug a trench or excavation on Garden street, and you believe that said trench or excavation was a dangerous obstruction, and you believe from the evidence that said trench was left open or unguarded or unlighted, and you believe that the leaving of said trench or excavation in the condition you find from the evidence the same to have been at the time of the alleged injury was such as an ordinarily prudent and reasonable person would, under like and surrounding circumstances, not have left said trench or excavation; and you further believe from the evidence that the wife of plaintiff fell in said trench, and was injured, and that if the failure, if any, of the defendant, its agents, servants, or employes, to exercise the same care and prudence that an ordinarily cautious and prudent person would have done under like circumstances was the proximate cause of the injuries, if any, to the wife of plaintiff; and you further believe that at the time of the alleged injuries the wife of plaintiff was exercising the care that an ordinarily reasonable, careful person would have exercised under similar circumstances and surroundings, and you believe that plaintiff was not guilty of contributory negligence as hereinafter charged,—then you will find for the plaintiff." The grounds of objection to this part of the charge are: First, that it instructed the jury that defendant was liable if the trench was left either open or unguarded or unlighted, whereas defendant could not be liable unless it was both open and unguarded or unlighted; and, second, because it was calculated to mislead and confuse the jury as to the conditions and circumstances whereon defendant's liability depends. Both

<sup>1</sup> Writ of error denied by supreme court.

the assignments evidently refer to the same matter. We believe the charge, rightly considered, does not instruct the jury that they might find against the defendant by reason simply of the trench being left open. The charge, read in the light of appellant's criticism, would be that, if the jury believed that it was left open, and that the condition it was left in was such as an ordinarily prudent person would not have left it in, then defendant would be deemed guilty of negligence in respect thereto. The entire expression of the court should be considered, and not a fragment thereof. Certainly, the jury were not charged that defendant was liable from the mere fact that the excavation was left open, but they were charged that, if it was open, and left in such a manner as was not consistent with ordinary care, it would be liable. This was correct as a proposition of law. It might as well be claimed that they were instructed that, if they found it unlighted or unguarded, defendant was liable. The court did not even do this, but requires the act to be one of negligence in order to make defendant liable.

The third assignment complains of that portion of the charge permitting the jury to consider the wife's mental suffering, because, as is stated by plaintiff in error, there was no evidence that she experienced any mental suffering. The petition alleged mental suffering. The decisions in this state are that direct evidence of such matters need not be given when the injury appears to be serious, and its effect permanent. *Railway Co. v. Curry*, 64 Tex. 85; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288.

The fourth and fifth assignments are not well taken. It is not shown by the brief of plaintiff in error that the husband knew of an excavation at that place. The jury were asked to be charged that, if he knew that curbstones were lying in the street, preparatory to the construction of a sidewalk, and that his wife was in the habit of going to town by way of this place, and he did not warn his wife of the condition of the street, he could not recover. There was no evidence, we think, to justify a charge of this kind.

There is no merit in the sixth, eighth, and ninth assignments. The seventh complains of the denial of a new trial for alleged newly-discovered evidence. The statement of the proposed witness did not purport to be sworn to by him before a person authorized to administer oaths. But a sufficient reason for refusing the new trial for his testimony is the fact that defendant had knowledge of it before the conclusion of the arguments; and from the affidavit of the mayor of the city, to whom the witness communicated his testimony, it seems this official was apprised of the testimony before the testimony closed. This last-mentioned fact unquestionably required the overruling of the motion for a new trial, so far as this ground was

concerned. If, however, it were found that defendant did not receive the information until after the arguments had commenced, still, to warrant the consideration of such testimony as newly-discovered evidence upon a motion for a new trial, proper effort should have been made to have it placed before the jury by invoking the power of the court to admit it at that time, or by asking to be allowed to withdraw the announcement of ready. Plaintiff in error could not, under the circumstances, take the chance of a verdict with the evidence as it stood, and, upon an adverse verdict, set up its non-introduction as a reason why it should be awarded a new trial. Affirmed.

#### LIMBURGER v. BARKER.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 8, 1897.)

ANIMALS — INSPECTION — FEES — CONSTITUTIONAL LAW.

1. Rev. St. 1895, art. 5013, provides that the county inspector of hides and animals shall inspect all animals known or reported to him as sold for slaughter. Article 5022 provides that persons removing cattle from one county to another shall be protected from payment of inspection fees in the latter county by the inspection certificate from the former. *Held*, that one who bought for slaughter cattle that had been brought from another county was not exempt from the tax under the former provision, although the cattle were accompanied by the certificate of inspection provided by the latter.

2. The acts relating to the inspection of hides and animals are not unconstitutional.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Sam Barker against H. Limburger, Jr., for inspection fees. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. O. Berry, for appellant. John A. Green, Jr., for appellee.

JAMES, C. J. The evidence shows the following case: Appellant was a butcher in the city of San Antonio, and purchased in San Antonio 317 head of cattle for his business. These cattle were bought in 50 different transactions, from 1 to 25 head at a time. One hundred and sixty of them were raised in Bexar county, and had never been inspected, and 157 of them had been brought to San Antonio from other counties by their owners for sale; and such owners had had the cattle inspected in the respective counties from which they were brought, and proper bills of sale and inspection certificates accompanied them. It appears that, after appellant bought the cattle, they were inspected by appellee, the then inspector of hides and animals for Bexar county, and the fees for so doing charged to appellant. Appellant never requested such inspection. The suit was brought to recover of appellant such fees.

We are of opinion that defendant was liable. Article 4621, Rev. St. 1879 (article 5013, Rev.

<sup>1</sup> Application for writ of error dismissed for want of jurisdiction.



St. 1895), makes it the duty of the inspector to examine and inspect all animals known or reported to him as sold in his district for slaughter. Defendant had purchased the animals for slaughter, and it became the duty of the said officer to inspect the same, upon that fact coming to his knowledge. Nothing in the other provisions in the statutes on the subject can be said to relieve the inspector of such duty, unless it be article 4630, Rev. St. 1879 (article 5022, Rev. St. 1895), which refers to animals brought from other counties. This article expressly states that the person so removing cattle from a county is protected from payment of inspection fees in any other district by the certificate issued to him in the county from which they are brought. Such certificates accompanied the 157 head brought into Bexar from other counties, and protected their owners from further fees, so far as their sale in Bexar county was concerned. But article 4621, Rev. St. 1879, above referred to, provides for inspection whenever cattle are sold for slaughter, and, from its language, contemplates that the inspection shall be made after the cattle are sold. It therefore seems clear that the fee to which the officer is entitled under the law for such inspection falls upon the purchaser for slaughter, who is then the owner, in whose hands the cattle subject to inspection then are. There is no merit in the assignment which questions the constitutionality of these acts. Affirmed.

#### In re SOULARD'S ESTATE.

(Supreme Court of Missouri, Division No. 1.  
Nov. 3, 1897.)

**EXECUTORS AND ADMINISTRATORS—WAIVER OF OBJECTIONS—GIFTS—SETTLEMENT IN TRUST—RESERVATION BY DONOR—PRINCIPAL AND AGENT—RATIFICATION—DELIVERY—WILLS—EXPENSES OF CONTEST—ATTORNEY'S FEES—TEMPORARY ADMINISTRATION—COMMISSIONS—RIGHTS OF DEVISEES.**

1. Where an administrator, in a proceeding to which he was a party, read in evidence a portion of the deposition of the opposite party, before it had been offered on behalf of such party, he thereby waived the incompetency of such party to testify as a witness respecting certain transactions with the decedent, which were in controversy.

2. To constitute a valid gift *inter vivos*, there must be both an intention to give, and also a complete and unconditional delivery to the donee, or some one for him, of the property given.

3. Under a settlement in writing, as follows: "I give to [naming the donees] the following described notes and bonds, or any reinvestment of the same that may hereafter be made, \* \* \* reserving, however, for my own use, during my life, the income and interest from said bonds and notes, and restraining them from making any disposition of the principal of said bonds and notes during my life, and also reserving the right to reinvest any money from the payment of these notes and bonds as to me may seem fit,"—the notes and bonds referred to were delivered to one of the donees, for the benefit of all, with the explanation that he "would not have any of the income, or anything of that sort, during [the donor's] life." It appeared that the interest on

such bonds and notes was collected by the donor or his agent until his death, and that several of such notes matured during his lifetime, the proceeds of which were reinvested under direction of himself or agent. *Held*, that such disposition of such notes and bonds and their proceeds could not be enforced as a gift, as the right of control reserved by the donor was inconsistent with absolute ownership by the donees.

4. Where it appeared that such donor intended, by means of such settlement, to make a complete disposition of the property, whereby the income should be paid to himself during life, the proceeds of the notes as paid reinvested under his direction, and the beneficiaries should have no power to dispose of the principal during his life, but at his death they should have the principal fund absolutely, the legal title vested in the donees, subject to the trusts declared.

5. Where such settlement was originally made by an agent, under color of a power of attorney, though not strictly within the authority expressly conferred, the entire transaction became the personal act of the donor on his ratification thereof.

6. The delivery of the property comprising such trust, on the execution of such settlement, to one of the beneficiaries, to hold for himself and the others, was a sufficient delivery to each, as the donor thereby divested himself of the legal title, and vested it in the donees.

7. The fact that the donor retained a beneficial interest in such property did not invalidate such trust, as he could as well make the income payable to himself for life as to any other person.

8. Nor was the reserved right to direct the reinvestment of the proceeds of such notes inconsistent with a valid trust, as it did not affect the title of the donees, nor divest them of their legal and beneficial interest.

9. Nor was it necessary, in order to declare such trust, that the words "trust" and "trustee," or equivalent words, should have been used, where the intention to create a trust clearly appeared from the language actually employed.

10. Though it is the duty of an executor named in a will to propound such will for probate, as the representative of the testator, for the expenses whereof, including reasonable charges for "legal advice and services," he is entitled to reimbursement out of the estate, under Rev. St. 1889, § 222, yet, where certain residuary legatees, after the formal probate of such will, brought suit to contest its validity, under sections 8888 and 8889, as against the devisees, one of whom was such executor thereof, attorney's fees and other expenses incurred in defending such suit should not be allowed as a charge against the estate, but should be borne by the parties interested in the result.

11. Under Rev. St. 1889, § 13, requiring the temporary administrator, pending the contest of a will, to "take charge of the property, and administer the same according to law, under the direction of the court," such officer was authorized to take charge of the real estate the title to which was in controversy, and had the right to collect the rents, and was entitled to the commission allowed by law on the sums collected.

12. Where the will was established as the result of such contest, the devisees were entitled to the rents so collected on the property devised to them, less the commission of the temporary administrator thereon.

Appeal from St. Louis circuit court.

Exceptions of John M. Harney, administrator *de bonis non* of the estate of Henry G. Soulard, deceased, to the final settlement of the accounts of Joseph Soulard La Motte, as executor under the will of said decedent. The exceptions were sustained by the probate court, but on a trial in the circuit court, on appeal, certain of them were overruled, and the executor appeals. Reversed.

P. Taylor Bryan and W. B. Douglas, for appellant. Lubke & Muench and Frost & Foy, for respondent.

MACFARLANE, J. The controversies in this case arose in the probate court of the city of St. Louis, on exceptions to the final settlement of the accounts of Joseph Soulard La Motte, as executor under the will of Henry G. Soulard, deceased. La Motte died prior to the approval of his settlement, and Augusta F. La Motte was appointed his executrix, and, as such, asked the approval of the settlement. John M. Harney, who after the death of La Motte was appointed administrator of the unadministered goods of the said Soulard, deceased, filed exceptions to the settlement. The propositions upon which the exceptions are based are fairly stated by appellant, as follows: "First. The failure of La Motte, as executor, to inventory and account for, as property of the Soulard estate, the following property, to wit: Fifteen hundred dollars in cash, and also certain debenture bonds and promissory notes, the principal of which bonds and notes aggregates fifty-eight thousand five hundred dollars (\$58,500), together with the interest thereon from the date of Mr. Soulard's death. Second. Improper credits taken by La Motte for sums paid out in attorney's fees and other costs of litigation, which sums were not properly chargeable against the Soulard estate. Third. Improper credits taken by La Motte for commissions on rents collected and paid out by him as executor, he having no authority to collect rents. Fourth. Improper credits taken by La Motte, as executor, in the distribution to himself and his sister, Mrs. Cates, of certain articles of personal property, which under the will were bequeathed to the residuary legatees." This last-named ground of exception, having been decided in favor of the exceptor, need not be here considered. The exceptions were sustained by the probate court, but on a trial in the circuit court, to which the case had been appealed, the exceptions stated in the first three propositions were overruled, and the exceptor appealed.

It appears from the record and evidence that Henry G. Soulard died, testate, in the city of St. Louis, on the 16th day of February, 1891, at the age of about 90 years. At the time of his death he was possessed of property valued at between \$400,000 and \$500,000, of which more than \$100,000 was in personalty, consisting of notes and bonds secured on real estate. Mr. Soulard was for many years a married man, his wife dying childless in November, 1888. At about five years of age, a niece of Mrs. Soulard was taken into the family by Mr. Soulard, and was supported, reared, and educated by him and his wife. This niece first married F. X. La Motte, with whom she lived in the Soulard household until the death of her husband, in 1868. Of this marriage was

born a son, Joseph Soulard La Motte, and a daughter, who afterwards married Mr. Cates. These two children continued to live in the Soulard family until the death of Mr. Soulard, in 1891. In 1874, Mrs. La Motte, the widow of F. X. La Motte, married Gen. D. M. Frost, and bore to him two children, Edith and Harriet. In January, 1885, Henry G. Soulard made and delivered to his wife a general power of attorney, authorizing her to transact all his business. After the death of his wife, and on the 12th day of November, 1888, Mr. Soulard made to the said J. Soulard La Motte a like power of attorney.

On the 4th day of October, 1888, Mrs. Soulard executed two instruments of writing, which were duly acknowledged before a notary public, and were as follows:

"St. Louis, October 4th, 1887. I, Harriet M. Soulard, by the power vested in me by a general power of attorney dated January 23d, 1885, and given to me by my husband, Henry G. Soulard, on the above date, now, by the power so vested in me, I hereby give to my grandnephew J. Soulard La Motte and to my grandniece Elizabeth P. Cates the following described notes and bonds, or any reinvestment of the principal of the same that may be hereafter made: One note made and payable by Hugh J. Carney, as president of the Academy of the Christian Brothers, for fifteen thousand dollars (\$15,000); ten bonds of the Academy of the Christian Brothers, for one thousand dollars (\$1,000), each amounting to ten thousand dollars (\$10,000); one note made and payable by James Taussig, for fifteen thousand dollars (\$15,000),—said notes and bonds amounting to the sum of forty thousand dollars (\$40,000), share and share alike; that is to say, the sum of twenty thousand dollars (\$20,000) to the use of said J. Soulard La Motte, and twenty thousand dollars (\$20,000) to the use of Elizabeth P. Cates, reserving, however, for my own use during my life, the income or interest from said bonds and notes, and restraining them from making any disposition of the principal of said bonds and notes during my life, and also reserving the right to reinvest any money from the payment of these notes and bonds as to me may seem fit. Henry G. Soulard, by Harriet M. Soulard, Attorney in Fact."

"St. Louis, October 4th, 1887. I, Harriet M. Soulard, by the power vested in me by a general power of attorney dated January 23d, 1885, and given to me by my husband, Henry G. Soulard, on the above date, now by the power so vested in me I hereby give to my two grandnieces Edith M. and Harriet M. Frost the following described notes, or any reinvestment of the principal of the same that may be hereafter made: One note made and payable by Azby A. Chouteau, for the sum of thirteen thousand (13,000) dollars; one note made and payable by James A. Conlon, for three thousand and five hundred (3,500) dollars; and the sum of

three thousand five hundred (3,500) dollars out of two certain notes made and payable by Louis Ottenad—making in all the sum of twenty thousand (20,000) dollars, share and share alike; that is to say, ten thousand (10,000) dollars to the use of Edith M. Frost, and ten thousand (10,000) to the use of Harriet M. Frost, reserving, however, for my own use during my life, the income or interest from said notes, and restraining them from making any disposition of the principal of said notes during my life, and also reserving the right to reinvest any money from the payments of these notes as to me may seem fit. Henry G. Soulard, by Harriet M. Soulard, Attorney in Fact."

After the death of his wife, and on the 14th day of November, 1888, Mr. Soulard signed and acknowledged before Francis Valle, a notary public, a written indorsement on each of the said writings, as follows:

"I, Henry G. Soulard, do hereby declare that I am cognizant of the foregoing act of my attorney in fact, my wife, Harriet M. Soulard; that it has my concurrence; that I do freely ratify the same. As witness my hand, this fourteenth day of November, 1888."

Previous to the trial, the deposition of J. Soulard La Motte was taken by a commission by agreement, the parties stipulating that the testimony so taken should be read on the hearing "with the same effect as if the same had been taken before a notary public of the county, subject only to objection for incompetency, immateriality, irrelevancy, or the leading character of questions." On the trial, the executor read in evidence portions of this deposition. The remainder was offered by the administratrix. The executor objected, on the ground that both Mr. and Mrs. Soulard were dead, and the evidence tended to prove a contract or cause of action to which they were parties. The objection was overruled, and an exception was saved. That the notes and bonds specified in the two instruments of writing executed by Mrs. Soulard were never inventoried or accounted for by the executor is not disputed. On the contrary, it stands admitted that they were, after the death of Soulard, delivered, by his executor, to those, respectively, to whom the writings purported to give them. The failure to inventory and account for these notes and bonds is justified by the executor, on the ground that, by the settlements and the acts of the parties, they became, at the death of Soulard, the property of the donees therein named. La Motte testified that, on the day Mrs. Soulard executed the instruments, they, together with all the notes and bonds described therein, were delivered to him; that, at the time, Mr. Soulard had control of a safe-deposit box in which he kept his valuable papers. La Motte had access to this box, kept his own papers in it, and, on that afternoon or the next morning, he deposited these notes and bonds in it. Mrs. Soulard

died November 8, 1888. On the day after her death, La Motte rented a safe-deposit box for his own use, in which he deposited all these papers. On the 9th day of November, 1888, Mr. Soulard executed the indorsements found on the written declarations previously made by his wife. The circumstances attending the ratification by Mr. Soulard of the act of his wife, as detailed by La Motte and Valle, the notary, are about these: Soulard was in doubt whether the attempted transfer by his wife, of the notes and bonds, would be effectual to accomplish the purposes expressed therein, and he took the advice of his counsel, Col. Gantt, who prepared the written ratifications, and directed their indorsement on the papers. This was done, and Mr. Soulard sent for the notary public before whom the indorsements were signed and acknowledged. The papers were thereupon delivered to La Motte, who retained them until the death of Mr. Soulard. On the 12th day of November, 1888, Mr. Soulard made to La Motte a power of attorney, which contained like powers as the one previously held by his wife. Under this power of attorney, La Motte, from March, 1889, acted as agent of Soulard in the transaction of most of his business. Previous to that time, the business had been mostly transacted by William H. Shaw as agent. La Motte testified that previous to his appointment as agent, whenever the interest on any of these notes and bonds became due, the interest notes were delivered to Mr. Soulard or his agent, by whom they were collected. After his appointment as agent, he collected the interest, and accounted to Mr. Soulard for it. Notes that fell due prior to La Motte's agency were collected and reinvested by Soulard or his agent, but, according to the evidence of La Motte, the new notes were given into his possession, and were retained by him until Mr. Soulard's death, when they were delivered to the donees.

1. Many of the facts bearing upon the conduct of the parties and the management of the business connected with the notes and bonds in question are furnished by the evidence of the witness La Motte. The instruments of gift, as well as the notes and bonds, were delivered to La Motte. The written ratification of the acts of the wife and attorney of Mr. Soulard, tending to prove an intention to give the notes and bonds to the parties designated in the writings, was made to La Motte. It is evident that the contract or cause of action relied upon by the executrix was made with La Motte for himself and as representative of other donees. Mr. Soulard, one party to the cause of action, being dead, La Motte, under the statute and the construction given it by this court, would be clearly incompetent to testify as a witness. But the stipulation under which the deposition of this witness was taken, after naming a commissioner and the time and place for taking the testimony, has this

agreement: "And that the said testimony shall be read at any proper hearing of said matter with the same effect as if the same had been taken before a notary public of said county, subject only to objection for incompetency, irrelevancy, or the leading character of questions." It might well be questioned whether the incompetency of the witness was not waived by this stipulation. The reservation of the right to object is limited to the incompetency of the testimony of the witness, and does not, under a fair construction of the stipulation, extend to the incompetency of the witness to testify. But we do not deem it necessary to pass upon this point, as we are of opinion that the incompetency of the witness was clearly waived by the act of the exceptor in reading a portion of the deposition himself; and that, before it had been offered by the executrix. It was recently held by this court that a party waives the right to object to a witness, on the ground of his incompetency under the statute, by taking and filing his deposition in the cause, though he offered to read no part of it on the trial. *Ess v. Griffith* (Mo. Sup.) 40 S. W. 930; *Tomlinson v. Ellison*, 104 Mo. 114, 16 S. W. 201. Surely, a party would not be allowed to admit the competency of a witness to testify to such matters as are favorable to him, and then to deny his competency to testify to other matters which are unfavorable. It is said in the case first cited: "The living party is not made absolutely incompetent as a witness, but he shall not be permitted to testify in his own favor." He may called as a witness by the administrator, and compelled to testify; but, when so called, he is entitled, on cross-examination, to testify in his own favor. Rev. St. § 8920. In such case the incompetency is waived, whether his evidence be given at the trial or by deposition. Section 8924. This opinion is controlling. The administrator read portions of the deposition, and the opposite party had the right to read the remainder. The parties seem to recognize the justice of this rule, by the terms of the stipulation.

2. The most casual reading of the declarations made by Mrs. Soulard, and the ratification afterwards made by her husband, leaves no doubt of the intention on their part that the principal of the notes and bonds described, and their reinvested proceeds, should become the property, respectively, of the persons therein named as donees. Courts are ever desirous of carrying out and effectuating the intention of parties as manifested by their agreements or declarations of trust, and will do so whenever it can be done consistently with the established rules of law. To constitute a valid gift *inter vivos*, there must be an intention to give, and a delivery unto the donee, or to some one for him, of the property given. An intention of the donor to give is not alone sufficient. The intention must be executed by a complete and unconditional delivery. Neither will a delivery be sufficient unless made with an intention to give. The transaction must

show a completely executed transfer to the donee of the present right of property and the possession. The donee must become the owner of the property given. *Dunn v. Bank*, 100 Mo. 97, 18 S. W. 1139; *McCord v. McCord*, 77 Mo. 166; *Walter v. Ford*, 74 Mo. 195; *Tomlinson v. Ellison*, 104 Mo. 105, 16 S. W. 201. A gift cannot be made to take effect in the future. Such a transaction would only amount to a promise to make a gift in the future, and, being without consideration, is void. *Spencer v. Vance*, 57 Mo. 429; *School Dist. v. Stocking* (Mo. Sup.) 40 S. W. 658.

Without reviewing the evidence in detail, a summary of which is given in the statement, we find from it these conclusions of fact, which we regard as well established: At the time Mrs. Soulard executed the settlements, she delivered them, and also the notes and bonds, to La Motte, but explained to him at the time "that he would not have any of the income, or anything of that sort, during Mr. Soulard's life"; that, soon after receiving the notes, bonds, and settlements, La Motte placed them, for safe-keeping, in a safety box controlled by Mr. Soulard, in which he kept his valuable papers. La Motte and Mrs. Soulard had access to this box, and the former kept his own papers in it. Mr. Soulard was, at the time, old and infirm, and seldom, if ever, opened the box. His business was transacted by his wife and an employed agent and clerk. On the death of Mrs. Soulard, La Motte rented a safety box, to which he transferred the papers, notes, and bonds. At the time the indorsements on the settlements were executed by Mr. Soulard, the notes and bonds were in the box controlled by La Motte. The interest on the notes and bonds was collected by Mr. Soulard or his agent until his death. La Motte was appointed agent in March, 1889, and continued to act as such until the death of his principal. Several of the notes matured during the lifetime of Mr. Soulard, and they were collected, and the proceeds thereof were reinvested, under the direction of himself or agent. From the time of the delivery of the notes and bonds to La Motte, a separate account was kept of their collection and reinvestment. Of this, Mr. Soulard was advised by monthly statements made him by his agents. The language of the settlement to La Motte and Mrs. Cates is: "I give to [naming the donees] the following described notes and bonds, or any reinvestment of the principal of the same that may hereafter be made [here follows a specific description of the notes and bonds], amounting to the sum of forty thousand dollars, share and share alike; that is to say, the sum of twenty thousand dollars to the use of J. Soulard La Motte, and twenty thousand dollars to the use of Elizabeth P. Cates, reserving, however, for my own use during my life, the income and interest from said bonds and notes, and restraining them from making any disposition of the principal of said bonds and notes during my life, and also reserving the right to reinvest any money from the pay-

ment of these notes and bonds as to me may seem fit." Though the evidence shows a delivery of the notes and bonds to La Motte, and also a clearly-expressed intention to give them to the donees named, yet the transaction does not amount to an executed gift, under the foregoing rules of law. The transfer to the donees is not absolute and unqualified. The right of control reserved by the donor is inconsistent with absolute ownership by the donees. The donees took no present, unconditional title to the notes so long as the donor retained control over them and their proceeds. It is clear that the donor intended that the gift should not become perfect until his death. The disposition attempted to be made of the notes and bonds and their proceeds cannot therefore be enforced as a gift.

3. Can the disposition of the property be enforced as an executed express trust? This depends, in the first place, upon the intention of the donor; that is to say, if the donor intended to dispose of this property as a gift, but failed in that purpose for any reason, he cannot have the imperfect gift enforced as an executed voluntary trust. An imperfect gift will not be converted into a declaration of trust on account of the imperfection. There must therefore have been an intention to create a trust before one can be declared and enforced. This principle is well expressed by Rapallo, J., in *Young v. Young*, 80 N. Y. 437, who says: "It is well settled that equity will not interpose to perfect a defective gift or voluntary settlement made without consideration. If legally made, it will be upheld, but it must stand as made, or not at all. When, therefore, it is found that the gift which the deceased attempted to make failed to take effect for want of delivery or a sufficient transfer, and it is sought to supply this defect, and carry out the intent of the donor by declaring a trust which he did not himself declare, we are encountered by the rule above referred to. It is established as unquestioned law that a court of equity cannot by its authority render that gift perfect which the donor has left imperfect, and cannot convert an imperfect gift into a declaration of trust, merely on account of that imperfection." As has been said, the transaction in question does not amount to a perfect gift. That is evident from the terms of the settlements themselves. Yet it is evident, also, that the donor intended to make a complete disposition of the property, by which the income should be paid to himself during life, the proceeds of the notes, when paid, should be reinvested under his direction, the beneficiaries should have no power to dispose of the principal during his life, but at his death they should have the principal fund absolutely, whether then in bonds, notes, or money. We must assume that the donor intended to do what these settlements show he attempted to do. If the settlements, together with what was done under them, amounted to a valid executed trust, then they should be carried

out in favor of the beneficiaries. These settlements are without consideration from the beneficiaries of the principal fund. The attempted trusts are voluntary, and, unless fully executed, they will not be enforced. If not executed, they would only be voluntary executory agreements for the creation of the trusts, which a court of equity would not perfect and enforce. A voluntary trust must be created by the donor himself, and not by the court. In *Stone v. Hackett*, 12 Gray, 227, Bigelow, C. J., says: "A voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions enforced against all persons except creditors and bona fide purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of the trust, nor regard it as binding so long as it remains executory. But it is equally true that, if such an agreement or contract be executed by a conveyance in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of the title, the relation of trustee and cestui que trust is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery." These principles seem to be well established. *Thornt. Gifts*, § 412, and cases cited; 8 Am. & Eng. Enc. Law, 1223, and cases cited. See, also, note to *Williamson v. Yager* (Ky.) 34 Am. St. Rep. 196 (s. c. 15 S. W. 660).

Counsel for appellant urge with much earnestness and ability several objections to treating this transaction as an executed voluntary trust. The importance of the subject and the force of the argument of counsel make a consideration of these objections proper. It may be said, in the first place, that the general power of attorney held by Mrs. Soulard gave her no authority to give away the property of her principal. The express authority given excludes, as a general rule, all implied authority to do something beyond what is expressed. "But he who may authorize in the beginning may ratify in the end." *Bank v. Gay*, 63 Mo. 39. The ratification of Mr. Soulard to the settlements made by his wife was complete. It was indorsed upon the instruments themselves, beneath his name, which had been signed by his wife. He declared that he was cognizant of the foregoing act of his attorney in fact, that it had his concurrence, and he fully ratified the same. It cannot fairly be said, as contended, that this ratification was only of the act of signing the settlements by his wife. He ratified, and intended to ratify, the act of his attorney. If her act, as manifested by the writing, was intended to create a trust in the notes and bonds described, that act and whatever had been done to perfect the trust

was ratified. We must therefore treat the entire transaction of the agent as the act of Mr. Souldard, the principal.

The inquiry, then, is whether the settlements and what was done under them were sufficient to place the bonds and notes in trust for the use of the beneficiaries therein named. It is well settled that no particular words are necessary to declare a trust. If the language sufficiently expresses an intention to create a trust, that will be sufficient. To this proposition, we believe, all authorities agree. *Perry, Trusts*, § 82; *Flint, Trusts*, § 84. In order to render a sufficiently expressed voluntary trust valid, it is only necessary that the trustor should have done everything which could have been done (the character of the property comprising the trust being considered) to transfer the property to the trustee in such mode as will be effectual to pass the title. This, it is said, he may do "by actually transferring the property to the persons for whom he intended to provide, and the provisions will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purpose of the settlement, or if he declares himself a trustee for those purposes." *Milroy v. Lord*, 4 De Gex, F. & J. 264; *Smith's Estate*, 144 Pa. St. 436, 22 Atl. 916. The property comprising the trust was delivered to La Motte, on the execution of the settlements, who held them for himself and for the other beneficiaries until the death of the donor. This was a sufficient delivery to each of the beneficiaries named. A delivery is sufficient if made to a third person for the grantee or beneficiary, "without reservation, and with the intention that it shall take effect from that time, and shall operate as a transfer of the title." *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497; *Hamilton v. Armstrong*, 120 Mo. 597, 25 S. W. 545; *Rothenbarger v. Rothenbarger*, 111 Mo. 1, 19 S. W. 932.

The settlements being beneficial to the donees, an acceptance will be presumed, particularly as to the two Frost girls, both of whom at the time were infants. In *Worth v. Case*, 42 N. Y. 367, the court says: "There is no doubt that a delivery of a deed or note to one person in favor of and for the benefit of another constitutes a valid and binding delivery as against the party who delivers it, whether the party in whose favor it is delivered is aware of it or not; and, for the purpose of protecting his interest, the law holds the party receiving the delivery as his trustee, and makes the acceptance of it the acceptance of the beneficiary." This statement of the law is in accord with the decisions of this court cited above. By the delivery of the settlements, together with the notes and bonds, the donor divested himself of the legal title, and vested it in the donees. It is true, he retained a beneficial interest in the property,—the right during his life to the interest and income therefrom,—and reserved

the right to direct the reinvestment of the proceeds. But these are parts of the declared purposes of the trust. The donor could as well make the income payable to himself for life as to any other party. In *Stone v. Hackett*, supra, the income of the property was to be paid to the donor during life, and upon his death the principal was to be divided among various charities, and the validity of the trust was upheld. In *Davis v. Ney*, 125 Mass. 590, a voluntary trust was upheld which allowed the donor to receive, not only the income, but such part of the principal as she might need during her life.

Nor do we think the reserved right to direct the reinvestment of the notes inconsistent with a valid trust. The reservation did not affect the title in the donees, or divest them of their legal and beneficial interest. As the trust required the income of the fund to be paid to the donor, the reservation of the right to direct the reinvestments was a reasonable provision for the protection of his equitable rights. The reservation was not of title, but of power, coupled with the trust, and is not inconsistent with the complete transfer of the title in present. *Thornt. Gifts*, § 435; *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257; *Harbison v. James*, 90 Mo. 427, 2 S. W. 292. It was not necessary, in order to declare a trust, that the words "trust" and "trustee" or equivalent words should have been used. If a clear intention to create a trust appears from the language used, the declaration will be sufficient, though technical words be not used. Three things, it has been said, must concur to raise a trust,—“sufficient words to create it, a definite subject, and a definite object; and to these requisites may be added another, viz. that the terms of the trust should be sufficiently declared.” *Bisph. Eq.* 65; *Cummings v. Coleman*, 9 Ves. 323; *Smith's Estate*, supra. All these requisites are found in these declarations. It is a voluntary trust, and the words "I give" are appropriately used as indicating a transfer of the property to the donees. Property can be as effectually transferred by gift as by sale, and the word—"give" is as expressive of a transfer of title as the word "sell." The subject of the trust is specifically described. The objects of the trust are clearly expressed. The language used sufficiently declares the trust. The notes and bonds described are given to the donees. The interest and income are to be paid to the donor during his life, and at his death the legal and equitable title to the principal becomes complete. The declarations and the property comprising the trust were delivered to the donees, and the legal title at once became vested in them, subject to the declared trusts. The disposition of the property was not in its nature testamentary, for it took effect immediately, and was not postponed to the testator's death. The intention of the donor in the disposition of

this property is perfectly clear, and no established rules of law prevent the courts from carrying it out.

4. As stated, Henry G. Soulard died testate and childless. By his will he devised to the said La Motte and his sister, Mrs. Cates, specific real estate. The residue of his estate he devised to his legal heirs. After the probate of the will in the probate court, and the due qualification of La Motte as executor, a suit was commenced in the circuit court by certain of the residuary legatees contesting the validity of the will. La Motte and Mrs. Cates, as devisees under the will, were made defendants in this suit. This suit, after a trial had commenced, was dismissed by contestants, and the will was duly established. La Motte was not an heir of deceased, but was devisee under the will of a considerable portion of his real estate, and was appointed executor. When the suit contesting the will was instituted, La Motte was suspended from his trust, as provided by statute, and the St. Louis Trust Company was appointed administrator pendente lite. La Motte employed and paid attorneys to defend the suit, and paid other necessary expenses of making the defense. An allowance of these items of expenses, amounting to about \$3,700, was asked in the settlement. As to these items the settlement was approved by the circuit court, and the correctness of its ruling is here questioned. The question, then, is whether the executor of a will, who is also a devisee under it, and whose interest depends entirely upon its validity, is entitled to reimbursement from the assets of the estate for sums paid to attorneys, for other expenses paid, in defending a statutory suit contesting the validity of the will, he being himself a party to the suit. The authorities are conflicting on this question. From them Judge Woerner reaches the conclusion that "it is the duty, or at least the privilege, of the person named as executor in a paper purporting to be a last will, to propound the same for probate in the proper court; but the executor is not bound to become a party to an issue of *devisavit vel non*, unless he be secured for the expenses by the persons interested in the will." But, he says, "if the will be established, the costs and counsel fees, being chargeable against those who are benefited by the litigation, may be charged against the estate, if it go to the parties so benefited; otherwise the executor's remedy is by action for contribution." 2 Woerner, *Adm'n*, § 517. "The executor," says Redfield, "is presumed to have the custody of the will, and he is the only person who can, in the first instance, properly prove the will." 3 Redf. Wills, 8. In *Bradford v. Boudinot*, 3 Wash. C. C. 122, Fed. Cas. No. 1,765, the court say: "The executor, believing the paper under which he acts is the last will, is authorized, and it is his duty, to support the first probate, and he is entitled to retain the expense of the litigation out of the estate." In speaking of the duties of executors, the supreme court of Virginia says: "He is the representative of the

will and of all interests created by it. \* \* \* It is therefore his right and his duty to obtain for the instrument the sanction prescribed by law." *Wills v. Spraggins*, 3 Grat. 555. "It is the privilege," says the supreme court of Alabama, "if not the duty, of one named as executor of a paper purporting to be the last will and testament, to propound it for probate. If he have no knowledge or reasonable ground on which to predicate a well-grounded suspicion against the legality of the will, and propound the paper in good faith, he but carries out the intention with which he was appointed. Any reasonable costs and expenses incurred by him in the honest endeavor to give effect to the will are a proper charge on the estate in his hands." *Henderson v. Simmons*, 33 Ala. 299. The supreme court of Rhode Island, in the case of *Hazard v. Engs*, 14 R. I. 6, held that, on an appeal from a decree submitting a will to probate, the persons nominated as executors are entitled, acting in good faith, to prosecute the probate in the appellate court at the expense of the estate. The court says, in conclusion: "We think the expenses reasonably incurred by the executor in prosecuting the probate are to be regarded as necessary expenses incident to administration." See, also, in *re Lewis*, 35 N. J. Eq. 99; *Compton v. Barnes*, 4 Gill, 55. The courts of Pennsylvania have adopted a different rule, holding that the quantum of the estate is not affected whether there be a will or not; and, the result of the contest not affecting the estate, those interested in the contest should bear the expenses, and not the estate. *Mumper's Appeal*, 3 Watts & S. 441; *Yerkes' Appeal*, 99 Pa. St. 401. The supreme court of Ohio follows the Pennsylvania cases, though in the case under consideration the judgment of the court was against the validity of the will. The court says: "We find no authority to sustain the position that a party acting as trustee is bound to defend the relation of trustee whenever the rightful existence of that relation is assailed or called in question, although, should he do so, and do it successfully, it seems he would in that case be entitled to charge his proper expenses against the trust estate, and for the reason that his expenditure inures to the benefit of the cestui que trust." Still, the court says: "We can see no good reason, on principle, why he should be held bound to assume the burden of defense in the contest of will under which he acts." The court is of the opinion that those claiming under the will are the proper parties to defend it. *Andrews' Ex'rs v. His Administrators*, 7 Ohio St. 151. It is held in California to be no part of the duty of an administrator to contest the validity of a will, offered for probate after his appointment, and he will not be allowed for expenses incurred therein. In Illinois it is held that moneys expended by an executor in defending a suit to contest the validity of a will, in behalf of the personal interests of the devisees named in the will, in which suit the will is set aside, are not proper credits to be allowed against the estate. *Shaw v. Moderwell*

104 IH. 65. An executor represents his testator, not only in executing the will after its probate, but in having it probated. He is appointed on account of the confidence reposed in him, and it is his duty to do everything necessary to carry it into execution. This duty includes that of propounding the will for probate, for it cannot be executed until it has been properly adjudged to be the will of the testator. The executor acts, not only in the capacity of a trustee of the estate, but he represents the testator in carrying out his will. It is therefore clearly the duty of an executor to obtain for the will, in the first instance, the sanction of the law which is necessary to make it effective. In performing that duty, he acts in the capacity of representative of his testator, and should of right be reimbursed out of the estate for all expenses incurred in good faith in the discharge of this duty, whether the will be established or rejected. That the advice and services of attorneys are proper items of expense in the first probate of the will cannot reasonably be doubted. Indeed, such expenses are fairly included under the statute which authorizes the allowance to executors of all reasonable charges for "legal advice and services." Rev. St. 1899, § 222. What is here said refers to the probate of wills in common form, by probate courts, where no notice to parties interested is required. In case the probate is contested in the circuit court, under the provisions of section 8888 and the general practice act (article 1, c. 33), all parties interested either as heirs of the deceased or as beneficiaries under the will are required to be made parties. *Eddie v. Parke's Ex'r*, 31 Mo. 514; *Rogers v. Dively*, 51 Mo. 104. "Under our law," it is said, "the proceeding to contest a probated will is in the nature of an appeal and a trial de novo. There can be no doubt that it devolves upon those who claim under the will to show that it was duly executed and attested, and that the testator was of requisite age." *Norton v. Paxton*, 110 Mo. 461, 19 S. W. 807. It is said in another case: "The onus is on the proponents of a will, in a contest of this character, to prove its proper execution and attestation, and also that the testator was of proper age and of sound mind. When these facts are shown, a will prima facie valid is established, and it then devolves upon those attacking its validity to prove fraud or undue influence if either is charged." *Maddox v. Maddox*, 114 Mo. 46, 21 S. W. 502.

The question, then, is: What are the duties and privileges of an executor in case the validity of the will, after its formal probate, is contested? The liability of the estate for his expenses depends upon the way in which this question is solved. The statute evidently contemplates a suit between those claiming under the will and those who consider themselves injured by it. In *Eddie v. Parke's Ex'r*, supra, the executor alone was made a party defendant. The devisees were not made parties plaintiff or defend-

ant, and on that ground a demurrer to the petition was sustained. The court says: "The only parties interested in the estate are the children of James and Elizabeth Eddie; yet neither of them are made parties to the proceeding, though the very object of the will is to divest them of the property devised to them by their grandfather. No decree or judgment under such circumstances could have any force or effect, for a judgment is only operative against those who are made parties to the suit." The technical contest in such statutory proceeding is over the validity of the will, but the ultimate object—the real object—is to determine the rights of the parties to the property. The estate is neither increased nor diminished by the result, and the executor is only interested in seeing that the formal proof of the due execution of the will is made. I am unable to see any good reason why an executor should be required to assume the burden of litigation between the parties directly interested. The estate itself is not to be affected by the result, and all parties interested in the property devised are parties to the suit. The contest being between the parties directly interested, they, and not the estate, should bear the expense of the litigation. Any other rule might operate ruinously to estates, and is contrary to the manifest policy of our law. If the expense of the contestants is to be paid out of the estate, they would have nothing to lose and everything to gain by the contest. There would be no limit to the expense the parties might incur short of the value of the estate itself. The entire estate could therefore be swallowed up in the litigation, and the contestants, if successful, would reap a barren victory. A premium to contest the will would thus be given to parties who might be displeased with the disposition the testator had made of his property. But few unsatisfactory wills would escape a contest. A rule leading to such results would be clearly contrary to the policy of our law. Under the statutes and laws of this state, a successful party to a suit is generally only entitled to his taxable costs as expenses, and no reason can be seen for a different rule in these cases. The case is not at all analogous to one affecting an estate in the hands of a trustee. The trusteeship of the executor is suspended during the litigation, and he has no power over the estate, and no duty to perform in respect to it, other than what he derived from his mere nomination by the testator. It is also held under this statute, as has been seen, that the devisees claiming under a will must be made parties, or their interests will not be affected by the judgment; and this, though the executor be a party. The clear inference is that the executor is not required to assume the burden of the litigation, and does not represent the beneficiaries under the will. The statute authorizes a contest



to be instituted to establish a will that has been rejected by the probate court. The executor is not required to commence this contest, whatever his privilege may be. It may be instituted by any person interested. If upon such a contest the will is again rejected, it could hardly be said that the estate should pay the expenses. Finally, the statute requires an issue to be made up, "whether the writing produced be the will of the testator or not, which shall be tried by a jury, or, if neither party require a jury, by the court." Rev. St. § 8888. An ordinary jury trial is thus provided, one party affirming and the other denying the validity of the instrument in question. The court has the right, after verdict, to grant a new trial, "as in other cases," and either party has the right to appeal. Id. § 8889. It could not have been intended that the estate should pay the expenses while the parties control the proceedings. It is true, generally speaking, that, in case the will is established by the contest, it could make no practical difference whether the expenses of the parties maintaining the will were paid directly by the parties who claim under it, or out of the estate which they will ultimately receive. But that is not always so, as is illustrated by this case. La Motte and his sister are devised specific real estate, and the residue is left to the heirs of the testator. The residuary legatees are the contestants. If the expense of defending the will be paid out of the estate, the entire burden will fall upon the residuary estate, and consequently upon contestants. While it would have been the duty of the executor to propound the will for probate, and in statutory contests to make formal proof of its due execution and attestation, if no one else undertook that duty, yet the expense of trying the matters contested should be borne by the parties interested in the result. La Motte was not only executor, but a devisee, under the will, and largely interested in its establishment; and we assume that the expense incurred by him in the litigation was in behalf of himself and sister, and none of it should be paid out of the estate. In allowing these items of expense we are of the opinion the circuit court committed error.

5. Objection is made to commission allowed the executor on rents of real estate collected by the administrator pendente lite. The item as it appears in the settlement is: "March 24, 1893. By two-thirds bal. of 5 per cent. com'n (divided with St. Louis Trust Co.), adm'r pend. lite, 1,313.92." It appears that an arrangement was made between La Motte and the trust company that the latter, while acting as administrator pendente lite, should pay to the former two-thirds of the commission on rents of real estate. The real estate upon which rents were collected included that devised to La Motte, but it does not appear what pro-

portion of the rents was derived therefrom. Under the Missouri law of administration, the executor or administrator has nothing to do with the renting of real estate unless authorized by the probate court, or unless the will so directs. The real estate descends to the heir or passes to the devisee, and not to the executor or administrator. But, in case the representative assumes to act without authority, he is bound as such to account for the rents collected. He and his securities are estopped to deny his authority. *Lewis v. Carson*, 93 Mo. 591, 3 S. W. 483, and 6 S. W. 365. The temporary administrator, while in charge of the estate, acts in the character of a receiver, and should take charge of all the property the right to which may be affected by the contest, whether real or personal, and preserve it for those who may be entitled to it at the end of the suit. The statute requires the temporary administrator "to take charge of the property, and administer the same according to law, under the direction of the court." Rev. St. 1889, § 13. The statute is broad enough, we think, to include the real estate the title of which is indirectly in controversy, and depends upon the result of the contest. If the heir or devisee should collect the rents, the other would have no security for its return in case the judgment should entitle him to it. The trust company, while acting as administrator, had the right to collect the rents on the real estate, and was entitled to the commission allowed by law on all sums collected. It had the right to divide the commission as it saw fit. Yet the devisee was only entitled to the net rents, less the entire commission, on the property devised to him. When the will was established, La Motte was entitled to have the rents collected on his property paid back to him, less the 5 per cent. commission. He should not have the entire rents paid to him, and also charge the commission thereon against the estate. The judgment is reversed, and cause remanded, with directions to correct the settlement as herein indicated, and approve it as corrected. All concur.

#### WEBB CITY & C. WATERWORKS CO. v. CITY OF CARTERVILLE.

(Supreme Court of Missouri. Dec. 14, 1897.)  
CITIES — CONTRACTS — NECESSARY CURRENT EXPENSES — INCOME.

1. In determining the necessary current expenses of a city to see if it has income in excess thereof allowing judgment against it for rental of hydrants, only the salaries of its officers and of a reasonable police force are to be considered; Rev. St. 1889, § 4977, declaring that, in case execution be issued against a city, and returned unsatisfied, it may be compelled to levy, within constitutional limits, a tax to be paid the execution creditor, except such amount as may be necessary to pay "the reasonable salary allowed by law to the mayor, council, assessor, marshal, constable, attorney, and a reasonable police force."

2. Money derived by a city from sale of bonds is no part of its income and revenue, as respects power to contract debts in any year in excess thereof.

In banc. Appeal from circuit court, Jasper county; Thomas Hackney, Special Judge.

Action by the Webb City & Cartersville Waterworks Company against the city of Cartersville. Judgment for defendant. Plaintiff appeals. Reversed.

Stewart, Cunningham & Elliot and Galen & A. E. Spencer, for appellant. McReynolds & Halliburton, for respondent.

BURGESS, J. This is an action by plaintiff, as the assignee of one James O'Neill, against defendant, for the sum of \$5,406.75, alleged to be due plaintiff from defendant for hydrant rental. There was judgment for defendant in the circuit court, from which plaintiff appealed.

On or about the 27th day of July, 1889, the board of aldermen of the defendant city, by ordinance duly passed, numbered 27, granted to said O'Neill, his associates and assigns, for the full period of 20 years from the completion thereof, the exclusive right to construct, erect, and operate in said city a system of waterworks, and to supply the city and its inhabitants with water. Under the contract, defendant was to pay \$50 per annum for the use of each hydrant erected by O'Neill, which was to be paid in equal installments of \$12.50 each after the expiration of each quarter, viz. on the 10th day of April, July, October, and January of each year. O'Neill accepted the terms of the contract, which was fully consummated, and this suit is brought by plaintiff, who succeeded, as assignee, to all his interest in the contract. The works were constructed, the hydrants erected, and defendant had the use of the hydrants according to contract. No provision for the levy of a special tax to pay said hydrant rental was ever at any time made by the city. The defendant answered the plaintiff's petition, substantially denying each and every averment thereof, and setting up the special defenses: First. That at the time of the passage of Ordinance No. 27 defendant was, and for years prior thereto was, and ever since has been, levying a tax upon the property within its limits "to more than the full amount and extent authorized and permitted by the constitution and laws of Missouri," and that all the revenue derived from such tax was and is required and used in paying the ordinary current expenses and charges of carrying on the city government outside of the indebtedness attempted to be created by said ordinance, and in paying past indebtedness created before it became a city of the fourth class, and that from such levy and collection defendant has no means or money to pay plaintiff's claim. Second. That at no time since said ordinance was passed could the defendant, by the levy of the tax allowed by law, have raised

the necessary funds to pay the debt so attempted to be created, or any part thereof, after paying its ordinary running expenses, and keeping up its city government. Third. That said ordinance attempted to create an indebtedness for the defendant city to an amount, including existing indebtedness, exceeding in the aggregate 5 per centum of the value of the taxable property of the city; that defendant at that time had an outstanding indebtedness of over \$5,000; and that the indebtedness attempted to be created by said ordinance and contract exceeded 5 per centum of the taxable property within defendant's limits. Fourth. That the indebtedness attempted to be created by said ordinance and contract is more than 5 per centum of the taxable value of the property within defendant's limits, as shown by the state and county assessment for any year after the attempted creation of such indebtedness. Fifth. That as to \$3,331.75 of the debt sued for by the plaintiff, defendant had issued to plaintiff its warrants on its treasurer, and that said warrants were delivered and accepted in payment of said indebtedness; and that plaintiff's remedy, if any, as to said amount is by suit upon such warrants. Trial by jury was waived, and the cause was tried by the court sitting as a jury.

It was admitted before the court that defendant, during all the transactions in question, was a city of the fourth class, having more than 1,000 and less than 10,000 inhabitants. It was proved that during all the time in question the defendant had had the actual use of the hydrants. Plaintiff tendered at the trial, and offered to surrender to defendant, six certain warrants of defendant, given for part of the water rental sued for, being warrants of numbers and dates following: No. 60, dated October 13, 1892; No. 115, dated January 20, 1893; No. 151, dated April 13, 1893; No. 42, dated July 6, 1893; No. 72, dated October 27, 1893; and No. 127, dated January 4, 1894. And proved that said warrants were not taken in payment of said rental, but were taken to be in payment of rental only when in fact said warrants should be paid. Plaintiff then proved the rentals sued for to have been due quarterly, as follows: For the year 1892: Third quarter, ending September 30, \$512.50; fourth quarter, ending December 31, \$512.50. For the year 1893: First quarter, ending March 31, \$512.50; second quarter, ending June 30, \$512.50; third quarter, ending September 30, \$656.75; fourth quarter, ending December 31, \$675. For the year 1894: First quarter, ending March 31, \$675; second quarter, ending June 30, \$675; third quarter, ending September 30, \$675.—total, \$5,406.75. Defendant proved the assessed value of property within its limits as per its tax books, to wit: Real estate, personal property, merchandise, and insurance to have been, in 1891, \$159,844; 1892, \$453,-

134; 1893, \$558,395; 1894, \$643,012,—and that the tax levy for all these years was 50 cents on the \$100 for each year. Defendant then proved that the books of its treasurer for the years 1892, 1893, and 1894 showed receipts and disbursements as follows: For the year 1892, total receipts, \$7,215.16, including \$4,000, proceeds of the sale of bonds of the city, and disbursements, \$6,881.50, including \$1,500 bonds paid. For the year 1893, total receipts, \$4,997.23, and disbursements, \$5,222.10. For the year 1894, total receipts, \$9,747.90, including \$6,000, proceeds of sale of city bonds, and disbursements, \$9,613.67, including \$6,000, bonds and interest paid. What was the particular character or purpose of these disbursements, or by what authority they were made, was not shown, except as to the \$1,500 in 1892 and the \$6,000 in 1894, paid on bonds and interest due on bonds.

Over the plaintiff's objection, W. L. Wees was permitted to testify that he had examined the books of the city clerk, and had figured up the total amount of receipts, as shown by those books and by the treasurer's books, and had made a statement showing the amount of such receipts and the amount of warrants issued, the amount of the warrants being obtained from the warrant stub book and the journal of the board of aldermen; that he has prepared a statement of those matters, which included also money received (as shown by the treasurer's books) from sale of bonds during said times. Defendant offered said statement as the result of the witness' investigations, and this statement was put in evidence over the plaintiff's objection. That statement shows receipts and warrants ordered for the years 1892, 1893, and 1894, as follows: In 1892, receipts including \$4,000 proceeds of bonds sold, \$6,930.41, instead of \$7,215.16, as previously shown from the treasurer's books for 1892, and a total of warrants issued and bonds and interest paid, \$6,493.02. For the year 1893 it shows receipts, \$5,012.23, instead of \$4,997.23, as shown by preceding statement from the treasurer's books, and a total of warrants, \$5,341.78. For the year 1894 it shows total receipts, including \$6,000, proceeds of bonds sold, \$9,863.86, instead of \$9,747.90, as shown by preceding statement taken from the treasurer's books; and it shows warrants ordered and payment of bonds and interest in 1894, \$9,418.14. This statement shows no particulars or character of the alleged warrants, or for what purposes issued, nor anything as to the nature of any payments, except \$1,500 bonds paid in 1892, and \$6,000 bonds and interest paid in 1894. Defendant then proved that in October, 1890, it issued \$1,500 bonds, and in July, 1891, \$1,500 more bonds; that in October, 1891, it issued \$1,500 bonds, with which the bonds of October, 1890, were taken up; that in 1892 it issued \$4,000 bonds, \$1,500 of the proceeds of which were used in taking up the issue of July, 1891; and that under an ordinance (or-

dinance 124) passed in November, 1893, it issued \$6,000 of bonds, from the proceeds of which all its outstanding bonds, to wit, \$1,500, issued in July, 1891, and \$4,000, issued in 1892, with accrued interest, were paid. Ordinance No. 124, under which this issue of \$6,000 bonds was made, provides that "said city shall levy and collect a tax annually of fifteen cents on each one hundred dollars valuation on all the taxable property of said city out of the tax rate allowed by law to be levied and collected on all taxable property of said city, with which to pay the interest on said indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof." Defendant then introduced an abstract from the books of the city clerk, showing warrants of the city of Carterville (excluding hydrant rentals) drawn for the years 1892, 1893, and 1894, inclusive. The total of warrants, exclusive of hydrant rentals, issued for the year 1892, was \$4,117.37; for the year 1893, \$3,157.93; for the year 1894, \$2,363.14. Among other disbursements, it appears that there was expended out of the funds of the city, upon a cemetery and in the salary of a sexton therefor, in 1892, \$283.75; in 1893, \$55; in 1894, \$40.10. Also, besides a city marshal, paid at the rate of \$40 per month, there was expended in the salary of a deputy city marshal in 1892, \$385; in 1893, \$266.50; and in 1894, \$280. Also for curbing and guttering streets there was paid out of the city treasury, in addition to the street commissioner's salary in 1892, \$371.75. Also for salary of a street commissioner there was spent in the year 1892, \$328.50; in 1893, \$357.75; in 1894, \$144.65. Also for salary of a deputy street commissioner in 1892 there was spent \$136. Also for insurance on buildings there was spent in the year 1892, \$40.50, and in the year 1893, \$42, and in 1894, \$17.50. Also for a road grader there was spent in 1892, \$235. It seems that the city was unable to pay its hydrant rental from its income and revenues from the time it first began to use the hydrants, and for that purpose, and to partially pay the expenses of the city government, it continued to borrow money until it had bonds outstanding aggregating the sum of \$5,500 at the time it ceased to pay its hydrant rental.

Plaintiff asked and the court refused to declare the law to be as follows: (1) "Under the contract introduced in evidence, if the plaintiff has complied with the requirements and provisions thereof as to furnishing water for use of defendant, the defendant became indebted to plaintiff on March 31st, June 30th, September 30th, and December 31st, respectively, of each year, for hydrant rental for the three months preceding each of said dates, at the rate of twelve and  $\frac{50}{100}$  dollars for each hydrant furnished defendant by plaintiff under the terms of said contract; and if, at the time of incurring any such indebtedness, to wit, on any of the dates above mentioned, in any year from and including

September 30, 1892, to and including September 30, 1894, the total income and revenue of defendant city then and thereafter provided for and collected during such year had not been expended by said city, but there remained unexpended of such amount sufficient to pay such hydrant rental for the three months next preceding such date, the finding will be for plaintiff for all such quarters' hydrant rentals." (2) "If the contract introduced in evidence was made by plaintiff and defendant with the assent of two-thirds of the voters of the city of Cartersville voting at an election called and held for that purpose, of which election there had been given fifteen days' previous notice by publication in a newspaper published in said city of Cartersville, and the indebtedness then and thereafter incurred under said contract did not, including existing indebtedness, in the aggregate exceed five per centum of the value of the taxable property in said city, as ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of any indebtedness thereunder, the finding will be for the plaintiff." Plaintiff duly excepted to the action of the court in refusing its declarations of law.

At the request of defendant the court declared the law to be as follows, to wit: "The court declares the law to be that by the terms, 'necessary expenses of the city, to keep up its organization, and perform the functions for which it is organized,' are the following: Pay of salaries of city officials; keeping streets in repair; publishing city ordinances; expenses of city elections; removal of nuisance; board of prisoners, and supplies for city jail; cost of preparing tax books; necessary supplies for city officials." The court, of its own motion, gave the following declaration of law, to wit: "The court declares the law to be that the contract entered into between the city of Cartersville and the plaintiff is valid, and binding on the defendant, provided the court finds that the hydrant rentals mentioned in said contract could be paid out of the income and revenue provided by the defendant for each year, after first deducting therefrom the necessary expenses for maintaining the city government; and, if the court finds from the evidence that the income and revenue provided by the defendant for each year for which plaintiff sues for hydrant rental, after deducting the necessary expenses of maintaining the city government for such year, was insufficient to pay the whole or any part of the hydrant rentals for the same year, the finding and judgment must be for the defendant." Thereupon the court found in favor of the defendant, and made its written finding in the following words: "The court finds from the evidence that the ordinance mentioned in plaintiff's petition was duly passed by the board of aldermen of the city of Cartersville; that an election was duly held in said city, on proper notice, on the day mentioned in the petition, and at the said election

the said ordinance was approved and ratified by more than two-thirds of all the voters voting at said election; that the plaintiff has complied with all the terms and conditions of said ordinance, and put in additional hydrants when requested by said city; and has furnished the water to said city, and furnished the city the use of the hydrants mentioned in the petition, during the times therein stated. The court further finds that, excluding from consideration moneys received from the sale of bonds issued by said city, and excluding from consideration moneys paid by said city on its bonds, that the income and revenue provided by said city for any one year has not been sufficient to pay the whole or any part of said hydrant rental, after the city has first paid its necessary, ordinary current expenses for the maintenance of the city government; that no provision for the levy of a special tax to pay the said hydrant rentals was made by the said city before or at the time of making the contract with plaintiff's assignor, James O'Neil, nor before or at the time plaintiff furnished the city water under the said contract. And the court declares the law to be, from these facts, that the ordinance passed by the board of aldermen and mayor, and ratified by the voters of the city of Cartersville, not having made provisions for the levy of a special tax to pay the hydrant rental which might thereafter become due to the plaintiff, the board of aldermen of the city of Cartersville have no power to levy a special tax to pay said hydrant rentals, and the plaintiff must look alone to the annual income and revenue of the said city for each year to pay said hydrant rentals; and that the city has the right, and it is its duty, to first pay out of its said annual income and revenue the ordinary expenses necessary to maintain the city government for each year; and, as such ordinary annual expenses equal or exceed the annual income and revenue, the plaintiff is not entitled to recover."

By the declarations of law given and the finding of facts it will be observed that all of the issues involved in the pleadings were found in favor of plaintiff, except that the income and revenue provided by the city for any one year, excluding moneys received from the sale of bonds issued by said city and moneys paid by the city on its bonded indebtedness, was not sufficient to pay the whole or any part of its hydrant rental after the city had first paid its necessary and ordinary expenses for the maintenance of the city government. In fact, it is admitted by counsel for defendant in their brief that the ruling of the court was as stated on all of the issues. Defendant took no appeal, so that the only question to be considered is with respect to the issue ruled adversely to the plaintiff, and upon which the case was decided against the company; that is, the sufficiency of the income and revenues of the city for the years in question derived from all

its sources to pay its ordinary current expenses. There was no request by either party for the court to state its finding upon the facts and law of the case, so that in passing upon the questions involved resort may be had to the finding of facts by the court, the declarations of law asked by plaintiff and refused, the declaration of law given at the instance of defendant, and that which was given by the court of its own motion. By the declaration of law given by the court of its own motion it was held that the contract between the city of Carterville and plaintiff is valid, and binding on the defendant, provided the hydrant rental mentioned in the contract could be paid out of the income and revenues provided by the defendant for each year, after deducting therefrom the necessary expenses for maintaining the city government; but, if insufficient to pay the whole or any part of the hydrant rentals for the same year, the finding and judgment must be for the defendant. The finding of facts is in accord with that declaration of law. By it the court finds that, excluding from consideration moneys received from the sale of bonds issued by the city, and excluding from consideration moneys paid by the city on its bonds, the income and revenue provided for the city for any one year was not sufficient to pay the whole or any part of the hydrant rental after paying its necessary current expenses for the maintenance of the city government. The question, then, is, what constitutes such expenses? By the declaration of law given at the instance of defendant such expenses were held to include not only the salaries of the city officials, but expenses for keeping streets in repair, publishing city ordinances, expenses of city elections, removal of nuisance, board of prisoners, and supplies for city jail, cost of preparing tax books, and necessary supplies for city officials; and, as the different purposes for which such expenses were incurred were not specified in the declaration of law given by the court of its own motion, nor in the finding of facts, we can but conclude that all of the items mentioned in defendant's declaration of law were taken into account by the court in estimating the amount of the city's necessary current expenses for each year. What should be included in such current and necessary expenses is somewhat difficult to determine, unless that question is settled by section 4977, Rev. St. 1889. The section provides that, in case an execution shall be issued against any incorporated town or city, and returned unsatisfied in whole or in part for want of property whereon to levy, the chief officers of such city may be compelled by mandamus to levy, within the constitutional limits, assess and collect, the annual taxes in such town or city from year to year, as occasion may require, and order the same, when collected, to be paid to the execution creditor, his agent or assigns, except such amount as may be necessary to pay the reasonable sal-

ary allowed by law to the mayor, council, assessor, marshal, constable, attorney, and a reasonable police force of any such town or city. It will be seen by this statute that the necessary current expenses of such cities are restricted to the salaries of its officers, and of a reasonable police force, and it would seem that the same rule should apply in an action to recover a judgment under the circumstances disclosed by the record in this case that would apply in proceeding to collect the judgment in the event of one being rendered. The items of expense that were improperly considered by the court amounted to several hundred dollars each year, and, but for the fact that they were included in the estimate of the current and necessary expenses of the city for each year, a different result would have in all probability been reached. It was said in *Lamar Water & Electric Light Co. v. City of Lamar*, 128 Mo. loc. cit. 202, 26 S. W. 1025, and 31 S. W. 756, that the words "income and revenue provided for such year" do not mean simply the revenue raised by a levy of tax on real and personal property. They include also the income derived from licenses and from all other sources." But this does not, we think, as insisted upon by plaintiff, include moneys arising from the sale of its bonds which were sold by the city in 1892 for the purpose of raising money to pay \$1,500 of its bonds which were then outstanding, and the remainder to pay other indebtedness; and the fact that the remaining \$2,500 was placed by the defendant in its general expense fund does not alter the case. Income does not mean money borrowed, but in this instance means revenues derived by the city from all sources, and upon all accounts. So that no error was committed by the court, when estimating the annual income and revenues of the city, in excluding from its consideration moneys received from the sale of bonds issued by it, and moneys paid by it upon its bonds which were outstanding. Under the circumstances there was no error committed in refusing the declarations of law asked by plaintiff. It follows that the judgment must be reversed, and the cause remanded. It is so ordered. All concur.

# SHERLOCK et al. v. KANSAS CITY BELT-RY. CO.

(Supreme Court of Missouri, Division No. 2.  
Oct. 22, 1897.)

RAILROADS—PUBLIC USE—FRANCHISE—MUNICIPAL CORPORATION—POWER TO GRANT—INTERJUNCTION—JURISDICTION.

1. A switch track, constructed and operated along an alley, by authority of the city, is for a public use.
2. A municipal corporation has no power to grant the use of an alley to a railroad company to lay its tracks therein, if the ordinary and reasonable effect of such a grant will be to prevent or unreasonably impede the passage of other vehicles belonging to abutting owners or other

members of the public desiring to use such alley.

3. Where a railroad company has constructed a track along an alley, so that the operation of cars thereon will obstruct it, a court of equity has jurisdiction to enjoin the company from so using its tracks, although no injury has as yet been done.

4. Where the construction and operation by a railroad of a track would prove a continuous damage to property owners, no adequate remedy at law can be had, and a court of equity has jurisdiction to grant an injunction.

Appeal from circuit court, Jackson county; Edward L. Scarritt, Judge.

Bill by Ann Sherlock and others against the Kansas City Belt-Railway Company to enjoin the building and operating of a track along a public alley. Injunction granted, and defendant appeals. Affirmed.

Pratt, Dana & Black, for appellant. Kenneth McC. De Weese, for respondents.

GANTT, P. J. This is an appeal from a decree of the circuit court of Jackson county perpetually enjoining the defendant, a steam-railroad company organized under the laws of this state, from constructing its track, and operating its engines and cars, along a public alley from Seventeenth to Eighteenth streets, and between Walnut street and Grand avenue, in Kansas City, Mo. The plaintiffs are the owners of lot 367, in block 28, in McGee's addition in Kansas City. Said lot fronts on the west side of Grand avenue, with a width thereof of 49½ feet, and run westwardly 115.6 feet to said alley. Said alley is 16½ feet wide, is a public thoroughfare dedicated as an alley when the addition was platted, and extends north and south through several blocks, ending at the south at defendant's yards, and at the north end between Fifteenth and Sixteenth streets. At the commencement of this suit plaintiffs were the owners of two livery and sale stables on their said lots, and said stables abutted on said alley; and said alley was used by the lessee in removing manure from the rear of the stables. Some time in the year 1891 the common council of Kansas City by ordinance granted the defendant company the right to construct, maintain, and operate a switch track north and south along said alley, through blocks 18, 23, and 28 of McGee's addition, from the south line of Eighteenth street to the north terminus of said alley, and to cross Sixteenth, Seventeenth, and Eighteenth streets with said tracks; and in 1894, by another ordinance, granted the right to lay a side track not less than 12 nor more than 13 feet west of the center of said switch track. In October, 1894, under and by virtue of these ordinances, the defendant began digging out and grading said alley in the rear of plaintiff's lot to bring it to the grade established in 1877, previous to the erection of plaintiff's building. This grading lowered the surface of the alley from two to five feet. Defendant also began to construct a standard-

gauge railroad track in said alley, and had hauled its material on the ground for that purpose. The original application for injunction in this case was filed November 3, 1894. A restraining order was granted, and upon November 21st the amended petition was filed upon which the cause was heard. The temporary restraining order was revoked. The petition contains averments of the ownership of the lot in question, the incorporation of the railroad defendant, the chartering of Kansas City, the nature and relative situation of the adjacent streets and alleys, as already stated, and then charges that "afterwards, and some time on or about the — day of October, 1894, or some time shortly thereafter, said defendant entered into and upon said alley named, running north and south through said block twenty-eight (28) from Seventeenth street to Eighteenth street, as aforesaid, and where said lot three hundred and sixty-seven (367) adjoins or abuts upon said alley, and dug out and graded down and removed the earth and stone from said alley where plaintiffs' said lot abuts thereon to the depth of five (5) or six (6) feet, and are now constructing, and intend to construct, in said alley, a railroad switch track of standard grade in said alley from Eighteenth street to Seventeenth street for private use, so that said alley along that portion thereof from Eighteenth street to Seventeenth street will be entirely and wholly occupied by said defendant with its said railroad track and engines and cars used thereon, to the exclusion of all other persons whomsoever, and whereby said defendant will wholly destroy said alley as a public thoroughfare, and will confine the same to its own exclusive use without lawful authority, or any authority whatever, and wrongfully, to the great and irreparable damage of plaintiffs, which said obstruction so placed and maintained, and intended to be placed and maintained, by said defendant in said alley, will constitute a public nuisance to the whole public of the state of Missouri, and a private nuisance to these plaintiffs; that, in addition to the wrong and injury sustained by these plaintiffs as aforesaid, the said defendant is now constructing, and intends to construct, across east Eighteenth street, and across east Seventeenth street, in said city, between which said streets the property of plaintiffs abuts on said Grand avenue, a double-track railroad switch track of standard gauge, for private use, to be used in connection with and as a part of said proposed railroad switch track in said alley; that said east Seventeenth and said east Eighteenth streets are public highways and thoroughfares, and are important traveled highways in said city, and that by reason of the construction and operation of said railroad switch track across said east Seventeenth and east Eighteenth streets travel will be diverted from said streets, and from said Grand avenue, and thereby decrease the value of plaintiffs' property, and take away trade hereto-

fore enjoyed by them; that the said injuries will be continuous, irreparable, and unascertainable, and cannot be compensated in damages. That, in addition to the wrongs and injuries sustained by the entire public by reason of the nuisances aforesaid, these plaintiffs will sustain local and specific damages and injuries to their said property, and in the use thereof, which said damage and injury is local, peculiar, and specific to them, and separate and different from that of the public generally or other persons who may suffer injury thereby; that said damage and injury so threatened, by reason of the construction of said railroad track and engines and cars, will be continuous, irreparable, and cannot be compensated in damages; that plaintiffs are without adequate remedy at law, or any remedy whatever, for the injuries and wrongs as aforesaid, except in equity for the abatement of said nuisances, and the restoration of said street to the use of the public, and especially for the free and open use of those plaintiffs in connection with their said lot. Wherefore plaintiffs pray that said defendant may be enjoined and restrained from constructing said railroad track in said alley, or from the obstruction and destruction of said alley as a public highway," etc. Defendant's answer consists: (1) Of a general denial. (2) That plaintiffs consented to the building of said railroad in said alley, and led defendant to believe that it had a right to construct and maintain the same, and upon faith thereof defendant expended large sums of money. (3) That it was a railroad organized and existing under the laws of Missouri and Kansas, and authorized to maintain and operate a railroad and engage in the switching business. Admitted that it was engaged in constructing a railroad in said alley. Averred that, in 1877, Kansas City had established the grade of said alley by ordinance, and afterwards by ordinance granted defendant the right to construct, maintain, and operate a railroad track over and upon said alley, and pursuant to such authority defendant was, at the time of the institution of this suit, proceeding to construct said railroad. "That in the construction of said railroad upon said alley, pursuant to such grant by said city, it was necessary to excavate the surface of the alley way to the grade established by said city, and such excavation was made almost to said grade when the injunction herein was served, and the plaintiffs claim that by reason of these acts their property will be damaged." "That the doing of such work, and the construction and maintenance of such railroad, are for the public use, and the amount of compensation to be paid therefor cannot be agreed upon between the parties; wherefore it becomes necessary for the court to take some steps to ascertain the amount of damage, if any, that will be sustained by reason of the proposed action of

defendant. Wherefore defendant asks that the court take such steps as are necessary to permit this defendant to acquire the right, as against the plaintiffs, to construct, maintain, and operate its said railroad over the said alley, by the appointment of commissioners by condemnation proceedings, or in such other manner as the court may deem proper." At the April term, 1895, the cause was heard, and a perpetual injunction granted, enjoining and restraining defendant from constructing, operating, or maintaining its railroad in said alley, and directing defendant to remove the railroad track from said alley from Seventeenth to Eighteenth streets. From that decree, after proper steps in the circuit court, this appeal is prosecuted. Upon the hearing, in addition to the facts already stated, it appeared that after the dissolution of the restraining order, and prior to the final hearing, the company proceeded to lay its railroad track in said alley; that said track was not laid in the center of said alley; that the cars which said company proposed to use on said track averaged 10 feet in width; that it was impossible for teams or vehicles to pass through said alley when said trains were moving therein; that the ordinance of the city placed no limit whatever upon the number of trains defendant might run upon said tracks, nor the length of time they should be allowed to stand thereon; that another ordinance of the city required all livery and sale stables abutting upon alleys to maintain doors opening outward upon said alleys to expedite the escape of stock in case of fire. There was also evidence that the rear doors of said buildings were used for carrying out manure and rubbish that would necessarily accumulate in said stables; that when cars were allowed to stand in the alley, or were passing, there would remain a space of only 3½ feet on either side for the passage of vehicles or animals. There was no evidence that, up to the time of the trial, the cars of the company had been allowed to stand upon the track in the alley, and the then superintendent of the company disavowed any intention of permitting them to do so. The evidence further tended to prove that the operation of the road on said alley in the rear of said buildings would depreciate their rental value and their market value for sale.

1. "Few questions have come before the courts in this generation of greater practical importance, or involving larger pecuniary interests, than those growing out of the construction of railways in city streets. Whether such streets may, under legislative and municipal authority, be occupied by railroad tracks, to the inconvenience of abutting owners, without making compensation, and what limitation, if any, there is to the legislative power over streets which cannot be transgressed without violating the legal and constitutional rights of lot owners, are

questions which have excited the gravest debate, and have been the subject of the most careful judicial consideration." Andrews, J., in the Kane Case, 125 N. Y. 175, 26 N. E. 278. Judge Cooley in his Constitutional Limitations remarks that "It is not easy to trace a clear line of authority, running through the various decisions, bearing upon the appropriation of streets and highways to the use of any grade or species." And such is and must be the testimony of any one who attempts to reconcile "the vacillation of the courts on this subject." Streets are highways, dedicated primarily for public travel by ordinary methods, but they are not exclusively devoted to that purpose. Elliott, Roads & S. c. 21. Abutting owners have the right appurtenant to their property of access to it over the adjacent streets and alleys, and this right is as inviolable as the right to the property. While this court, by a long line of decisions from Lackland v. Railroad Co., 31 Mo. 180, down to and including Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. Ry. Co., 113 Mo. 308, 20 S. W. 658, has held that "the laying of a railroad track on the established grade, and operating a steam railroad thereon, does not subject the street to a servitude different from that which was contemplated in the original dedication," it has been seriously questioned, and it may be gravely doubted, whether the weight of modern authority in this country is not rightly arrayed against such a doctrine. Nor has it been accepted with us without qualification. A street cannot be used for sidetracks, water tanks, or like structures. Tate v. Railway Co., 64 Mo. 149. As already stated, the tracks must be laid to grade, so that the only obstruction would be the passing of trains; otherwise an action will lie to abutting owners. Cross v. Railway Co., 77 Mo. 320; Smith v. Railroad Co., 98 Mo. 24, 11 S. W. 259; Knapp, Stout & Co. v. St. Louis Transfer Ry. Co., 126 Mo. 26, 28 S. W. 627. A railroad laid in a street without municipal authority is a public nuisance. 23 Am. & Eng. Enc. Law, 1093. The franchise must be granted for public, and not for private, purposes. Glaessner v. Association, 100 Mo. 503, 13 S. W. 707.

This last proposition brings us to the first contention of the plaintiffs, to wit, that this railroad switch track is a private use of the public highway. It is earnestly insisted by learned counsel for plaintiffs that while the defendant is a railroad corporation under the laws of this state, and a common carrier, the use for which it proposes to maintain this switch track is private. This contention must be ruled against plaintiffs. In Brown v. Railway Co. (Mo. Sup.) 38 S. W. 1099, it was ruled that a switch track constructed in an alley by authority of the city, and connecting with the main line of and operated by a railroad company, was under article 12, § 4, of constitution of Missouri for public use. Said the court: "We cannot declare that to

be a private use which the law makes a public use." There, as here, the company constructed and operated the track. The private merchants who were served by the switch had no control or management of the cars or the business of transportation. We are satisfied that the principle thus announced is correct. Knapp, Stout & Co. v. St. Louis Transfer Ry. Co., 126 Mo. 26, 28 S. W. 627. But again, while a municipal corporation may ordinarily authorize the laying of a railroad track in a street or alley, still it must exercise this right in such a manner as not to destroy the use of the street or highway as a public thoroughfare, or unreasonably interfere with the right of abutting owners to have access to and from their property on said highway. It has no power to grant the exclusive use of any highway to any one person or corporation. In Lockwood v. Railroad Co., 122 Mo. 86, 26 S. W. 698, this court sustained a decree enjoining the operation of a railroad on a street in St. Louis upon the complaint of abutting owners. The street in that case was 24 feet wide between curbs, so that the ordinary business upon the street could not be carried on at the same time with that of the railroad. It was held that the grant was virtually a monopoly of the use of the street, and that the city had not power to thus divert the street from the uses to which it had been dedicated. In Knapp, Stout & Co. v. St. Louis Transfer Ry. Co., 126 Mo. 26, 28 S. W. 627, the company was authorized by a city ordinance of St. Louis to lay down, maintain, and operate a switch track to connect with the St. Louis Union Stock Yards "along the western portion of Hall street." Under this grant the company constructed its railroad along and upon what would be the west sidewalk, under the general terms of the ordinance, right up to the line of Knapp, Stout & Co.'s property abutting on said street. It was evident that such a railroad destroyed the use of the street for ordinary travel. Upon a review of the former decisions of this court, among others Lockwood v. Railroad Co., 122 Mo. 86, 26 S. W. 698, this court said: "Taking these cases all in all, it is very clear a municipal corporation has no power to grant to a railroad company such a use of a street as will destroy its usefulness as a public thoroughfare, or destroy or unreasonably interfere with the right of an abutting property holder to access to and from his property." "This track, placed on what is properly the sidewalk, close up to plaintiff's lot, is an unlawful structure,—one which the city did not and could not legalize as against the rights of plaintiff." "The injury inflicted upon the plaintiff is of a continuous character, and the case is one calling for equitable relief." Afterwards, in Schulenberg & Borkeler Lumber Co. v. St. Louis, K. & N. W. Ry. Co., 129 Mo. 455, 31 S. W. 796, this court cites both Lockwood's Case and Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. Ry. Co. with



approval, both as to the want of power in the city to authorize a steam railroad through a street so narrow that such use would necessarily destroy it as a public way, and deprive abutting owners of access to their property, and as a proper case for relief by injunction. The municipal council of Kansas City has large powers over the streets, alleys, and public highways of said city. Still it must exercise that power in conformity to the constitution of the state. By the dedication of streets and alleys to public use, a trust is confided to the city to preserve and utilize them for that purpose only. The city has no power to destroy the alley on which plaintiffs' property abuts, as a thoroughfare. *Lockwood v. Railroad Co.*, 122 Mo. 86, 26 S. W. 698. More than this, the city has no power to grant the use of this alley to a railroad company to lay its tracks therein, and operate its engines and cars thereon, if the ordinary and reasonable effect of such a grant will be to prevent, or unreasonably impede and obstruct, the passage of other vehicles belonging to the abutting owners or other members of the public desiring to use such alley. Now, the facts of this case are so obvious that their bare statement demonstrates that the ordinance permitting the laying of this track, with the unlimited right to run steam engines and cars thereon, at all times of day or night, practically gives defendant the monopoly of that alley, the very nature of its use by the defendant each time totally obstructing it and excluding all others therefrom. Such a use is not to be compared to that ordinary inconvenience or delay which an ordinary wagon or vehicle may cause to another of like kind. The facts of this case bring it clearly within the principles which governed in *Lockwood v. Railroad Co.*, 122 Mo. 86, 26 S. W. 698.

It remains only to consider the objection that as yet the company has not been guilty of the threatened injury. It is, however, conceded that it has constructed its track, and proposes to operate its road thereon, and this brings it within the peculiar jurisdiction of a court of equity to prevent a threatened injury. Had the plaintiffs sat idly by until a large expenditure of money had been made, defendant might well have complained; but they have notified defendant at once, and have had recourse to every means in their power to prevent the destruction of this highway on which their property abuts. The nature of the obstruction, the use to be made of the alley as a steam railroad, leaving no pass-way for animals or vehicles, fully establishes the charges of the petition. It would be a continuous damage to the plaintiffs, and they are entitled to the injunction granted. There is no conflict between the views here expressed and the opinion in *Brown v. Railway Co.* (Mo. Sup.) 38 S. W. 1099. The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

## RIDENOUR-BAKER GROCERY CO. v. MONROE.

(Supreme Court of Missouri, Division No. 2  
Dec. 22, 1897.)

FRAUDULENT CONVEYANCES—EVIDENCE—HOMESTEAD—FENSONS ENTITLED.

1. A conveyance by a daughter is void against her creditors where it was made on the eve of insolvency to her mother on an agreement to convey to the daughter certain land of which the latter knew nothing, and to pay a part of the price that she might receive if she ever sold the land conveyed to her.

2. A daughter owning a half interest in the premises occupied by her parents with whom she does not live, but whom she and her brother help to support, is not the head of a family, so as to entitle her to claim the premises as her homestead, under Rev. St. 1889, § 5435, providing that a dwelling house, etc., shall be exempt to every housekeeper or head of a family using it as a homestead.

Appeal from circuit court, Newton county; J. C. Lamson, Judge.

Action by the Ridenour-Baker Grocery Company against Dicey P. Monroe. From a decree for defendant, plaintiff appeals. Reversed.

This is an appeal from a final decree of the circuit court of Newton county dismissing a bill in equity by plaintiff to set aside a certain conveyance of real estate in Neosho as fraudulent, and to subject the same to a judgment in favor of plaintiff against Lula E. Monroe, the daughter of defendant. It is an equitable suit in aid of an attachment, and based upon section 571, Rev. St. 1889. The plaintiff was and is a creditor of the firm of Bryan & Monroe, composed of J. L. Bryan and Miss Lula E. Monroe, doing a mercantile business at Neosho from about the 1st of October, 1893, until about the 12th of March, 1894, when the establishment was foreclosed by attachment suits in favor of the Bank of Neosho and the plaintiff and other creditors. Plaintiff's attachment suit was commenced on March 15, 1894, and in due time judgment was obtained by plaintiff against the firm of Bryan & Monroe for the sum of \$260. On the 7th day of March, 1894, Miss Lula E. Monroe, by warranty deed, conveyed her undivided one-half of the lot in suit to her mother, Mrs. Dicey Monroe, for the nominal sum of \$270. At the time said deed was executed Miss Lula Monroe and said firm of Bryan & Monroe were insolvent. On 13th day of March, 1894, the sheriff of Newton county attached and levied upon all the right, title, and interest of said Lula Monroe in and to the lot in suit. The evidence discloses that one Eas-terday, by deed dated May 25, 1891, and recorded March 16, 1892, conveyed the real estate in suit to Henry and Lula Monroe for the consideration of \$145. The lot in dispute is situated in Neosho, Newton county, and contains something less than 3 acres, being 200 feet by 600 feet, and a dwelling house of 7 rooms is situated on it. It is variously estimated at from \$1,000 to \$2,000. Plaintiff charges the deed from Lula Monroe to her mother was fraudulent and without consideration, and that the

defendant combined and conspired with her daughter to cheat, defraud, hinder, and delay the creditors of Bryan & Monroe, and prays that it may be set aside, and said lot subjected to its judgment, and for proper relief. Defendant in her amended answer avers that she paid value for said lot; and, secondly, it was and is a homestead, and not subject to sale under execution or attachment. The circuit court found for defendant, and plaintiff appeals.

Lyman W. White, for appellant. Brunk & Dabbs and Pratt & Phipps, for respondent.

GANTT, P. J. (after stating the facts). 1. This record leaves no doubt in our minds that the deed from Lula Monroe to her mother, Mrs. Dicey Monroe, was utterly without consideration. The evidence of the mother and daughter establish this fact. Miss Monroe testified that the consideration for the deed was a promise by her mother of \$500 if the mother ever sold the place,—\$1 in cash and her mother's undivided interest in Tennessee land; that she had never received any conveyance of the Tennessee land, and she knew absolutely nothing of its location, value, or amount. The mother testified that she promised the daughter \$250 if she ever sold the lot in dispute and her undivided interest in her Tennessee land, but she had no intention whatever of ever selling the Neosho lot; that she had never made her a deed to the Tennessee land. It appears from Henry Monroe's evidence that his mother was one of 11 heirs in the Tennessee tract, but he did not know what county it was in. He further testified that his mother had no means, and was dependent upon himself and sister for support; that his father had no property of any kind, and his only income was a pension of \$12 a month. That Mrs. Monroe paid nothing for the lot in suit is too plain for discussion. A debtor hopelessly insolvent, and conveying all of her visible property to a relative, ought to be able to show something more tangible than the verbal promise of an insolvent person to pay something upon a condition which she announces she has no idea will ever happen, and an equally vague verbal agreement to convey real estate in a different state, of the value of which the vendee is totally ignorant. Arrangements of this kind between near relatives, upon the very eve of insolvency, call for the closest scrutiny by courts of equity, and we have no hesitancy in declaring this one a transparent fraud, and void as against the plaintiff, who was a creditor at the time it was conceived and attempted. Indeed, counsel for the mother virtually concedes the fraud, but argues that, as it was a homestead, its conveyance could not be fraudulent.

2. The principal, and we may say the only, defense to this action is that the interest of Miss Lula Monroe was a homestead acquired by her prior to her becoming indebted to plaintiff, and therefore not subject to attachment or sale for her debts. Such was the finding of the circuit court, and such is now the conten-

tion of defendant. Section 5435, Rev. St. 1889, provides that the homestead of every housekeeper or head of a family, consisting of a dwelling house and appurtenances, and land used in connection therewith, which is or shall be used as a homestead by such housekeeper or head of a family, shall be exempt, etc. Long before the adoption of our homestead act this court had defined the words "head of a family" to be one who controls, supervises, and manages the affairs about the house, not necessarily a father or a husband. *State v. Slater*, 22 Mo. 464; *Spengler v. Kaufman*, 46 Mo. App. 644; *Wade v. Jones*, 20 Mo. 75; *State v. Kane*, 42 Mo. App. 253. "A family is a collective body of persons who live in one house, under one head or manager." *Duncan v. Frank*, 8 Mo. App. 286. Her brother testified that his sister resided in St. Joseph. He lived in Denison, Tex., when his deposition was taken. The defendant, Mrs. Dicey Monroe, was asked, "Who is the head of your family?" and answered, "All of us." "Hydra-headed family?" "Yes, sir." "How many claim to be the head of the family?" "We all claim it." "The children are all past age." When asked how much Miss Lula contributed to the support of the family, said she did not know; that Henry, her son, contributed as much as Lula to the support of the family. Reduced to a simple proposition, the question is, does the fact that an adult daughter is a part owner of the premises in which her parents reside, but does not reside with her parents, but aids her brother in supporting them, constitute her the head of a family, so as to entitle her to claim said premises as her homestead? By the same token her brother is also a head of the family, and the natural head, the father, is dethroned. It is too plain for argument that Miss Monroe did not control, supervise, or manage the family affairs of her father's house. It is one thing to aid and assist one's parents by remittances from time to time, and quite another to assume control of their household, and manage and supervise the matters about the house. The defendant's counsel objected to the effort of plaintiff's attorney to prove who managed and controlled the house, and the court sustained the objection. In the absence of proof to the contrary, we entertain no doubt that the father was the head of that family in the contemplation of law. As this exemption must stand, if at all, upon our statute, and the evidence utterly fails to establish that Miss Lula Monroe was the housekeeper or head of her father's family, her claim of homestead in this lot cannot be upheld. Not being her homestead, she could not make a voluntary conveyance of her interest in the lot to cheat her creditors. The judgment of the circuit court is reversed, with direction to the circuit court to enter a decree that the deed from Lula Monroe to Dicey Perkins Monroe was without consideration, and voluntary, and was made to hinder, delay, cheat, and defraud the creditors of said Lula Monroe, and decree it to be null and void as to her creditors, and that plaintiff

has a lien thereon to the amount of its judgment, interest, and costs against the firm of Bryan & Monroe, and its costs in this behalf laid out and expended in the circuit court of Newton county and in this court, and that it have all proper execution and process for the sale of said premises, to satisfy said judgment and costs.

SHERWOOD and BURGESS, JJ., concur.

JONES v. HOWARD et al.

(Supreme Court of Missouri. Dec. 14, 1897.)

EXECUTION—PROPERTY SUBJECT.

Rev. St. 1889, § 4915, provides that all real estate whereof defendant, or any person for his use, was seised at the time of the rendition of the judgment whereon execution was issued, or at any time thereafter, shall be liable to be seized and sold on execution. Section 4922 provides that the lien of an execution dates from filing for record the notice of the levy. *Held*, that a vendor who has received part of the purchase money, and has put the vendee in possession of the land under the contract of sale, retains no such direct beneficial interest in the land as is subject to execution.

Sherwood and Robinson, JJ., dissenting.

In banc. Appeal from circuit court, Moniteau county; D. W. Shackelford, Judge.

Action by Walter T. Jones against Henry B. S. Howard and another for partition, etc. From a judgment in favor of defendants, plaintiff appeals. Affirmed in division, and transferred to court in banc. Affirmed.

The following is the opinion in division (MACFARLANE, J.):

"Thomas W. Howard died in October, 1893, intestate, seised of a tract of land in Moniteau county, which he occupied with his family as a homestead. He left, surviving him, a widow and five adult sons, named, respectively, James A. J. Howard, John D. H. Howard, Thomas H. F. Howard, Henry B. S. Howard, and Richard P. W. Howard. On October 25, 1893, the sons entered into an agreement among themselves for the settlement of their father's estate. The part of it relating to the land is as follows: 'The said J. A. J. Howard, J. D. Howard, and T. H. F. Howard agree to convey all their interest in the real estate of the said T. H. Howard, deceased, to the said H. B. S. Howard and R. P. W. Howard, upon the said H. B. S. Howard and R. P. W. Howard paying each of them the sum of five hundred dollars.' On the day this agreement was made, defendant Henry B. S. Howard paid thereon to J. A. J. Howard the sum of five dollars. Previous to the sale, the parties were in the joint possession of the land, and afterwards the vendee continued in the sole possession. On the 3d day of November, the said defendant paid to J. A. J. Howard \$495, the balance of the agreed sum; and the latter, together with the other heirs, executed and delivered to the former a deed conveying to him a portion of

said land. In March, 1887, one George F. Tower recovered a judgment in the circuit court of said county against the said J. A. J. Howard for \$331.77; and on the 2d day of November, 1893, he sued out an execution thereon, and had the same levied upon the interest of the said judgment debtor in the land of which his father died seised, as aforesaid. On the same day he caused a notice of said levy to be filed in the office of the recorder of deeds of said county. The interest so levied upon was sold by the sheriff in March, 1894, and plaintiff became the purchaser, to whom a deed in due form was executed, acknowledged, delivered, and recorded. Plaintiff had notice, before he purchased, of the sale and conveyance of the land by the judgment debtor to defendant. This suit is brought and prosecuted by plaintiff against the said H. B. S. Howard and Harriet Howard, the widow of said deceased, for the assignment of dower and homestead to the widow, and for partition of the land between himself and the said H. B. S. Howard. Plaintiff claims under his sheriff's deed the one-fifth interest which James A. J. Howard inherited from his father. Defendant claims the same interest by virtue of his purchase and deed from the said James A. J. Howard. The questions may be made clear by a restatement of the facts in chronological order: In March, 1887, judgment was rendered against James A. J. Howard in the circuit court of Moniteau county. In October, 1893, the said James inherited the land. October 25, 1893, James sold the land to defendant, by contract, for \$500, of which \$5 was paid in cash. November 2, 1893, execution issued, levied upon the land, and notice filed. November 3, 1893, defendant paid the balance of purchase price, \$495, and received a deed from the said James. March, 1894, sheriff's sale to plaintiff. The circuit court held that plaintiff acquired no interest in the land by virtue of his sheriff's deed, rendered judgment for defendant, and plaintiff appealed.

"The statutes of Missouri provide that 'all real estate whereof the defendant, or any person for his use, was seised either in law or equity, at the time of the \* \* \* rendition of the judgment, order or decree whereon execution was issued, or at any time thereafter,' shall be liable to be 'seized and sold upon \* \* \* execution issued from any court of record.' Rev. St. 1889, § 4915. The lien of an execution dates from filing for record the notice of the levy. *Id.* § 4922. It is further provided that the term 'real estate,' as used in said section, 'shall be construed to include all right and interest in lands, tenements and hereditaments.' *Id.* § 4917. We do not find that the precise question here involved has ever been decided by this court. It has been held, however, that, when parties have bound themselves by agreement to convey land and to pay for it, equity recognizes an interest in the land as already in the purchaser which is subject to sale under execu-

tion, 'upon the principle that the vendor is to be regarded as seised in equity to the use of the purchaser.' But it is said: 'If no money has been paid, and if the person who may become the purchaser is not actually under any obligation to pay, then there is no seisin in the seller, even in equity, to the purchaser's use, and there is no interest in the land in him, which is liable to sale or execution.' *Brant v. Robertson*, 16 Mo. 149; *Quell v. Hanlin*, 81 Mo. 441; *Block v. Morrison*, 112 Mo. 350, 20 S. W. 342. In the case last cited it is said: 'That a title bond for the conveyance of land gives the vendee an interest which he may sell cannot be doubted.' The principle of law is well settled that, where there has been a contract for the sale of land, the vendor becomes the trustee of the land for the vendee, and that the vendee has an interest in the land, which may be sold under execution.' In *Black v. Long*, 60 Mo. 182, it was held that, in case the vendee has paid the purchase money, is put in possession of the land, and has made valuable improvements thereon, the vendor retains no interest in the land which is subject to sale under execution. 'Under such facts,' it is said, 'he would have been entitled to specific performance.' The vendor 'could not have dispossessed him in ejectment. His equities would have constituted a perfect defense, and would have effectually defeated an action.' This decision was approved in *Parks v. Bank*, 97 Mo. 132, 11 S. W. 41. In that case the vendee had paid the purchase price, and was in possession under his contract when the judgment against the vendor was rendered. Before sale under execution, the vendor, by deed, conveyed the property to the vendee, and the deed was recorded. In this state of facts the court says: 'The equitable title of plaintiff being complete before the judgment, and supplemented by a deed of the legal title before the execution sale, the case was brought precisely within the facts of *Black v. Long*, and within the rule of *Davis v. Owenby*, 14 Mo. 170.' In these cases the vendor held the legal title in trust for the vendee, who had possession of the land, accompanied with the entire equitable title. The vendor retained no interest in the land that he could transfer to another, nor that could be transferred by sale on execution against him. He had parted with all real interest before the judgment was rendered, and held only a naked trust, which was executed by deed duly recorded before the sale was made. *Davis v. Owenby*, supra. In *Anthony v. Rogers*, 17 Mo. 395, the vendee, under a title bond, tendered the amount due, and demanded a deed, which was refused. The court held that the vendee 'acquired an interest which was subject to sale under execution upon a judgment rendered against him, subsequent to the tender, and that the purchaser was entitled to a conveyance from the vendor upon payment of the purchase price. It has often been held by this court that a grantor in a

deed, fraudulent as to creditors, retains an interest in the land which is subject to sale under execution. The deed in such case being fraudulent, the grantee is seised for the use of the grantor. *Rankin v. Harper*, 23 Mo. 594; *Dunnica v. Coy*, 24 Mo. 168.

'None of these decisions precisely fit the case at bar, but we think they settle the principle that there must be a direct beneficial interest in the land, in order that it may be subject to a lien of a judgment or execution. *Broadwell v. Yantis*, 10 Mo. 403. After *J. A. J. Howard* had sold, by a written contract, his interest in the land to his brother, and received a part of the purchase money, and the vendee took and held the exclusive possession, which he had previously held in common with his vendor, he retained no real interest therein. By his contract he parted with all beneficial interest in the land, except the mere incidental right to a vendor's lien for the balance of the purchase price. He continued to hold the legal title, but only in trust for his vendee, who had the right to demand a conveyance thereof whenever the purchase money was paid. The simple legal title as trustee, without possession, did not constitute an interest in land which was subject to the lien of a judgment or execution. *Black v. Long*, supra. If the legal title had been put in a third party to hold in trust until payment of the purchase money, there would have been no interest left in the vendor which could have been sold under execution; yet his real beneficial interest would have been the same. If he had made a deed to the purchaser, instead of a contract, his real interest in the land would not have been changed. He would still have his lien for the purchase price, and by the contract he has nothing more. The vendor occupies the situation of a mortgagor out of possession. The lien is a mere incident of the debt, and passes by its assignment. It is not subject to sale, but must be reached by garnishment proceedings. We are aware that the authorities are not harmonious on this question. Indeed, the apparent current of judicial decision seems to be that the interest of the vendor in such case is subject to sale under execution. *Freem. Ex'rs*, § 191; *Freem. Judgm.* § 363; *Black, Judgm.* § 438, and cases cited. But we are of the opinion that the rule that a vendor who has received a part of the purchase money, and has put the vendee in possession of the land, under the contract of sale, retains no such direct beneficial interest in the land as is subject to sale under execution, is more in accord with our own decisions and with the spirit of our statute. The rule also has the approval of very respectable authority. *Chisholm v. Andrews*, 57 Miss. 637; *Tally v. Reed*, 72 N. C. 336; *Adickes v. Lowry*, 15 S. C. 132. Some of the cases holding the contrary doctrine also hold that the vendee, 'if in possession of the land sold, is not bound to ascertain, before making each payment, that no judgment has been obtained

against his vendor'; and, unless he have actual notice of the judgment, his payments will be good. Freeman says that this principle is conceded everywhere, 'and seems to have been dictated by a consideration of the hardship to be inflicted on the vendee in possession by establishing a different rule.' Freem. Judgm. § 884; Moyer v. Hinman, 13 N. Y. 180. We think it best to adopt a rule just and reasonable in itself, and which requires no exceptions in order to avoid hardships. If the purchaser at the sheriff's sale had no notice of the contract or deed, either actual or constructive, he would, of course, have taken the title as against both the vendor and vendee. In this case, however, defendants' deed was not only of record, but plaintiff had actual notice thereof before his purchase. *Davis v. Owenby*, supra. The judgment is affirmed.

"BARCLAY, P. J., and ROBINSON and BRACE, JJ., concur."

Moore & Williams, for appellant. James E. Hazell, for respondents.

PER CURIAM. The foregoing opinion, filed by Judge MACFARLANE in this cause while it was pending in the First division of the court, is approved and adopted as the opinion of the court in banc, by the majority of our number. The judgment of the circuit court is accordingly affirmed. BARCLAY, C. J., and GANTT, MACFARLANE, BURGESS, and BRACE, JJ., concurring in said opinion and judgment, and SHERWOOD and ROBINSON, JJ., dissenting therefrom.

#### STATE v. MAY et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 22, 1897.)

#### HOMICIDE — EVIDENCE — INSTRUCTIONS — CONSPIRACY — SERVING JURY LIST.

1. Laws 1895, p. 166, § 4204, declaring that "a list of jurors \* \* \* shall be delivered to the defendant in the cases specified \* \* \* at least 24 hours before the trial, and in the cases specified \* \* \* at least 12 hours before the trial; and in other cases before the jury is sworn, if such list is required," gives defendant an absolute right to the 24 hours, or the 12 hours, if the case is one of those enumerated, subject to his waiver; the clause "if \* \* \* required" referring only to "other cases."

2. One is not served with jury list 24 hours before trial, as required by Laws 1895, p. 166, § 4204, where it is delivered to him at 12 m. Saturday, and at 10:30 a. m. Monday he is required to announce his challenges to the jury; Sunday being dies non.

3. Defendants having offered themselves as witnesses, the state can attack their general moral character.

4. Though the court instructs as to the other elements of murder in the second degree, refusal to charge that if defendant intentionally killed deceased by hitting him over the head with a stick, which was a deadly weapon, the presumption, in the absence of evidence to the contrary, is that the killing is murder in the second degree.

5. The operation of threats made by one of two conspirators, but before the existence of

the conspiracy, is limited to the one who made them.

6. Evidence that G. pointed out B. to C., and said, "There he is," and that C. nodded his head, and that at the same time G. pointed out to him W., is not evidence of a conspiracy to effect the great bodily harm or death of B. or W., though an enmity existed between G. on the one hand and B. and W. on the other hand, and though, soon after, C. and B. indulged in a fight, and G. and W. did likewise, resulting in W.'s death from a blow inflicted with a club which G. picked up on the spur of the moment.

7. Even if C. and G. conspire to beat B. and W. with their fists, C. is not answerable for the death of W. caused by G. acting independently of such agreement and striking him with a club.

8. Exclamation of C. to G. to "Catch him and kill him," referring to B., with whom C. was having some words, could have no effect to establish an agreement between C. and G. to effect an unlawful purpose, so as to make C. answerable for death of W., killed by G. striking him with a club while C. and B. were fighting.

9. An instruction as to murder in the first degree is, owing to the inherent cruelty and barbarity of the act, warranted by evidence that defendant struck deceased on the head with a club after he was lying prone and helpless on the ground.

10. Evidence of defendants' resistance to arrest for a previous admitted homicide is irrelevant on their trial for the homicide.

Appeal from criminal court, Buchanan county; R. E. Culver, Judge.

George May and another were convicted of murder, and appeal. Reversed.

Willson & Watkins and Huston & Brewster, for appellants. The Attorney General and Saml. B. Jeffries, for the State.

SHERWOOD, J. George and Charles May, respectively uncle and nephew, appeal to this court from their conviction of murder in the first degree. William I. Burdette is the name of the person killed, and the indictment charges the homicide to have been done on the 9th day of February, 1896, with a heavy wooden club, and that with it the skull of William I. Burdette was broken and crushed by the defendants. Touching the circumstances attendant on the tragedy, there is the usual conflict in the testimony. About two weeks prior to the 9th of February aforesaid, Charley May, as he was usually called, arrived at his uncle's house. He was a stranger in those parts. William I. Burdette had a son, by the name of "Bill" Burdette, who was a prominent figure in this presently to be disclosed drama of the countryside. The elder Burdette and the elder May lived on adjoining farms, and between them, as is frequently the case between rival nations occupying contiguous territory, there existed feelings less calculated to "raise a mortal to the skies" than to "drag an angel down." Old man Burdette would not let George May set traps on his farm to catch skunks, and there was anticipatory trouble between them in case the elder Burdette compelled the elder May to work a certain piece of road. It does not appear, however, that May ever was compelled to do such work. But towards

"Bill" Burdette, the son, George May entertained a special aversion, which in about October of the precedent year gave token of its existence by a fight occurring between the parties, which, as May got the better of the combat, resulted in the defeated party causing the arrest of May, and, in consequence of the latter being fined, created a deficit in his exchequer to the amount of \$17.50. This financial outcome by no means tended to soften George May's asperity of temper towards "Bill" Burdette and towards his father. This increased acerbity of feeling in May's breast caused him to utter to several neighbors of his divers and sundry threats of a less or greater force against the persons and lives of the two Burdettes. It is in evidence that these threats occurred in the early part and middle of October, in November, and also in December, prior to the homicide, and prior to Charles May's advent at his uncle's residence. Of these threats a patient search of this record does not afford a trace or indication that the younger May knew anything. Bill Burdette had formerly been a resident of Kansas, and while there placed a pretium affectionis on a set of harness (vide 4 Cent. Dict. 4714; Jacob, Law Dict.; also Jones v. Williams, 139 Mo., loc. cit. —, 39 S. W. 496); and in consequence of its informal appropriation he was for a time forcibly secluded from ordinary social intercourse. On his release he returned to Missouri. But Charley May had also resided in Kansas, and was in this respect his peer, and could add the similitude to Bill Burdette's unconventional method of acquiring property. Shortly after the expiration of Charley May's prison sentence, he, too, returned to Missouri. These preliminaries are necessary to an understanding of the previous biographies of the chief persons mentioned in this record, and of their relations to and towards each other. Having disposed of these prefatory matters, we proceed to relate those things which have a closer bearing on the issues joined in this case.

On the morning of Sunday, the 9th day of February, 1896, George May, his two little girls, aged, respectively, 13 and 11 years, and Charles May, after suitably dressing themselves for the occasion,—Charley May with his overcoat on,—wended their way afoot to Sugar Creek church, a building about a mile or so from where they lived. William I. Burdette and family, consisting of his wife and three daughters in the spring wagon, drawn by a pair of mules, and two daughters (one married and one single) on horseback, also betook themselves to the house of God. Claude Andrews also joined this cavalcade on its way to the objective point aforesaid, he being the attendant of one of William I. Burdette's daughters. Services being over, and a portion of the congregation still remaining in the church, some of them gathered around the two stoves. Among these, as "Bill" Burdette testifies, were George May and Charles May, as well as himself; that on this occasion

George May pointed him out to Charley May (whom "Bill" Burdette did not then know), saying "There he is," and that Charley May thereupon nodded his head; that George May also pointed out, at the same time, to Charley May, the father of witness; and that this was done while about a dozen persons were gathered about the stove, and while witness was within some 7 or 8 feet of George May. No one else testifies to this designation of Bill Burdette by George May, although it would seem that others standing about the stove would of necessity have seen or heard it. Pretty soon after this, George May, Charley, and the little girls left for home, the road leading back to their home turning first west for about 200 yards, and then turning south. On the east side of this road there was a hedge fence and a corn field, and on the west side of this hedge, between it and the road, was a bank 5 or 6 feet high, and on this ran a path. At the corner where the road turns south there is a gate leading into Elliott's field. Into this gate defendants and the little girls turned as they proceeded south. Very soon, however, Charley May and the two little girls got through the hedge, which it was easy to do, and walked in the path along the top of the bank. How soon George May got through the hedge and walked in the path does not clearly appear. Meanwhile Bill Burdette, who left the church a little after the Mays did, rode on his horse in the same direction in which they had gone. He overtook them soon after he had turned the corner, where the road, after proceeding west some 200 yards, turns south. At this juncture, he says, he saw Charley May and the little girls just getting through the hedge, and walking on top of the bank, about 25 yards from the corner. He says he did not see George then. Upon riding nearly opposite to them, he says, Charley stopped, and said, "Hello, Wild Bill! never won a fight, and never will." Bill says he asked him what he knew about it; and he said, "'Here's one you can't whip, you God damn son of a bitch;' and I told him I didn't know him, and didn't want any trouble; and George May says, 'Catch him, God damn him, and kill him.'" That witness saw George May just before he spoke the words just quoted. That he was on the inside of the cornfield, coming up in a kind of run. That, immediately George May uttered these words, Charley May jumped down the bank,—there some three or four feet high,—jumped off the bank into the road, pulled him off his horse, thumped him around, and stuck a knife into him. That he did not see George May get clear through the hedge, but saw him with a club, and that was the last thing before Charley May knocked him down again, etc.

A somewhat different version of this story is told by the little daughters of George May, who testified: That, after walking a short distance in the cornfield, they got through the hedge with Charley's assistance, and walked along on the top of the bank,

leaving their father walking inside of the cornfield. That, shortly thereafter, Bill Burdette came riding in view, and, when he came up, riding in the road near them, Charley May said, "Wild Bill! never fought, and never will." That to this Bill Burdette replied, "What is that to you, you God damn son of a bitch?" That Charley May then said, "Christ, Bill; I wouldn't take that off my daddy!" and immediately ran down the bank and towards him. That, as he did so, Bill Burdette threw an apple at him. That thereupon Charley dashed forward and seized hold of Bill Burdette's overcoat. That the overcoat tore, threw Charley May to his knees, and Bill Burdette jumped off his horse onto him. That Charley turned Bill over, and got onto him, and they got down fighting on the east side of the road, next to the bank, in a sort of ditch or depressed place. That William I. Burdette very soon after this drove up to the scene of the action in a spring wagon, which also contained his wife and three daughters, about opposite to where the fight was in progress, stopped in the middle of the road, jumped out of the wagon, took a whip in his hands, and went down to where Charley May and Bill Burdette were fighting on the east side of the road. That, on this, their father, who up to that time was over in the cornfield, came over the hedge fence, picked up a club off the side of the bank, when William I. Burdette said, "Don't you come down here," while some of those in the spring wagon cried out, "Kill the son of a bitch, pa; kill him!" That their father then went down the bank towards William I. Burdette, who then hit their father with the butt end of his buggy whip on his right thumb, as he threw up his right hand as if to ward off the blow. That old man Burdette struck their father twice with the whip as hard as he could, and then their father struck old man Burdette with the club. That old man Burdette fell to his knees, got up again, put his hand back towards his pants pocket, backed off towards the west side of the road, and had just gotten to the right or west side of the mules hitched to the spring wagon, when their father hit old man Burdette again on the side of the head, and he fell, and that their father only struck old man Burdette twice. Meanwhile, they say that Charley May and Bill Burdette were down on the east side of the road fighting; that their father started on home, and said to Charley, "Come on, Charley; that will do," when Charley got up off Bill, and Bill picked up the buggy whip and hit Charley with it, and Charley turned and stabbed him with the knife.

Behind the parties in the spring wagon, as it advanced on south, there rode, on horseback, the same parties that went with them to church, to wit, Claude Andrews, Mrs. Ida Elliott, and a single daughter of William

I. Burdette; and behind rode Mr. Coleman, also on horseback.

Claude Andrews, as state's witness, testifies that he was just behind the spring wagon, and, when the mules stopped, and old man Burdette got out with his whip, and went round in front of his mules to assist his son, he (witness) ran ahead and had seized hold of Charley May before George May and old man Burdette met in front of the mules and had their encounter there. He also states that George May struck old man Burdette four times with the club, the last time when he was prone on the ground.

The testimony of James Coleman forms a pleasing contrast with that of some other witnesses for the state. He was disinterested, and evidently a cool observer of what occurred. He testifies: That, when old man Burdette left the church and started home in the spring wagon with his family, witness was riding about 100 yards behind. That as he approached the top of the turn he looked down the road and saw Bill Burdette in front on horseback, old man Burdette and his family in the spring wagon, and the persons on horseback in front of witness; that is, Andrews and the two daughters of Burdette, who were riding with him. That he also saw George May and Charley May. That at this time they were walking along side by side on top of the outside of the hedge. That his attention was momentarily attracted by a little dog which was worrying his horse, and when he looked up again it was just in time to see Charley May pass out into the road, and he ran to Bill Burdette's horse with his hands outstretched, then he twisted to the left a little, and Bill Burdette came off the horse. That Charley May had hold of him, and then witness knew it was a fight for the first time. That Charley May picked Bill Burdette up, and put him in the ditch on the east side of the road. Those in front of witness had stopped, thus compelling him to do the same, and the fight occurred about 30 yards in front of witness, who states about this time Bill Burdette got up, and Charley put him back down into the ditch. Coleman, after stating these things, says: "The old man [Burdette] jumped out of the wagon on the west side, and he passed in front of the team, and I could not see what had become of him. During all this time George May had stood up on this bank from where Charley left. He started down into the road, and as he came he picked up a piece of rail. They met in front of the team, where I could not see them, and I don't know what happened. Then I looked around to see if there was anybody in sight to help stop it. There was nobody but Johnny Elliott, and when I looked back the old man had backed out into view on the west side of the road, with George May close to him, facing him. George hit him, and knocked

him nearly down." Coleman says that the old man then straightened up straight; that he made a staggering step, holding his hands up, not having anything in them that witness saw, when George May hit him the second time, and on the head, when old man Burdette sank to the ground, and fell over; that George May then passed back out of his view in front of the team of mules; that after George May went out of witness' vision, the fight between Charley May and Bill Burdette seemed to cease, and they got up, so witness could see the tops of their heads; then another little scuffle occurred between Charley May and Bill Burdette, when the latter seemed to sink against the bank, and Charley May then went towards George May, and they passed on down the road. Coleman also states that when the fight began he saw May's little girls standing on the bank. This witness' testimony seems to go counter to the theory of the state in one respect, which appears to be that George May, although it was muddy, remained walking in the cornfield for the purpose of concealment; and no other witness appears to corroborate the testimony of Bill Burdette as to George May's exclamation to Charley May, to "catch and kill" Bill Burdette.

Mrs. Burdette, who was in the spring wagon, in testifying, states: That she saw the fight between Charley May and Bill Burdette, and that it occurred 30 or 40 yards in advance of the spring wagon as it moved down south. That she saw Charley May pull Bill Burdette off his horse, and shove him into the ditch, when Bill Burdette raised up on his elbow, when (the spring wagon having approached very close to the parties) Mrs. Burdette says she told her husband to get out and back her son up, or else Charley May would kill him. Her husband, thus instigated, when the mules stopped, got out of the spring wagon with a buggy whip in his hand, on the west side of the mules, and went in front of them, and George May met him and struck him with a club. That, on being struck, her husband fell down right close to the team. That she only saw George May strike her husband twice, and that, after this second lick, she began begging George May for mercy. And witness further states that, though she had seen George May walking in the cornfield, she had not seen him any more until she saw him coming with a club, and meeting her husband as he went around the heads of the mules.

Other witnesses for the state assert that but two blows were struck by George May with the club, while they also say that the last lick was struck when old man Burdette lay flat on the ground. Mrs. Ida Elliott confirms the statement of her mother, that George May only struck her father twice; but she also says that her father, when struck the last time, was motionless on the

ground, and that this last blow was struck after her mother had begged for mercy,—differing, on this point, with her mother; and this witness says that, before George May got through the hedge, her father had gotten off the spring wagon, and started towards her brother. The large majority of the witnesses undoubtedly agree in this: that George May picked up the club or piece of rail on the top of the bank, after he got through the hedge, and after old man Burdette had gotten out of the wagon, reached the heads of the mules, and started towards his son.

George May, testifying in his own behalf, confirms the preceding statement; and he confirms the statement of his little girls that old man Burdette had reached Charley, and was hitting him over the head with the butt end of the whip before he got over the hedge, seized the club, and hit old man Burdette over the head with it. He also testifies that he never struck him but twice, and that, although he fell to his hands and knees when first struck, yet that he straightened up straight, and put his hand back to his pants pocket, before he struck him the second or last lick. That old man Burdette did so straighten up before being struck the last time is confirmed by the testimony of James Coleman. George May also testifies that, when he sprang over the hedge and picked up the rail, old man Burdette said, "Don't you come down here," and that thereupon he stepped down and told old man Burdette, "Don't you hit him any more," and that then old man Burdette struck him twice on the thumb with the butt end of the whip, and then George May says he struck him for the first time, and did not strike him the second time until after the old man had straightened up and reached back with his right hand towards his pants pocket, and that then the old man was standing on the west side of the mules, and that at the second lick the piece of rail broke into three pieces, and the old man fell flat to the ground, and that when he was struck on the thumb with the whip, he had both hands raised up to ward off the licks.

Charley May, in testifying, says that when he was on top of Bill Burdette, "pounding him in the head," old man Burdette hit him across the head with the whip, and that he (witness) did not see any of the fight between George May and old man Burdette.

The foregoing is regarded as a sufficiently substantial statement of the facts in this case in order to properly understand it and the rulings made by the lower court.

Before going into a discussion of the merits of this case, it is necessary to notice the ruling made touching the panel of jurors. The bill of exceptions contains this recital: "A list of said jurors was delivered to the defendants at 12 o'clock noon on Saturday, the 21st day of November, 1896, and the court thereupon adjourned until Monday



morning, November 23, 1896, at 9:30 a. m. And afterwards, to wit, on the said Monday, the 23d day of November, 1896, the court convened pursuant to said adjournment. And at the hour of 10:30 a. m. of said 23d day of November, 1896, the court, over the objection of the defendants, required defendants herein to announce their challenges to the jury. The defendants thereupon objected to announcing their challenges to the jury at that time, for the reason that they had not been allowed twenty-four hours within which to make their said challenges, exclusive of Sunday, which had intervened after the said list of jurors had been presented to them, which objection of defendants the court overruled, and required defendants to announce their said challenges at the hour of 10:30 a. m. on said 23d day of November, 1896; to which action, ruling, and judgment of the court the defendants at the time accepted."

1. As Sunday is dies non as to judicial proceedings, it is not counted in computing the time in which motions are to be filed in court or other steps taken therein of a similar nature in pending causes. This was the rule at common law and still remains unchanged by our statute. Twenty-four working hours are what the statute means; and it does not require either lawyers or judges to work on Sunday. *Bank v. Williams*, 46 Mo. 17; *Cattell v. Publishing Co.*, 88 Mo. 356; *State v. Harris*, 121 Mo. 445, 26 S. W. 558; *Maloney v. Railway Co.*, 122 Mo. 106, 26 S. W. 702. The recital shows that the list was delivered at a certain time to defendant, and it will be presumed this was done on request; and, if so, defendants cannot be presumed to have waived, but on the contrary to have insisted on, their privileges; and this is shown also by their exception saved to the ruling mentioned. Apart from this view, it is important to note the provisions of our statute on this point. Section 4204 of the Laws of 1895 (page 166) is as follows: "A list of jurors who have been found by the court to be qualified to sit as such in his case shall be delivered to the defendant, in the cases specified in the first subdivision of section 4200, at least twenty-four hours before the trial, and in the cases specified in the second subdivision of said section, at least twelve hours before the trial; and in other cases, before the jury is sworn, if such list be required." This section is a transcript of section 4204, Rev. St. 1889, except that it changes 48 hours to 24, and except, also, that it changes the punctuation in that section in this way: that for a comma in the original section, after the second occurrence of the word "trial," is substituted a semicolon. This, I understand from an eminent punctuator, causes the word "required" to refer only to "other cases," where a list may be demanded before a jury is sworn, leaving the party entitled thereto to an absolute right to the length of time specified in

the statute, subject, of course, to an act on his part of unmistakable waiver. The secretary of state informs us that the punctuation is the same on the original bill as found in the printed Laws of 1895. From this it seems evident that the legislature intended something by the change made in the punctuation, and that their meaning was that already indicated. The lower court consequently erred in ruling as it did.

2. The defendants having offered themselves as witnesses, it was competent, under our rulings, to attack their general moral character. *State v. Grant*, 79 Mo. 113, and cases cited. But it rather seems that the prosecutor did not seem to definitely establish much in the way of bad character as to George May, except that he was regarded as a "scrapper," or fighter, as occasion might require.

3. The state proved in what county William I. Burdette died, but not in what county the mortal wound occurred.

4. Error was committed in refusing to give the first instruction asked by defendants, which was the following: "If you find from the evidence that the defendant George May intentionally killed William I. Burdette by hitting him over the head with the stick mentioned in evidence, and that such stick was a deadly weapon, then the law presumes that such killing was murder in the second degree, in the absence of evidence to the contrary." The doctrine embodied in this instruction is well-settled law in this state, and has been for a long period. *State v. Tabor*, 95 Mo. loc. cit. 595, 8 S. W. 744, and cases cited. The trial court, it is true, instructed as to the elements of murder in the second degree, but the particular feature presented in the refused instruction was not given.

5. The threats which the evidence tended to show that George May uttered with regard to the Burdettes were obviously inadmissible as to Charles May, and this for several reasons: The theory of the state was a conspiracy to effect the death of one or more of the Burdettes; but at the time these threats are alleged to have been made Charles May did not reside in Missouri, and there was no conspiracy in existence, unless, indeed, George could be said to have conspired with himself,—a circumstance quite unusual. Where a person joins a conspiracy already existent, he thereby ratifies any acts done or threats previously made by the conspirators in furtherance of the common design; but, in order to fasten the guilt of such antecedent acts or threats on such newly-joined conspirator, it is a sine qua non to establish that the conspiracy was afoot when the acts were done or the threats made. 3 Greenl. Ev. (14th Ed.) § 94; 1 Greenl. Ev. § 111; 1 Bish. New Cr. Proc. § 1248; *Baker v. State* (Wis.) 50 N. W. 518; *Williams v. Dickenson* (Fla.) 9 South. 847. As there was no such evidence as to Charley May, the third instruction was erroneous, both as to him and

to George May. And, as to any threats made by George May, the jury should have been instructed to limit their operation alone to George May. *State v. McKinzie*, 102 Mo. 620, 15 S. W. 149.

6. This brings us to the consideration of the third instruction from another point of view and in a different aspect: Did the words of Bill Burdette, as to what he said occurred in the church, amount to any evidence of a conspiracy to effect the great bodily harm or death of either of the Burdettes? We are not of opinion that it did, for it would be going a great way to hold that such mere words and designation of a person would amount to evidence of an agreement to effect either of the guilty purposes before mentioned. The doctrine of chances or of preponderating probabilities does not apply to a case like this where human lives are at stake. Even if it be granted that those spoken words were evidence of a conspiracy to kill either or both of the Burdettes, there is no evidence of a preparation to effect such design. No arms were carried by the so-called "conspirators." Charles May only had a pocket knife, and George only had a club, which he picked up on the spur of the moment, after old man Burdette had jumped from the spring wagon and was advancing on Charley May, or else had reached and struck him twice over the head with the butt end of the whip. But, suppose (for we can only suppose) that the evidence mentioned amounted to proof of conspiracy between George and Charles May to beat the Burdettes with their fists, and that George May, acting independently of such agreement, struck and killed old man Burdette; for this Charles May could not be held responsible. This point has been expressly adjudged. Bishop says: "Where two combine to fight a third with fists, if death accidentally results from a blow inflicted by one, the other also is answerable for the homicide. But if the one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable." 1 Bish. New Cr. Law, § 637, and cases cited. Now, the evidence shows very clearly that the combat between George May and old man Burdette was an entirely different and independent affair from that in which Charley May was engaged, and of the former of which Charley knew nothing. Nor do we think the result is at all affected by the alleged exclamation of George May to Charles May, to "catch him and kill him," as such words might naturally spring from the excitement of the occasion; and, besides, George May's exclamations could have no effect to establish an agreement between George May and Charley May to effect an unlawful purpose, unless a prior and existing conspiracy had been shown to exist between them, which has not been done. For these reasons we are of opinion that an instruction should have been given, as asked, instructing the jury to find Charley May not guilty.

7. Recognition was properly given in the instructions to the fact that defendants might be

found guilty of a less grade of homicide than murder in the second degree.

8. But, notwithstanding what is above said, it is proper, also, to say that, if it be true that George May, after old man Burdette was lying prone and helpless on the ground, struck him on the head with the club, this, owing to the inherent cruelty and barbarity of the act, might perhaps warrant an instruction, as well as a verdict, for murder in the first degree. *State v. Kloss*, 117 Mo. 591, 23 S. W. 780, and cases cited; 1 Whart. Cr. Law (9th Ed.) § 475.

9. Evidence was introduced, without objection by defendants' then counsel, about one Horn, a justice of the peace, arming himself with a pistol, and without warrant, and upon information derived from another, proceeding to George May's house, and arresting the defendants, who objected to the same, and offered some resistance thereto, since they questioned the squire's authority to make the arrest. The justice had no authority to make such arrest. Kelly, Cr. Law, § 59; Rev. St. 1889, § 4333. But, if he had, such evidence was in regard to another, distinct, and subsequent offense, which had no connection with, and could shed no light upon, the previous homicide. Its only tendency was to prejudice the jury against the defendants, and to confuse them in regard to the real issues and evidence in the cause. *State v. Jackson*, 95 Mo. loc. cit. 649, 8 S. W. 749, and cases cited; *Farris v. People*, 129 Ill. 521, 21 N. E. 821. The court, therefore, of its own motion should have refused to admit such wholly irrelevant evidence. It becomes at times the duty of a court to take such a course, although, if no objection be taken at the time to the admission of such evidence, no advantage can be taken in an appellate court of such failure of the trial court to act.

The premises considered, we reverse the judgment as to Charles May, and order his discharge. The judgment as to George May is also reversed, and the cause as to him remanded. All concur, except BURGESS, J., who does not concur in paragraph 2.

#### GORDON v. BURRIS et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 7, 1897.)

APPEAL—FAILURE TO OBJECT—PLEADING—WILLS  
—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY—  
HEARSAY—DECLARATIONS—BURDEN OF PROOF.

1. The fact that the issue as to whether a writing produced was testator's will was not made up by the court, as required by Rev. St. 1889, § 8888, will not justify a reversal of the judgment, where no objection was made, and the jury found on such issue.

2. Though, ordinarily, the court should enter judgment on the verdict, yet this is not necessary on a verdict on the issue as to whether a writing was a will, under Rev. St. 1889, § 8889, making the verdict "final" on such issue.

3. A will containing a legacy to Lucy May Gordon, described as testatrix's granddaughter, has a latent ambiguity removable by extrinsic evidence, where testatrix's sole granddaughter was Mary J. Gordon.

4. A letter to plaintiff by one of three brothers, stating that the writer heard his brother urging testatrix to will her land to the three brothers, was hearsay, in an action to prove that the brothers exercised undue influence.

5. Where defendants are charged with exercising undue influence when testatrix made her will, declarations of one as to what another said are hearsay.

6. Where defendants are charged with exercising such undue influence over testatrix as to cause plaintiff's disinheritance, their statements, made within a year before the will was executed, that testatrix should never leave plaintiff any of her property, were admissible.

7. A testatrix's statements, made after the execution of a will, to the effect that she was unduly influenced in making the will, are not admissible as evidence of the facts stated.

8. The fact that testatrix cried, when speaking of plaintiff, in connection with the disposition of her property under a will she had made, is competent to show that plaintiff was disinherited through undue influence.

9. The burden is on contestants to show that a will is rendered invalid by undue influence.

10. Where contestants do not produce substantial evidence to show that testatrix made her will through undue influence, the court will direct a finding of the jury against them on such issue.

11. Though a court cannot take from the jury the consideration of an issue in support of which the evidence is uncontradicted, yet, where sufficient uncontradicted evidence has been introduced to satisfy the statute requiring proof of the execution of a will, it is not error to charge that the will is executed, where it is contested, but where no issue as to its execution is made by the pleadings.

12. Testatrix made a will when she was over 70 years of age, and when confined to her bed with sickness. Her mind was vigorous for her age. Her heirs were three sons and a granddaughter, whom she was fond of, and whom the will disinherited. The sons were adults living near testatrix, and before the will was executed they had expressed a desire that the granddaughter be disinherited, and one of them so worried testatrix that her physician required him to keep away. No troublesome family matters were shown other than the making of the will. She refused to make the will until her husband promised to provide for the granddaughter, and she cried when talking about the granddaughter shortly thereafter. Her husband died insolvent, soon after her death, without keeping his promise. *Held*, that the question as to whether the sons had exercised undue influence should have been submitted to the jury.

Appeal from circuit court, Livingston county; Joshua Alexander, Special Judge.

Action by Mary J. Gordon, by next friend, against Fred Burris and others. From a judgment for defendants, plaintiff appeals. Reversed.

Miller Bros., for appellant, Davis, Wait & Sheetz, for respondents.

MACFARLANE, J. This is a statutory suit contesting the will of Lucinda Burris, deceased. The petition charges, in substance, that on and prior to March 20, 1890, John Burris and Lucinda Burris were husband and wife; that there was born of the marriage three sons, Augustus, George, and Frederick, and one daughter, Josephine; that the daughter married Liston Gordon in 1878, by whom she had one child, plaintiff, Mary Josephine Gordon, and died in 1885; that on the 20th

day of March, 1890, the said Lucinda Burris executed and had witnessed a paper writing by which she devised to her three sons, in equal parts, all her estate, consisting of 240 acres of land, worth about \$30 per acre, which was made subject to \$30, which she bequeathed to Lucy May Gordon. The said Lucinda died on the 31st of March, 1890, the said three sons and plaintiff, her granddaughter, surviving her. The will was in due time probated, in common form, by the probate court of the county. The three sons, devisees under the writing, are made defendants. The petition charges that "said defendants, by fraud, art, and deceit and undue influence, overpersuaded and induced the said Lucinda Burris to make the pretended will," whereby the said plaintiff was virtually disinherited. The answer admits the probate of the will, and avers that the paper writing is the last will and testament of the said Lucinda Burris, and denies all other allegations. The answer charges, as a special plea, that plaintiff had previously prosecuted a suit against the same parties, contesting the same will; that after certain proceedings in said court plaintiff took a nonsuit; that thereupon defendants filed a motion for judgment establishing the will; that said motion had never been disposed of, but was still pending, and was a bar to this suit. The reply was a general denial of new matter. By agreement the case was tried before J. W. Alexander, Esq., as special judge.

To sustain the will, defendants examined as witnesses Judge E. J. Broadbuss and Dr. Freeman, who were the subscribing witnesses. These witnesses both testified that the said Lucinda Burris signed the paper writing as her last will, that she was of sound mind, and that they subscribed their names as witnesses in her presence. After this formal proof the will was read in evidence. Plaintiff, to sustain the charge of her petition, offered evidence tending to prove that testatrix at the time of her death was over 70 years old; that she had suffered from la grippe, followed immediately by an attack of pneumonia, from which she was convalescing when the will was made, though she was still confined to her bed, and was physically very feeble. While suffering from pneumonia, she was exposed to the measles, and she, her family, and her physician believed that, in her condition, she could not survive an attack of that disease. In these circumstances the will was made on March 2, 1890. In a few days thereafter she took the measles, from which she died on the 31st day of the same month. The evidence tended to prove, also, that testatrix regarded plaintiff, her grandchild, with affection. The evidence does not show the age of the defendants, or whether they lived in the family of the testatrix or not. It may be inferred, however, that they were mature men. One of them had studied medicine, and acted as agent for his mother in renting her land. We can fairly infer, also, that they

either lived in the house or near by at the time the will was made. One of them was sick at the time, and occupied a room in the house, and the others appeared to have been about the house much of the time. There was evidence tending to prove that during the sickness of Mrs. Burris, and before her death, defendants insisted that she should make her will and give them the property. A witness testified that she heard defendants in the room with their mother talking "about having her make the will. They thought it ought to be done, they said. They said that they ought to have the property. Their father went in at this time, and says, 'Mother is sick; don't bother her now.'" Cora Glore, who was a servant in the family, testified that testatrix told her, after the will had been made, that "they coaxed her to make the will. Told her she might die, and she had better have a will. \* \* \* She said they did not want her to will little May anything. She called her 'Little May.'" The witness testified that when she spoke of little May she cried. Mrs. Wilkison testified that one of the boys, Fred, had studied medicine, and waited on his mother, and administered medicine to her. The record shows the following evidence of Judge Broadbuss, who wrote the will, and was one of the subscribing witnesses: "Before I left, after I had written the will, and it had been signed, the old lady said, 'Now, Mr. Burris, you know you agreed to provide for Mary [whatever her name was], and now is the time to have the will written, while you are here.' Q. While you were there? A. 'While Judge Broadbuss is here.' I said, 'Yes; I would write it out.' He said, 'No; he wasn't ready just then.' He said he would be in town in a few days, and I could write his will, and he would then provide for the little girl. She said at that time that Mr. Burris was going to provide for Mary, or whatever her name was. Q. They directed that conversation to you? A. Yes, sir; to me, and in the presence of the old man and George. The old man said he intended to do so, and would do so. Q. Did the old man ever come to your office and make such a will? A. He never came to my office afterwards, that I know of. \* \* \* Dr. Freeman testified substantially to the same facts, though his impression was that the conversation occurred before the will was signed. Plaintiff offered to read in evidence a letter from defendant George Burris to plaintiff, which, on objection by defendants, was excluded as hearsay. This letter contained the following statement: "I came over to father's from my home, and went into the room adjoining the one where mother lay sick, and the hired girl was in that room, and Gus was in the room with mother, and he did not know I was on the place, and I do not think he knew any one could hear in the adjoining room what he said to mother. He was talking, and trying to get mother to promise that she would give the land to us three boys,—that is, myself, Gus, and

Fred." Plaintiff offered to prove by a witness that defendant George Burris said to him, in the summer of 1889, that plaintiff should never have anything. This evidence was excluded. Plaintiff offered to prove by the same witness that George and Gus Burris each said to him, in the summer of 1889, that their mother never should leave the little girl any of her property or anything. This evidence was also excluded. At the close of defendants' evidence the court directed the jury to return the following verdict: "We, the jury, find the instrument signed by Mrs. Lucinda Burris, and attested by E. J. Broadbuss and J. B. Freeman, is the last will and testament of said Lucinda Burris." The verdict was returned as directed, and the judgment, after reciting the verdict, is as follows: "It is therefore considered and adjudged by the court that the plaintiff take nothing by her writ; that the defendants go hence without day, discharged hereof; and that they recover their costs of plaintiff in this cause expended." From this judgment plaintiff appealed.

1. In a suit to contest the validity of a will which has been proved in common form, or to have a will proved which has been rejected, the court is required to make up an issue, "whether the writing produced be the will of the testator or not, which shall be tried by a jury, or if neither party require a jury, by the court." Rev. St. 1889, § 8888. "The verdict of the jury, or the finding and judgment of the court shall be final, saving to the court the right of granting a new trial, as in other cases, and to either party an appeal in matters of law." Id. § 8889. It appears nowhere in this record that an issue was made up by the court as required by statute, but the verdict of the jury finds on the issue that should have been submitted. No objection was made to the course adopted, and, the verdict showing that the proper issue was tried, the error in procedure does not justify a reversal of the judgment.

2. Ordinarily, the formal judgment of the court upon the verdict of a jury is necessary to establish conclusively the fact tried, but this statute makes the verdict of the jury upon the issue tried final and conclusive. By the verdict the jury finds the paper writing produced to be the will of Lucinda Burris, and this verdict is entered upon the records of the court. We are of opinion that the record entry is sufficient in form to constitute a formal establishment of the will.

3. Plaintiff sues as Mary J. Gordon, and the evidence shows that her true name is Mary Josephine Gordon. Under the will the testatrix devises \$30 to Lucy May Gordon. There is no doubt, under the evidence, that the testatrix had in mind and intended to name in the will her granddaughter, the child of her deceased daughter, Josephine, and her husband, Liston Gordon. When the will was written the name of this child was discussed. She was mentioned as her granddaughter, as she is in the will, and as

the daughter of Liston Gordon. Testatrix insisted that her name was Lucy May, and it was so written by Judge Broadbush. It was shown that the old lady always called the child May. It does not appear that testatrix had any other granddaughter. The evidence is very conclusive that the intention was to name plaintiff in order to prevent her from claiming as a pretermitted heir. The necessity of naming or providing for this particular child was mentioned at the time, and induced the provision for her. The incorrect naming of the granddaughter was a latent ambiguity in the will, and extrinsic evidence was admissible to remove it. *Riggs v. Myers*, 20 Mo. 243; *Bradley v. Rees*, 113 Ill. 327.

4. The question seriously discussed by counsel is whether there was sufficient evidence that the will was the product of undue influence or fraud to require a submission of the issue to the jury. As bearing on that question, some evidence was offered by plaintiff, and excluded by the court. Complaint is made to the exclusion of the letter written by defendant George Burris to plaintiff, in which he states that he had heard defendant Gus Burris "talking, and trying to get his mother to promise that she would give the land to us three boys." This letter was mere hearsay. George Burris was himself a competent witness, and could have testified to the conversation between Gus and his mother; but his statements of what the conversation was, either by writing or orally, were properly excluded. For the same reason the court properly excluded the evidence of witnesses who were called by plaintiff to prove that George said he heard Gus declare that their mother should never leave plaintiff any of her property.

5. But the court, we think, committed error in excluding the evidence of the witness to the effect that George and Gus Burris each said to him, in the summer of 1889, that their mother should never leave plaintiff any of her property. In ruling against this evidence the court gave this as its reason: "The testimony will be excluded until there is testimony offered tending to connect it with the execution of the will." The evidence tends to show an intention, at that time formed, to prevent the testatrix from so disposing of the property as to give plaintiff any share in it. Plaintiff was at that time, morally and legally, as much entitled to share in the property of her grandmother as either of the defendants. If testatrix had died intestate, plaintiff would have inherited one-fourth of the estate. In making the statement attributed to them, the language clearly implies that defendants intended, if possible, to prevent their mother from making a will or deed in such a way as to give plaintiff any benefit of, or interest in, her property. The conversation was within a year of the date of the will, and the evidence should have been admitted as

bearing upon the question of undue influence. It tends to show a fixed purpose on the part of said defendants to do the acts they are charged with having done when the opportunity arrived. In considering the question, therefore, whether or not there was any evidence of fraud or undue influence which required a submission of the question to the jury, we should treat this evidence as having been admitted.

6. The evidence of Cora Glore, detailing declarations of the testatrix, made subsequent to the execution of the will, was given over the objection of defendants. That such declarations are not admissible as evidence of the facts stated is well settled in this state. *Gibson v. Gibson*, 24 Mo. 234; *Walton v. Kendrick*, 122 Mo. 518, 27 S. W. 872; *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127. The fact that the testatrix cried when speaking of plaintiff in connection with making the will, and the disposition of her property thereunder, was admissible, however, to show the affection she entertained for her grandchild, and her sentiments in thinking of what she had done. The conversation must have been very soon after the will was made, for testatrix died within 10 days after that event. The making of the will was evidently the one principal subject on the mind of the testatrix at the time of this manifestation of grief, and we think it sufficiently connected in point of time with the making of the will, considering the circumstances, to be admissible as a verbal fact or external manifestation of the internal feelings. *Gibson v. Gibson*, supra. The declaration that defendants coaxed Mrs. Burris to make the will, and that they did not want her to leave "Little May" anything, was not admissible as evidence of those facts, and will not be considered in determining the sufficiency of the evidence.

7. In these statutory proceedings to contest the validity of wills, the burden of proving their due execution rests upon those maintaining their validity. After evidence has been given tending to prove that the disputed writing was executed in the manner required by the statute, the burden of proof rests upon those contesting its validity to prove that it is rendered invalid by extraneous facts, such as incompetency, fraud, or undue influence. The issue to be tried by the jury, or the court sitting as a jury, is "whether the writing produced be the will of the testator or not." The triers of fact must, therefore, determine whether or not the will was executed according to the requirements of law, and whether or not, notwithstanding its due execution, it is rendered invalid on account of the extraneous facts charged. *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, and cases cited.

8. There has been some question among lawyers whether, under the terms of the statute, both questions should not be submitted to the jury, and allow it to determine,

from all the evidence, whether the writing in question be the true will of the person who executed it or not. It is well settled as the law of this state that the party who has the burden of proof upon an issue must produce evidence tending to prove it; otherwise the court will pass upon the question as a matter of law, and will direct the jury as to its finding on that issue. This rule has been applied to this class of suits, and it is now well settled that, if contestants do not produce substantial evidence tending to prove the ground charged as a cause for invalidating the will, the court will direct the finding of the jury against them on that issue. *Jackson v. Hardin*, 83 Mo. 175; *Maddox v. Maddox*, supra; *McFadin v. Catron*, 120 Mo. 289, 25 S. W. 506; *Doherty v. Gilmore*, 136 Mo. 416, 37 S. W. 1127.

9. But when evidence is given in support of an issue, and such evidence is not of a character which requires the interpretation of the court, it has been held that the jury should be left to pass upon it, though no contradictory evidence be given. The jury, it is said, must determine the credibility of witnesses, and the weight to be given to their evidence, and a court, when it undertakes to pass upon the sufficiency of such evidence to prove a given fact, usurps the province of the jury. This rule has not been uniformly recognized in this state, but was declared at an early day, and has been generally followed in the later decisions. *Bryan v. Wear*, 4 Mo. 106; *McAfee v. Ryan*, 11 Mo. 365; *Wolff v. Campbell*, 110 Mo. 120, 19 S. W. 622.

10. Plaintiff's counsel now insist that the rule should be applied in this case. They say the burden is on the proponents to establish the due execution of the will, and that issue should have been submitted to the jury, though the evidence of the two attesting witnesses shows every fact essential to its proper execution, and though the witnesses are unimpeached, and their evidence is uncontradicted. The proceedings provided for contesting wills stand for the probate in solemn form, in which all the parties interested are brought before the court. The probate, in common form, is conclusive on all persons until impeached and brought in question by the proceedings provided by the statute. The statute requires the contest to be commenced by some person interested, "by petition to the circuit court of the county." This implies that the ground relied upon to defeat the will shall be stated in the petition, and, if no sufficient ground be stated, the petition is demurrable. If the invalidity is claimed to exist on account of extraneous matters, and no issue is made by the pleadings as to the proper execution of the will, then the pleadings should be construed as an admission of that fact by the parties, and, if the formal proof is made to the satisfaction of the court, they should be estopped, on appeal, to question the correct-

ness of the verdict, though rendered under the imperative direction of the court. The charge in this petition is that "defendants, by fraud, art, and deception, and undue influence, overpersuaded and induced the said Lucinda Burris to make a pretended will," etc. By her petition plaintiff does not question the due and proper execution of the will, or tender an issue on the question of its execution, nor do any of the parties to the suit do so. Still, a writing is not a will unless executed with all the formalities required by the statute, and when brought before the court for probate, whether in common or solemn form, proof of execution is necessary; but, in case the parties make no issue upon it, the proof is necessary for the satisfaction of the law, and not of the parties. They will be bound by their pleadings, as in other cases. The evidence of the two subscribing witnesses shows that the paper writing was signed by Lucinda Burris as her last will, and that they subscribed their names thereto as witnesses in her presence, and that she was at the time of sound mind. On this evidence the court, in effect, directed the jury to find that the will was duly executed. We are of the opinion that the fact the jury was required to find was inferentially admitted by the pleadings of all the parties interested, and no error, at least of which they complain, was committed in giving the peremptory instruction. It is therefore unnecessary to decide in this case whether, if an issue had been made by the pleadings of the parties upon the question of the execution of the will, the court could properly have directed the jury on that issue.

11. The only remaining question is whether or not there was substantial evidence tending to prove that Mrs. Burris was induced to execute the paper by means of the fraud or undue influence of defendants. In consideration of this question we must look, not only to the direct evidence, but to all the circumstances, and if, considering them all, the jury could fairly have found that the fraud or undue influence of defendants influenced or induced the making of the will, and the disposition of her property as thereby made, then the issue should have been submitted to the jury. Mrs. Burris, at the time of making the will, was over 70 years of age, and was just recovering from a long and serious spell of sickness. She was still confined to her bed, and was very weak and much emaciated. Yet her mind was vigorous for one of her age and condition. Her three sons, the defendants herein, seem to have been of mature years, and lived either in the family or in the immediate neighborhood. The evidence tends to prove that they were anxious that the land of their mother should be divided among themselves, to the exclusion of plaintiff. It is manifest from the evidence, also, that Mrs. Burris desired that her granddaughter should be provided for. It is shown by the fact that before she made

her will she exacted a promise from her husband that he would make provision for her out of his own property. It is shown, also, from her distress when afterwards talking of plaintiff in connection with what she had done under her will. These facts have a tendency to prove that the property was not disposed of as testatrix wished. There was evidence tending to prove that the old lady was so worried over some matter by the conduct of her son defendant Gus Burris that the attending physician required him to be kept away from her as a condition of his continuance as her physician. The evidence shows no troublesome family matter except the making of the will. The jury might have inferred from this circumstance, if unexplained, that the importunities of this son in regard to making a will was the cause of worry to the testatrix. We have the evidence of at least one witness who testifies to facts which these circumstances corroborated. Mrs. Atkinson testified that she heard the Burris boys talking to their mother about making a will. They said that they three ought to have the property. "Grandpa came in, and he says, 'Mother is sick; don't bother her now.'" For the purposes of the questions in this case, we must take this evidence as true. It shows that defendants were importuning their mother, though then sick, to make a will, and leave them the property, and it worried her. A jury might well infer that defendants were endeavoring, by unreasonable and worrying importunities to overcome the wish of their mother to allow plaintiff to inherit her proportion of the estate. The evidence shows testatrix did not consent to leave all her property to defendants until her husband had agreed to provide for plaintiff out of his property. This circumstance tends to show that the old lady held out in her wishes until this promise was made. The fact is that Mr. Burris never made any provision for plaintiff, and soon after the death of his wife died insolvent. If defendants knew of his insolvency, and his inability to provide for plaintiff, and this promise was used to induce testatrix to make the will, the facts would have a tendency to prove the use of improper means and influences to secure the making of the will. Taking into consideration the condition of Mrs. Burris; her affection for her granddaughter, then a child of 12 years; her evident wish to provide for her; taking the importunities of defendants, the grown sons of testatrix, living near by, desiring to secure to themselves the property; their persuasions; the worry of testatrix before making the will, and her grief afterwards,—we conclude that the evidence tended to prove undue influence, and that the issue should have been submitted to the jury. No evidence was offered by defendants in support of their special plea of the pendency of another suit. If the motion mentioned in said plea is still pending, it can be withdrawn or dismissed

by plaintiff before a retrial is commenced. The judgment is reversed, and the cause is remanded for a retrial. All concur.

### LORING v. GROOMER.

(Supreme Court of Missouri, Division No. 2.

Dec. 7, 1897.)

#### TAX DEEDS—VALIDITY—EVIDENCE—HOMESTEAD—TIME OF ACQUIRING—EXTENT OF RIGHT.

1. A tax deed which is a mere skeleton, and contains no recitals showing that the statutory requirements have been complied with, is void on its face.

2. Where a tax deed is void on its face, a quitclaim deed by the grantee in the tax deed is not admissible in evidence in favor of one claiming under such deeds.

3. The homestead law of 1865 (section 1) exempted from execution the homestead of every housekeeper or head of a family, consisting of the dwelling, etc., and the land used in connection therewith, not exceeding a certain amount and value, used by him as such homestead. Section 7 provided that such homestead should be subject to levy on all causes of action existing at the time of acquiring it; and for this purpose such time should be the date of the filing in the proper office for the records of deeds the deed of such homestead, and (in case of existing states) such homestead should not be subject on any liability thereafter created. *Held*, that a housekeeper or head of a family did not acquire a homestead in land used as such at the time he inherited it, since he had no deed to file in the recorder's office.

4. Nor did he acquire a homestead, within section 7, at the time land inherited by him and others was partitioned, where the report of the commissioners in partition was not filed in the recorder's office.

5. Where one was not a housekeeper or head of a family at the time he inherited land, or at the time of otherwise acquiring the land, he could not acquire a homestead in the land simply by becoming the head of a family or housekeeper.

6. Under Acts 1887, p. 197, amending the homestead law so as to exempt homesteads acquired by descent or devise from levy on all causes of action accruing after the acquisition of such homestead, whatever land a housekeeper or head of a family was occupying with his family and using as a homestead, not exceeding the amount and value limited by such homestead law, at the time such amendatory act was passed, became exempt as to all causes of action accruing thereafter, irrespective of how the title was acquired, or whether the title was in him or his wife.

Appeal from circuit court, Dekalb county.

Action by Samuel G. Loring against Lina Groomer. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

S. G. Loring, in pro. per. Hewitt & Blair, for respondent.

BURGESS, J. This is a suit in equity by plaintiff, who claims to have acquired all of the title of one Christopher L. Groomer to the lands in litigation by virtue of a sheriff's deed, to set aside as fraudulent and void two deeds to different parts of said lands, executed by said Christopher to the defendant, who was then, and is now, his wife; and to be placed in possession of said lands. Defendant, in her answer, denied generally the

allegations in the petition, and then averred that, at the time of the execution of the deeds by Christopher L. Groomer to her, he had acquired the title to the lands, and was in the occupancy thereof, together with his wife, this defendant, claiming the same as a homestead, and that said lands do not exceed 160 acres in area, nor the value of \$1,500. The trial resulted in a judgment for defendant, and a decree in her favor setting aside the sheriff's deed to plaintiff. In due time thereafter plaintiff filed his motion for a new trial, which, being overruled, he appeals.

The facts are as follows: Some time prior to the year 1871, William J. Groomer died, intestate, at the county of Dekalb, in the state of Missouri, leaving surviving him his widow, Sarah, and the following children, viz.: William R., David A., Logan P., Richard R., Christopher L., and America J., as his only heirs at law. America J. thereafter intermarried with William W. Bratcher. At the time of his death, William J. Groomer was the owner in fee of a tract of land in said county, containing about 700 acres, which included the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 14, township 60, range 30. On September 10, 1871, David Groomer, Sr., conveyed by deed to the heirs of said William J. Groomer a tract of land in said county, of which the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 11, township 60, range 30, in said county, was part. This deed was duly recorded in the recorder's office of said county in September, 1871. In 1872, William R. Groomer and David A. Groomer began suit in the circuit court of said county against Sarah Groomer, the widow, and Logan P., Richard R., America J., and Christopher L., for partition of the lands which they inherited from their father, William J. Groomer, and the lands conveyed to them by David Groomer, Sr., viz.: The N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 14, township 60, range 30, and the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 11, township 60, range 30,—the lands in question; the 40-acre tract in section 14 having been acquired by inheritance, and the 80-acre tract in section 11 by deed from David Groomer, Sr. By the report of the commissioners in the partition suit, filed at the March term, 1872, of the Dekalb county circuit court, the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 11, township 60, range 30, was partitioned and allotted to Christopher L. Groomer, and other lands to the other parties, according to their respective interests. At the same term of said court it was adjudged and decreed by the court that the title to the lands described in the said report "be, and the same is hereby, vested in the parties to whom said lands are partitioned and allotted." It does not appear, however, from the record, that any part of the N. E.  $\frac{1}{4}$  of section 14, township 60, range 30 (part of the land inherited from the father, William J. Groomer), was partitioned or allotted by the commissioners, although petitioned for. On the 30th

day of September, 1875, Christopher L. Groomer acquired by meane conveyances the title to three-sixths of the said N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 14, township 60, range 30, the same being the one-sixth interest of each of the following named heirs of William J. Groomer, deceased, viz. William R. Groomer, America J. Bratcher (formerly Groomer) and husband, and David A. Groomer, which, together with the one-sixth he inherited, vested in him absolutely four-sixths interest in the said 40 acres. On January 2, 1871, one James Ewart purchased the said N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 14 at a collector's sale for the delinquent taxes for the year 1867, and received a deed from the said collector, which said deed was duly recorded on January 2, 1871, in the recorder's office of the said Dekalb county. On April 6, 1877, the said Ewart conveyed to the said Christopher L. Groomer, in consideration of \$60, the said N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  by deed of quitclaim in the usual form, which said deed was duly acknowledged and recorded April 6, 1871, in the recorder's office of Dekalb county. Christopher L. Groomer, the husband of the defendant, entered upon the lands in question—the 80 acres in section 11, and the 25 acres in section 14—March 8, 1877, erected a small dwelling on the 25-acre tract, and fenced it, and cleared up a part of the 80 in section 11, and fenced portions of it from time to time as he grew able to do so. On May 27, 1877, Christopher L. Groomer married the defendant, went to housekeeping on the land, and they have occupied the same ever since, claiming the same as their homestead. On the 14th day of August, 1877, Christopher L. Groomer duly executed a general warranty deed containing the usual covenants, in consideration of one dollar, to him paid by Lina Groomer (his wife), whereby he conveyed to her the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 11, township 60, range 30; and afterwards, to wit, on the 19th day of October, 1892, he also conveyed by deed the 25-acre tract in section 14. On the 10th day of April, 1880, Logan P. Groomer and Sarah, his wife, by their deed of quitclaim, duly signed, sealed, acknowledged, and delivered, in consideration of the sum of one dollar, to them paid by Christopher L. Groomer, remised, released, and quitclaimed to the said Christopher L. Groomer the north 25 acres of the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 14, township 60, range 30, which said deed was duly recorded in the office of the recorder of deeds of Dekalb county, Mo. Christopher L. Groomer and wife conveyed by general warranty deed dated March, 1878, the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 14, township 60, range 30, to one Simon Jones, who afterwards conveyed the same to one Sampson F. Jones, and Sampson F. Jones conveyed the same to one Henry Wilson, in trust to secure one Wilder for \$800. On the 20th day of September, 1888, the plaintiff (Loring) purchased the same land at a foreclosure sale un-



der said trust deed. At a regular term of the circuit court of Dekalb county, Mo., in the year 1884, upon the motion of Logan P. Groomer, the said court made an entry nunc pro tunc amending the judgment entered in the partition proceedings of the lands of William J. Groomer, deceased (made at March term, 1872, of said court), whereby the title to the said S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 14, township 60, range 30, was vested in the said Logan P. Groomer. At the February term, 1894, of said circuit court, plaintiff obtained judgment against Christopher L. and Sarah Groomer, his mother, for breach of the covenant of warranty contained in the deed from them to Simon Jones, March 6, 1878; and thereafter, at the October term, 1894, of said court, at an execution sale under said judgment, purchased the lands in question, which had been levied upon and seized as the lands of said Christopher L. Groomer.

The first point insisted upon for a reversal of the judgment from which this appeal was taken is with respect of the action of the trial court in admitting in evidence the collector's deed from Ranson, as collector, to James Ewart, and the quitclaim deed from Ewart to Christopher L. Groomer. The tax deed in question is almost a literal copy of the tax deed which was held to be void upon its face in *Burden v. Taylor*, 124 Mo. 12, 27 S. W. 349, and for the same reasons given in that case was void, and therefore improperly admitted in evidence. A tax collector cannot, as such, pass the title of land from one man to another, without at least substantially complying with the statutes, from which alone he derives authority to sell and convey lands for delinquent taxes. The deed is a mere skeleton, and is so glaringly void that it is unnecessary to pass seriatim upon its many fatal defects. It follows that the quitclaim deed from Ewart to Christopher L. Groomer was also improperly admitted in evidence, because Ewart had no interest in the land, other than that which he acquired by the collector's deed; and, as he acquired no title by that deed, none was passed by the quitclaim deed from him to Groomer. The deed executed by Christopher L. Groomer on the 6th day of March, 1878, to Simon Jones, for the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 14, township 60, of range 30, contained covenants of general warranty which run with the land (*Rawle, Cov.* [5th Ed.] § 204); and plaintiff, having, by mesne conveyances, succeeded to the rights of the covenantee, became, in legal contemplation, a creditor of said Groomer from the time of the breach of the covenant of warranty in the deed to Jones, which was not broken, according to the allegations in plaintiff's petition, until the 1st day of August, 1888, when Logan Groomer entered upon the land, and has ever since been occupying the same adversely to plaintiff (*Id.* § 131). No cause of action existed in favor of plaintiff before that time. Then when plaintiff, as assignee of the covenant in that deed, recovered judgment thereon against the grantor, Christopher L., for

breach thereof, had the land in question sold, became the purchaser thereof, and received the sheriff's deed therefor, he became invested with all the interest of said Groomer in said land, if any he had, which was subject to sale under execution. Christopher L., his sister and brothers, acquired the land in section 14 by inheritance, and that in section 11 by deed, and was, therefore, tenant in common with them; and while it was thus held by them Christopher was not a housekeeper, or the head of a family, and had no homestead rights in it. But it is insisted that when Christopher's interest was set off to him in the suit in partition between himself, sister, and brothers, in March, 1872, and he and his wife, the defendant, moved onto it, and thereafter claimed it as his homestead, under the homestead law of 1865 entitled "Estates of Homesteads," which was then in force, it was, from the time of its occupancy by them as such homestead, exempt from levy under attachment and execution, and that no title passed to plaintiff by virtue of his sheriff's deed. By section 1 of the chapter it is provided that: "The homestead of every housekeeper or head of a family, consisting of a dwelling house and appurtenances, and the land used in connection therewith, not exceeding the amount and value herein limited, which is or shall be used by such housekeeper or head of a family as such homestead, shall, together with the rents, issues and products thereof, be exempt from attachment and execution, except as herein provided. Such homestead, in the country, shall not include more than one hundred and sixty acres of land, or exceed the total value of fifteen hundred dollars, and in cities having a population of forty thousand or more, such homestead shall not include more than eighteen square rods of ground, or exceed the total value of three thousand dollars." By section 7 of said act it is provided that: "Such homestead shall be subject to attachment and levy of execution upon all causes of action existing at the time of the acquiring such homestead, except as herein otherwise provided; and, for this purpose, such time shall be the date of the filing in the proper office for the records of deeds, the deed of such homestead, and (in case of existing estates) such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created." In order to hold in accordance with defendant's contention, we have not only to give to section 7, supra, a very liberal construction, but we are compelled to inject into it words that we do not feel authorized to do. That section, as it then stood, provided that the homestead should be subject to attachment and levy of execution upon all causes of action existing at the time of acquiring such homestead, and for that purpose such time should be the date of filing in the proper office for the record of deeds the deed of such homestead, and that such homestead should not be subject to attachment or levy of execution upon any liability created after the passage of said act. If the report of the commissioners

in the partition suit had been filed in the recorder's office of Dekalb county, it might, by a very liberal construction of the statute, be held that that brought it within the provisions of the statute requiring the deed to be filed in the recorder's office, but there is no evidence that this was done. Christopher L. Groomer, having acquired the land in section 14 by inheritance, and that in 11 in partition, had no deed thereto to file in the recorder's office, and it was only from the time of filing the deed to the homestead that it was thereafter exempt from levy and sale under attachment and execution upon liabilities thereafter created. At the time of the inheritance of part of the land, and the acquisition of the balance by Christopher L., he was not a housekeeper, or head of a family, was not entitled to a homestead, and he could not acquire one simply by becoming the head of a family or housekeeper.

Our position finds support in the fact that the general assembly, in 1887, so amended the statute as to exempt homesteads acquired by descent or devise from attachment, levy, and sale under execution upon all causes of action accruing after the acquisition of such homestead. Acts 1887, p. 197. There would have been no necessity for such legislation if the statute of 1865 exempted homesteads acquired by descent and devise from attachment and levy under execution, as in the case of a homestead acquired by deed. When, however, the act of 1887 became a law, whatever land Christopher Groomer was occupying with his family and using as a homestead, not exceeding the number of acres and value prescribed by statute, to wit, 160 acres of land, with dwelling house and appurtenances, not exceeding the total value of \$1,500, became exempt from attachment and levy of execution for all causes of action accruing thereafter; and it makes no difference how the title was acquired, or whether the title to such homestead was in him or his wife. It follows that, as plaintiff's cause of action did not accrue until after the homestead was acquired by Christopher L. Groomer, it was not subject to sale under execution issued upon the judgment rendered in plaintiff's favor against him. Other errors are assigned by plaintiff, but there does not seem to be anything in them which justifies a reversal of the judgment, or would lead to a different result on another trial. Finding no reversible error in the record, we affirm the judgment.

GANITT, P. J., and SHERWOOD, J., concur.

#### FISHER v. KIETHLEY.

(Supreme Court of Missouri, Division No. 1.  
Dec. 23, 1897.)

WILLS—DOCTRINE OF ADEPTION—WHEN APPLICABLE.

1. Under Rev. St. 1889, § 8871, providing that no part of a will shall be revoked except by a subsequent will in writing or by cancellation or destruction, if a devise of land remains unre-

voked by any method provided by statute, a gift of other lands does not operate to adeem, since the land devised is left for the will to operate on.

2. The doctrine of adeption being founded on the presumption that testator only intended each object of his bounty to receive an equal portion of his estate, it cannot be extended to a payment in satisfaction of a legal obligation, or to property sold by testator to the devisee for a value.

Appeal from circuit court, Ralls county; John A. Hockaday, Judge.

Ejectment by John P. Fisher against James T. Kiethley. From a judgment for plaintiff, defendant appeals. Affirmed.

John Megown, for appellant. Geo. A. Mahan and F. L. Schofield, for respondent.

MACFARLANE, J. In the year 1869 Roland Kiethley was seized in fee of a tract of land, containing about 300 acres, upon which he resided. He had a number of children, all of whom had left the paternal home except his son John C. Kiethley, who was married, and lived with him upon the farm. On the 3d day of May, 1869, the said Roland Kiethley made and published his last will, under which he sought to dispose of his entire estate among his children. He devised to his said son John C. 100 acres of said land, describing it. In connection with this devise the will recites: "Which said devise, over and above the amount bequeathed to my other children, I deem just and right on account of the ill health of my said son and his affectionate care of me in my old age." The residue of his property he directed should be sold, and the proceeds thereof divided among the other children. John C. continued to reside with his father for about three years after the execution of the will, when he moved to the state of Illinois, where he remained about two years. Soon after his return his father, the said testator, conveyed to him in fee simple 150 acres off the north side of said farm, which included the mansion house and other buildings. This 150 acres was separated from the 100-acre tract by a strip of land about 80 yards wide and over 2,000 yards long. The express consideration for this deed is "the care and support of said Roland Kiethley [the grantor] and ten dollars." The grantor was over 80 years of age when this conveyance was made, and died in 3 or 4 years after. After the death of his father, the said John C. Kiethley conveyed both tracts to plaintiff, Fisher, who commenced this suit in ejectment to recover the possession of the 100-acre tract, February 7, 1891. There had been some previous litigation in regard to the conveyance and the devise, both of which had been adjudged valid. The petition is in the usual form of actions of ejectment.

By his answer, after a general denial, defendant stated, in detail, the facts hereinbefore noted and charged; "that the said

one hundred and fifty acres so conveyed was of much greater value than the one hundred acres devised to said John C. Kiethley by the will, and that it was conveyed to him and accepted by him in full satisfaction of his interest in said estate, and that in equity and good conscience the said conveyance to him and acceptance by him of the said tract of one hundred and fifty acres did, and, considering all the facts and circumstances, should, operate as a complete and full ademption of said devise of one hundred acres, under which devise this plaintiff claims title." The answer further charged that plaintiff purchased the land with full notice of all the facts and circumstances under which it had been devised to his grantor. The issues were tried by the court. Defendant in support of his answer offered evidence tending to prove all the allegations thereof. The evidence also tended to prove that the testator, Roland Kiethley, when he made the deed, believed that the will had been destroyed, and that John C. Kiethley had forfeited the right to the devise to him, for the reason that he had not continued to live with and care for him. The court found for the plaintiff, and judgment was rendered accordingly, and defendant appealed.

1. The claim of defendant, as it appears from the answer, is that the devise of the 100-acre tract made to John C. Kiethley, under the will of his father, Roland Kiethley, was adeemed, revoked, or satisfied by the subsequent conveyance to him of the 150-acre tract. It must be agreed that the evidence tends to prove—indeed, is very convincing—that the testator intended that the provision made by the deed should operate as a revocation of the devise, or, rather, he believed that the devisee had forfeited the testamentary provision by reason of leaving home and ceasing to care for him. There was no evidence, however, tending to prove that the devisee had such an understanding when he accepted the deed. The grantor had the right to make the deed for the consideration therein expressed, and it has been held valid by this court. *Keithley v. Keithley*, 85 Mo. 220. It must be conceded, furthermore, that by the will and deed, giving them both effect, the said John C. Kiethley secured the bulk of his father's estate, to the virtual disinheritance of the other children. This disposition of the property is manifestly inequitable, but the will has also been confirmed by the judgment of this court. *Owens v. Sinklear*, 110 Mo. 55, 19 S. W. 813. So we must, then, take the will and deed together, both of which, taken separately, are valid instruments, and determine whether or not the latter revoked, adeemed, or satisfied the provision made for said devisee in the former; assuming, as the evidence tends to prove, that the testator intended it to have that effect.

2. In the first place, all the authorities, so

far as we are advised, except one which we will notice further on, agree that the doctrine of ademption only applies to bequests of personal property. We find but the one case, in the absence of a statute, in which it has been held applicable to the devise of real estate. 2 Story, Eq. Jur. § 1111; 1 Am. & Eng. Enc. Law (New Ed.) 611, and authorities cited; 1 Rep. Leg. 365; 2 Woerner, Admn. § 446; *Burnham v. Comfort*, 108 N. Y. 539, 15 N. E. 710; *Allen v. Allen*, 13 S. C. 512. Counsel for defendant argues with much force that no sufficient reason exists, on principles of equity, for the distinction made in applying the doctrine to a bequest of a legacy, and refusing to apply it to a devise of real estate. It is true the doctrine of ademption is founded upon principles of justice in order to work out a fair and equal division of the estate of a parent, or one standing in the relation of a parent, among all the objects of his bounty. Courts act on the presumption that a parent intends that all the objects of his bounty shall share equally in his estate, and, in case he has given a legacy to one by will, and afterwards a gift or advancement to the legatee of property, of the same kind, that he intends to adeem, or take away the legacy in whole, or in proportion to the value of the donation. The doctrine is applied on the same principle as is that of advancements in case of intestacy. The reasons for the rule, as expressed by Lord Hardwicke, are: "This court inclines against double portions. Another good one, the court considers it as a performance of what was intended to be done, and paying the debt of nature which he owed his child." *Watson v. Lincoln*, Amb. 325. "It is a rule adopted by courts of equity to prevent a child from getting a double portion, an inequality which it is fair to presume the testator did not intend." *Wallace v. Du Bois*, 65 Md. 153, 4 Atl. 402. While no reason, on principles of justice and equity, seems to exist for the distinction made between a bequest of personal property and a devise of real estate, yet the distinction has ever been most uniformly made by the courts, not because the equities are not the same, but because of the safeguards that have ever been thrown around the transfers of real estate and contracts by which titles are affected. The rule has remained unchanged by the legislation of this state, though questions of the revocation of wills and of advancements have been dealt with, and we must assume that no change has been considered desirable. We do not think the courts, at this day, should take the initiative in abrogating a rule which has been so long and so universally approved. The statute of frauds requires all agreements affecting the title to real estate to be in writing (Rev. St. 1889, § 5182), and the statute concerning wills provides expressly how alone they may be revoked (Id. § 8871). The section last cited provides: "No will in writing, except in the cases hereinafter mentioned,

nor any part thereof, shall be revoked, except by a subsequent will, in writing, or by burning, canceling, tearing or obliterating the same, by the testator, or in his presence, and by his consent and direction." The doctrine of ademption is treated by the courts as a satisfaction rather than a revocation of the legacy. The theory is that the gift contemplated by the will to take effect after the death of the testator is advanced during his lifetime. The legacy is thus adeemed, or taken out of the will altogether, because the testator has already parted with its control. The subject of the bequest is gone, and the will has nothing to operate upon. Hence the gift must be ejusdem generis, as the bequest, in order to effect an ademption. On the same principle, a conveyance by the testator, during his lifetime, of the land previously devised, operates as a revocation of the devise. This results from necessity, on account of a failure of the subject of the devise. It cannot be regarded either as ademption or as an exception to the statutory mode of revocation. In neither case is it intended by the courts to set aside the statute or to defeat its provisions. Real estate is known and transferred by its description, and, in case specific land is devised, a subsequent conveyance of other land does not take the devised land out of the will, and cannot effect an ademption of the devise without violating the letter and spirit of the statute. The statute was supposed to subserve a salutary purpose, and should not be disregarded by the courts, even to carry out the intention of the testator, and to accomplish a more equitable division of his property among his children. As said by the court of appeals of New York in a case, as in this, in which justice seemed to demand the application of the doctrine of ademption to a devise of land: "A rule of law which has heretofore been sanctioned and relied upon, which is in unison with the spirit and with the sense of our statute, and which offers a safe rule of property, is rather to be followed than to be departed from, for reasons moving from the circumstances of this case." *Burnham v. Comfort*, 108 N. Y. 535, 15 N. E. 712. See, also, *Clark v. Jetton*, 5 Sneed, 229; *Allen v. Allen*, 13 S. C. 512; *Weston v. Johnson*, 48 Ind. 1. We are cited to a decision of the supreme court of the state of Virginia which holds that a devise of real estate will be adeemed by a subsequent marriage settlement of other land, of equal value, upon the devisee. *Hansbrough's Ex'rs v. Hooe*, 12 Leigh, 321. In this case one of the three judges dissented. The judge who wrote the majority opinion agreed "that no case had occurred in which the doctrine of ademption of legacies has been extended to devises of real estate," but, he says, "it is equally true that there is no case, in Virginia at least, deciding that the doctrine is inapplicable to such devises." The judge there-

upon proceeds to decide the case on principles of equity, notwithstanding a statute of that state in regard to the revocation of wills similar to our own. Tucker, J., who wrote a very able dissenting opinion, shows that the bequest of a legacy may be adeemed by bestowing the gift upon the legatee during the lifetime of the testator. In such case the gift itself is gone; is taken out of the will altogether. In case the land devised is conveyed during the lifetime of the testator, the devise will be necessarily revoked, because it has nothing to operate upon. "But," he says, "a gift of other lands cannot operate to adeem, since the land devised is left for the will to operate on; nor can it operate to revoke, because revocation can only be according to the statute." In concluding this discussion he says: "We are bound by adjudications in this respect [referring to certain implied revocations] which we may not disregard. But, when no precedent commands us to set the statute at defiance, we should steadfastly adhere to its wise and salutary provisions." So we say in this case. The devise of the tract of land in dispute remained unrevoked by any method provided by statute, and the land which was the subject of the devise remained for the will to operate upon. There could, therefore, have been neither an ademption nor revocation of the devise.

8. It also appears from this record that the conveyance of the 150-acre tract by the testator to the devisee was for a valuable consideration, and was not made as a portion or advancement. The expressed consideration was \$10 and an agreement to care for and support the grantor. An attack upon the deed for inadequacy of consideration was defeated. *Keithley v. Keithley*, supra. As has been said, the doctrine of ademption is founded upon the presumption that the testator only intended each object of his bounty to receive an equal portion of his estate. The doctrine, therefore, cannot be extended to a payment in satisfaction of a legal obligation, or to property sold by the testator to the devisee for a valuable consideration. It only applies to a portion advanced to the legatee to which he is by nature entitled. 1 Am. & Eng. Enc. Law (New Ed.) 616, and cases cited.

4. There is no evidence that the conveyance was taken in satisfaction or substitution for the previous devise, assuming that the testator, for the consideration expressed in the will, bound himself to give the legatee the 100-acre tract. Satisfaction could not be effected without the consent of the devisee, and there was no evidence that he gave his consent. 1 Pom. Eq. Jur. § 528. It follows that both the devise and the conveyance must stand. The judgment is affirmed.

BARCLAY, P. J., and ROBINSON and BRACE, JJ., concur.

## SANDERS v. LACKS.

(Supreme Court of Missouri, Division No. 1.  
Dec. 23, 1897.)

ELECTION CONTEST—APPEAL—JURISDICTION—  
PLEADING—WAIVER—JUDGES OF ELECTION  
—OATH—NUMBERS—ELECTION.

1. Under Const. 1875, art. 6, § 12, which provides that appeals shall lie to the supreme court "in cases involving the title to any office under this state," the supreme court has jurisdiction of a case in which the election of a county collector of revenue is contested.

2. Where plaintiff in a contested election case goes to trial without insisting on an answer or other traverse, or objecting to proceeding without it, he will, on appeal, be held to have waived it.

3. Under Rev. St. 1889, § 4665, which provides that the judges of election, before entering on their duties, "shall take the following oath," the vote will not be thrown out on account of the failure of a judge to take the oath.

4. In the absence of any evidence of any intentional or fraudulent deviation from the law, the returns from a precinct will not be thrown out merely because there were but four judges of election, instead of six, as is required by Rev. St. 1889, § 4777.

5. In the absence of both allegation and proof of any fraud or misconduct on the part of the judges of election in a precinct, the vote will not be thrown out because the judges are not equally apportioned to the two leading political parties.

6. The acceptance of judges of election, by the mutual consent of the voters present, without any formal election, is a sufficient compliance with Rev. St. 1889, § 4791, which provides that, in case of the failure of the judges of election to open the polls at the time fixed by law, the voters present, to the number of 10 or more, may proceed to elect judges to act as such polls.

Appeal from circuit court, Butler county; John G. Wear, Judge.

Contest of election brought by Alexander Sanders against John N. Lacks. Judgment for contestee, and the contestant appeals. Affirmed.

A. D. Hight, J. T. Davison, and Geo. D. Tinch, for appellant. W. N. Barron and E. R. Lentz, for respondent.

BARCLAY, P. J. This is a contested election case, brought to the supreme court by appeal of the plaintiff, or contestant, after a decision on the circuit in favor of the defendant, who holds the certificate of election to the office in dispute, which is that of collector of the revenue for Butler county. The proceeding began with a notice of contest, the grounds of which need not be specially stated at this point. In due time the contestee demurred to the notice. His demurrer was overruled. No answer was filed, but the parties went to a trial as upon a denial of the facts alleged. The court found for defendant, and the appeal followed in due course. The plaintiff furnishes in the brief of his counsel a summary of the evidence, from which we take the following passages, as fairly presenting the leading facts bearing on the points raised by the assignments of error: "The testimony shows that the election in question was the general election for nation-

al, state, and county officers, held November 3, 1896; that Alexander Sanders, the contestant, and John N. Lacks, the contestee, were, respectively, the Republican and Democratic candidates for the office of collector of the revenue within and for Butler county; that Fitzgerald was the name of a regularly constituted voting precinct in said Butler county. The evidence given by County Clerk Spence shows: That six judges were appointed by the county court to conduct the election in said Fitzgerald precinct. Three of these appointees were Democrats and three Republicans. That the Democratic and Republican parties cast the largest vote in said Fitzgerald precinct at the last general election preceding the election held November 3, 1896. The evidence of all the witnesses, both for contestant and contestee, who testified in relation thereto, was: That the election in said Fitzgerald precinct was conducted by four judges only, and that one of them, John Huskey, was not sworn. Three of these judges, Kerby, Ansil, and Huskey, were Democrats, and Nance alone a Republican. That but two of these four, Nance and Kerby, were of the judges appointed by the county court. That Huskey and Ansil were not appointed by the county court, nor elected by the voters present at the election precinct to the number of ten or more. That two judges, Huskey and Nance, acted as ticket or ballot judges, and also as receiving judges. That Kerby and Ansil, both Democrats, acted as counting judges. That several times during the day of the election there was but one judge to distribute and receive ballots, and but one to count votes. That the attention of the judges, clerks, and voters present was called to the fact that the law required six judges to constitute an election board. That, at the time of opening the polls, there were enough voters present from whom there might have been selected six judges. That no election was held by the voters present at Fitzgerald precinct (to the number of ten or more) of judges to act in place of those appointed by the county court, but who failed to appear in time to perform their duties. \* \* \* Of the votes cast for collector of the revenue at Fitzgerald precinct on the 3d day of November, 1896, John N. Lacks, the contestee, received 80 votes, and Alexander Sanders, the contestant, received 45 votes. That, of the total vote of the county cast for collector of the revenue at said election, John N. Lacks, the contestee, received 1,631 votes, and Alexander Sanders, the contestant, received 1,619 votes. The evidence also shows that John N. Lacks, the contestee, received the certificate of election, took the oath of office, and was commissioned as collector of the revenue within and for Butler county." The statement in plaintiff's summary of the evidence touching the failure to elect the substituted judges must be taken rather as the conclusion of counsel than as the fact itself. Further on we shall refer to the testimony on

that point, and indicate our view of its legal effect. The various grounds of plaintiff's objections to the election will be stated along with the discussion thereof.

1. The supreme court has jurisdiction of this cause, because it involves title to an "office under this state." Const. 1875, art. 6, § 12; *State v. Rombauer* (1890) 101 Mo. 499, 14 S. W. 726.

2. The fact that no answer was filed does not require the court to take as true the allegations of fact in contestant's notice of contest. If any answer or other traverse as to facts was necessary, in view of the broad language of section 4710, Rev. St. 1889, the course of the plaintiff in going to trial without insisting on such traverse (or raising some objection to proceeding without it) must, at this stage of the controversy, be held to amount to a waiver of any such formal pleading. *Henslee v. Cannefax* (1872) 49 Mo. 295.

3. The general contention of the contestant is that the entire vote of Fitzgerald precinct should be thrown out, because of certain irregularities in the holding of the election there. The first objection of this nature is that one of the judges was not sworn by any one authorized to administer oaths. The mere absence of an oath by a judge would not vitiate the election, assuming now that an oath is imperatively prescribed to be taken by the judges before entering on their duties. Rev. St. 1889, § 4665; *People v. Cook* (1853) 8 N. Y. 84; *Taylor v. Taylor* (1865) 10 Minn. 107 (Gil. 81). The omission of the oath is not pronounced by law to be fatal to the official authority of any such judge, and we consider such omission to be no worse than a like oversight on the part of a strictly judicial officer of the state when he enters upon his duties. It has been ruled in Missouri that the failure of a special judge to take an oath (prescribed by statute) does not invalidate the decision rendered by the said judge. *Vogt v. Butler* (1891) 105 Mo. 479, 16 S. W. 512. The principle of that ruling is applicable to the point now made. We consider the objection by appellant on that score untenable.

4. It is next insisted that the return from Fitzgerald precinct should be nullified, because the election there was conducted by four judges, instead of six. The reform ballot system (commonly called the "Australian"), which has been adopted as part of the law of Missouri, requires six judges at such a precinct as that in view in this case. Rev. St. 1889, § 4777. The plaintiff insists that said requirement is vital, and that a failure to observe it demands of the courts a cancellation of the vote of the people cast at any precinct where such a deviation from the law occurs. Plaintiff relies on the recent decision of the court in *banc in Hope v. Flentge* (1897) 41 S. W. 1002, to sustain his contention on this point. That judgment, however, gives no countenance to any such theory as plaintiff advances. On the con-

trary, that case is authority for the proposition that no voter should be disfranchised on account of a mere irregularity occasioned by the neglect or misconduct of election officers (over whose conduct he has no control), unless the legislature has declared that such irregularity, neglect, or misconduct should avoid the election, or render the voter's ballot illegal. It appears from the testimony in the case at bar that, when the poll opened in the precinct, there was some discussion among those present touching the number of judges required to preside. Finally four judges took charge, two of whom had been designated by the county court. There was no evidence that there was in this any intentional or fraudulent deviation from the law, or anything other than an innocent mistake as to the demands of the election statute. The law in force before the adoption of the Australian method of voting called for but four judges at that precinct. Irregularities in the management of elections under the Australian ballot act have been the subject of many judicial decisions. The minute directions of that act for moving the machinery to express the popular will were not easy to master at once. So, the introduction of the system in any locality was invariably accompanied by an exhibition of deviations from the forms of procedure which the act laid down. In Australia, England, and the United States, judges who have been able to appreciate the larger objects and intent of the reform ballot act have been led to announce certain practical rules for dealing with such departures from the strict lines of conduct marked out by the act. The thought underlying those rules is the same that inspires a much older rule for the construction of written laws, namely, that the great purpose aimed at by a statute should never be sacrificed by too literal an adhesion to those minor provisions, which are obviously intended merely as means to carry out the larger design of the act. Ruth. Inst. (2d Am. Ed.) p. 415. Popular elections involve the exercise of one of the most cherished rights of the citizen in a free government. But the right of suffrage must needs be exercised under conditions which do not always admit of a rigid observance of every technical requirement of law. The judges of election who manipulate the machinery necessary to record the expression of the voters' will are usually laymen, unfamiliar with legal technicality, and often wholly innocent of that sense of the importance of matters of mere form which often seems to possess a strange fascination to some learned minds. Election judges are drawn from the great body of the people. They serve for a short while; in the main, do their best to faithfully perform their duties under the law. But they are often guilty of omissions and oversights in attempting to follow the strict letter of the law. In dealing with those lapses, the courts have promulgated a

practical general rule, which seems to have a direct bearing upon the appeal at bar. That rule is thus stated by the most eminent American text writer on the law of this subject, viz.: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election." *McOrary, Elect.* (4th Ed.) § 225. The use of the terms "mandatory" and "directory" in this connection is, no doubt, sanctioned by usage in the law of election by ballot. The terms are sometimes misleading, and not strictly accurate; but they are convenient to point out the distinction between two general classes of irregularities, and they are sufficiently well understood to keep their places in the literature of the subject in hand. Applying the rule already quoted, it is clear that the fact of four judges acting at a precinct in lieu of six (the complement prescribed by law) should not be held to deprive of their votes the citizens who voted at that precinct.

5. The next objection to the election is that the judges at the precinct were not equally apportioned to the two leading political parties. Of the four judges who finally acted, one was a Republican, and three were Democrats. It does not appear that any harm or prejudice to contestant's interests was occasioned by the failure to follow the law in the particular just mentioned. The full vote of the precinct was polled, counted, and returned. There is neither allegation nor proof of any sort of fraud or misconduct on the part of the judges in performing any of their duties in connection with the election. Nor is there any showing of unfairness in the result. This being so, we hold that the general rule already quoted, as to the effect of irregularities at elections, should be applied, and that the objection last above stated should be considered insufficient to nullify the vote cast at the precinct in question. The objection is one, however, that we should be disposed to treat very seriously if there was any testimony of an unfair result, which there is not in this case.

6. Only two of the four judges who acted were appointed by the county court in advance of the election. The other two were not elected in any formal manner, but ap-

pear to have been informally designated by the voters (over 10 in number) at the opening of the poll, and to have entered then on the discharge of their duties. One of the witnesses describes how this came about: "We simply accepted them in there by the common consent of all present [referring to the two election judges not named by the prior order of the county court]." Plaintiff contends that such a selection of the two judges was fatally irregular, under section 4791, Rev. St. 1889. But that section directs no special form of procedure for the election of substitute judges in event of the absence of a judge officially appointed by the county court. If the voters, in sufficient number, present at the time for opening of the poll by common consent, designate some qualified person to act as judge, such designation is an "election" of the judge, within the meaning of the law.

7. We have noted all of the plaintiff's objections to the election which appear to merit any remark, and, finding them groundless, affirm the judgment.

MACFARLANE, ROBINSON, and BRACE, JJ., concur.

#### MARTIN et al. v. TRAIL et al.

(Supreme Court of Missouri. Dec. 14, 1897.)

EJECTMENT—CURTESY—REVERSION—SEISIN—PARTITION—ADVERSE INTERESTS—SEPARATE OR COMMON POSSESSION.

1. In ejectment, plaintiff claimed as heir of the reversioner, who died before the termination of the particular estate on which the reversion depended, and defendant, as the surviving husband of the deceased reversioner, claimed the right to curtesy in the reversion. *Held*, that defendant was not entitled to curtesy, as his deceased wife was not seised of the reversion, either in fact or in law, during coverture, and therefore the fee vested in plaintiff on the termination of the particular estate.

2. Rev. St. 1889, § 7145, provides that in partition the court shall declare the rights, titles, and interests of the parties, and give judgment that partition be made between such of them as shall have any rights therein; and section 7148, that whenever there are parties claiming the same portions adversely to each other, the court may either decide upon such adverse claims, or direct the share or shares so in controversy to be set off and allotted, subject to the claims of the parties in controversy against each other. It appeared, in an action of ejectment, that the property in controversy had been allotted and set off to plaintiff, "subject to the life interest therein" of defendant in a partition suit, in which their respective adverse interests were not in issue. *Held* no bar to such action.

3. Where certain defendants in ejectment pleaded separately their sole possession of distinct portions of the land as tenants of their co-defendant, and there was evidence tending to prove a common possession as to the entire tract, it was error to direct a finding for defendants on such issue, as plaintiff had the right to have such question tried.

In banc. Appeal from circuit court, Lafayette county; Richard Field, Judge.

Ejectment by Joseph Martin and another against George L. Trail and others. From a

judgment for defendants, plaintiffs appeal. Reversed.

This is an action of ejectment. The petition is in the usual form. The defendants answer separately. Defendant Trail denies the right of plaintiff to the possession of the land. Two of the other defendants answer separately that each is in possession of a separate part of the land as tenant of defendant Trail. The third disclaims any possession or right to possession. The judgment was for defendants, and plaintiffs prosecute this appeal.

R. F. Porter and J. D. Shewalter, for appellants. Wallace & Chiles and Wm. Aull, for respondents.

MACFARLANE, J. The principal facts are matters of record or stand admitted. They are these: John Graves died intestate prior to December 12, 1853, seised of a large tract of land in Lafayette county. He left surviving him a widow, Elizabeth Graves, and two sons, Thomas R. Graves and David A. Graves. On said day the parties, by deed of partition, divided the land among themselves. The heirs conveyed to the widow, as her dower, a portion of the land, to have and hold during her life, with remainder to the grantors and their heirs. The land in controversy is a portion of the dower lands. The said Thomas Graves died intestate in 1857, leaving one child, Mary T. Graves, who married defendant Trail. The said Mary had one child by the marriage, Mary W. A. D. Trail, who married Joseph Martin. She and her husband are the plaintiffs in this suit. Mrs. Mary Trail, wife of defendant, died about the year 1871, leaving plaintiff as her sole heir at law. The widow of the said John Graves lived on the land conveyed to her as dower until 1881, when she died. At the August term, 1881, of the circuit court of Lafayette county, plaintiff, then Mary W. A. D. Trail, by her curator, William M. Green, defendant George L. Trail, and the heirs of the said David A. Graves, by their attorney, William M. Greer, commenced a suit by petition ex parte for the partition of the said dower land. In this petition the plaintiffs "state that the interest of said Thomas R. Graves in said lands has thus descended to and invested in plaintiff Mary W. A. D. Trail, subject to the tenancy by the curtesy therein of her father, George L. Trail, being the said interest for and during his natural life. Plaintiffs state that plaintiff Mary W. A. D. Trail is entitled to one-half of said lands subject to the life interest therein of her father, George L. Trail." In their prayer for judgment petitioners say: "Plaintiffs desire that partition be made, and that one-half of said lands be set off to Mary W. A. D. Trail and George L. Trail, to hold according to their respective interests." The petition was heard, and the court found that "Mary W. A. D. Trail is entitled to one-half

of said land, subject to the life interest therein of her father, George L. Trail." It was thereupon adjudged "that partition of said land be made between the parties aforesaid according to their respective rights as above declared and ascertained by the court." Commissioners were appointed, and were ordered to set off to the said Mary one-half the land. They reported, among other matters: "We allot and set off to Mary W. A. D. Trail, subject to the life interest therein of her father, the following lands." Here follows a description of the land allotted to the said Mary and her father, and which is the land in controversy in this suit. The report was approved by the court, which ordered that "partition and division so made by said commissioners is made firm and effectual forever." The court, at request of defendants, declared as a matter of law that "on the pleadings in the case and the law of this case and the evidence offered the plaintiff cannot recover, and the court will find for the defendants." The judgment was accordingly for the defendants, and plaintiffs appealed.

As will be seen from this statement there are two well-defined legal questions presented by this record: (1) The right of the husband to curtesy in a reversion of the wife, dependent upon a life estate. (2) Was the right of the husband to curtesy conclusively adjudicated by the partition proceedings and judgment?

1. The widow of John Graves was in the possession of the land, holding an estate therein for her life, and at the termination of the particular estate the wife of defendant Trail was entitled to the reversion. The wife died before the termination of the particular estate. The first question is whether or not defendant Trail, the husband, under these facts, was entitled to curtesy in the reversion on the termination of the particular estate, or did the fee vest in the heir of the reversioner. It is not disputed by counsel for defendants that at common law seisin of the wife during coverture was necessary to entitle the husband to a tenancy by the curtesy upon the death of the wife. Nor do they dispute that at common law an estate by the curtesy only attached to those estates of inheritance of which the wife had actual seisin—a possessio pedis—during coverture. But it is insisted that, notwithstanding the common law of England, which is of a general nature, has been adopted in Missouri, yet, as seisin is not, under the statutes of Missouri, "a controlling element in the title to real estate," as it was at common law, the rule that seisin was necessary to entitle the husband to curtesy in the wife's land is not applicable under the changed conditions, and should not be applied. We may state, in the first place, that we find nothing in the legislation of this state that indicates any intention to abolish the rule of the common law in respect to



seisin of the wife during coverture being a necessary condition to the right of the husband to curtesy. It is true that the title to so much of the land in this country is held by persons who do not occupy it, and the free transfer of title from one to another by deed alone without livery of seisin has made it necessary to change the rule of the common law in respect to the character of seisin required. The changed condition requires nothing more, and the supreme court of this state has gone no further than so modifying the rule to the changed conditions as to make a right to the actual possession answer for the necessary seisin. Indeed, the policy of our law, as shown by legislation, has been to restrict, rather than enlarge, the rights of the husband in the property of the wife, both real and personal. This fact should restrain the courts from removing any one of the conditions upon which the right of curtesy rested at common law further than has already been done in respect to the character of the required seisin. The cases of this court cited and relied upon by counsel for respondents go no further than to hold that no actual possession of the wife is necessary, as at common law; and the effect of all the decisions is that the wife must be seised during coverture, either in fact or in law. In *Reaume v. Chambers*, 22 Mo. 36, Judge Scott says: "As to the question whether actual seisin of the wife's land is necessary to entitle the husband to curtesy, we are of the opinion that such an idea never prevailed here. Whatever may be the common law on the subject, the circumstances of the country demanded a modification of the rule. Titles to land conferred by the United States were supposed to give seisin in deed to purchasers. Descents, with us, depend not on actual seisin, but on the statutes regulating descents, and we have allowed the conveyance of land while in the actual possession of others." There is nothing in this declaration that imparts the idea that seisin of the wife was not necessary in this state to entitle the husband to curtesy. The court was dealing with the character of the seisin, and held that seisin, in law,—the seisin under which the paramount title draws to and connects with the possession,—is sufficient. An examination of the case will show that the wife held the paramount title to the land in question during coverture, and was entitled to, though not in, the actual possession. In *Harvey v. Wickham*, 23 Mo. 115, it was held, following the *Chambers Case*, that, "after descent cast, no entry or actual possession was necessary in order to entitle the husband to curtesy in the wife's land." The same was held in *Stephens v. Hume*, 25 Mo. 349. Seisin of the husband during marriage is still necessary to entitle the wife to dower, though the subject has been dealt with by the legislature, and though the property rights of married women have been greatly

enlarged in other respects. It is but reasonable to say that, if a larger right of the husband in his wife's land had been deemed desirable, the legislature would have provided for it. In *Gentry v. Woodson*, 10 Mo. 224, which was a dower case, the court says: "Under the issue of non seisin, there is no doubt but that the actual corporeal seisin, or a right to make such seisin, in the husband, during coverture, is essential to entitle the widow to dower." In *Payne v. Payne* (Mo. Sup.) 24 S. W. 782, it is said: "Now, seisin of the husband at some time during the marriage is an indispensable prerequisite in order to entitle the widow to dower, and it must be a seisin in fact or law. \* \* \* If therefore, says Washburn, the husband has only a reversion or remainder after a freehold estate in another, though it be a fee, it will not give his wife a right of dower therein unless by the death of the intermediate freeholder, or by a surrender of his estate to the husband. Hence the husband had only a reversion after the life estate. He had no seisin, either in fact or in law, at any time during the marriage. The seisin during the whole of that time was in the life tenant." In *Null v. Howell*, 111 Mo. 278, 20 S. W. 24, it is said: "There could be no dower in lands assigned as dower. The interposition of the life estate of the widow would prevent the necessary seisin of the husband." In dealing with questions involving the husband's right of curtesy, seisin of the wife is uniformly recognized by this court as being essential. See *Tremmel v. Kleiboldt*, 75 Mo. 255; *McTigue v. McTigue*, 116 Mo. 139, 22 S. W. 501; *Cornwell v. Orton*, 126 Mo. 355, 27 S. W. 538. At common law, seisin in deed—that is, actual possession—was necessary. In Missouri the common law has been so modified as to make seisin in law—that is, a present right to possession—sufficient. But no case in Missouri holds, nor are we cited to cases elsewhere, in the absence of statutes, which hold, that seisin of one kind or the other by the wife is not a necessary condition to the right of curtesy in the husband. The American rule, as given by the text writers generally, is that, "If the estate of the wife is a reversionary one, subject to a prior freehold estate in another, her constructive seisin of such reversion will not entitle her husband to curtesy unless the prior freehold determine during coverture." 1 Washb. Real Prop. 183; Tied. Real Prop. 107; 4 Kent, Comm. 28; Williams, Real Prop. 219; 4 Am. & Eng. Enc. Law, 901. Counsel for appellants cite us to numerous decisions of the courts of other states which declare the same rule. The rule we think entirely consistent with the changed conditions alluded to by Judge Scott in the *Chambers Case*, supra. There is no question in that case but that the wife had the present right to the possession of the land during coverture. Seisin "in law" is a right to immediate possession according to

the nature of the estate. Bouv. Dict.; 1 Washb. Real Prop. 62; Tied. Real Prop. § 24; Gentry v. Woodson, supra. The case of McKee v. Cottle, 6 Mo. App. 416, is cited and much relied upon by defendant in support of his position. In that case the ancestor of the wife died intestate seised of a tract of land, leaving a widow and several children, Sarah Ann being one of them. Sarah Ann married defendant Cottle a few months after her father's death. Two years afterwards the land of decedent was partitioned, and 123 acres—the land in controversy—was allotted to the widow. Sarah Ann died in 1862, leaving issue, and the widow died soon after. In a suit for partition of the dower land, defendant Cottle, the surviving husband of Sarah Ann, claimed a tenancy by the curtesy in the interest to which the wife would have been entitled had she survived the dowress. The claim was sustained by the court, as we understand from the argument, on the ground that upon the death of her ancestor the wife of defendant became seised in law of an interest in the land as heir of her father, which seisin continued after the marriage. Therefore the wife was seised of the land during coverture, and this seisin was not defeated by the subsequent assignment of dower. We need not consider the correctness of the decision, for the case at bar raises no such question. It is evident that the court held that seisin in fact or in law, at some time during coverture, was necessary. In the case before us there never was seisin of the wife of defendant Trall, either in fact or in law, during coverture. Defendant Trall therefore had no right to curtesy in the reversion of his wife. On the termination of the life estate the fee vested in plaintiff as the heir of the reversioner. The same conclusion was reached arguendo in Cochran v. Thomas, 131 Mo. 258, 33 S. W. 6, but the dictum there made, to the effect that actual seisin of the wife was necessary to create curtesy initiate, as applied to the law as recognized in Missouri, is incorrect.

2. Said defendant insists, in the next place, that his right to curtesy was determined and adjudicated in the partition suit to which plaintiff was a party, and the correctness of that judgment cannot be questioned in this collateral proceeding. The question on this branch of the case is whether or not the partition judgment is a bar to this action. If the rights of these parties were adjudicated in the partition proceeding, it will be conclusive on them in this suit, though erroneously decided; and it could make no difference that the proceedings were ex parte. Judgments in partition are as conclusive on the parties to the suit on all issues over which the court has jurisdiction, and which were thereby determined, as other judgments, and are no more subject to collateral attack. Whether or not, in proceedings for partition, a question affecting the rights or interests of any party was adjudicated, must be de-

termined as in other cases, considering the peculiar nature and objects of the proceeding and the law specially applicable thereto. There was no extrinsic evidence offered on the trial of this case which tends to prove that the right of defendant Trall to curtesy in the land partitioned was tried and determined. Whether or not it was determined must, therefore, be ascertained from the face of the record in that case. The primary object in a partition suit is to separate common interests into distinct portions of the land to be held by the respective owners in severalty, yet "whenever it shall appear in any proceeding in partition that there are parties claiming the same portions adversely to each other, the court may either decide upon such adverse claims, or, in its discretion, direct the share or shares so in controversy to be set off and allotted, subject to the claims of the parties in controversy against each other." Rev. St. 1889, § 7148. The record in the partition suit was put in evidence on the trial. An inspection of that record falls to show that an issue was distinctly made on the question of the right defendant now asserts. All the parties in interest joined in the petition, and the court is asked to determine no conflicting interests. It is manifest that there was at that time no controversy between the husband and the heir of the reversioner which they wished to have determined in that suit. This is made more apparent from the fact that the heir and the husband were each represented by the same person. Mr. Greene acted as curator for the heir, then only 12 years of age, and attorney for the husband of the reversioner. The statute provides that "the court shall ascertain from the evidence in case of default, or from the confession of the parties, if they appear \* \* \* and shall declare the rights, titles and interests of the parties, \* \* \* and determine such rights, and give judgment that partition be made between such of them as shall have any rights therein accordingly." Rev. St. 1889, § 7145. It will be observed that parties are, as in other cases, bound by any confessions made in their pleadings; and, if an interest is admitted by a party, and the court finds according to the admission, the judgment will be conclusive on the fact admitted. The petition charges that "the interest [one-half] of Thomas R. Graves has descended to and is vested in plaintiff Mary W. A. D. Trall, subject to the tenancy by the curtesy of her father, George L. Trall, being the interest for and during his natural life." The petition then states that petitioners are tenants in common, and that Mary W. A. D. Trall is entitled to one-half of said land, subject to the life interest therein of her father. The prayer is that the court "ascertain and declare the several respective rights, titles, and interests of said parties herein set forth, and give judgment accordingly, and to order and direct that one-half of said land be set apart to Mary W. A. D. Trall and George L. Trall, to hold according to their respective interests." It appears clear to us from all the statements of the pe-

tion that the only purpose of the suit was to make a division of the land among the tenants in common, and was not intended to determine the respective rights of the father and daughter in the part of the land to be set off to them. There was no request that the respective interests of these parties be ascertained and declared. The statute authorizes the court, in its discretion, to set off a share to which adverse claims are made, subject to such claims. If that is done in any case, there could be no adjudication of the respective claims, whatever may have been the condition of the pleadings. Although, therefore, the statement in the petition be construed to be an admission by Mary W. A. D. Trail that her father, George L. Trail, was entitled to a life estate in one-half of the land, it would have no more force than if it had been made out of court, unless acted upon by the court, and the title was so adjudged. The court ascertained the interests of the parties as follows: "That Mary W. A. D. Trail is entitled to one-half of said lands, subject to the life interest therein of her father, George L. Trail." Commissioners were appointed, and they were ordered to "set apart to said Mary W. A. D. Trail the equal one-half of said lands, without mention of the claim of her father, and to the other parties interested the other half of said lands, to be held by them according to their rights as herein declared." The report of the commissioners shows: "We allot and set off to Mary W. A. D. Trail, subject to the life interest therein of her father, George L. Trail, the following." The land in controversy is then described. The report was approved by the court, "and said partition and division so made by said commissioners was made firm and effectual forever. It is evident that the adverse interests of plaintiff and defendant were never passed upon or adjudicated. While the right of defendant to a life estate seems to have been recognized throughout the proceedings, it was never so declared by the court, but the title was adjudged to be in plaintiff, subject to the life interest therein of defendant. The interest was left to be subsequently determined, as the statute provides may be done. The language of the statute is followed. One-half is set off to plaintiff "subject" to the interests of defendant. Rev. St. 1889, § 7148; *Lycan v. Miller*, 112 Mo. 548, 20 S. W. 36, 700. The parties to be affected are called "tenants in common." That relation did not exist between plaintiff and defendant. The court was asked to set off one-half to plaintiff and defendant, "to hold according to their respective interests." The object was not to adjudicate their interests, but to relieve the other half of any claim defendant might make there to. The court found plaintiff to be entitled to one-half, subject to the life interest of defendant therein, but ordered the commissioners to set off that half to plaintiff. The commissioners did set off one-half to plaintiff, subject to the interest of defendant, and their action was approved, and as a final and crowning order

"the partition and division" was made firm and effectual forever. The judgment, following the prayer, is for partition only. No issue was made, no trial was had, and no confession was acted upon by the court; and the rights of those parties were, therefore, not adjudicated, but were left for future determination. We are of the opinion that the judgment was not a bar to this action.

Reaching this conclusion, it is unnecessary to decide whether or not, if an issue had been made, the court would have had jurisdiction, in the partition proceeding, to determine the rights of those parties as between themselves. See *Atkinson v. Brady*, 114 Mo. 200, 21 S. W. 480.

3. The evidence tended to prove that the several defendants held distinct portions of the land as tenants of defendant Trail. The defendants pleaded separately their sole possession of such portions. It is held in such case that "distinct actions ought to be brought to recover distinct and separate possessions," though the common landlord was joined as a defendant. *Sutton v. Casseleggi*, 77 Mo. 408. Plaintiff would, however, have the right to dismiss as to any of the defendants at any time before the cause was finally submitted, and proceed against the others. The judgment of the court was on the other questions involved, and the issue of separate possessions was not submitted, though there was evidence tending to prove a common possession to the entire tract. Plaintiff had the right to have that question tried, and the court erred in giving a peremptory instruction to find for defendants on that issue. The judgment is reversed, and cause remanded.

BARCLAY, C. J., and GANTT, SHERWOOD, BURGESS, ROBINSON, and BRACE, JJ., concur.

#### SCUDDER et al. v. AMES.

(Supreme Court of Missouri. Dec. 23, 1897.)

SURVIVING PARTNER—SETTLEMENT—PRIVATE ACCOUNTS—PARTNERSHIP ASSETS—INTEREST—ACCOUNTING—INCOME TAXES—GOOD WILL—ATTORNEY'S FEES—APPEAL AND ERROR.

1. A surviving partner is not entitled to credit for a commission paid to an agent for procuring an allowance of a partnership claim against the county, in the county court, when such claim had already been allowed, and there was no evidence that the agent performed any service other than to receive the money and pay it over to the estate.

2. Where an account due a partnership estate is kept open by the surviving partner in his individual capacity, and further advances made thereon, in the absence of any special arrangement as to the payment of these subsequent advances, any sum realized from the account must be first applied to the portion of it due the estate.

3. Two brothers were partners, and kept everything in common. That one drew from the firm for his private expense more than the other made no difference in the adjustment, each private account being charged to "expense" at the

end of the year, and settled in that way. *Held* that, on the death of one, the other could not draw from the firm assets a sum necessary to make the amount drawn by him equal to that drawn by his brother.

4. A surviving partner neglected to inventory the assets of a certain branch of the business, and keep a separate account of them after his partner's death, but conducted the business as before. No loss to estate or benefit to the surviving partner accrued by reason of this neglect, and it appeared that an amount equaling three-fifths of the assets were paid out to discharge then existing liabilities of the business, and it did not appear that such partner realized any interest on such assets. *Held*, that he is not chargeable with interest thereon from the date of his partner's death to the date when the account was settled.

5. Neither a surviving partner nor his administratrix is chargeable with the duty of accounting in the state courts for partnership assets which are outside the state until such time as the proceeds thereof actually come into their hands, within the state.

6. An allowance of expenses and attorney's fees to an administratrix, by the referee and the lower court, before whom the expenses were incurred and the services rendered, will not be disturbed where there is no showing of unfairness in the allowance.

7. Exceptions to an allowance made in accordance with a ruling of the court on a former appeal of the case must be held to have been adjudicated by the former decision where no new evidence is introduced on the subject.

8. A surviving partner is not chargeable to the partnership estate for the good will of the partnership business when part of the testimony was that such good will was worth nothing, and the witnesses who considered it of value testified that it would not be so where the surviving partner continued to carry on the business.

9. An administratrix of a partnership estate, who in good faith pays special tax bills issued against the estate under an ordinance which was afterwards held void, is not chargeable with such payments, although at the time they were made, but unknown to her, a demurrer to a petition in another case, seeking to collect such tax from another estate, had been sustained, and was pending in the supreme court on appeal.

10. The allowance of a payment, by a surviving partner out of the partnership estate, of a sum in compromise of a contract over title to land previously sold by the partnership, will not be disturbed, on the purely technical ground that it should have been paid out of the separate estates of the partners.

11. An administratrix of a surviving partner received a sum of money, resulting from an old transaction of the firm, and upon the representation of the person who had conducted the transaction, and who had long been the trusted agent of the partners, she, after a careful investigation, allowed him a portion as his share. *Held*, that she is not chargeable with the amount so allowed, it appearing from the testimony of the agent that there had been an agreement with the partners that he was to receive such portion.

12. A surviving partner is not chargeable for his failure to further prosecute, at a considerable expense, a partnership claim which his attorney advised him there was little or no chance of winning, although others afterwards realized from a further prosecution of the claim, unknown to him.

13. A surviving partner is not chargeable for his failure to further prosecute in behalf of the estate a suit involving a claim to property, after it has been decided against the estate in the United States supreme court, although others having a different claim to the same property afterwards successfully prosecuted it.

14. Attorney's fees paid by an administratrix to a surviving partner, in litigation growing out

of her efforts to make a settlement of the partnership estate to which there are complicated and conflicting rights, are properly charged to the estate.

Sherwood, J., dissenting.

In banc. Appeal from St. Louis circuit court; D. D. Fisher, Judge.

Lucy V. Semple Ames, administratrix of the estate of Edgar Ames, filed in the probate court an amended final settlement of the accounts of the partnership estate of Henry Ames & Co. From a judgment of the circuit court affirming a judgment of the probate court settling this report, John A. and William H. Scudder, executors of the will of Henry Ames, appealed. It was reversed and remanded, and referred to a referee, from whose report exceptions were taken, and the case retried in the circuit court. From a final order therein, both parties appeal. Remanded.

Boyle & Adams and Geo. W. Lubke, for plaintiffs. Jas. O. Broadhead, Douglas & Scudder, and Campbell & Ryan, for defendant.

BRACE, J. On the 14th day of August, 1863, Henry Ames died, leaving a will by which his brother, Edgar Ames, was made executor, and, in the event of his death, John A. and William H. Scudder were to become executors thereof. For many years prior thereto the brothers, Henry and Edgar Ames, as equal partners, had been engaged in the pork-packing and commission business in the city of St. Louis. The profits of their business were not divided, but invested in real estate, stocks, bonds, and ventures of various kinds, all going into the partnership account. Among these ventures was that of buying cotton within the Confederate lines during the latter part of the Civil War, in which they employed J. J. Garrard, Miles Sells, and Alpheus Lewis, who were sent South to make purchases of cotton for them, under an arrangement whereby Ames & Co. were to furnish all the money required, to sustain all losses, and be entitled to one half of the profits, and the other parties were to receive the other half of the profits for their services. This business was carried on in Mississippi, Tennessee, and Louisiana, and the account thereof kept on the books of Ames & Co., in St. Louis, in the name of Garrard, Sells & Co. At the close of the war, in connection with this cotton-buying business, they opened a store at Vicksburg, Miss., which was conducted by one of their clerks, named Satterlee. This business was carried on first in the name of George A. Satterlee & Co., and afterwards in the name of J. J. Garrard & Co., and with each concern an account was separately kept on the books of Ames & Co. When Henry Ames died the account of Garrard, Sells & Co. stood open on the books of the concern,

showing, apparently, a large indebtedness from that concern to Henry Ames & Co., but representing in fact their own transactions in that firm name, and showing an immense loss. The account of George A. Satterlee & Co. had been transferred to the account of J. J. Garrard & Co., which also stood open on the books, and was then the only active account representing actual assets in these Southern ventures. After the death of his brother, Edgar Ames conducted the business as before in the firm name on his account. On the 4th of September, 1866, he qualified as executor of Henry Ames, and on the 31st of October, 1866, being the last day of the usual fiscal year of the partnership concern, he balanced the partnership books, made an inventory of the partnership assets on hand on the 1st of November, 1866, and filed the same in the probate court on the 7th of November, 1866. On this inventory the balances shown by the books to be due from Garrard, Sells & Co. and from J. J. Garrard & Co. appeared as part of the assets of the partnership in his hands on the 1st of November, 1866; but no account was taken of the real assets of the partnership in the South, which the account of J. J. Garrard & Co. represented. The amount of these accounts, thus inventoried, was as follows: Garrard, Sells & Co., \$573,819.51; J. J. Garrard & Co., \$16,980.58. Edgar Ames, as surviving partner, continued in the administration of the partnership estate from the 1st of November, 1866, until the 9th of December, 1867, when he died, intestate, without having made any settlement, as such surviving partner, with the partnership estate. On the 18th of December, 1867, letters of administration on the estate of Edgar Ames were granted to his widow, Lucy V. S. Ames, who gave bond and also took charge of the assets of Henry Ames & Co. for final administration; and she continued in the administration thereof, making annual settlements, until June 30, 1870, when she presented to the probate court her accounts for final settlement, when, for the first time, the actual assets of the Southern venture, as shown by what is known in the case as the "Webb Exhibits," filed therewith, were brought into the account. Among these assets were uncollected accounts due Satterlee & Co. and J. J. Garrard & Co., amounting to \$69,365.39. These, with the other uncollected accounts of the estate, were afterwards, on the 29th of August, 1869, sold at public sale, in pursuance of an order of the probate court, and the administratrix became the purchaser thereof for the estate of her husband. On the filing of her report of this sale, John A. and William H. Scudder, as executors of the individual estate of Henry Ames, filed exceptions to so much thereof as related to the sale of these Southern uncollected accounts. The exceptions were sustained, and, as to these accounts, the sale was set aside. From this order of the pro-

bate court the administratrix appealed to the circuit court; and thence to the supreme court, where the decision of the probate court was affirmed at the March term, 1873, thereof. 52 Mo. 290. Afterwards, on the 17th of April, 1874, the administratrix filed an amended final settlement, in which the Southern assets, as shown by the "Webb exhibits," were omitted, showing a balance in her favor of \$53,666.18. To this settlement exceptions were filed by the executors of Henry Ames, and from the judgment of the probate court thereon an appeal was taken to the circuit court, and thence to the supreme court, where, at the April term, 1884, of said court, the judgment of the circuit court was reversed, and the cause remanded to the circuit court for new trial, without direction. 89 Mo. 496, 14 S. W. 525. Whereupon, it was sent to a referee, C. S. Hayden, Esq., upon exceptions to whose report the case was retried in the circuit court, and the final account between the administratrix and the partnership estate stated, showing a balance due said estate of \$59,971.75. From the final order and judgment thereon, entered on the 3d of August, 1893, both parties appeal.

1. The matters complained of in this settlement on behalf of the administratrix are the following: "First. That the court charged the administratrix with \$39,508.22 on account of 'Southern assets as shown per Webb exhibits,' and with other amounts on account of collections on said assets made since the date of said exhibits, and refused to allow as a credit or reduction from these amounts the sum of \$39,523.61 which the evidence clearly disclosed Edgar Ames, prior to his death, had fully accounted for and paid to the partnership estate on account of these 'Southern assets.' Second. That the administratrix is charged with \$833.33 on account of the 'Dennis Fitzpatrick matter' in excess of the amount she should be charged on that account. Third. That the administratrix is charged with \$1,321.38 on account of collections from F. R. Turley in excess of the amount she should be charged on that account. Fourth. That the administratrix is charged with certain sums to which the partnership estate is not entitled, to wit: \$2,074.41 on account of 'Burney indebtedness'; \$1,100 on account of indebtedness of G. W. Nichol & Co.; and \$74.51 on account of indebtedness of J. & G. O. Porter. Fifth. That the administratrix is charged, contrary to law and the evidence, with the sum of \$10,147.73, and with interest thereon, amounting to \$16,296.16, for 'amount withdrawn on October 31, 1866, from partnership estate funds by Edgar Ames to equalize his account with that of Henry Ames.' Sixth. That the administratrix is charged, contrary to law and the evidence, with the sum of \$12,508.48 as interest from August 14, 1866, to June 30, 1870, on \$53,761.37, being the total amount of cash and merchandise at

Vicksburg on said 14th day of August, 1866. Seventh. That the administratrix is charged, contrary to law and the evidence, with sums paid by her for and on account of 'United States income tax,' said sums being \$5,422.20 and \$1,190.55. Eighth. That the court refused, contrary to law and the evidence, to allow the administratrix credit for \$4,487.10 for expenses incurred by her in the several hearings of this cause before the referee under the two orders of reference made herein by said court. Ninth. That the court refused, contrary to law and the evidence, to allow the administratrix credit for the sum of \$3,082.95, being 5 per cent. commission on the sum of \$61,659 credited to her as commissions; the court holding that the administratrix was not entitled to commission on commissions, whereas, under the law, commissions are allowed on the total amount of the personal estate, without reference to the purposes for which it is distributed."

(1) As the statement of the account by the circuit court is based upon the balance of \$53,666.18 shown to be due the administratrix by her final settlement of March, 1874, in order to determine the merit of the first complaint it will be necessary to ascertain to what extent the "Southern assets" entered into that balance. In the first annual settlement of the administratrix, filed March 20, 1869, in which a balance due the partnership estate of \$973,139.04, is shown, she charges herself with open accounts, as per inventory, in the sum of \$999,110.49. Included in this amount is the Southern account, aforesaid, of Garrard, Sells & Co., amounting to the sum of \$573,819.51. The balance from this settlement was carried forward and charged to her in her second annual settlement, filed April 1, 1870, by which a balance due the estate of \$908,718.97 is shown. In this settlement the Southern accounts do not figure. This balance was carried forward and charged to her in her aforesaid final settlement of June 30, 1870. In this settlement she took credit for \$573,819.51, the amount of the Southern account of Garrard, Sells & Co., charged to her as aforesaid, and charged herself with assets of George A. Satterlee & Co., \$59,843.35, and of J. J. Garrard & Co., \$38,590.16, making a total of \$98,433.51, which sum purported to be the real assets represented by these accounts on the 15th of August, 1866, as shown by the Webb exhibits, of which amount the sum of \$69,365.39 consisted of uncollected accounts, which were sold as aforesaid, leaving an actual cash balance of \$29,068.12 charged against her on account thereof. After the case arising on the appeal from this settlement was remanded (52 Mo. 290), the administratrix filed her amended settlement of April 17, 1874, now under consideration, in which, ignoring this last settlement, she charges herself with the balance of \$908,718.97, due on her second annual settlement, takes credit for \$573,819.51,

the amount of the Southern account of Garrard, Sells & Co., but took no account whatever of the real assets which the Southern account of J. J. Garrard & Co. represented, to which course she seems to have been induced by the conclusion (drawn from the opinion on that appeal) that the probate court had no jurisdiction over those assets or to settle her account therefor. Thus it becomes apparent that, while the account of Garrard, Sells & Co., first aforesaid, was accounted for, the administratrix failed to account for the account of J. J. Garrard & Co., or any of the assets represented by that account, *eo nomine*, in any of her settlements, by which the balance in her favor of \$53,666.18 was produced in the settlement of April 17, 1874, now in question. In this state of the case the circuit court, in revising her settlement and stating the account anew, as aforesaid, charged her with the said sum of \$39,508.22, the first charge complained of, being the amount found to have been actually realized from those assets, as shown by the Webb exhibits. It is not contended that the estate of Edgar Ames did not realize that amount from those assets; but, the decision that the administratrix is accountable for the same having been sustained by the supreme court (89 Mo. 512, 513, 14 S. W. 525), she asks that, this amount having been determined, she be required to pay only so much of it as the partnership estate has not already received from Edgar Ames on account of those assets. The net amount realized from the Southern assets, as found by the court, consists of the following items, to wit:

As shown by the Webb exhibits.....	\$39,508 22
Subsequently realized from Turley claim	3,837 51
Subsequently realized from Burney claim	2,074 41
Subsequently realized from Nichols & Co. ....	1,100 00
Subsequently realized from Briery claim	8,419 63
Subsequently realized from Anderson claim.....	5,755 43
Subsequently realized from Porter claim	74 81

Total.....\$60,769 51

—And the amount claimed to have been received by the partnership estate from Edgar Ames, on account thereof, being the said sum of \$39,523.61, which amount, counsel for the administratrix contend, was in fact received by that estate in the following manner: The account of J. J. Garrard & Co., which was balanced on the 31st of October, 1866, showed a balance due from that concern of \$16,980.58. This balance was carried into the inventory of Edgar Ames. The debit side of that account, consisting of cash and merchandise advanced, amounted to the sum of \$111,340.55, which was reduced to the amount of the balance by credits, October 31, 1866, of bills receivable amounting to the sum of \$94,359.97. Included in the debit sum were advances made to said concern prior to August 14, 1866, amounting to said sum of \$39,523.61. The bills receivable, which constituted the credit side of the account,

consisted simply of drafts and acceptances of J. J. Garrard & Co., drawn by Edgar Ames, a part of which he had discounted, and the proceeds thereof, to the amount of \$59,650.58, carried into the cash account of the concern on the 31st of October, 1869, which went into the cash balance of \$27,704.05, of that day, which balance was carried into the inventory, as was also the remaining bills receivable, amounting to the sum of \$34,709.39. Thus it will be seen that on the books of Ames & Co., and on the inventory of Edgar S. Ames, the whole of the account of J. J. Garrard & Co., as it appeared upon the books of Ames & Co. before it was balanced, amounting to the sum of \$111,340.55, was accounted for as follows:

By cash from discount of bills receivable (inventoried in cash balance of \$27,704.05).....	\$ 59,650 58
Remainder of bills receivable (inventoried) .....	34,709 39
J. J. Garrard & Co. account, balance (inventoried) .....	16,980 58
Total .....	\$111,340 55

Having thus been accounted for in the inventory, was that amount accounted for, in fact, to the estate? This is the important question, which can be determined only by the settlements thereafter made. After the death of Edgar Ames and on the 23d of March, 1868, the administratrix filed a settlement of Edgar Ames' account to the date of his death, in which settlement she is charged with the inventory, and, consequently, with the foregoing items, and thus accounted for them in that settlement, in which a balance due the partnership estate of \$1,750,638.95 was shown. If that balance had been carried into the first annual settlement of the administratrix of March 20, 1869, and had been accounted for by the disbursements of that and the subsequent settlements, which produced the balance in her favor of \$53,006.18 on her final settlement of the 17th of April, 1874, it would be apparent on the face of the settlements that the whole of the debit side of the account of J. J. Garrard & Co., including the charges as well before as after the 15th of August, 1866, amounting to the sum of \$111,340.55, had been accounted for; but this was not done. Instead, she in that settlement charged herself only with the assets that actually came into her hands as administratrix *de bonis non*; and, unless the items representing that sum can be discovered among the assets thus charged, the same have not been accounted for. Now, while the cash and bills receivable thus charged do not appear *eo nomine* in the assets with which she charged herself in her first settlement, it does appear that in the item of "open accounts" with which she did charge herself in that settlement, amounting to the sum of \$999,110.49, was included the account of Edgar Ames, amounting to the sum of \$366,393.30, into which, by that time, the cash and bills re-

ceivable must necessarily have passed. So that, if the books were correctly kept, and that account was correctly stated, there can be no question that therein the sum of \$94,350.97, the amount of the bills receivable with which the account of J. J. Garrard & Co. was credited on the 31st of October, 1866, was accounted for. After the most searching scrutiny to which these books and this account have been subjected, continuing for a period of a quarter of a century, no error affecting this matter has been found or pointed out; and it is perfectly safe to assume that the amount aforesaid had been paid by Edgar Ames, and accounted for to the partnership estate, in the account aforesaid, on account of the assets represented by the Garrard account, at the time the administratrix came to make her first settlement. But there is no ground for assuming that the balance due on that account, amounting to the sum of \$16,980.58, was accounted for in the account. There is no reason why it should have gone into it, and no evidence tending to prove that it did; and, as the administratrix failed to charge herself with that balance in that or any of her subsequent settlements, when she was called on to account for the actual assets which that account represented at the death of Henry Ames, she would not be entitled to a credit for the amount of that balance, having obtained credit therefor already by omitting to charge herself with that balance. So that what we have to do with now are the debits and credits of that account only. It appears by the debit side of that account, amounting to the sum of \$111,340.55, showing the amount of goods and cash sent to Vicksburg by the partnership concern, and charged to J. J. Garrard & Co., from the beginning to the 31st of October, 1866, that on and before the 14th of August, 1866, the date to which the inventory of the Webb exhibits was made up, the amount sent was \$49,523.61, for which amount the administratrix claimed credit before the referee, and also in the circuit court; but, it further appearing that the last of the items, constituting the charges aggregating that amount, was \$10,000, cash charged in St. Louis on the 14th of August, the counsel for the administratrix, conceding that that item could not have reached Vicksburg and been included in the Webb exhibits, reduced their claim in their brief in this court to the sum of \$39,523.61; and, their attention having in the course of the oral argument been called to the fact that the next preceding item was a charge on the 11th of August, 1866, "To merchandise, \$3,782.13," and that it appeared from the evidence that the merchandise was shipped to Vicksburg by steamboat, they at once conceded that this item could not have reached its destination in time to have been included in the Webb exhibits, and that the claim should be reduced by that amount; so that, the credit really claimed is now

\$35,741.48, being the amount of items charged in the Garrard account which actually went into the Webb exhibit inventory of the 14th of August, 1866, and which it is claimed were accounted for to the partnership estate in the settlement of that account by Edgar Ames, as aforesaid. This contention would have to be sustained if that account had in fact been thus settled in full; but, as we have seen, this was not done. It was only accounted for partially; that is to say, to the extent of the bills receivable credited on the 31st of October, 1866, to the amount of \$94,359.97, which was all the partnership estate had received for its cash and merchandise sent to Vicksburg, both before and after the 14th of August, 1866, up to the time when it was proposed to charge the administratrix with these assets in lieu of the account. In order, then, to ascertain how much of this amount should be credited against the charge for the actual assets as found by the court to have been on hand on the 14th of August, 1866, as per the Webb exhibits, an amount must be deducted therefrom sufficient to discharge the aggregate amount of the items of the account succeeding that date, representing the money and merchandise of the partnership estate which did not go into the Webb exhibits, or any other inventory thereof, and, consequently, were never accounted for in any of the settlements. The aggregate amount of those items is \$75,599.07, which, being deducted from said sum of \$94,359.07, leaves a balance of \$18,760.00, with which amount the administratrix should have been credited against the charge of \$39,508.22, instead of with the amount of \$35,741.48, as claimed by counsel for the administratrix, leaving as the actual amount with which the administratrix ought to have been charged on account of assets shown by the Webb exhibits the sum of \$20,748.22. Or, to state the matter in another form, the administratrix should have been charged with the assets of the partnership on hand at Vicksburg, as shown by the Webb exhibits, on the 14th of August, 1866, in the sum of \$39,508.22, and the assets sent to Vicksburg between that date and the 31st of October, 1866, not inventoried, in the sum of \$75,599.07, making a total of \$115,107.29, from which amount should have been deducted the sum accounted for by Edgar Ames, in bills receivable of the latter date, in the sum of \$94,359.07, leaving a balance of \$20,748.22, as the sum with which she should have been charged on this account, instead of \$39,508.22. Consequently, she is entitled to a deduction from that charge of \$18,760, which is allowed.

(2) The court in its settlement charged the administratrix with \$3,323.33, being the amount collected on the Dennis Fitzpatrick matter, less \$10 paid therefor by her at the sale which was set aside, against which amount she claims she ought to have been allowed a credit of \$833.33, the amount paid

R. A. Watt for collecting the same. The facts in regard to this matter are about as follows: Dennis Fitzpatrick had a contract with the St. Louis county court to build an insane asylum. Henry Ames & Co. and the said Watt and others were sureties on his bond for the performance of his contract, and on account thereof Henry Ames & Co. were compelled to pay the sum of \$5,029.13, the account of which was inventoried by Edgar Ames as assets of the concern. This building, however, seems to have been completed by the sureties about May 1, 1869, and on the 12th of July, 1869, a petition in behalf of the bondsmen, signed by "Lucy V. Semple Ames, Administratrix of Henry Ames & Co.," and S. Simmons, was presented, asking for relief on said contract, upon consideration of which, the court, after first granting the prayer of the petition, and ordering the payment of the sum of \$18,622.14 to the sureties, afterwards, on the 22d of July, 1869, reconsidered the matter, and referred the same to the county auditor. On the 13th of September, 1869, the auditor filed his report, and the same was continued for further consideration. Afterwards, on the 26th of October, 1869, an amended petition, signed by "S. Simmons, for Himself and Other Co-Sureties," was presented to the court, the prayer of which was refused on the 28th of the same month. And thus the matter rested until August 9, 1870, when the county court made the following order: "In the Matter of Petition of Securities of D. Fitzpatrick. The court this day reconsiders its action had herein on yesterday in disallowing the claim of Samuel Simmons and others, securities for Dennis Fitzpatrick, contractor for the brick work of the county insane asylum, by the following vote: Justices Allen, Long, Brannan, and Conrades voting yea, and Justices Farrar, Dalley, and Cronenbold voting nay. And thereupon, upon motion of Justice Conrades, the court order that the sum of ten thousand dollars be, and the same is hereby, allowed said securities in full for their claim against the county on account of loss sustained by them in completing the work contracted for by said Dennis Fitzpatrick; Justices Allen, Long, Brannan, and Conrades voting yea, and Justices Farrar, Dalley, and Cronenbold voting nay on said allowance." In the meantime this claim had been returned by the administratrix with her settlement of June 30, 1870, as an uncollected open account, credited as such, ordered to be sold by the probate court, and purchased at the sale for the sum of \$10 by the administratrix, which sale was afterwards set aside. "Some time after the sale was made, Watt came to Mr. Crosby, the agent of the administratrix, and said that he was hoping to get a claim through the county court in the Dennis Fitzpatrick matter, and wanted to know if he should go on and collect it; that he would expect 25 per cent. of whatever amount was



collected as compensation for his services; which amount was agreed to be paid him, and some time afterwards there was \$3,333.83 collected and paid by Watt to Mrs. Ames. Whereupon Crosby paid him 25 per cent. of that amount for his services, which is the amount of the credit now claimed. This is the substance of the account which Crosby gave of the transaction, on whose evidence reliance is placed for the credit. We find nothing in it to warrant the court in making the allowance. It is not disputed that this payment to Watt was made in pursuance of the order of the county court of August 9, 1870, entered 20 days before the sale of the assets by the administratrix, on August 27, 1870. So that, as far as the evidence shows, when the agreement between Crosby and Watt was made, the amount which Watt collected was already ordered to be paid, and all the administratrix had to do was to draw it. There was no necessity for getting a claim for it through the county court. It was already through, and there is no evidence that Watt performed any service whatever in getting the claim allowed, although, as one of the sureties, he was, of course, interested in that accomplishment. All the service he did or could have done under the agreement was to receive the money and pay it over to the administratrix. To collect it was the duty of the administratrix, compensation for which is fixed by law, and for which she can claim no credit beyond such compensation.

(3) The court, in its settlement, charged the administratrix with the following amounts on account of the Southern assets: To amount collected from F. R. Turley, \$3,837.51; to amount collected on Burney indebtedness, \$2,074.41; to amount collected on indebtedness of G. W. Nichol & Co., \$1,100; to amount collected on indebtedness of J. & G. C. Porter, \$74.81,—which are the charges objected to in the third and fourth items of the administratrix's complaint. These charges, made by the referee and approved by the circuit court, arose upon exceptions of the executors charging the appropriation by the administratrix, through the Webb exhibits, of amounts collected from the Southern debtors of Satterlee & Co. and Garrard & Co. to the estate of Edgar Ames, that should have been applied to the partnership estate, and can be best considered and ruled upon in connection with those exceptions. The material facts bearing upon those exceptions are fairly stated in the report of the referee, and are made sufficiently apparent by the following extracts therefrom:

"At the death of Henry Ames, on the 14th of August, 1866, Edgar Ames did not have the goods or assets of the Southern firms appraised, nor did he account for their value, nor was any change made or balance drawn on the books of the Southern firms in consequence of Henry Ames' death; but business

and books in the South were treated as if no death had occurred. Until the exhibits known in this case as the 'Webb Exhibits' were made out and filed in the probate court, upon the presentation there of the first final settlement of this administratrix at the June term, 1870, there was no ascertainment and separation by Edgar Ames, or his representative, or the representative of the partnership estate of Henry Ames & Co., of the property of that firm in the South, as it had existed at the time of Henry Ames' death. Before the filing of this administratrix's first final settlement of the partnership estate, Webb, the former bookkeeper of Satterlee & Co. and Garrard & Co., took the books of those firms, being the books in which the accounts with the Southern customers had been kept, and, under the supervision of J. J. Garrard, the principal man of those firms, made from those books statements of the accounts in them, and of the property of Henry Ames & Co. in the South, as of August 14, 1866, the date of the death of Henry Ames, with a view of showing what the indebtedness of the Southern customers to Henry Ames & Co. was, and what were the assets and liabilities, nominally of Satterlee & Co. and Garrard & Co., but really of Henry Ames & Co., at the date of Henry Ames' death. These statements exhibit, not all the detailed accounts as those appear or would have appeared in the books, but rather the summing up of the accounts of the debtors, the amount of the accounts, the amount collected, the date of collections, the liabilities of Satterlee & Co. and Garrard & Co., and the valuation of the stock. These Webb exhibits were filed with the first final settlement at the June, 1870, term of the probate court. Before there was any hearing, and in the fall of 1870, the exceptors, under notice to the administratrix, took the deposition of Webb, and examined him at length as to these exhibits and the state of these debtors' accounts. Under the present exception the exceptors go behind these exhibits, deny that the amounts as shown by them are correct, and contend that various sums of money were paid by these debtors, which sums should have been applied to extinguish the older indebtedness to Henry Ames & Co., but which payments these exhibits, as made up, almost, if not wholly, ignore. The books of Satterlee & Co. and Garrard & Co. are now lost; Webb is dead; Shaw, the predecessor of Webb, is dead; and the Webb exhibits and the testimony of Webb and Garrard remain the principal, and, with the testimony of Crosby, the only, sources to which recourse can be had as evidence as to what those books contained. Attached to this exception is a list of names, to which are affixed amounts, these names being those of certain of the Southern customers; and these amounts, the exceptors contend, are the sums which, in the cases of those customers, have been collected and misappropriated by Ed-

gar Ames or this administratrix. \* \* \* It cannot be told what the arrangements were, what debts were to be paid out of this or that crop, in most of these cases. The evidence is different in different cases; but, though the administratrix failed in some cases to prove her contention, in those very cases there may have been binding arrangements, and advances may have been made, and cotton, the proceeds of which were realized, may have been shipped and sold on that basis. It cannot, in favor of the exceptors, be assumed that such was not the case, especially when the evidence shows that sometimes such was the case. \* \* \* That such agreements were in some cases made and executed the proof shows. Sometimes money was advanced; sometimes labor was paid for; sometimes agricultural implements were furnished, and the repayment was, by the arrangement, to be from the proceeds of a particular crop. Garrard, who was the chief man of those Southern firms, testifies that the books of Satterlee & Co. and Garrard & Co. would show to what extent agricultural implements, etc., were advanced. \* \* \* But there is an objection to the theory of the exceptors which lies behind this. The intent of the brothers Ames, as early as June, 1866, some months before the death of Henry Ames, seems to have been to turn their Southern business into a new channel, and for this purpose to establish the house of Garrard & Craig in New Orleans, and in doing so to wind up the business of J. J. Garrard & Co., the member or principal member of which firm was to be transferred to New Orleans. But there was business that could not suddenly be brought to a close. The part of the Southern states where their business had been carried on was, as the effects of the Civil War and bad crops, in a very impoverished condition. Large amounts were due those firms from planters who depended solely upon their crops for payment, and no doubt it was in some—perhaps in many—cases necessary for Edgar Ames to make advances from his funds, after the death of his brother, to afford a chance of recovering any indebtedness, old or new. It should also be kept in mind that Henry Ames, in entering into this Southern business with his brother, must have had in view its nature, the manner in which it was carried on, and those peculiar features in it, which did not exist in an ordinary business in ordinary times. Under these circumstances, and bearing in mind that Henry Ames died in the midst of what is called the 'cotton season,' it can hardly be contended that Edgar Ames, upon the death of his brother, had no right, no matter what were the arrangements between the Southern firms and the planters, to make the contested appropriations. It does not appear that these appropriations were made in consequence of any instructions from Edgar Ames. Garrard says he received no instructions from Edgar Ames as to how any

moneys paid by the Southern debtors after August 14, 1866, should be appropriated; and when asked, where customers were indebted before August 14, 1866, and collections were realized from them, and applied to accounts contracted after that date, instead of to prior indebtedness, when and by whom were such credits so applied, Garrard says that Webb kept the books, and entered all the credits and debits upon the accounts on the books, as the books will show. It would appear, from what Garrard elsewhere says, that where arrangements were made for advances on particular crops, the books of the firm showed these arrangements; and, from what Webb and Crosby testify, we must infer that, in making out the balances of the Webb exhibits, Webb was guided by these special agreements, as shown by the books of the two firms. \* \* \* The reasonable conclusion drawn from the whole evidence seems to be that there was no invariable practice; that sometimes payments were appropriated, so far as they went, to wipe out the oldest indebtedness; that at other times, where an agreement or understanding existed between the parties as to a particular crop, and advances on the faith of it were made, the old balance was disregarded, and the credits first applied to what was regarded as the debt of that crop. It would seem, too, that the books of Satterlee & Co. and Garrard & Co., in some, if not in all, cases, showed those crop arrangements. If such were not the case, it is difficult to understand how, with the full ledger accounts of all these parties before the exceptors, they for so many years neglected to attack the Webb exhibits and raise before the probate court this important question as to the appropriation of payments involving so many accounts and so much money. In the absence of special arrangements, the rule of law was clear, and it was patent that Edgar Ames, or the Southern firm for him, would have had no right to prefer himself to his beneficiary's estate, or, in other words, the partnership estate. The ledger accounts, with their numerous and often large credits, though they do not disclose the evidential facts, do point directly, and, indeed, suspiciously, in many cases, to a disposition of moneys received that the law forbids to a person in the situation of Edgar Ames. As no attack was made under these circumstances upon the Webb exhibits, and no question raised in the probate court as to the misappropriation of any of those payments, the conclusion is almost inevitable that the balances as shown by the Webb exhibits were accurate, and were, in spite of suspicions raised by the ledger credits, sustained by facts appearing from the journals, the cash books, or other books of the Southern firm. This conclusion is confirmed by the direct testimony of Webb, who made the exhibits from the books, and by that of Crosby, who, before the Webb exhibits were filed in the probate court, went to Vicks-

burg, and there carefully compared the books and the exhibits. It was after those exhibits had been on file some months in the probate court that the exceptors gave notice to the administratrix, and took the deposition of Webb and others at Vicksburg, where the books of Satterlee & Co. and Garrard & Co. were produced. Each side was represented by counsel, and each, it appears, had a bookkeeper present on its part. The hearing was protracted, and there was full opportunity and every motive to sift the books, the Southern accounts, and the Webb exhibits. \* \* \* In the first list of names and amounts embodied by the exceptors in the present exception, the amounts set against the names indicate the several sums which the exceptors contend were collected and misapplied, as above stated. The referee finds that the exceptors have failed to show that said or any sums were collected and misapplied as alleged, and finds that it is not shown, and does not appear, that said or any moneys were collected or received in connection with these accounts, or any of them, by Edgar Ames, or his administratrix, which should have been appropriated to the partnership estate of Henry Ames & Co., and which have been retained by Edgar Ames, or for his estate, except as hereinafter stated."

The referee then proceeds to an examination of the Turley, Burney, Nichols, and Porter accounts, excepted from the foregoing ruling, and, after a careful analysis of all the evidence bearing upon them, finding no equitable basis upon which the payments made to the administratrix on these accounts could be prorated, and no sufficient evidence that they were paid on account of advances made after the 14th of August, 1866, held that they should be applied on the indebtedness prior to that date, and accordingly so charged the administratrix, upon the well-recognized principle that the trust and not the individual interest is to be preferred in case of conflict between them. After a like careful examination of all the evidence in regard to the Mississippi accounts, we reach the same conclusion as did the referee in regard to those accounts, and conclude that the circuit court committed no error in sustaining the ruling of the referee as to the application of payments on all those accounts, and in charging the administratrix with the payments aforesaid on the accounts of Turley, Burney, Nichols, and Porter.

(4) At the death of Henry Ames there was on the books of Henry Ames & Co. an individual account of each of the brothers. At various dates between that time and the 31st of October, 1866, when the books were balanced, Edgar Ames withdrew from the partnership funds the sum of \$10,147.73, to equalize those accounts, with which amount and interest the court charges the administratrix in its settlement, which is the subject of the fifth item of her complaint. When the case was here before, this matter was considered and passed upon. 89 Mo. 508, 14 S. W. 525.

That part of the opinion in which it was disposed of is as follows: "It had been the custom of the brothers, Henry and Edgar, composing the firm of Henry Ames & Co. to keep everything in common, and whether one brother drew from the firm for his private expenses more than the other made no difference in the adjustment, as all these sums were charged to 'Expense,' and settled in that way at the end of the year. This custom had acquired the binding force of a contract, supported, too, by a valuable consideration, to wit, that, whereas, one brother might draw out, in any one year, more than the other, the latter might do the like the next year; and this in all probability was the current of such events, and led to the adoption of the custom in questions. The act, then, of Edgar Ames, in drawing out from the assets of the firm after his brother's death, \$10,356.06, to make the amount drawn out by him equal to that drawn out by his brother, was wholly unwarranted; and as no evidence was adduced as to the terms of the partnership contract between the brothers, it may not unreasonably be inferred, from the long-continued dealings between partners, what those terms were, and, even if there was a written contract of partnership, this would not prevent such a custom from being ingrafted thereon by the force of long usage. The maxim in this case applies, '*Consuetudo societas societatis lex.*' The amount just mentioned constitutes a proper debit against the estate of Edgar Ames, and, as the administratrix failed to charge him therewith, she ought to be charged with it on her final settlement of the partnership." Some additional evidence was taken on the rehearing in regard to this matter, and the same was considered anew by the referee and the circuit court, in the light of which the former reversed and the latter affirmed the position taken by this court. We have carefully examined this evidence, and, while we find it simply cumulative in character, it tends rather to confirm than to impair our confidence in the correctness of our former conclusion. In brief, it appears therefrom that prior to 1862 no accounts were ever kept with either of the brothers, but what was drawn by them from the concern for their personal use was charged direct to the expense account of the firm; that in 1862 an individual account with Edgar Ames was opened, but at the end of the year the amount thereof was charged to the expense account; and this continued until the death of Henry, while Henry's withdrawals continued to be charged to the expense account as before, until October, 1865, when an account was also opened with him. Before the end of that fiscal year Henry died, and thus it happened that these two accounts stood open on the books of the concern at that date. We find nothing in the evidence to create a doubt that, had Henry lived until the end of the fiscal year, when the books were balanced, those accounts would have been carried into the expense account, as had, in

effect, always theretofore been done. These accounts seem to have been opened by each of the brothers against himself for the purpose of information to each in regard to the extent of his personal expenses, rather than for the purpose of an accounting between themselves; and we find no warrant in the evidence for departing from their long-continued custom,—a custom that had no regard for any excess that one brother might need, and withdraw for his personal expenses, over the other. We adhere to our former ruling on this subject, and find no error in this charge.

(5) When this case was here before, it was held that Mrs. Ames, as administratrix of the partnership estate, was chargeable with the moneys received by her as the proceeds of the partnership business conducted in Mississippi (89 Mo. 513, 14 S. W. 525); and in pursuance of that decision she was charged by the circuit court with the sum of \$39,508.22 on account of "Southern assets, as shown by the Webb exhibits," being the net amount in her hands on that account on the 30th of June, 1870, and, in addition, the court, sustaining the referee, in its settlement charges her with \$12,508.48, interest from August 14, 1866 to June 30, 1870, on \$53,761.37, the gross value of the goods and money on hand at Vicksburg on the 14th of August, 1866, from which and subsequent collections the amount aforesaid was realized. This charge is the subject of the administratrix's sixth complaint, and seems to have been made, not because Edgar Ames or his administratrix did or could have realized for the estate that or any other amount of interest on those assets, but on the theory that Edgar Ames, by failing on the death of his brother to inventory those assets and thereafter keep a separate account of them, wrongfully converted the same to his own use, and ought to be charged with interest thereon for this omission of duty, as if he had in fact so converted them, although, in point of fact, it does not appear that any loss has accrued to the estate by this omission of duty, or benefit to the surviving partner by reason of any use made by him or his administratrix of the assets, and it does appear that the proceeds of those assets were applied by them to the payment of the debts of the concern as fast as in the ordinary course of business they could be realized upon between the dates aforesaid, and the balance then accounted for; the sum of \$18,760 having been accounted for, as we have seen in the first paragraph of this opinion, on the 31st of October, 1866, on account of those assets, and an amount equal to three-fifths of all the available assets in hand on the 14th of August, 1866, including the money and goods aforesaid and all collections thereafter made, having been in fact paid out to discharge liabilities of the concern due at that date within three or four months thereafter. Under such circumstances there is no equity in charging the surviving partner with interest on assets used, evidently, not for his own

benefit, but for the benefit of the partnership estate. Besides, it must be remembered that these were foreign assets, beyond the jurisdiction of the courts of this state, being administered upon in the first place by the surviving partner under his common-law right to convert the same into money in the usual course of business, and apply the same to the payment of the partnership debts. The appointment of Mrs. Ames as administratrix *de bonis non* of the partnership estate, upon the death of the surviving partner, conferred no jurisdiction upon her over these assets, and imposed no duty on her in respect to them. *Woerner, Adm'n, c. 17; Easton v. Courtwright, 84 Mo. 27.* It was only when she became the recipient of the proceeds of those assets in her official capacity in this state that she became chargeable with the duty of accounting therefor to the partnership estate in the courts of this state (89 Mo. 513, 14 S. W. 525), and accountable only for what she did in fact receive. Upon no principle of law or equity can she be made accountable for this item of interest, which she did not receive and could not have received. The court committed error, we think, in making this charge, and it should not be allowed to stand.

(6) The administratrix in her settlement took credit for two amounts, \$5,422.20 and \$1,190.55, paid by her on account of income tax to the United States government, which the court below disallowed, and charged to her, in accordance with the decision of this court when the case was here before (89 Mo. 512, 14 S. W. 525), after hearing some additional evidence on the matter, the substance of which was that the payments were made on the advice of counsel, and the return of income made only after repeated solicitations therefor by the United States officials. The evidence does not materially change the complexion of this issue, and, as it was directly passed upon in the former decision, it must be held to have been thereby finally adjudicated, which disposes of the seventh item of the administratrix's complaint.

(7) The administratrix claimed to be allowed the sum of \$15,228.70 for expenses and attorney's fees incurred in this cause since the former appeal to the supreme court, from which amount the court below, in its settlement, deducted the sum of \$4,487.10, and allowed her on that account the sum of \$10,741.60. This deduction is the subject of her eighth complaint. As the referee and the circuit court, before whom these expenses were incurred and services rendered, were in a much better position than we are to determine their amount and value and make an equitable apportionment of them, and as we discover nothing unfair or inequitable in this allowance, we are not disposed to disturb it.

(8) It appears, from a detailed statement made by counsel for the administratrix from her settlement, that the total value of the personal property administered upon, in-

cluding certain items charged to the administratrix as assets by the court on the final settlement under consideration, amounted to the sum of \$1,367,397.80, upon which, apparently, the administratrix is entitled to a commission of five per cent., amounting to the sum of \$68,369.89. The total amount allowed her on this account was \$85,335.33, leaving a balance of \$3,034.56 for which she claims an additional credit. This statement seems to be correct, except that included in the aggregate value of the personal estate are four items which, if the present adjustment of the account be correct, should be deducted therefrom, viz.: (1) Credit allowed in paragraph (1) of opinion, \$18,760.00; (2) charge for interest disallowed in paragraph (5) of opinion, \$12,508.48; (3) commission taken by Edgar Ames, disallowed, \$14,432.75; (4) commission on rents, disallowed, \$2,973.23,—total, \$48,674.46. Deducting this amount from \$1,367,397.80, there would be left the sum of \$1,318,723.34 as the real value of the personal estate administered upon, on which the administratrix would be entitled to 5 per cent. commission, amounting to the sum of \$65,936.16; and, having been allowed only \$65,335.33, she is entitled to an additional credit on this account in the sum of \$600.83, which disposes of the ninth and last item of the administratrix's complaint.

2. We will now proceed to the consideration of the objections to the settlement of the circuit court made by the executors of Henry Ames, deceased, as near as may be in the order in which they are urged in the brief of counsel.

(a) It is first questioned whether the administratrix has made sufficient showing to entitle her to credit for the account of Garrard, Sells & Co. In the inventory of Edgar Ames, filed November 7, 1866, among the accounts due Henry Ames & Co. was charged the account of Garrard, Sells & Co., amounting to the sum of \$573,819.51, balance due on the 31st of October, 1866. After that balance was struck the account was credited, November 1st, by Garrard & Craig, \$50,000, reducing the balance on that account to \$523,819.51; and at the same time the \$50,000 credit was charged to the account of Garrard & Craig. So that, after the death of Edgar Ames, when the administratrix came to file her inventory of the estate remaining unadministered upon, she inventoried the accounts as changed by these entries: Among the accounts charged in inventory filed by Edgar Ames and remaining uncollected, as follows: Garrard, Sells & Co., amount remaining after the transfer by Edgar Ames of \$50,000 to account of Garrard & Craig, \$523,819.51. And among new accounts, due since the filing of said inventory by Edgar Ames and remaining unpaid: Garrard & Craig, amount transferred from old account of Garrard, Sells & Co., \$50,000. And she charged herself in her first annual settlement, in the amount of open ac-

counts due the partnership estate, with the aggregate amount thereof, \$573,819.51; and, having carried this debit through her settlements, on her final settlement she asked credit therefor in manner as follows: By Garrard, Sells & Co. (this amount representing moneys expended by Henry Ames & Co. in cotton speculations with J. J. Garrard, Miles Sells, and Alpheus Lewis, and being no asset in fact,—all the assets of Garrard, Sells & Co., or George A. Satterlee, or J. J. Garrard & Co., belonging to Henry Ames & Co., and the amount of these assets having been charged above in this settlement) \$523,819.51; Garrard & Craig (this amount representing the capital which Henry Ames & Co. agreed to put into the firm of Garrard & Craig, of New Orleans, as partners in command, but in fact they never did so, and this amount was transferred to Garrard & Craig by Edgar Ames on the books of Henry Ames & Co., out of the supposed assets of Garrard, Sells & Co., but in fact these assets never came to Garrard & Craig) \$50,000,—which credit the court allowed in its settlement. It appears from the evidence that in June, 1866, about the time Henry Ames & Co. changed the name of the concern at Vicksburg from Satterlee & Co. to J. J. Garrard & Co., they determined to open a cotton factory and commission house in the city of New Orleans under the name of Garrard & Craig, with a special capital of \$50,000. Instead of furnishing the money, they drew a draft on J. J. Garrard & Co. for the sum of \$50,000, which Garrard & Co. accepted. This draft was used before a notary in New Orleans as evidence that the special capital had been furnished, so as to comply with some supposed or actual requirements of the law of Louisiana concerning the formation of such co-partnerships, and, having served its purpose, no further use was made of the draft. It seems to have occurred to Edgar Ames, after the books of the concern were balanced on the 31st of October, that some record of this transaction ought to appear on the books of the concern, so he thereupon caused a memorandum thereof to be entered upon the journal, and the charges aforesaid to be made on the ledger. The evidence is conclusive that not a dollar of the draft was ever paid to Garrard & Craig, or that they were indebted to Ames & Co. to the amount of a cent on account thereof. It was a mere paper transaction, and the charges and credits aforesaid a mere matter of bookkeeping, representing nothing in the way of indebtedness by Garrard & Craig, any more than did the other accounts of Garrard, Sells & Co., Satterlee & Co., and J. J. Garrard & Co., all of which represented nothing more than the actual assets of the partnership in the South, for all of which the administratrix has been required to account in this settlement, and, having accounted therefor, is unquestionably entitled to a credit for any of these ac-

counts with which she has charged herself in her settlement. The court, therefore, committed no error in crediting her with said sum of \$578,819.51, as aforesaid.

(b) The allowance of 20 per cent. deduction from the amount of assets shown by the Webb exhibits for depreciation in the stock of goods at Vicksburg, made by the trial court in this settlement, was in accordance with the ruling of this court when the case was here before (89 Mo. 508, 14 S. W. 525); and, while the question is reargued by counsel for the executors, no new evidence was introduced on that subject, and the question must be held to have been adjudicated by the former decision.

(c) It appears from the record that from the time that the Webb exhibits were filed in the probate court on the 30th of June, 1870, until April 27, 1887, after the case had for the second time been appealed to this court and remanded, these exhibits were accepted by all parties, and acted upon by all the courts through which the final settlement with which they were returned had passed, as a correct inventory of the assets of the concern of Satterlee & Co. and J. J. Garrard & Co. belonging to the estate of Henry Ames & Co., for which the administratrix was accountable. At the date last aforesaid the executors for the first time filed exceptions to the settlement, calling in question the correctness of those exhibits, for which other exceptions, still more comprehensive and of like character, were finally permitted to be substituted on the 16th of June, 1890. These exceptions, in effect, required a restatement of a long list of the accounts of the concerns to the date of the filing of the exhibits and a reapplication of payments thereon before and after that date, on the theory that all the assets of these concerns had, in fact, on the 14th of August, 1866, been converted by Edgar Ames to his own use. These exceptions, under directions of the circuit court, were finally heard by the referee, Mr. Hayden, in the light of all the evidence that could at that late date be obtained in regard to these accounts. He took up each one of them, and with infinite patience carefully examined it, in connection with the objections to the amounts accounted for thereon, in the light of all the evidence bearing upon it that was offered or could be obtained, and in an exhaustive report, containing in each case an analysis of the testimony and the result of his investigations, charged the administratrix with such amounts as he found from the evidence she ought to be charged with on account thereof, and overruled the exceptions to the remainder. His action in this behalf was approved by the circuit court, except in one instance (the H. W. Anderson account), in which the amount charged by the referee to the administratrix was reduced from the sum of \$7,537.59 to the sum of \$5,755.43. After a careful consideration of all the evi-

dence on this branch of the case, scattered through the immense record before us, and of the argument of counsel in support of their views in respect thereof, we feel as well satisfied with the conclusion reached by the referee, modified in the instance aforesaid by the circuit court, as to the other accounts in the list specified, as we do with his conclusion as to the accounts of Turley, Burney, Nichols, and Porter, disposed of in paragraph (3) of this opinion, and shall not disturb the ruling of the circuit court thereupon.

(d) After the death of Henry Ames on the 14th of August, 1868, Edgar Ames continued the business of the firm, as before stated, until the 31st of October, 1866, when, in accordance with their custom, the business of the year was closed, and the account thereof stated and inventoried. After this he continued in the business on his own account in the name of the firm "at the old stand," which was the property of the brothers, until his death on the 9th day of December, 1860,—engaged there, also, at the same time, in settling up the partnership business of the former firm, and administering upon the estate of his brother, of which he had been appointed executor. While accounting to the partnership estate for the rent of the premises, and for the use of the property and money which belonged to the brothers, or the partnership estate after the 31st of October, he did not inventory or account for the "good will." A charge for the "good will" against the administratrix, based upon an alleged sale thereof by her, was disallowed by this court on the former appeal (89 Mo. 508, 14 S. W. 525); the court saying, however, that "if the exception made had, instead, been one as to whether Edgar Ames should be charged himself with the good will of the firm as an asset thereof, a different question might have been presented." After the case was remanded, among the new and additional exceptions filed to the settlement, as hereinbefore stated, was the following: "(7) That the said administratrix failed to inventory and account for a claim existing in favor of said partnership estate, and against the estate of Edgar Ames, deceased, for the value of the good will of the firm of Henry Ames & Co., which was appropriated by said Edgar Ames to his own use, and not accounted for, amounting in value to about \$20,000." The referee refused to charge the administratrix with anything on account of the matter of this exception, on the evidence introduced, of which, in his report, he gives the following summary: "On this point there is no substantial difference of opinion between the witnesses called for the executors and those called for the administratrix. Mr. William H. Scudder, one of the executors, was of opinion that the good will of the firm at the death of Henry Ames was worth \$20,000. In answer to the question, 'Suppose you

would not have got the exclusive right to the use of the old firm name, but that Edgar Ames would have been carrying on business in the same name?" Mr. Scudder replied that the good will would not have been worth anything. Mr. Bartle was of opinion that the good will of the firm of Henry Ames & Co., in the fall of 1868, was worth \$50,000, but that if the surviving partner should have continued the business, and used the former firm name and brands, the good will would not have been worth much, though it would have been worth something. If the buyer was not known in business by any other name than his own, he would be very glad to give a very handsome sum for the name of Henry Ames & Co., if he only could put the head brand on his packages, and ship them South, as long as this would last. Mr. McEnnis was of opinion that the good will of a house or partnership doing business in the pork-packing and provision line was rather doubtful and difficult to estimate. The business varied a great deal, the articles were perishable, and much depended on the personal character of the partners in keeping up the standard and excellence of the meats. The value, to a great extent, of any packer's brands rests on himself,—the manner in which he does his business. The brand is of little value. 'It loses its value the very moment the men who cure the meat drop out. We see that in the number of brands which have failed in this country. It is almost impossible to fix the value. It is an intangible thing, and the value, in a case of that kind, would have to be guesswork on provisions.' If Edgar Ames continued in the same kind of business after the death of Henry Ames, and solicited business from the customers of the old firm, the value of the good will of the old firm of Henry Ames & Co. would, in Mr. McEnnis' opinion, have been nothing. Mr. Finch was also of opinion that, under the circumstances just stated, the good will of the former firm of Henry Ames & Co. would have been of no money value. If there was one portion of the firm still in existence and still in possession, the good will would not be of any value to any person to buy it. A brand is worth nothing without being sustained by the individuals who establish it. It is the men who make the brands in the first place. Such is, in substance, the testimony of the witnesses of the matter at issue." This ruling of the referee was approved by the circuit court, and, after careful examination of all the authorities cited by counsel on each side, we are of opinion that a correct conclusion was reached below on the facts and circumstances of this case, the law applicable to which seems to be well stated by Judge Woerner in language as follows: "The good will of a firm dissolved by the death of one of its members has often a marketable value, and in such case it is liable to be sold for the benefit of all the partners like any other property of

the firm. In such case, it must be taken into consideration in the valuation of the stock, and the proceeds of its sale become assets for the payment of debts or distribution between the deceased and surviving partners. But it is not always either valuable or salable. It is described as the sum which a person would be willing to give for the chance of being able to keep the trade established at a particular place, or, rather, it is the price to be paid for the advantage of carrying on business, either on the premises, or with the stock of the old firm, or connected therewith by name, or in some manner attracting the customers of the old to the new business. Upon the sale of an established business, its good will has, obviously, a marketable value; but this depends largely, if not entirely, on the absence of competition on the part of those by whom the business has been previously carried on. Hence, since a surviving partner is under no obligation either to retire from business merely because the partnership is dissolved, or to carry on the old business so as to preserve its good will until the final winding up of the partnership affairs, its market value is often destroyed or inconsiderable." Woerner, Adm'n, § 127, pp. 291, 292. We think the evidence supports the finding, and that in this case the good will, subject to the rights of the surviving partner, was of no appreciable value, and the administratrix should not be charged with anything on account thereof.

(e) In the first annual settlement the administratrix took credit for \$330.91, paid Ruggles & Bixler. This credit was approved by the probate court, and by the circuit court allowed to stand, and in so doing, the executors contend, committed error. This amount was paid in discharge of two special tax bills issued under ordinances of the city of St. Louis in due form against the partnership real estate. After the administratrix had paid these bills, the ordinance, in pursuance of which the improvement had been made and the tax bills issued, was held by this court to be void. *Ruggles v. Collier*, 43 Mo. 353. At the time they were paid, they were, prima facie, a lien on the partnership property, which had received the benefit of the improvement, and there is no question but that they were paid in good faith by the administratrix under the belief that the partnership estate was legally liable therefor. The great majority of the property holders in number and amount paid like tax bills against their property in like manner as did the administratrix and we do not think hers should be held a gratuitous payment, as contended by the executors, for the reason that at the time it was made the circuit court had sustained a demurrer to the petition in the *Ruggles Case*, and the same was pending in this court on error, of which fact she had no knowledge, having no connection whatever with that case. The evidence does not tend to show

that in this matter she did not act with that degree of care which cautious persons exercise in their own business, and this was the measure of her duty as administratrix. *Jacobs v. Jacobs*, 99 Mo. 427, 12 S. W. 457; *Merritt v. Merritt*, 62 Mo. 150. The exception to the credit was properly overruled.

(f) A credit of \$333.64 was also taken and allowed by the probate court in the first annual settlement of the administratrix, being the amount of money paid by her to Voss and Schultz, which was sustained by the circuit court, of which the executors complain. It appears that in the lifetime of Henry and Edgar Ames they had sold and conveyed, by warranty deed, a 10-acre tract of land in Illinois, belonging to the partnership; that subsequently one Pausennan asserted and claimed adverse title to a part of said land so conveyed; and that, upon the advice of her attorney, Gov. Koerner, that the claimant could maintain title to the property, and that it would be less expensive to pay the sum aforesaid to buy said outstanding title than to incur litigation in respect of the same, the administratrix paid said sum to said Voss and Schultz. It is not suggested that the compromise was not a wise and prudent one, and beneficial to both estates, but that it should have been paid for out of the separate funds of each estate. The objection is purely technical, and we do not feel disposed to disturb the ruling of the probate and circuit courts as to this item.

(g) The circuit court found that the estate of Henry Ames, deceased, is indebted to the partnership estate of Henry Ames & Co. in the sum of \$5,304.77, being interest at the rate of 6 per cent. per annum on the sum of \$29,815.08, advanced and paid to said estate of Henry Ames, deceased, out of the funds of the partnership, during the life of Edgar Ames, as appears by the report of the referee, and deducted one-half of the amount so found from the distributive share of Henry Ames. Although in May, 1870, it was formally agreed in writing between the administratrix and the executors that said principal sum was the true amount advanced, as aforesaid, and that it should be so charged by the probate court, and thereafter, on the 17th of June, 1870, in pursuance of that agreement, it was by the judgment of said court so charged, and the same has remained unchallenged from that time until the filing of the motion for a new trial as a basis for the present appeal, by the executors, they now contend that a mistake was made in the amount of said principal sum, which they contend should have been \$21,311.73, instead of \$29,815.08, whereby the administratrix obtains a credit of \$8,503.35 in excess of what should be allowed on the principal sum, and credit for a corresponding excess on account of the interest thereon, the sum of which is the amount charged by the court, aforesaid, and two items of

interest charged in the account of Henry Ames, amounting to \$857.80. This contention is based upon a misconception of the facts disclosed by that account, from which it appears that the amount of the cash advanced, exclusive of interest charges, was exactly the sum of \$29,815.08, and that the executors were right when they agreed that that was the true amount. The probate court was right when it adjusted the account upon that basis, and the circuit court was right in thereupon making the interest charge aforesaid. The misconception doubtless arose from taking the balance shown by the account, instead of the cash advances, as the basis of calculation, unmindful of the fact that there entered into the balance a debit to Edgar Ames of \$10,000, the value of the personality bequeathed by Henry Ames to his wife, for which no corresponding credit was therein taken.

(h) It is next urged that the circuit court committed error in sustaining the referee in overruling the exception of the executors as to what is known in the record as the "Neal Cotton Matter." After a careful examination of all the evidence bearing on this matter we reach the same conclusion as did the referee. The following extracts from his report disclose the salient facts of this matter, about as briefly as can well be done:

"It appears that in the year 1864 there were 215 bales of cotton near Alexandria, La., on the banks of the Red river, in the part of the country where Gen. Banks was then operating with his troops. This 215 bales of cotton Miles Sells, as agent for Henry Ames & Co., bought of Thomas Neal, paying him for it the sum of \$6,000. This cotton was soon after seized, taken on board a United States gunboat, and marked 'U. S. N.' Sells, thinking, as he testifies, that the chances for recovering this cotton were not good, sold one-half of it to Northrup & Greene for \$3,000, and, taking Neal's power of attorney to enable him to claim it in Neal's name, preceded the cotton up the Mississippi. This cotton was shipped to Cairo, and there subsequently sold, and the proceeds paid into the registry of the United States district court. On his arrival at St. Louis, Sells saw Edgar Ames, and related to him what had occurred in regard to this Neal cotton. Sells testifies that he told Edgar Ames of the sale of one-half of this cotton to Northrup & Greene, stated that Capt. Nanson was to have an interest in the cotton, and further said to Edgar Ames that, as Sells & Co.—a firm for whom Sells was acting and trying to get business in the South—had got no business, he (Sells) thought that Mr. Ames ought to be willing to give Sells & Co. a part of his (Henry Ames & Co.'s) interest in this Neal cotton. The result of this conversation, according to Mr. Sells, was that Edgar Ames agreed to let Sells & Co. have one-third of one-half of the net profits of this cotton; that is, Sells & Co. were not to pay \$1,000, or any sum, for one-third of one-half,



but this one-third of one-half 'was turned over to Sells & Co. without any consideration at all.' By this arrangement, thus made between Henry Ames & Co. and Sells, Henry Ames & Co. were to retain one-sixth, Capt. Nanson to have one-sixth, Sells & Co. to have one-sixth, and Northrup & Greene were to retain half, for which they had paid \$3,000. Under the power of attorney which he had received from Neal, the original owner in Louisiana from whom this cotton was purchased, Miles Sells filed a claim to the cotton in the name of Neal, with himself (Sells) as agent, in the United States district court at Springfield, Ill., this cotton having been carried to Cairo and libeled in the district court for the Southern district of Illinois. Counsel were there retained to prosecute the claim to the cotton. This was, of course, in the lifetime of both the Ameses. The litigation continued, and afterwards, and in the year 1868, under decision of the district court, a part of the proceeds of this 215 bales of cotton, after deductions for military salvage, costs, etc., was distributed, and in July, 1868, \$11,607.49 was paid to the administratrix from the proceeds of this cotton. As the claim to the cotton was made in the name of Thomas Neal, the original owner, and Neal had given his power of attorney to represent him to Miles Sells, the money was paid over on its distribution to Sells, the distributee recognized by the court. Sells testifies that he paid over their respective shares to the parties in interest. To Crosby, the bookkeeper and agent of the administratrix, Sells sent, on the 9th of July, 1868, a check for \$11,607.49, drawn to the order of Henry Ames & Co., and with it a statement from Sells & Co. to the effect that of this \$11,607.49 the sum of \$6,803.74 was the share belonging to Henry Ames & Co., and \$4,803.75 was the share belonging to Sells & Co. Crosby testifies that, on the basis of the statement thus furnished him, he made the entries in his books in regard to this distribution of proceeds of this cotton. About the last of July or 1st of August, he paid over to Sells & Co. the sum of \$4,803.75 as their share of this distribution. This sum of \$6,803.74 was all that was ever realized to the estate of Henry Ames & Co. from the Neal cotton. With this sum of \$6,803.74 the administratrix charged herself in her settlement of the partnership estate filed on the 20th of March, 1869. After this distribution from the registry of the United States district court of Springfield, the proceeds of which were received and paid over by Miles Sells, as stated, there was still a large sum arising from the sale of this Neal cotton, the right to receive which evidently involved different points of law, or rested on a different basis from the previous distribution. It appears that this 215 bales of Neal cotton was libeled, as prize, not by itself, but with other cotton. \* \* \* The evidence shows that strenuous efforts were made by way of deliberation and consultation, the parties meeting at Springfield and elsewhere, and consulting attorneys and agents, to get the balance of the

money in the registry of court. The lawyers who had been employed by Henry Ames & Co. had little hope of any further recovery, and, it would seem, did not care to prosecute the case further. It was thought that an act of congress would have to be obtained to get out of the difficulty which presented itself. Mr. Sells consulted with Mr. Crosby, as representing the administratrix, and with the administratrix herself. The result of it all was that neither Mr. Northrup, nor Capt. Nanson, nor Mr. Goodin, representing Sells & Co., was willing to go on with the case. The administratrix took the same position as the others. The matter was dropped. Afterwards, a claim agent named Corwine applied to Northrup, and then to Sells, and wished, on certain terms, to prosecute the case. This claim agent wanted one-half of the amount recovered, his expenses paid, and a retainer of \$1,000 or \$1,200. There were renewed consultations among those interested, Mr. Sells consulting the administratrix again, and the result was that the administratrix and all the other parties, except Northrup and Miles Sells, refused to contribute towards the employment of Corwine for the further prosecution of the claim. Northrup and Miles Sells employed Corwine, and as the result of this renewed litigation there was obtained and paid over to them, in 1872, according to the testimony of Miles Sells, \$10,000 or \$12,000. The credibility of Miles Sells as a witness is reflected upon by the exceptors, but there is nothing that shows that his testimony is not to be believed. This testimony of his was taken in 1887 as to transactions of 1864 and subsequently. \* \* \* This cotton business began in 1863. Henry Ames did not die until August, 1866. Edgar Ames died in December, 1867. Both the partners knew Sells, and evidently had great confidence in him, trusting to him the management of this cotton business. The evidence shows the brothers left much to Sells' discretion, as the nature of the business and money risks attendant upon it required they should do. As nearly all, if not all, cotton coming North was seized for violation of the nonintercourse act of congress, or otherwise, title to it could be asserted only through claim; and the general, if not the invariable, rule was that this claim must be made in the name of the original owner, and that his loyalty to the government must be proved. It is also clear that Henry Ames & Co. did not wish that their names should appear in these transactions. Miles Sells obtained powers of attorney from the original owners to himself, and Henry Ames & Co. during the lives of the two, and Edgar Ames during his life, intrusted Miles Sells with all matters pertaining to these cotton transactions, of the details of which he alone became cognizant. Under these circumstances, it is not strange that the administratrix followed the same course of dealing and put confidence in Sells. He had been before, and necessarily remained after, the death of the brothers, the repository of knowledge of which there was no written evidence. When the statement as to

the respective interests in the proceeds of this Neal cotton came from him in July, 1868, as to what was due to Henry Ames & Co. and what to Sells & Co., the administratrix was dealing with one to whom the brothers had intrusted this business and left all its details. Nor was the amount paid over to Sells & Co. at once, or as a matter of course, but time was taken sufficient for investigation. We are not, upon a suspicion that something may have been wrong, to presume such was the fact. As to a further prosecution of the claim to this cotton, after the first distribution, the administratrix cannot, in view of the evidence, be held guilty of negligence. The counsel employed by the brothers, in their lifetime, considered that there was little or no chance of recovery; nor does it appear that any lawyer ever advised prosecution. The delay that occurred after full consultation; the refusal first of all to incur further expense, in view of a case considered by lawyers almost hopeless; the subsequent refusal to proceed by any, except two,—these things show how the matter was looked upon by the other persons in interest. Only a claim agent presented himself, who insisted upon extravagant terms, and who himself refused to prosecute the claim upon a contingent fee of half the amount. I am of opinion that this second exception ought to be overruled, and that the administratrix ought not to be charged with any amount on account of anything pertaining to the Neal cotton matter."

To this statement, and in support of his ruling, it is only necessary to add that it appears from the evidence that neither the administratrix, nor her agent, Crosby, knew that Corwine had been employed by Sells & Northrup, or that he was seeking to recover or did recover anything on account of this matter, until it was disclosed in the testimony of Sells, taken before the referee in 1887, at which time Sells was insolvent, as long before that time he had been.

(1) It is next urged that the court erred in sustaining the action of the referee in refusing to charge the administratrix with any amount on account of the Elgee cotton. The following extracts from the report of the referee exhibit the material facts in that matter:

"In 1864, Miles Sells, the agent of Henry Ames & Co.," proposed to buy, and Elgee, a Southern planter, to sell, a "lot of cotton which Elgee had at Bayou Buffalo, Miss., consisting of over 2,000 bales. Terms were made, but before any sale could be affected, Elgee reported to Sells that the cotton had been seized at Bayou Buffalo, a part taken away, and the rest destroyed. Elgee proposed that Sells should follow the cotton, which appears to have been seized by the United States authorities as abandoned cotton, and gave Sells papers and a power of attorney from him (Elgee), and Sells accordingly followed the cotton, about 572 bales, to St. Louis. This cotton had been shipped in charge of a United States government offi-

cer, and was held by the authorities in St. Louis. Sells was in constant communication with Henry Ames & Co. Both the brothers, partners in that firm, were at that time living. Henry Ames did not die until August, 1866. Edgar Ames died in December, 1867. It was agreed between Miles Sells, on one part, he holding the power of attorney from Elgee and acting for him, and Henry Ames & Co., on the other part, that Henry Ames & Co. should employ counsel, furnish the necessary bonds, and pay expenses in any suits or proceedings necessary to recover the cotton, and upon its recovery pay Elgee at the rate of \$200 a bale, less half of the money paid for expenses. If the cotton was not recovered, Henry Ames & Co. were to lose the sums advanced. These terms were complied with by Henry Ames & Co. A suit in replevin was brought by Glover & Shepley and Henry Hitchcock, as counsel for Henry Ames & Co., in the name of Elgee, the owner of the cotton, against Lovell, who held possession of the cotton by virtue of his seizure for the government. After various proceedings, immaterial here, the cotton was sold, and the proceeds deposited with the government to await the result of the litigation. This suit of Elgee against Lovell was decided in the United States circuit court at St. Louis against plaintiff, during the lifetime of both the Ameses. They had an appeal taken to the supreme court of the United States, and while this was pending, and before decision, both the brothers died. The administratrix, after their deaths, advanced large sums, the necessary fees of lawyers and other expenses, to sustain the litigation. In January, 1868, the decision of the United States circuit court was affirmed by the supreme court of the United States. 22 Wall. 180. Upon this there were consultations by the administratrix and by Miles Sells with their counsel to learn if something further could not be done as to recovering the proceeds of this cotton. Their counsel advised that the matter was at an end, and that there was no further remedy in the premises. It appears that there were various claimants to this cotton,—among others, one Bouchard; also Mr. D. D. Withers, a creditor of Elgee, who had a judgment against Elgee, as Withers testified, to the amount of something like \$1,000,000, while the cotton sold for between \$300,000 and \$400,000. The administratrix introduced in evidence the deposition of Withers, taken as stated below, in New York, in 1885. Withers testified that he had an interview, in the spring of 1866, with Edgar Ames about this cotton; that the proceedings in the replevin suit were never abandoned, but prosecuted to the end; that he (witness) employed his own counsel to assist Glover & Shepley in arguing the case in the supreme court of the United States. After the case had been affirmed in the supreme court of the United States a suit was brought

for the proceeds of this cotton in the United States court of claims in the name of the representative of Elgee, who had died, but through the instrumentality of Withers, and about \$350,000 collected and finally distributed through the probate court of the city of New Orleans, where Elgee had lived in his lifetime. This suit, Withers testifies, was practically for his own benefit, as he was the only creditor. Withers testifies—and he appears to be a straightforward and trustworthy witness, and is one who is called to the stand by the executors—that in prosecuting the suit in the court of claims he had no communication with any party who had prosecuted the replevin suit, that he had never had anything to do with the administratrix, and that she had nothing to do with the suit in the court of claims. It seems clear that the proceeding in the latter court was one undertaken and prosecuted by Withers for his own benefit. There is no ground in the evidence for a charge to the effect that by this or any proceeding in the court of claims the administratrix received any money or proceeds from this Elgee cotton. \* \* \* It appears clearly from the evidence that there was no sale of any part of this Elgee cotton to Henry Ames & Co. At first, terms were agreed on between Sells and Elgee; but the cotton was seized, and no sale was effected. Afterwards, the agreement made was still subject to the fact that Elgee could give no possession to the cotton or its proceeds, which were held by the government, and claimed by it and by a number of people. The money which was expended by Henry Ames & Co., and afterwards by the administratrix, was expended to get the cotton or its proceeds where the contract, or its essential feature, could be put in operation. The suit in replevin was faithfully prosecuted. Mr. Sells repeatedly sought some further proceedings, but, as Mr. Hitchcock says, Mr. Shepley and he regarded the decision as finally disposing of any interest the firm of Henry Ames & Co. might have in the cotton. Mr. Hitchcock told Mr. Sells that there was no way of setting up any further claim to the proceeds of the cotton. There is no evidence showing that after this the administratrix further prosecuted the claim. \* \* \* It is a pure assumption to suppose, in relation to the Elgee cotton, that, after being defeated in two courts, she could have prosecuted this claim further in the court of claims, and there succeeded in recovering a further sum of money upon it. But, however this may be, she had no right to disregard the positive advice of the counsel selected and trusted by the brothers in their lifetime, unless some state of facts existed different from any disclosed by the evidence in this case. In my opinion, this exception on account of the Elgee cotton matter should be overruled, and

the administratrix should not be charged with any sum by reason of anything shown in this transaction."

That the conclusion reached by the referee is correct there can be no doubt. The decision of the supreme court of the United States, in *U. S. v. Woodruff*, 22 Wall. 180, in which the rights of the claimants to this same cotton were considered, and in which it was held that no one except the owner of the property seized and entitled to the proceeds thereof could sue therefor in the court of claims, shows that Henry Ames & Co. would have had no standing in that court.

(j) The executors next object to the allowance, made the administratrix by the referee, and approved by the circuit court, for attorney's fees paid by her in the protracted litigation growing out of her efforts to make settlement of the partnership estate. It is not contended that the amount allowed was not paid, or that it was unreasonable for the services rendered. There can be no question but that the rights of the parties were conflicting and complicated to an extraordinary degree, and after a careful consideration of the whole record we are satisfied that the administratrix endeavored to faithfully discharge her duties and render a true account of her trust under the most trying and difficult circumstances, and, so thinking, we approve the ruling of the circuit court in allowing her credit for attorney's fees as the same were adjusted by the court. We are also satisfied that the interest account was properly adjusted in the settlement, except in the particular mentioned in paragraph (5) of this opinion.

3. It follows, from what has been said, that the circuit court was in error in finding the balance in the hands of the administratrix belonging to the estate of Henry Ames & Co. and subject to distribution to be the sum of \$59,971.75, and that there should be deducted from that amount the following credits, to which the administratrix is entitled: As found in paragraph (1) of this opinion, \$18,760; as found in paragraph (5) of this opinion, \$12,508.48; as found in paragraph (8) of this opinion, \$600.88,—the total of such deductions being \$31,869.31, leaving as the true amount in her hands, belonging to that estate and subject to distribution, the sum of \$28,102.44, less a reasonable allowance for legal advice and services since the taking of these appeals. Wherefore it is ordered that this cause be remanded to the circuit court with directions to readjust the account of the administratrix, make final settlement thereof, and distribution in accordance with the views expressed in this opinion, and that the cost of these appeals be taxed against the executors of Henry Ames, deceased. All the judges concurring, except SHERWOOD, J., who dissents.

**BELOCHER v. SELLARDS.**

(Court of Appeals of Kentucky. Dec. 18, 1897.)

**SALES — DAMAGES FOR DELAY IN DELIVERY — WAIVER.**

1. For the seller's failure to deliver the goods according to the terms of the bargain the measure of damages is the difference between the contract price and the market value of the article at the time when, and place where, it should have been delivered.

2. Where the buyer of logs had been compelled to advance money to have them put into the river and rafted, and the evidence tended strongly to show that the seller was insolvent, the buyer's acceptance of the logs after the time fixed for delivery was not a waiver of damages for the delay, as there must be other circumstances than the mere acceptance of the goods manifesting an intention to waive such damages.

Appeal from circuit court, Pike county.

"Not to be officially reported."

Action by John H. Sellards against William R. Belcher to recover price of logs sold to defendant. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

Connolly & Connolly, for appellant.

**BURNAM, J.** The plaintiff brought this suit to recover from defendant a balance which he claimed to be due him for logs sold and delivered defendant. He alleges that in the year 1891 he delivered to defendant a poplar raft containing 2,500 cubic feet, at 15 cents per cubic foot; a raft containing 1,662 cubic feet, at 11 cents per cubic foot; a raft containing 1,100 cubic feet, at 11 cents; and a yoke of oxen, valued at \$40,—aggregating \$724.82,—which he credits with \$152.62, moneys advanced, and \$210 in note, leaving a balance of \$361.90. Defendant, by way of answer and counterclaim, says that he bought of plaintiff three rafts to be delivered to him in good order, on the 1st day of June, in the Big Sandy river, at the mouth of Chloe creek, for which he agreed to pay 15 cents per cubic foot for all logs over 25 inches in diameter, and 11 cents per foot for all logs which ran between 20 and 25 inches in diameter; that plaintiff failed to comply with his contract by the delivery of the logs on the 1st of June, and that he did not deliver any of them before the middle of December following; and charging that the value of the logs had materially declined between the 1st of June, when they were to be delivered, and the 16th of December, when they were actually delivered. Defendant also alleges that plaintiff was the owner of only 2,334 cubic feet in the big raft, as 206 feet of this raft belonged to George and Jeff Bevins; that he was the owner of only 1,068 cubic feet in the second raft, as 23 feet of this raft also belonged to the same parties, and that he was compelled to and did pay these parties \$28.80 for their interest in these rafts, for which he claims he is entitled to credit. He also alleges that George and Jeff Bevins had a claim on the rafts for \$49.80 additional, which he paid to them at the request of the plaintiff, for which he is entitled to credit; and he alleges that one Chaney claimed to be the owner of a

part of the logs included in these rafts and sued for by plaintiff, and that he was compelled to and did pay Chaney \$73.24 in extinguishment of his claim, and that he is entitled to this additional credit. He alleges that, as plaintiff failed to comply with his contract, and deliver the logs at the time and place stipulated in the contract, and as he suffered great loss in consequence of this breach of contract, he should be accountable to the plaintiff for only the money actually received by him for the timber, after deducting the expenses of marketing same, alleging that he received the timber solely because he had advanced \$150 for labor in getting the rafts delivered, and that he accepted these rafts on account of these advancements and the insolvency of the plaintiff, in order to save himself from loss. He alleges that upon settlement he has overpaid plaintiff \$16.82, and makes his answer a counterclaim. All the allegations of this answer were denied by reply, and plaintiff relies upon the acceptance of the logs at the time they were delivered, in December, as a waiver on the part of the defendant of his rights growing out of the original contract, and as an estoppel from going behind what occurred at that time. The plaintiff admits that he failed to deliver the rafts at the time and place contracted for, and he also admits that there was a marked decline in the value of this timber during this interval, and some of the witnesses for the defendant put this decline as high as from four to five cents on the cubic foot. Plaintiff also admits that he was indebted to the two Bevins in the full amount paid them by defendant, but denied that he owed Chaney anything, although it seems to us that the weight of the evidence sustains the contention of defendant as to this claim also. Upon the trial the jury found a verdict for \$271.71 in favor of plaintiff, upon which judgment was rendered, and from that judgment this appeal is prosecuted. No error of law is complained of on the appeal, as the instructions given to the jury were not excepted to in the court below, although they are manifestly erroneous. The only ground upon which reversal is asked is that the verdict is flagrantly against the weight of the evidence.

It may be stated as a well-settled principle of law that, where contracts for the sale of chattels are broken by the vendor's failure to deliver the property according to the terms of the bargain, the vendee is entitled to recover damages for the breach; and the measure of damage is the difference between the contract price and the market value of the article at the time when, and place where, it should have been delivered, with interest. See Sedg. Dam. § 734; *Lumber Co. v. Bradlee*, 96 Ky. 494, 29 S. W. 313. And the acceptance of an article after the time specified for its delivery does not constitute a waiver of damages for the delay, unless there are other circumstances manifesting an intention to waive such damages. See *Dignan v. Spurr*, 3 Wash. St. 309, 28 Pac. 529; *Gaylor v. Karst* (Com. Pl.) 17 N. Y. Supp. 720; *Lumber Co. v. Sutton*, 46 Kan. 192,

26 Pac. 444; and *Strain v. Manufacturing Co.*, 80 Tex. 622, 16 S. W. 625. There is nothing in the evidence in this case which conduces to show that defendant ever manifested any intention to waive his right to compensation for the damage suffered by him which was caused by the alleged breach of contract on the part of the plaintiff. He had been compelled to advance \$150 to have the logs put into the river and rafted; and if, as alleged, plaintiff was insolvent (and we think the evidence strongly tends to establish this fact), then he had no other means of saving himself, and preventing the loss of the money he had already advanced, except to take the logs when they were finally delivered to him. And the proof in the case leaves no room to doubt that his damage arising from this breach of contract alone was largely in excess of the \$90.19 allowed him as a set-off, not taking into consideration the money he had been compelled to pay the Bevinses and Chaney. In our opinion, the verdict is flagrantly wrong, and the judgment is therefore reversed, and the cause remanded for a new trial consistent with this opinion.

#### MIDDLETON'S HEIRS v. MIDDLETON'S DEVISEES.

(Court of Appeals of Kentucky. Nov. 16, 1897.)

##### CONSTRUCTION OF WILL—VESTED REMAINDER.

Under a devise to N. for life, with a provision that at her death the property "shall go and descend in equal shares to her children and to the descendants of such of her children as may be dead," the title vests in the children in being at the death of the testator, opening up to let in after-born children, only the possession and enjoyment being postponed until the life tenant's death.

Appeal from circuit court, Shelby county.

"Not to be officially reported."

Action by Bettie Rice and others against Pearl Rice and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Warner W. Jesse, for appellants. L. C. Willis, for appellees.

HAZELRIGG, J. Anthony Middleton died in 1879, leaving a daughter, Nancy Elizabeth, who had theretofore married J. H. Rice, and to whom several children had been born, and who were living at Middleton's death. Several children were also born after his death. The interest these children take under the will of the grandfather, and when that interest vests, are the sole questions presented on this appeal. The clause of the will to be considered is as follows: "Item 2. After the payment of my debts and funeral expenses I hereby give and devise to my beloved daughter, Nancy Elizabeth Rice, all my estate, real and personal, as her sole and separate estate, to be held, used, and enjoyed by her during her life, and at her death the same shall go and descend in equal shares to her children, and to the descendants of such of her children as may be dead." If

the estate in interest vests only upon the death of the life tenant, and goes to her children then living, as she is still alive, the title the adult children and the life tenant seek to pass in this proceeding would be defective, and of uncertain tenure, because it cannot be known who of the children may be living at her death. But if, under the will, it was the estate in possession thereby that was to be postponed until the determination of the life estate, and the title was to vest in the children in being at the death of the testator, opening up to let in such of them as were after-born, then the estate in all the children is a vested remainder, and is unaffected by the death of the life tenant, save only in its possession and enjoyment. If the time be postponed until their mother's death for the estate to vest, then the title is suspended awaiting a future event, and this is a construction not to be thought of unless required by express language. It is manifest that we have no such language here. It can hardly be said that the language even imports a postponement of the estate in interest, rather than a postponement of it in possession. If we attend strictly to the language, the implication is that what the mother has goes or descends to the children at her death. And this is not the estate in interest, but the estate in possession, and therefore it is the estate in possession which "shall go or descend" to the children at her death. Nor is this to go or descend to the children "then living," or to the children "surviving" the life tenant. No such language is used. If, therefore, we say that the estate vests at the death of the mother, we do violence to a fair implication to the contrary, and besides, as we shall see, violate a fundamental rule of construction, based on the long-settled policy of our law, to the effect that the estate shall vest in cases of this kind at the very earliest possible moment compatible with the requirements of the language to be construed. And if we say the limitation as to the children refers to those living at the death of the life tenant, we supply vital words not used by the testator, with the result that the estate in interest is suspended indefinitely. Moreover, it is well settled that the use of the words "shall go," or "descend," or of the adverbs "when," etc., and "then," etc., do not import a contingency, or "make anything necessary to precede the vesting of a remainder, but only express the time when a remainder shall take effect in possession, not when it shall become vested." *Williams v. Williams*, 91 Ky. 534, 555, 16 S. W. 361; *Williamson v. Williamson*, 18 B. Mon. 375. Such words relate merely to the time of the enjoyment of the estate. In our opinion, the language under consideration presents the case of a pure vested remainder, in virtue of which each child, born and to be born, is invested with an indefeasible fee, the enjoyment and possession of which only are postponed until the determination of the life tenancy. And this is

in accord, not only with what we conceive to be the manifest intention of the testator as expressed in the words of the devise, but is in line with the unbroken current of authority. It is in the elementary books that a devise to "A. for life, and after the death of A. to B., vests an interest in B. on the death of the testator, which will not lapse by the death of B. in the lifetime of A." Ballard & B. Ann. R. E. St. Ky. § 40, and authorities cited. And so, in 2 Washb. Real Prop. (5th Ed.) p. 228, it is said that "a devise to A. for life, remainder to B. in fee at his death, would be a vested remainder if B. is in esse; and, if he die before A., the estate at A.'s death would go to his (B.'s) heirs." The same author says further (page 280): "Upon a devise to A. for life, remainder to the children of J. S., if J. S. has children at the testator's death, they would take a vested remainder; and, if he were to have other children during the life of A., and before the remainder was to take effect in possession, it would open, and let in the children born during A.'s life, who would take shares as vested remainders." And so, continuing, the author says, when the grant was to A. for life, and at her death to her children, it was held to open, and let in after-born children. In Phillips v. Johnson (1853) 14 B. Mon. 172, this court had before it a devise of an estate "to my sister, Nancy Standeford, for her sole use," etc., "during her life, and at her death to be equally divided among her children," and it was held: "Where a devise is to the mother for life, and then to her children, the right to the remainder vests in the children as they are born; and, if any of them die before the determination of the life estate, their interest vests in their heirs." And to the same effect is the case of Bowling's Heirs v. Dobyns' Adm'rs, 5 Dana, 438, decided in 1837.

There has been no departure from these cases and the elementary authorities. A more recent case,—White's Trustee v. White, 86 Ky. 602, 7 S. W. 26,—where the remainder was held to be contingent, will serve to illustrate the distinction. The grant was to Lucy Ann White for life, and at her death to vest in fee simple in her children then living, and the representatives of such as might be dead. Here the words "then living" were held to fix the time vesting at the date of the death of the life tenant. And so where the devise is to one for life, and at the death of the life tenant to her children surviving her, or to her children, "the survivors or survivor." Ormsby v. Dumesnil, 91 Ky. 601, 16 S. W. 459. While it was said that the remainder was a vested one, it was said that the holding was not in severalty, and the interest of one dying before the life tenant became extinct, but that the title vested in the children as a class. As we have seen, however, we have no such words in the suit before us as "children then living," or "children surviving her," or the words "survivor or

survivors," and the taking here is clearly in severalty, and in present, with the possession postponed until the death of the life tenant. The rule is the same in other states. In Allen v. Mayfield, 20 Ind. 293, the bequest was to Catherine Allen, the testator's wife, during her life, and after her death to his adopted daughter, Bertha. Bertha died before the life tenant, and, in answer to the question whether the estate in Bertha was a vested or contingent one, the court held it to be a vested estate; citing Toll. Ex'rs, 306; 2 Williams, Ex'rs, 891. In Gourley v. Woodbury, 42 Vt. 397, the testator conveyed his river farm to his daughter, Mary, for her life, and at her death to the five children of Mary. The court said: "The great weight of authority is to the effect that a deed conveying a use for life to one, with remainder to another, is to be construed as vesting the remainder immediately upon the date of the deed, unless the express words of the deed absolutely forbid such an interpretation. Language almost precisely like that of the deed has been repeatedly, and almost uniformly, held to convey a vested, not a contingent, remainder." Leeming v. Sherratt, 2 Hare, 14, 23; Dingley v. Dingley, 5 Mass. 535; Lane v. Goudge, 9 Ves. 225. See, also, Green v. Hewitt, 97 Ill. 113. It will be noticed that in some of the cases cited the names of the remainder-men are given, but this is immaterial. It is hardly necessary to observe that the word "children," when used in its legal sense, which is also its commonly accepted meaning, is a word of purchase, and the children take precisely as if their names were called. The clause, "and to such of their descendants as may be dead," means nothing more than if, at the time of the distribution of the estate, when the time comes for its enjoyment in possession, one or more of the children be dead, their issue shall take. This, it is true, would result anyway, but it is a common form of expression, denoting merely the inheritable quality of the estate. Judgment is affirmed.

#### WOOLLEY v. JOHNSON'S EX'RS.

(Court of Appeals of Kentucky. Oct. 29, 1897.)

##### MARSHALING ASSETS AND SECURITIES.

Where a testator had a life estate in land, with power to dispose of it by will or deed to such uses as he might select, a devise by him of what property he had, after the payment of his debts, to his sister and brother, was held on a former appeal to be a devise to his creditors in exercise of a power of appointment. In distributing the proceeds of the property among his creditors, *held*, that a lien creditor, after exhausting his lien, stands, as to the balance of his debt, on an equality with other creditors; neither the general equity rule giving to lien creditors a pro rata upon the full amount of their claims, nor the statute in force at the date of the will postponing lien creditors, after exhausting their liens, until other creditors shall have received a sum pro rata equal with them, having any application.

Appeal from circuit court, Fayette county.  
"To be officially reported."

Action by M. C. Johnson's executors against Ellen D. Payne and others to foreclose a mortgage. From a judgment for plaintiffs, defendants appealed, and that judgment was reversed. See 24 S. W. 238. On the return of the case to the lower court, it took the form of a creditors' bill for a settlement of the estate of A. K. Woolley, the mortgagor, and from a judgment of distribution R. W. Woolley appeals. Reversed.

J. R. Morton, for appellant. J. D. Hunt, for appellees.

HAZELRIGG, J. Aaron K. Woolley was the owner in fee of one-half of 166 acres of land by devise from his mother. The other half was devised to him from the same source for life, with remainder over to others, coupled, however, with a power to dispose of it himself by will or deed to such uses as he might select. He undertook to incumber his entire estate by a mortgage to Johnson and Mrs. Hearne, but his effort as to the estate held for life was held inoperative by this court (*Payne v. Johnson's Ex'rs*, 95 Ky. 275, 24 S. W. 238) because not a valid exercise of the power of appointment under the will. The donee of the power, however, was held to have exercised the power by his will, in which he devised what property he had, after the payment of his debts, to his sister, Mrs. Payne, and his brothers, Frank and Vertner Woolley; and this was said by this court in the former appeal to be "in fact a devise to creditors who are, in so far as this record shows, to receive the proceeds of sale in proportion to their respective claims." After a return of the case from this court, the other creditors were made parties, and the action took the form of a creditors' bill for settlement of the estate instead of a suit, as it had formerly been, to satisfy the mortgage liens. The sole question before the chancellor below was, how shall the assets of testator, A. K. Woolley, be distributed? The learned special chancellor adjudged Johnson's executors entitled to one-half of the proceeds of the sale of the entire land, and of this there is no complaint. But in distributing the balance he held the executors entitled to a pro rata on the entire debt, without reducing their demand by the amount of the previous payment. This is in accordance with the rule of marshaling securities laid down in *Logan v. Anderson*, 18 B. Mon. 114, and followed in a number of cases since, to the effect "that a creditor having more than one contract security will be allowed to prorate with the general creditors for the full amount of his claim, taking no account of his independent securities." *Hibler v. Davis*, 13 Bush, 21. The statute in force at the time of Woolley's death, and which appellant insists is applicable, prescribes an entirely differ-

ent rule for the distribution of the assets of insolvents. That statute, in the particular mentioned, is as follows: "But when any creditor has a lien and the property subject to the lien is not sufficient to discharge the debt, he shall not be entitled to any portion of the residue of the estate, until all the creditors not having liens shall have received a sum equal pro rata with such lien creditor." It would seem that the court below, in departing from this statute, did so for the reason that under the will of Woolley the lien creditor had a claim in the nature of a contract right, not only on the one half covered expressly by his mortgage, but on the other half as well, and this fact demanded the application of the rule in the *Logan v. Anderson* case. It is manifest, however, that while such an application here might not be positively illogical, it is certainly an extension of the rule, and the exact state of case in which the rule has been heretofore applied is not before us. We are, therefore, not bound to apply it; nor does the statute then in force necessarily control the distribution. The property is devised to Mrs. Payne, and Frank and Vertner Woolley. The testator certainly did not contemplate a distribution of his estate under the statute regulating insolvent estates. By his appointment on behalf of his creditors—all of them, including Johnson—he brought within their reach, and not because of any diligence of theirs, certain property which otherwise would have gone to his heirs under the will of his mother, and provided that certain of his kin should have the residue of his estate "after the payment of his debts." The testator had already provided for the Johnson debt, in part, at least, and we think, after applying the property under mortgage towards the satisfaction of that debt, as Woolley must have supposed would be done, the balance of it is to be considered as included among the debts of the testator in contemplation of his will, and to stand on an equality with all other debts in the distribution of the estate. It is not to be supposed that the testator intended either that the Johnson lien debt, after being paid in part, was to be given undue advantage over other debts under some complicated rule for marshaling equitable securities, or, on the other hand, to be made to take a subordinate position in the distribution, and be denied a pro rata share in what was left after crediting therein the proceeds of the mortgage. His intention must have been to pay the Johnson debt with the proceeds of the mortgaged property as far as might be, and then, out of the balance of the estate, pay the unsatisfied lien debt, and all other debts against the estate, treating all debts alike, and placing them on an exact equality. Such a distribution would be in accord with the present statute, which provides that, "when any creditor has a lien, and the property subject to the lien is

not sufficient to discharge the debt, he shall receive on the remainder of the debt unsatisfied by the lien property the same pro rata as other creditors who have no lien." Ky. St. § 3869. And such a distribution is in accord with the language of this court on the former appeal, where it was held that, so far as the record then showed,—and nothing is shown to the contrary now,—the creditors of Woolley were to receive the proceeds of the sale "in proportion to their respective claims." And this, it seems to us, is the equity of the case, and conforms to the intention of the testator. There seems to have been no error in the method of paying the Hablz claim, but, for the reason given, the judgment is reversed for proceedings consistent with this opinion.

#### DILLS v. ADAMS et al.

(Court of Appeals of Kentucky. Nov. 10, 1897.)

##### CONSTRUCTION OF WILL.—LIFE ESTATE OR FEE.

D. devised all his estate to his wife, "to have and to hold her natural life, for her support and maintenance, and to be disposed of at her pleasure," excepting certain real estate devised to his children, which he provided should remain in the possession of his wife during her lifetime, "to control and have benefit of rents and income therefrom for her maintenance, and she paying taxes thereon." He then provided that all other lands, not otherwise disposed of, his wife should "have full control and charge of, and the liberty and power from me, by this my will, to sell and convey each and all tracts and parts of tracts not sold or devised, to whomsoever she may, and to dispose of the proceeds as she may deem best or desire, as I have full confidence in her wisdom, justice, and motives"; again declaring that "the property is entirely hers, and at her disposal." Held, that the wife takes the fee in all the land, except that specifically devised to the children, in which she takes a life estate.

Appeal from circuit court, Pike county.

"Not to be officially reported."

Action by George Ann Adams and others against Ann Dills, executrix of John Dills. Judgment for plaintiffs, and defendant appeals. Reversed.

Stewart & Stewart, Holt & Holt, Auxler & Auxler, and R. T. Burns, for appellant. John F. Hager and Samuel J. Salyer, for appellees.

LEWIS, C. J. The will of John Dills, the construction of which this case involves, is as follows: "After all my just debts are paid, I will all my real estate, consisting of lands and lots, and all my personal assets, to my beloved wife, Anna Dills, which is to include dues of every source and kind, and all personal property, of every kind, live stock, household furniture, books, &c., to have and to hold her natural life, for her support and maintenance, and to be disposed of at her pleasure, excepting the following named real estate, which I devise as follows." Then comes a description of three tracts or lots of

land, fully distinguished and identified, which are devised severally to his daughter George Ann Adams, his daughter Augusta York, and his son John A. Dills, and their respective children. But the lands so devised to his three children he expressly provides shall remain in possession of his wife during her lifetime, to control and have the benefit of the rents and income therefrom for her maintenance, she paying taxes thereon. He then adds: "All other tracts of land or parts of tracts not otherwise disposed of by me, or mineral interests, my wife is to have full control and charge of, and the liberty and power from me, by this, my will, to sell and convey each and all tracts or parts of tracts not sold or devised, to whomsoever she may, and to dispose of the proceeds as she may deem best, or desire, as I have full confidence in her wisdom, justice, and motives." He then expressed a desire that no bond should be required of his wife, appointed executrix, and repeated the declaration that after his debts are paid, "excepting what is bequeathed" (by which was meant that specifically devised to his three children), "the property is entirely hers, and at her disposal. And whatever money may be on deposit, or otherwise on hand, or loaned, is to be hers, the same as other assets herein willed to her." A short time after the date of the will the testator made a codicil, the main purpose of which appears to have been to limit the estate of his three children to the lands devised, for their several lives, remainder in fee to their respective children. But he was careful to add that the codicil should not be so construed as to give to either of his children possession or control of said lands so devised to them until after the death of his wife. Looking to the intention of the testator, and the plan adopted for disposing of his estate, it is plain that his wife is entitled to the absolute fee in all the lands, except the particular tracts devised to his son and two daughters, and their children; and in those tracts she has a life estate. There is really no necessity for resorting to accepted rules of construction in order to determine the true meaning and purpose of the will, because it is too palpable for any dispute. The lower court therefore erred in deciding that the widow has power to sell and convey the lands, other than such as are specifically devised to the three children, only for payment of taxes, debts, and for maintenance; for having, under the will, the fee-simple title, she can sell and convey all or any of said lands. But whether a case might not arise requiring the interposition of the chancellor to protect her in her old age from the rapacity and imposition of others, we need not decide, because not now called on. For the reasons indicated, the judgment is reversed, and the case remanded for further proceedings consistent with this opinion.



## COMBS v. PRIDEMORE et al.

(Court of Appeals of Kentucky. Dec. 18, 1897.)

PLEADING—AIDER BY VERDICT—SALES.

1. Where the only issue presented by the answer was as to whether there was a contract between the parties, a defect in the petition in failing to show a performance by plaintiff or breach by defendant was not cured by either the answer or verdict.

2. In an action to recover the price of logs sold, which were never accepted by defendant, the petition was defective in failing to allege the time within which the contract was to be performed, or that the logs alleged to have been placed in a stream at defendant's request were a part of the logs covered by the contract, or were delivered within the time fixed by the contract.

Appeal from circuit court, Knott county.

"Not to be officially reported."

Action by Evans Pridemore and others against Spencer Combs to recover the price of logs sold and delivered. Verdict and judgment for plaintiffs, and defendant appeals. Reversed.

J. J. C. Bach, for appellant. John L. Scott & Son, for appellees.

BURNAM, J. This was an action by appellees to recover of appellant \$395 for logs sold and delivered to him. It is alleged by appellees that in the year 1892 they made a verbal contract with the appellant to deliver to him at the mouth of Carr Fork all the poplar saw logs which they saw proper to deliver, for which appellant promised and agreed to pay them 45 cents per 100 feet for second-class timber and 75 cents per 100 for first-class timber, and that he would have the timber branded on the 15th day of each month; that, at the instance and request of appellant, they hauled and placed in the channel of Carr Fork 75 poplar logs, which contained 400 feet each, and which, at 75 cents per 100, were worth \$250. They allege that appellant failed and refused to brand the timber in accordance with his agreement, and that, after allowing several of these branding days to pass, a tide came, and the logs were washed out into the river before they were branded, and a number of them were lost. The defendant, by way of answer, denies every allegation of plaintiffs' petition, and by way of defense alleges that he had a contract with the Louisville Finance & Trust Company to deliver them from 1,000 to 3,000 logs in the Kentucky river at the mouth of Carr's creek, at the price of 50 cents per 100 for second-class and 75 cents per 100 for first-class logs, 50 per cent. of which was to be paid on the 15th of each month succeeding the branding, and the other 50 per cent. to be paid when the logs should be delivered into the Kentucky river; that, as he did not have enough logs to make up the maximum number provided for in his contract, as a matter of favor to the appellees, and at their request, he permitted them to put some logs they had on hand into this contract, upon the condition that

they were to accept the price and payments stipulated in the contract with the trust company; that he (appellant) was to assume no responsibility of branding or delivering the logs, except that, when the company should pay for the logs, he would turn over to appellees the amount due to them as the price of their logs; that he had no interest in the logs of appellees; and that putting them into the channel of a floating stream before being branded was an act of negligence on the part of appellees for which he was in no wise responsible. The issue being made up, the case was tried out upon the question as to whether there had been a contract between the parties, as alleged, which resulted in a judgment in favor of appellees, and from that judgment this appeal is prosecuted.

No error of law occurred upon the trial of the issue. In fact, the record shows that all of the instructions were given at the instance of appellant, and were excepted to by appellees, and the only question suggested by the brief of counsel for appellant upon which he relies for reversal is that the allegations of the petition as amended do not state facts sufficient to authorize a recovery. No demurrer was filed to this pleading, and the issue as presented involved alone the inquiry as to whether there had been a contract between the parties, and none as to the acts or omissions of the parties under it. The petition, therefore, was not aided by either the answer or verdict, and, if it fails to state a cause of action, judgment should be rendered for appellant. The petition fails to state any time within which this contract was to be performed, or that the timber placed in the channel of the creek by appellees at the request and direction of appellant constituted a part of the logs which they were to deliver under the alleged contract, or within the time within which the contract was to be performed, and are not identified by the petition as a part of the logs covered by the alleged agreement. A petition must state the facts which constitute a cause of action in favor of plaintiff, and every fact necessary to enable plaintiff to recover must be alleged; and every essential averment required to make a declaration good under the common law must be stated, not only to enable the opposite party to form an issue, and inform him of what the pleader intends to prove, but also to enable the court to declare the law upon the facts stated. See *Canal Co. v. Murphy*, 9 Bush, 522, and *Stivers v. Baker*, 87 Ky. 508, 9 S. W. 491. It seems to us that the petition in this case is fatally defective in the particulars indicated, and that no cause of action is set forth therein, and a new trial should have been awarded; wherefore the judgment is reversed, and cause remanded, with directions to allow a new trial, and to permit plaintiffs to amend their petition, if they so desire, and for further proceedings consistent with this opinion.

**COOK v. BARNES et al.**

(Court of Appeals of Kentucky. Dec. 16, 1897.  
**EXECUTORS — NEGLIGENCE IN FAILING TO WITHDRAW BANK DEPOSIT.**

A testator had on deposit in bank \$26,000, under a contract not to withdraw it until after 30 days' notice. Just before his death he advised his executor to withdraw the deposit in small sums, as he would push the bank to the wall if he attempted to draw all at one time. The executor, immediately upon qualifying, gave the bank the required notice, but induced the bank officers to pay, before the end of 30 days, some checks, to meet immediate needs of the estate. Prominent business men advised the executor to follow the testator's instructions. Between the time of his qualification, in May, 1891, and July 3, 1891, the executor drew out about \$10,500. The bank suspended August 8, 1891. Between July 3d and August 8th the executor was, for two weeks, disabled, by serious sickness, from attending to business. *Held*, that the executor was not negligent.

Appeal from circuit court, Nelson county.  
 "Not to be officially reported."

Action by Nannie Cook against Cassie Barnes and others. Judgment for defendants, and plaintiff appeals. *Affirmed*.

Nat W. Halstead and P. B. & Upton Muir, for appellant. W. S. Pryor and Ben Johnson, for appellees.

**HAZELRIGG, J.** This is an effort by one of the devisees under the will of John Johnson, who died in Nelson county, to charge the executor with several thousand dollars lost to the estate because left on deposit by the executor in the Masonic Savings Bank of Louisville until the bank's suspension or failure, some months after his qualification. The proof discloses that the sum of some \$26,000 had been placed on deposit at the bank named, by the testator, under a contract that it was not to be withdrawn until after 30 days' notice, and that, just before testator's death, he advised his son, the present executor, that he had this money on deposit, and that it should be withdrawn by him, as executor, "in small sums, and not to draw all the money at one time, for the bank was in a shaky condition, and, if he aimed to draw it all at once, he would push it to the wall, and the bank would pay none of it, but that the president of the bank was honest, and, if he gave him time, he believed he would pay the whole debt." At the earliest opportunity after the death of his father, the son qualified as his executor, and on the following day visited Louisville, and, in company with his attorney, called on the bank for the money. Payment was declined, because of the contract as to notice, and thereupon immediate notice in writing was given. It appears that the executor then took counsel with prominent business men, who were acquainted with the general condition of the bank, and was advised by them to go slow in checking for his money, and to follow the instructions of his testator; that this was the safest way of getting the whole of the deposit, and any other course

would precipitate a suspension. The executor, by personal appeals to the bank officials, got them to agree to pay, before the end of the 30 days, some checks, to meet the immediate needs of the estate. He qualified on May 11, 1891, and between the time of giving his first check, on May 5, 1891, until July 3, 1891, he drew out, in checks, about the sum of \$10,500. Since the failure of the bank, dividends to the extent of some \$8,000 have also been collected by the executor. The bank closed its doors on August 8, 1891. The testimony of the cashier of the bank conduces to show that the judgment of the advisers of the executor was correct, and that, if a check for the entire sum of the deposit had been presented, and payment of it insisted on, the bank could not have paid it, but would have suspended. The only semblance of neglect is to be found in the delay in checking between the date of the last check, in July, until the suspension, in August; and this is explained by the serious sickness of the executor, which disqualified him for some two weeks from doing business. And, moreover, it appears that no money had been obtained except on the personal application of the executor. In our opinion, the evidence shows that the executor acted as an ordinarily prudent man would have acted under similar circumstances; and the judgment, exonerating him of the charge of negligence and devastavit, is affirmed.

**BOARD OF COUNCIL OF CITY OF DANVILLE v. FORMAN.**

(Court of Appeals of Kentucky. Dec. 16, 1897.)

**INTOXICATING LIQUORS—SALE BY DRUGGIST.**

1. Defendant, charged with the offense of selling liquor as a druggist without a prescription, in violation of a city ordinance, was properly acquitted, where the agreed statement of facts on which the case was heard failed to show when or where the offense was committed, or that there was any ordinance on the subject.

2. Ky. St. § 2558, part of local option law, which prohibits a druggist from making more than one sale of liquor on any prescription, does not apply unless it is shown that the law has been voted into operation in the city or district where the sale takes place; and in the absence of such a showing, or of evidence of the existence of an ordinance forbidding such a sale, a druggist cannot be convicted therefor.

Appeal from circuit court, Boyle county.  
 "To be officially reported."

W. M. Forman was acquitted of selling liquor in violation of a city ordinance, and the board of council of city of Danville appeals. *Affirmed*.

Chas. C. Fox, for appellant. R. J. Breckenridge, Jr., for appellee.

**HAZELRIGG, J.** Appellee was charged, by warrants sworn out before the police court of the city of Danville, "with unlawfully selling spirituous liquors, to wit, whisky, to one Frank Eggleton; said Forman being a drug-

gist, and said liquor not being sold on the prescription of a physician in said city, on the — day of October, 1895, against the ordinance of said city in such cases made and provided." On appeal to the circuit court from a judgment of conviction in the police court, he was acquitted, and the commonwealth has appealed. The agreed facts submitted to the court below are as follows: "It is agreed that the witness Eggleton would state that he bought of the defendant, Foreman, whisky three different times on the same prescription, one or two days apart each time, paying for it each time, and the defendant would deny that he sold Eggleton more than twice on the same prescription, the prescription being for one pint, and he let witness have one-half of the pint one day, and on the following day or day after the other half, being paid each time for amount taken; that the prescription itself will show that it was filled in part at different times, and the defendant was a licensed druggist." It is certified that "the above agreed statement of facts was all the evidence introduced on the trial of the case." This being true, the judgment could not have been otherwise. The plea was not guilty, and there is no argument or proof as to when the alleged offense was committed, and it may have been barred by lapse of time. Moreover, it does not appear in any way where it was committed, — whether in or out of the city. Nor is it shown what the ordinances of the city were, or, indeed, that there are any at all on the subject involved; nor do any ordinances appear in any pleading in the case or in the record in any way. 17 Am. & Eng. Enc. Law, p. 266. It is true certain language purporting to be ordinances are set out in the briefs of counsel, but, of course, constitute no proof upon which the trial court could have based a judgment. Section 2553 of the Kentucky Statutes makes it the duty of druggists, who sell in localities where people have voted against the sale of liquors under what is known as the "Local Option Law," to keep an accurate register of such sales, and preserve the prescriptions upon which liquors are sold, and further provides that "only one sale shall be made on any prescription." If it were shown by agreement or proof that this law had been voted into operation in the city, or that an ordinance of a similar character was in force, the state of the case presented as to the sales by Foreman to Eggleton would seem to come clearly within the provisions of the law. Otherwise, the patient would only have to provide himself with a prescription for a pint or quart of whisky, and, after calculation of how many drinks there were in a given quantity, buy and pay for a drink at a time. There is nothing whatever in the law preventing a sick man from taking the medicine prescribed for him by his physician on the premises, and in extreme cases it is often important to the patient that he get the speediest possible relief. If the plan pursued by Fore-

man and Eggleton were permitted generally, there is danger that the drug store, in the hands of less scrupulous persons, might become a mere dramshop. But, as we have seen, we have no knowledge of the statute indicated, or that any ordinance of similar character is in force in Danville, or that the defendant sold any liquor within the city limits, or within 12 months before the institution of the prosecution. The judgment is affirmed.

#### BORCHES et al. v. WILLIAMS et al.

(Court of Appeals of Kentucky. Dec. 16, 1897.)

#### PREFERENCE OF CREDITORS OPERATING AS ASSIGNMENT.

The fact that a creditor has personal security for his debt does not prevent him from maintaining an action, under Ky. St. § 1910, to have a transfer made by the principal declared to be a preference, and to operate as an assignment for the benefit of his creditors.

Appeal from circuit court, Bell county.

"To be officially reported."

Action by J. W. Borches and others against Maggie Williams and others to have certain transfers made by H. L. Hunt declared to operate as an assignment for the benefit of all his creditors. Judgment for defendants, and plaintiffs appeal. Reversed.

D. B. Logan, for appellants.

BURNAM, J. Appellants instituted this action under section 1910 of the Kentucky Statutes, alleging that appellees H. L. Hunt and J. G. Green, under the style and firm name of Green & Hunt, executed to appellants their two promissory notes, for \$155.37 each, with defendant O. W. Short as surety, and that no part of either note had ever been paid, and further alleging that H. L. Hunt, one of the appellees, was indebted to other persons in large sums, and that while so indebted to plaintiffs and various other persons, in contemplation of insolvency, and with the design to prefer his co-defendant Maggie Williams, to the exclusion of other creditors, and when he did not have sufficient property to pay his debts, he did, within six months before the institution of this action, deliver to her solvent accounts and notes due him by her co-defendants Goodin, Rice, and others, and setting out the amounts of such indebtedness. Appellants also alleged that appellee H. L. Hunt, about the same time, under the same circumstances, and with the same design, transferred to his brother, the defendant G. M. Hunt, personal property, notes, and accounts, of the aggregate value of \$98, and that he had, under the same circumstances, and for the same purpose, transferred and delivered to his mother \$115 in money; and appellants prayed that the sale of the notes and accounts to the defendants Maggie Williams,

G. M. Hunt, and his mother, Johanna Hunt, be adjudged to operate as an assignment of all the property of H. L. Hunt for the benefit of his creditors, and for the payment pro rata of all his debts. Appellees filed a general demurrer to this petition, which was sustained; and appellants, declining to plead further, prosecute their appeal to this court.

We infer from the brief of appellees that the sole ground on which the demurrer was sustained was that it appeared from the allegation of the petition of appellants that they had personal security on their debt, and that there was no allegation that the surety was insolvent, or that they were in danger of losing any part of their claim. The mere fact that a creditor has security upon his debt does not exclude him from the right to prosecute his legal remedies for the collection of his debt against the principal, and we think that the demurrer should have been overruled. The judgment is therefore reversed, and the cause is remanded for proceedings consistent with this opinion.

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WILSON et al. v. CAROTHERS et al.  
(Court of Appeals of Kentucky. Dec. 18, 1897.)

PLEDGES—LIABILITIES SECURED.

A pledge of collateral by C. & Bro. to W. & M., "for the payment of our notes this day executed, or any other unsecured liability or liabilities of ours" to W. & M., secures the payment of all liabilities of C. & Bro. to W. & M., whether secured or unsecured.

Appeal from circuit court, Nelson county.

"Not to be officially reported."

Action by Wilson & Muir against Carothers & Bro. and others. Petition dismissed on demand, and plaintiffs appeal. Reversed.

John D. Weckliffe, for appellants. O. T. Atkinson, for appellees.

PAYNTER, J. On October 10, 1890, Carothers & Bro. owed the appellants two notes, for \$1,000 each, to which four persons had signed their names as sureties. On that day Carothers & Bro. seem to have executed other notes to Wilson & Muir for other sums, and they delivered to Wilson & Muir certain obligations as collateral security, accompanying which was a writing signed by Carothers & Bro., in which appears language as follows, to wit: "All of which is to be held by Wilson & Muir as a collateral and continuing security for the payment of our notes this day executed, or any other unsecured liability, or liabilities of ours to Wilson & Muir, and to apply to any and all renewals of such paper, and to that to be hereafter executed." The sole question in this case is whether the language is broad enough to include the two \$1,000 notes mentioned. It is contended that the collaterals were only pledged to secure the payment of the notes that day executed and any other unsecured liability. These notes were liabilities of Carothers & Bro. to Wilson & Muir. We think the clause "or liabilities of ours to

Wilson & Muir" is broad enough to include any liabilities which Carothers & Bro. were under to Wilson & Muir. The court should not have sustained a demurrer to the petition. The judgment is reversed for proceedings consistent with this opinion.

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GIBSON et al. v. BOARD.

(Court of Appeals of Kentucky. Dec. 18, 1897.)

PUBLIC LANDS—PATENTS.

Rev. St. c. 102, § 3, subsec. 8, provides that "none but vacant land shall be subject to appropriation made under this chapter. Every entry, survey, or patent made or issued under this chapter shall be void so far as it embraces lands previously entered, surveyed, or patented." Subsection 7 provides that "the legal title of the land shall bear date from the time of making the survey." Subsection 10 provides that "the register may receive plats and certificates of survey after the expiration of the time herein allowed by law for returning the same; but in such case the legal title shall take effect only from the date of the patent." A patent was issued to P. November 12, 1867, on a survey made April 3, 1857, and registered August 12, 1867. A patent was issued to W. for the same land, August 30, 1866, on a survey made in April or May, 1866. Held that, though P.'s survey was not filed within the time required by law, it was valid, and therefore the subsequent survey and patent to W. were void.

Appeal from circuit court, Breathitt county.

"To be officially reported."

Action by Gibson & Cunningham against Buckner Board to recover damages for cutting and removing timber from land. Judgment for defendant, and plaintiffs appeal. Reversed.

D. D. Sublett, John L. Scopp & Son, and W. S. Pryor, for appellants. Wallace & McDonald, for appellee.

PAYNTER, J. The petition for rehearing is granted, and the opinion delivered November 30, 1897, is withdrawn. The appellants, Gibson & Cunningham, brought this action against Board to recover damages for cutting and removing timber off of certain tracts of land particularly described in the petition. Board denied that he had wrongfully cut and removed the timber, and in the amended petition averred that he was the owner of two of the tracts of land hereafter referred to. The court adjudged he was the owner of them. Neither of the parties has shown a possessory title to the land. The case must turn upon the question as to who acquired the title to the property under the grants from the commonwealth. The appellants, Gibson & Cunningham, claim under the Caleb Puckett patents, for 50 acres each. The survey upon which patent No. 40,481 was issued was made April 3, 1857, and registered August 12, 1867, and the patent was issued November 12, 1867. The survey upon which patent No. 40,483 was issued was made April 3, 1857, and reg-

istered August 12, 1867, and the patent granted November 12, 1867. The appellee, Board, claims under the Hezekiah Webb patent, dated August 30, 1866, which was issued upon a survey made April or May, 1866, which patent covers the same land covered by the patents to Puckett. It will be observed that the patentee through whom Board claims the land entered, surveyed, and had the patent issued after the land had been surveyed by Caleb Puckett. All these entries, surveys, and patents were under chapter 102, Rev. St., relating to treasury warrant claims. This chapter had origin in the act of 1835, following the language of subsection 8, § 3, c. 102, Rev. St., which is as follows, to wit: "None but vacant land shall be subject to appropriation made under this chapter. Every entry, survey, or patent made or issued under this chapter shall be void so far as it embraces lands previously entered, surveyed, or patented." This court has held in *Kirk v. Williamson*, 82 Ky. 161; *Goosling v. Smith*, 90 Ky. 157, 13 S. W. 437; *Davidson v. Coombs*, 5 Ky. Law Rep. 312; *Terry v. Johnson* (Ky.) 27 S. W. 984 (construing chapter 102, Rev. St.),—that every entry, survey, and patent is void so far as it embraces lands previously entered, surveyed, or patented. The act of 1835 contained substantially the same provision as the one which we have quoted, and in construing it in *McMillan's Heirs v. Hutcheson*, 4 Bush, 611, the court held that such entries, surveys, and patents were void. Under the cases cited, the Hezekiah Webb entry, survey, and patent are void, and he acquired no title to the land in virtue thereof. It follows that Board had no title to the land. The appellants, Cunningham & Gibson, having acquired title through the Caleb Puckett patent, they were entitled to maintain the action. Subsection 7, § 3, c. 102, Rev. St., reads as follows: "The legal title of the land shall bear date from the time of making the survey." Subsection 10, § 3, c. 102, Rev. St., reads as follows: "The register may receive plats and certificates of survey after the expiration of the time herein allowed for returning the same; but, in such case, the legal title shall take effect only from the date of the patent." It will be observed that, under subsection 7, when the parties making the entry and survey comply with the law, they acquire title to the land of the date of the survey; while, under subsection 10, if they do not file their surveys with the register within the time fixed by the law, "the legal title shall take effect only from the date of the patent." It is difficult to see what the legislature intended by this provision, if no rights could be acquired by reason of any entry and survey made, or patent which issued, between the time at which the previous survey should have been filed with the register and the issuing of the patent thereon. As an original proposition, it could be very plausibly

argued that the legislature intended to retain substantially section 11 of the act of 1815 by subsection supra. However, to take that view, it is necessary, in order to give any effect to subsection 8, § 3, c. 102, Rev. St., to hold that unless the party making the previous survey filed it within the time the law required, it was not to be regarded as valid in a controversy between the party who made it and one who made a subsequent survey, unless the former was carried into grant before the second survey was carried into grant; hence the legal title vested in the party who made the first survey of the date of the patent. However, this court has had before it for interpretation chapter 102, Rev. St., containing both of these provisions, and has construed them as heretofore stated. We feel that we should adhere to the previous rulings of the court. The act of 1815 contains a section which was expressly intended to meet questions similar to the one involved in this case. Under that act the actual survey was considered the commencement of the title, and, when perfected by grant, the title related to the time of the survey. Another section of that act, to which we have just referred, provided that, if the plat and certificate of survey were not returned into the register's office within the time prescribed by the statute, such plat and certificate could be registered and grants issued thereon; but, in any contests with other claimants, such grants were to be considered as vesting title from the date of the registry only, and not from the date of the survey. Under the interpretation given that statute in *Payne v. Riley*, 4 Dana, 38, the title under the Hezekiah Webb patent would be held to be superior to that of the Caleb Puckett patent. The same statute, as interpreted in *Payne v. Riley*, was the one which was interpreted in *Rains v. King* (Ky.) 19 S. W. 329. It appeared in that case that on April 14, 1837, a survey was made for King & Loughlin under the treasury warrant, dated in February, 1834, but was not returned to the register's office and registered until December 6, 1846, and the patent thereon issued in June, 1847. It will be observed, from the date of the treasury warrant, that it was issued prior to the act of 1835, and the court held that their rights should be determined by the provisions of the statute in force when it was issued. The court in *Rains v. King* was not construing chapter 102, Rev. St. In *Adams v. Frazier* (Ky.) 20 S. W. 268, the dates of the entries, surveys, and patents do not appear; hence we are unable to tell what statute the court was construing. When we consider the statutes which the courts were called upon to interpret, it is apparent there is no conflict in the decisions of the court on the question involved in this case. We adhere to the doctrine announced in *McMillan's Heirs v. Hutcheson*, *Kirk v. Williamson*, *Goosling v. Smith*, and *Davidson v.*

Coombs, for the reasons we have given. The judgment is reversed for proceedings consistent with this opinion.

**BARTRAM et al. v. BURNS.**

(Court of Appeals of Kentucky. Dec. 18, 1897.)

**APPEAL—REJECTED PLEADING NOT PART OF RECORD.**

The action of the lower court in refusing to allow a pleading to be filed cannot be reviewed unless there is an order of court making the rejected pleading a part of the record, or a bill of exceptions identifying it as the one offered.

"Not to be officially reported."

On rehearing. For opinion on original hearing, see 43 S. W. 248.

**PAYNTER, J.** Since delivering the opinion in this case, a re-examination of the record discloses the fact that the amended petition to which the court referred was not properly a part of the record. There was no bill of exception showing that it was the amended petition tendered, nor is there any order of court identifying it. The mere indorsement of the clerk upon the margin of this so-called "amended petition" that it was the one offered is not sufficient. The court having refused to permit it to be filed, in the absence of an order making it a part of the record, or bill of exceptions showing it was the amended petition offered, it must be disregarded. *Nolan v. Feltman*, 12 Bush, 119; *Young v. Bennett*, 7 Bush, 474; *Hortsman v. Railroad Co.*, 18 B. Mon. 218; *Vaughn v. Mills*, Id. 633. The opinion in this case was written upon the idea that it was properly a part of the record. It follows that the appellants have not placed themselves in a condition which will enable the court to determine whether or not the court below erred in overruling the motion to file the amended petition. In so far as the opinion holds that the appellants are entitled to assert their claim for lasting and valuable improvements, it is not to be binding on the court below, for the reason that the question adjudged was not properly brought here for review. It results that a rehearing should be granted, and the case affirmed.

**REED et al. v. WHITLOW.**

(Court of Appeals of Kentucky. Dec. 15, 1897.)

**JUDGMENT—RES JUDICATA—HOMESTEAD.**

A judgment of the United States circuit court overruling a motion by defendant to quash an execution sale on the ground that the property was his homestead is a bar to a subsequent action by defendant to recover the property on the same ground.

Appeal from circuit court, Edmonson county.

"Not to be officially reported."

Action of ejectment by P. M. Whitlow against James P. Reed and others. Judgment for plaintiff, and defendants appeal. Reversed.

W. H. Holt, for appellants. E. W. Hines and J. S. Lay, for appellee.

**GUFFY, J.** This was an action of ejectment instituted by the appellee against the appellants in the Edmonson circuit court to recover certain town property in the town of Brownsville, and upon motion of appellants, after answer filed, was transferred to equity, and upon final hearing the court adjudged in favor of plaintiff (now appellee), and from that judgment appellants have appealed to this court. Both parties claimed title under W. M. Houchin; the defense, in substance, being that the United States government obtained judgments against William Merideth and Elias Merideth, who, it seems, were distillers, for certain sums of money, and, execution having issued thereon, W. M. Houchin entered as security on each of the judgments for each of the said Merideths, and that the bonds were not paid, but execution issued thereon, which was levied by the United States marshal or special bailiff upon the property in question, and the same was sold, and bought by the United States government, and conveyed by deed to the government, and afterwards sold and conveyed to these appellants. It is also claimed that these appellants were in the adverse possession of the land when the same was conveyed to the plaintiff. It is the contention of appellee that the lots were the homestead of Houchin at the time of the seizure and sale, and that no title passed, and that he sold and conveyed the same to one James G. Hardy, and that some time afterwards Hardy executed a title bond to the appellee, and very recently, in compliance with said bond, conveyed same by deed to the appellee. Appellants' contention is that under the law as it then existed, as expounded by this court and by the United States supreme court, the homestead was liable to seizure and sale under execution; and, further, that the question as to the liability of the property in controversy to the seizure and sale was passed upon by the United States circuit court; that, after the sale, Houchin, by proper proceedings, moved the circuit court to quash the levy and sale, upon the ground that the property was his homestead, and that same was not liable to sale, which motion the court overruled. Appellants also contend that Hardy paid nothing for the property. The proof conduces to show that the property was the homestead of Houchin at the time of the levy and sale, and that he afterwards conveyed it to Hardy, and testifies that Hardy paid nothing for it. Hardy's deposition has not been taken; neither has plaintiff given his deposition. It seems that Hardy had executed a title bond to Whitlow for the property some time not long after his purchase from Houchin, both being after the sale aforesaid, and it seems that the appellee rented the same out for a time; but afterwards it seems that

the property was occupied by one Holmes, who paid rent to the United States government, and it is claimed that he was in possession of it at the time that these appellants purchased same. It is also pretty clearly shown that Houchin, after the sale, had attempted to have the sale set aside upon the grounds hereinbefore mentioned, and that the court adjudged against him. It appears to be admitted that the same property was exempt from execution under the laws of the United States that was exempt under the Kentucky statute at the time of the seizure and sale of the property in contest; and it is the contention of appellee that the lot in question was, by the laws of Kentucky, exempt from execution at that time, it being the homestead of Houchin. It is, however, the contention of appellants that, under the law announced by this court in *Com. v. Cook*, 8 Bush, 220, the homestead exemption only applied to debts or liabilities between individuals, and that there existed no homestead exemption as against an execution in favor of the commonwealth; hence that the same rule, of necessity, must be applied to executions in favor of the United States. It was held in the decision, *supra*, that the exemption law of 1866 was intended to operate in transactions between individuals, and nowhere refers directly or indirectly to the state. It is true that, after the seizure and sale of the property in question, this court in *Com. v. Lay*, 12 Bush, 283, to some extent modified the decision in 8 Bush; but this modification was after the sale of the property in question under execution in favor of the United States, and it is therefore argued that, under the law as it existed at the time of the sale in question, the property was not exempt; hence that perfect title passed under the sale, without regard to any modification or change of the rule of law occurring afterwards. We deem it, however, unnecessary to determine as to the correctness of appellants' contention in this respect.

The further contention of appellants is that the question of the liability of the lot in contest to the execution was made and presented by Houchin to the United States circuit court while he was in possession and still claiming same, and that the same was decided adversely to his claim; and inasmuch as the said court had jurisdiction of the matter, and its judgment therein has never been reversed or modified, the same must be held to be in full force and effect. We think that the record discloses sufficiently that the ground of Houchin's motion was to set aside the sale upon the sole ground that the property was exempt on account of it being his homestead, and that that question was considered and decided by the United States circuit court. It follows, therefore, that Houchin had no title to the lots in question after the sale under the execution aforesaid, and, having no title him-

self, he could not pass any to Hardy. The other questions involved need not be discussed or considered. For the reasons indicated the judgment of the court below is reversed, and the cause remanded, with directions to dismiss appellee's petition, and for proceedings not inconsistent herewith.

#### YOUNG'S TRUSTEE v. BULLEN.

(Court of Appeals of Kentucky. Dec. 17, 1897.)

PROCESS—SERVICE ON NONRESIDENTS—CONFLICT OF LAWS—ENFORCEMENT OF MARRIED WOMAN'S CONTRACT MADE IN ANOTHER STATE—TRUSTS—PARTIES.

1. Civ. Code, § 56, provides, excepting certain persons under disability, that "if a defendant be out of this state," the plaintiff may have a copy of the petition, with a summons annexed, served on him. Section 419 provides that no personal judgment shall be rendered on service, as provided by section 56. The Code previously in force provided for the same mode of service, and declared that it should be deemed actual service. *Held*, that the service, pursuant to section 56, avoids the necessity of appointing an attorney to defend, or of executing a bond before judgment, as provided in cases of constructive service, and authorizes a judgment subjecting any property of the defendant, whether he be a nonresident, or merely an absent defendant.

2. Plaintiff may testify for himself against a nonresident defendant who has been served, as provided by Civ. Code, § 56.

3. A contract executed by a married woman in another state, where it is valid, can be enforced in Kentucky by subjecting her property in Kentucky to the payment of the debt thus created.

4. Under a will authorizing a devisee to select a trustee from several persons named, and providing that the said trustee shall, with the consent of the devisee and her husband, have the absolute control and management of the property, the income to be paid to the cestui que trust for life, and at her death the principal to go to her children, the trustee is a necessary party to an action to subject the income to the payment of a debt of the cestui que trust, and may make defense and prosecute an appeal.

5. A trustee who has made an unsuccessful defense to an action to subject the income of the trust estate to the payment of a debt of the cestui que trust is not entitled to an allowance of attorney's fees out of the trust estate until the debt has been paid.

6. A trustee having, in good faith, paid out, for the support and maintenance of the cestui que trust, the amount of certain collections before they were actually made, a judgment refusing to compel him to pay such sums on a debt of the cestui que trust will not be disturbed.

Appeal from circuit court, Henderson county. "Not to be officially reported."

Action by Charles W. Bullen against H. M. Young, Sudie S. Young, and Harry Soaper, trustee of Sudie S. Young, to subject the trust estate to payment of a debt. Judgment for plaintiff, and Harry Soaper, trustee, appeals, and plaintiff files cross appeal. Affirmed.

Yeaman & Lockett, for appellant. S. B. & R. D. Vance, for appellee.

WHITE, J. H. M. Young and Sudie S. Young are husband and wife, and in the year 1888 lived in Kansas City, state of Missouri, and while there they borrowed from the Continental National Bank of St. Louis, Mo., of which appellee was cashier, the sum of \$5,000.

This note was renewed several times, and each time signed by the wife and husband. There was \$2,500 paid on this note to the bank, and finally appellee, through whose influence with the bank the loan was made, himself paid off the note to the bank, and took the note of Mrs. Young and her husband for the amount so paid. This note to appellee, Bullen, was renewed several times, but the last renewal, and the one sued on, was signed in the state of Pennsylvania, and sent by mail to appellee in St. Louis, Mo.; Young and wife having left the state of Missouri, and moved to the state of Pennsylvania. This action is brought by appellee on the last renewal, and by it he seeks to subject the estate of Sudie S. Young that is in the state of Kentucky, Henderson county, in the hands of a trustee appointed by the will of Sudie S. Young's father, to the payment of this note. The petition filed makes both Sudie S. Young and her husband and Harry Soaper, trustee, parties defendant. There was an affidavit for warning order filed, the same was made, and attorney appointed to defend. The appellee also took a copy of the petition and summons, and obtained service in the state of Pennsylvania, as provided by section 56, Civ. Code. Actual service was had on the trustee, and he alone filed answer, and denied the right of appellee to subject any part of the trust estate in his hands to the payment of appellee's note, and pleads that Sudie S. Young is one of the children of William Soaper, who died testate in Henderson county, and by the will of said Soaper, which was duly probated, etc., it is provided as follows: "Item 8. It is my will, and I direct, that the property of every kind herein devised to my daughters shall be held in trust for their separate use and benefit by my sons, Richard H. Soaper, Thomas Soaper, William Soaper, and Harry Soaper, and my sons-in-law, L. C. Dallam and S. K. Sneed, but I authorize each of my daughters, from the persons above named, to select one as and for her trustee, and the trustee so selected shall exercise the trust for and on behalf of her so selecting him, exclusive of the others above named as trustees. The said trustee, with the written consent of my daughters and their husbands, if they have any, shall have the absolute control and management of said property, and may loan out, sell, invest, or reinvest it, as to them may seem best. My said daughters shall have the use of said property, and the absolute right to its annual profits or proceeds, my object being to preserve the principal in such shape as they may prefer during their lives, and that at their death it shall go to their children, and, in default of children, to their right heirs, or persons as they may by last will and testament appoint." The property in the hands of the trustee is 10 bonds of \$1,000 each of the city of Henderson, and 294 acres of land in Henderson county.

It is alleged in the answer of the trustee that Sudie S. Young is a married woman, and has children living. It is contended by the trustee that Sudie S. Young, under the will of her fa-

ther, took only a life estate in the property devised to her, with remainder to her children, or to such person as she might appoint, and that the said property was not subject to appellee's debt. This answer of the trustee denies that the note sued on is the debt of the married woman, Sudie S. Young, but charges that the same was and is the debt of her husband, H. M. Young, alone. Sudie S. Young nor her husband, H. M. Young, ever appeared or answered, or made any defense to the action. The case was tried by the chancellor upon the testimony of appellee, Bullen, and of proof of the laws of the state of Missouri.

The court rendered judgment ascertaining the amount due on the note, adjudging it to be the debt of Sudie S. Young, and that the rents and interest of her property situated in Henderson county were subject to its payment, and directed the appellant, trustee, to pay the debt of appellee out of the rents of the land and the interest on the bonds as they are collected by him; but the court did not subject the property itself to the payment of the debt,—only its income,—and adjudged appellant to pay to appellee \$125, rents collected, and then in his hands. From this judgment the trustee alone appeals, and contends that Sudie S. Young and her husband were not before the court at the date of the rendition of the judgment, or at all, and that no judgment could be rendered against her or her husband, subjecting her property in Henderson county to the payment of appellee's debt, and that the service had by delivery of a copy of the petition and summons to Sudie S. Young and H. M. Young in the state of Pennsylvania was not an actual service, but only constructive, and, if constructive, the judgment was erroneous, because no bond was given, as required by the Code in cases of constructive service. Chapter 2, tit. "Service of Summons," art. 1, which includes sections 47 to 56, inclusive, of the Civil Code, provides how summons may be served. Section 56 of said chapter and title provides: "Excepting infants, under the age of fourteen years, other than married women, and persons of unsound mind and prisoners, if a defendant be out of this state, the plaintiff may take a copy of the petition, certified by the clerk, with a summons annexed thereto, warning him to appear and answer the petition within sixty days after the same shall have been served on him, and may cause a copy thereof to be delivered to such defendant by a person to whom he is personally known. Proof of the delivery shall be made by the affidavit of the person making it, indorsed on or annexed to the certified copy and summons, in which the time and place of the delivery, and the fact that the defendant was personally known to the affiant, shall be stated. The officer before whom the affidavit is made shall certify that the affiant is personally known by him to be worthy of credit." This record shows



that service was had on Sudie S. Young and H. M. Young in substantial compliance with this section. Therefore, the very material inquiry arises as to the effect of such service. Section 86 of the Old Code, under the head of "Actual Service," is identical with section 56 quoted supra, followed by section 87, which declares that service by section 86 shall be deemed actual service, and the case shall stand for trial at the first term beginning not less than 60 days thereafter. In the case of *Berry v. Berry*, 6 Bush, 594, this court held that this section permitted service on nonresident defendants. By section 419, Civ. Code, it is expressly provided that no personal judgment shall be rendered on service, as provided by section 56.

We are of opinion that the service had in pursuance to section 56 avoids the necessity of appointing an attorney to defend, or of executing a bond before judgment, as provided in cases of constructive service, and that after such service a judgment may be rendered, subjecting any property of the defendant so brought before the court, whether that defendant be a nonresident or an absent defendant. Taking this view of the case disposes of the objection urged to the testimony of the plaintiff below, Bullen.

By the proof in the case, we hold that the note sued was for credit given to Sudie S. Young, and her note was taken and was delivered and dated and payable in the state of Missouri, and is subject to the laws of Missouri. The proof shows that in the state of Missouri a married woman has power to make contracts in her own name, and so bind herself and her property, both real and personal, and that she can borrow money, and execute her note therefor, so as to bind herself and her property and estate for its payment. The question then arises as to whether a contract executed by a married woman in the state of Missouri, where it is legal and binding, can by suit be enforced in the courts of Kentucky, so as to subject her property here to the payment of her contract debt? This question was before the court in the case of *Gibson v. Sublett*, 82 Ky. 596, and the court then said (opinion of the court by Judge Lewis): "In our opinion, whenever it is ascertained and determined, by judgment of court, that a contract made by a married woman in another state is valid and binding, as, according to the rule founded upon comity between the states, the contract in this case must be adjudged, the remedy provided for the satisfaction of judgments should be applied as though the judgment was against a feme sole, or a married woman invested with the rights, and subject to the responsibilities, of a feme sole." This doctrine is supported by *Milliken v. Pratt*, 125 Mass. 374; *Wood v. Wheeler*, 111 N. C. 231, 16 S. E. 418; *Evans v. Cleary*, 125 Pa. St. 204, 17 Atl. 440; *Wright v. Remington*, 41 N. J. Law, 43 S.W.—44

48; *Robinson v. Queen*, 87 Tenn. 445, 11 S. W. 38. The case of *Ruhe v. Buck* (Mo. Sup.) 27 S. W. 412, cited by counsel, was decided by a divided court, but the points principally discussed seem to be that at the time of contract there was no action maintainable against a married woman by the laws of Missouri, and the spirit of comity did not require that a nonresident shall be allowed a remedy which by the policy of the state is denied to the citizens. The contract in this case was made in Dakota, before the act of the state of Missouri removing the disabilities from a married woman was passed. Judge Sherwood, in a very able dissenting opinion, maintains that the action could be maintained against a married woman to the extent of her valid contract made in Dakota, although that contract was prohibited by the laws of Missouri, and no remedy given by the latter state for its enforcement. It seems to be well settled in this state and many others that a contract, if valid where made, is equally so everywhere, and will be enforced in the courts of this state. Story, Conf. Laws, §§ 66, 102.

Appellee complains that the appellant, trustee, had no right to make defense to the action, or to prosecute this appeal. We are of opinion he was a necessary party to the action, and this seems to be conceded by appellee making him a party, and would have a right to make defense, if an attempt be made to appropriate the trust fund in his hands wrongfully, and in which event he would be entitled to an allowance of reasonable attorney's fees, to be paid out of the trust estate; but, having made an unsuccessful defense, we are of opinion he was not entitled to his attorney's fees out of the trust estate until after appellee's debt is paid.

It appears from the report of the trustee that he had collected, November 1, 1895, \$250, and August 29, 1895, \$100, and that before the actual collections he had in fact paid said sums to his cestui que trust in good faith for her support and maintenance, and these sums the court in its judgment refused to compel the trustee to pay appellee on his debt. We do not feel inclined, under the circumstances, to disturb this part of the judgment. Wherefore the judgment on the cross appeal is affirmed, and on the original appeal affirmed, with damages.

#### ROONEY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 7, 1897.)

CRIMES AGAINST RAILROADS—DISTURBING TRACK FIXTURES—INDICTMENT—EVIDENCE.

1. An indictment under Ky. St. § 807, making it an offense to disturb a fixture attached to the track or switch of a railroad in operation, need not allege that the railroad company was a corporation authorized to do business in the state.

2. Admission of rules of railroad, if error, is

harmless, the evidence independent of them showing that destruction of a switch light is within Ky. St. § 807, making it an offense to disturb a fixture attached to the track or switch of a railroad in operation, or do anything whereby an engine or car might be upset, arrested, or thrown from the track.

Appeal from circuit court, Laurel county.

"To be officially reported."

John Rooney appeals from a conviction. Affirmed.

H. C. Eversole, for appellant. W. S. Taylor, for the Commonwealth.

GUFFY, J. The appellant was indicted, tried, and convicted under the following indictment: "The grand jury of Laurel county, in the name and by the authority of the commonwealth of Kentucky, accuse John Rooney of the crime of willfully and maliciously tearing up, displacing, breaking, and disturbing a fixture attached to the track and switch of a railroad in operation, whereby the engine and cars on said railroad might be upset, arrested, and thrown from the track and switch of said road, committed in manner and form as follows, viz.: The said John Rooney did on the 4th day of October, 1897, and before the finding of this indictment in the county aforesaid, unlawfully, willfully, and maliciously tear up, displace, break, and disturb a fixture attached to the tracks and switches of the Louisville & Nashville Railroad Company's railroad, a railroad then in operation, viz. a switch light, by striking and hitting said switch light with a coupling pin, bars, and pieces of iron and other hard substances, whereby the engine and cars on said railroad and switch thereof might be upset and thrown from said track and switch, against the peace and dignity of the commonwealth of Kentucky. [Signed] W. R. Ramsey, Commonwealth Attorney 27th Judicial District of Kentucky." Indorsed: "A true bill. S. W. Brock, Foreman." The indictment was found under section 807, Ky. St., which reads as follows: "Any person who shall willfully and maliciously tear up, displace, break or disturb any rail or other fixture attached to the track or switch of any railroad in operation, or break any bridge or viaduct of such road, or do any act whereby any engine or car might be upset, arrested or thrown from the track of such road or switch, or any branch or turn out, shall be confined in the penitentiary not less than one nor more than five years." The defendant filed grounds for new trial, which are as follows: (1) Because the court failed to properly instruct the jury as to the law of the case, and refused to instruct the jury as to the law of the case; (2) because the court permitted illegal and incompetent testimony to go to the jury against defendant, over his objections; (3) because the verdict of the jury is contrary to law and evidence; (4) because the court permitted the testimony of one Johnson to go to the jury as to the printed rules

of the Louisville & Nashville Railroad Company, as to the operation of its trains, and the probable result of removing a switch light, over the objections of defendant; (5) because he has discovered important testimony in his defense since the trial that he did not and could not by reasonable diligence have discovered before the trial.

It is insisted for appellant that the indictment is insufficient, and the demurrer thereto ought to have been sustained, and he also earnestly contends that there is no evidence to authorize the verdict of the jury. It will be seen that the injury to the road consisted in knocking off one of the lamps or lights fastened to or belonging to one of the switches of the Louisville & Nashville Railroad Company. The destruction of the switch light is conclusively proven, and it is also proven by the commonwealth's own witnesses that trains continued to run both ways during that night, without being delayed or hindered in consequence of the destruction of the light. It is also proven that the switch was closed at the time of the destruction of the light. The commonwealth then introduced H. V. Johnson, who testified as follows: "I am a stock agent of the L. & N. Railroad Company. I reside in the city of Louisville, Ky. I am acquainted with the rules governing the operation of railroad trains and engines. A switch lamp is used for the purpose of reflecting two colors of lights,—white and red. The lamp is set on an iron pin that goes into a hole or socket in the bottom of the lamp. When the switch is closed the white light reflects to the track: when the switch is open it reflects a red light. A white light indicates to a train crew that the track is clear; a red light is to indicate to the crew that the train is to run into the switch. The switch is always closed, except when open for a train to enter in from the main track, and when closed the light always reflects white. The switch lamp never reflects a red light to the track until the lock is thrown. This lock can only be opened by the train crew, who carry the keys to unlock it, whose duty it is to relock the switch before they leave it. These lights are kept lighted at night for the purpose of indicating to the crew of passing trains the location of a switch. The engineer stops his train, and one of the brakemen goes and unlocks the break, and throws the switch, which turns the red light to the track, and the train crew then pulls in the switch. If this switch lamp is misplaced, and the switch dark; a passing train could not tell where these switch tracks are. But for the switch lights, a train might pass the switch on the main track without knowing it, and might run into another train, and cause a collision; or it might cause the engineer to stop his train too soon, not knowing the exact location of switch; or it might cause the engineer to run his train past the switch before stopping. It is the duty of a train crew, if

they find a dark switch, to give notice all along the line of that fact, which might disarrange the running of a train on the track, and cause the trains to stop. I knew John Rooney, the defendant. He was arrested for this offense in the city of Louisville by Capt. Haager, chief detective of the Louisville detective force, at the house of defendant's brother-in-law, a few days after he knocked the switch lamp off. If he resisted the arrest I do not know it, or if he locked a door to resist arrest I do not know it. I was with the officer when the arrest was made. We went to the house, and called for him, and after a little delay he came out. I saw no weapon that he had. If he attempted to make his escape the back way, I do not know it. The fact of his knocking the lamp off of the switch, and putting it out, would not cause the train to run into the switch, unless some one threw the switch, or prevent or obstruct a train on the main track. When a switch light is out, it indicates danger; and it is the duty of the train crew to stop the train, and go to the nearest telegraph office, and notify the train dispatcher. The failure to display a signal at a point where there is a switch light or stationary signal means the same as a red light, which indicates danger, and is a signal to stop. A train cannot pass it without stopping and ascertaining the cause." Cross-examined by defendant: "I am not an engineer, and never operated or run an engine, nor never fired an engine. I never had anything to do with operating an engine or train on a railroad track, but have rode on engines and seen engineers operate them on the road." Counsel for defendant propounded the following question: "If knocking the lamp off of its place, and putting it out, would of itself cause, or might cause, a train on the main track to be arrested, upset, or thrown from the track, unless some one threw the lock of the switch, how could the act of the defendant cause any train to be arrested, upset, or thrown from the track or in any way injured? A. I will not answer that question unless you permit me to answer it in my own way. Counsel: The court will determine whether you answer or not. A. It could not, of itself, but it might cause a train detained on the main track on account of the switch being dark and another train to run into it passing on the main track. Trains generally have orders where to switch for other trains to pass. Engineers do not always know the roads over which they run well enough to know where the switches are located, especially of dark nights. Headlights do not always reflect light sufficient for the engineer to tell where the switches are."

It seems to us that the indictment is sufficient. It charges that he did disturb a fixture attached to the tracks and switches of the Louisville & Nashville Railroad, a railroad then in operation, and we do not think it was necessary to allege that the Louisville & Nashville Railroad was a railroad cor-

poration authorized to do business in the state; and it is also evident that the allegations of the indictment are in strict accord with the section of the statute, supra, providing for the punishment of persons committing any of the offenses denounced. It is earnestly contended for appellant that the witness Johnson was not qualified to testify as to the danger or injury that might result from the destruction of a switch light, and that it was error to allow him to testify as to the rules of the company in regard to the running of trains. From his testimony, independent of the rules, it is manifest that some interruption to the proper and safe operation of the road might be caused by the displacing or destruction of said light, and that such arresting, delay, or obstruction would be the proximate result of the destruction of the switch light aforesaid. It would seem to be reasonable, even in the absence of evidence, that the destruction of the switch light would reasonably tend to imperil the safe and prompt operation of the railroad, and beyond all question the destruction of the light comes within the literal expression used in the statute, to wit, "fixture attached to the track or switch of any railroad in operation." The evidence, independent of the proof as to the rules, was sufficient to authorize the verdict. The jury were the judges as to whether the break was willful and malicious, and also of the other facts, and from the proof whether the act might result in any of the injuries mentioned in the statute. The public and the railroad companies are vitally interested in the protection of the means of railroad transportation, and it is of the utmost importance that the public, as well as the roads, should be as secure as possible from any and all interference which might reasonably obstruct the operation of the road or endanger the lives of passengers. The statute having this end in view should be reasonably and fairly enforced, and although one year's imprisonment might seem a severe punishment for the act complained of, when no serious harm seems to have resulted therefrom, yet we do not feel authorized to disturb the verdict, there certainly being some evidence to sustain it, and the court having properly instructed the jury. Judgment affirmed.

#### FRIEDRIZIE v. MOORMAN'S ADM'X.

(Court of Appeals of Kentucky. Dec. 17, 1897.)

##### HUSBAND AND WIFE—CHATTEL MORTGAGE.

An action to foreclose a chattel mortgage executed by husband and wife, in which the wife (sued both as administratrix of her husband, and in her individual capacity) pleaded her coverture at the time the note and mortgage were executed, and that the mortgaged property belonged to her, was properly dismissed on the evidence.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by Fred. Friedrizle against Jennie P. Moorman, as administratrix of John Moorman and individually, to foreclose a chattel mortgage. Judgment for defendant, and plaintiff appeals. Affirmed.

Gardner & Moxley, for appellant. Bullitt & Shields, for appellee.

GUFFY, J. It is alleged, in substance, in the petition in this action, that the defendant, Jennie P. Moorman, and John Moorman, being indebted to the plaintiff in the sum of \$324, executed and delivered to plaintiff, Friedrizle, their certain promissory note, due one day after date, for the sum of \$324, and that to secure the payment of said note they executed a mortgage on a certain lot of personal property (describing same), and that after the execution of said note and mortgage the said John Moorman died, and Jennie P. Moorman qualified as his administratrix, and that plaintiff had made demand, accompanied by the proper affidavit, and that payment had been refused. Plaintiff prayed judgment against Jennie P. Moorman, administratrix as aforesaid, and against Jennie P. Moorman, for his said debt, and that his lien on said property be foreclosed, and for a sale of the same. A demurrer to the petition was sustained, after which an amended petition was filed, in which it was alleged, in substance, that Jennie P. Moorman, in consideration of plaintiff's forbearing to foreclose said mortgage, and in consideration of the use of the articles mentioned therein, agreed and promised, in writing, to pay the said note, and, by the provisions of the said mortgage, plaintiff had at all times, after the execution of the mortgage, the right to the possession of the property mentioned therein. Afterwards a substitute amended petition was filed, in which it is alleged that subsequently to the death of John Moorman, and while defendant, Jennie P. Moorman, was an unmarried woman, she,—in consideration of plaintiff's forbearance for a reasonable time to foreclose his mortgage on the property mentioned in the petition,—the defendant, Jennie P. Moorman, in her individual capacity, agreed and promised, in writing, to pay the said note for \$324, and that for a reasonable time he did refrain from bringing suit and foreclosing the said mortgage. Defendant's demurrer to the petition, as amended, was overruled, as was her motion to strike out certain parts of the amended petition. The answer may be treated as a denial of all the averments of the petition as amended, except the fact that the parties had signed the note and mortgage. The answer also averred that Jennie P. Moorman, at the time of the signing of the note and mortgage, was a married woman, and pleaded and relied upon her coverture, and also claimed that the property described in the petition was her individual property. The mortgage was never acknowledged or recorded. The

court, upon final hearing, dismissed plaintiff's petition, and from that judgment plaintiff has appealed.

A considerable amount of testimony was introduced, and without going into a general discussion of the testimony, or the various contentions of counsel for appellant and for appellee, it seems to us that, upon a careful consideration of the law and facts involved, the same sustains the judgment of the court below. The judgment appealed from is therefore affirmed.

SLUSHER v. SIMPKINSON et al.  
(Court of Appeals of Kentucky. Dec. 9, 1897.)

#### FRAUDULENT PREFERENCE.

Where defendant bought of an insolvent debtor a stock of goods for \$3,000, paying him \$1,500 cash, and applying the balance to a debt of the insolvent on which defendant was bound as his surety, it was a preference, under the statute of 1868, to the extent of \$1,500, and an order of the court to the preferred creditor to surrender it, or pay it over to the court receiver, for the benefit of all the creditors, was proper.

"Not to be officially reported."

On petition for rehearing. Overruled.

For former opinion, see 40 S. W. 570.

A. K. Cook, for appellant. Weller & Hays, for appellees.

HAZELRIGG, J. The sole question discussed by counsel representing appellant on the original hearing was one with respect to the pleadings. It is now urged that the court below ought not to have directed appellant to pay to the receiver the sum representing the extent to which appellant had been preferred, but have ordered appellant to account for the goods purchased of the debtor, Howard. The facts are that appellant bought of Howard a stock of goods of the value of \$3,000, paying him, in effect, the sum of \$1,500 in cash, and applying the balance to the payment of a debt of the insolvent debtor on which appellant was bound as his surety. This was a preference, under the statute, to the extent of the sum of \$1,500, and the court properly ordered the preferred creditor, the appellant, to surrender it, or pay it over to the court's receiver for the benefit of all the creditors. Appellant is one of them, and is, of course, entitled to his share of the fund to be distributed. And if the creditors have in some way already got the goods, or some part of them, as suggested by counsel, this may be adjusted on the final distribution of the fund, as the creditors cannot have both the goods and their purchase price in the hands of the appellant. Petition overruled.

DORSEY'S ADM'R et al. v. SWANN.  
(Court of Appeals of Kentucky. Dec. 7, 1897.)  
LIMITATIONS—VENDOR AND VENDEE—LIEN FOR PURCHASE PRICE—INTEREST—DESCENT AND DISTRIBUTION.

1. A deed recited that a part of the premises were in litigation, and provided that, if it should be decided that the grantor did not own the dis-

puted property, \$450 of the purchase price should be refunded to the grantee. By parol agreement the payment of this portion by the grantee was deferred until the litigation should be determined. After a decision of the supreme court sending the case back for a new trial, the grantee purchased the claimant's interest for \$50. The grantor then sued the grantee's devisee to recover the \$450, less \$50 paid by the grantee. *Held*, that limitations did not begin to run until the purchase of the outstanding interest.

2. The lien for the deferred payment on the disputed parcel did not extend to the other lands embraced in the deed.

3. The \$450 should not bear interest, except from the date of the institution of this suit.

4. The judgment must be made out of property in the hands of the devisee devised by the grantee.

5. Though a suit is based upon a promise, and the promise is not proved, yet if plaintiff proves himself entitled to relief, in relation to the essential matters in dispute, relief should be granted.

Appeal from circuit court, Hardin county.  
"Not to be officially reported."

Suit by John C. Dorsey's administrator and others against Ann Swann. From a judgment for defendant, the plaintiffs appeal. Reversed.

James Montgomery and C. H. Noggle, for appellants. W. H. Marriott, for appellee.

GUFFY, J. It appears from this record that John C. Dorsey and wife and Elizabeth Dorsey, in October, 1870, sold and conveyed to John J. Swann a lot of land in Hardin county, and a certain house and lot, known as the "Duncan Lot," at Nolin Station, in said county of Hardin, and a strip of land near said lot, at the agreed price of \$5,000, part of which was paid in cash and notes executed for the residue. In the deed is the following stipulation: "It is understood that one-half of the house and lot is in dispute in a suit in the Hardin circuit court wherein Moses Duncan's heirs are plaintiffs and Joshua G. Dorsey," etc., "are defendants, and that if said heirs hold said lot the grantors herein are to pay back four hundred and fifty dollars for the part so sold, the whole house and lot being estimated at nine hundred dollars." It also appears that in the suit of Sallie Duncan against Mary E. Dorsey, etc., this court, in February, 1875, rendered the following opinion: "The court, being sufficiently advised, rendered the following opinion herein: John C. Dorsey, being one of the parties in possession of the property claimed by appellant, and a defendant to the action, and against whom a recovery is sought, was an incompetent witness, and, if competent, the whole testimony, when considered, did not authorize a dismissal of the action. The appellees are attempting to enforce this contract, made with an infant for the sale of his real estate, by proving the declaration of the infant, prior to his arriving at age, to the effect that the consideration had been fully paid, and without showing that the contract was beneficial, or that the wants of the infant required that the sale bond should be made,

and, even if these facts appeared, the chancellor would hesitate before determining that under such circumstances the sale by the infant should be confirmed. The guardian of the infant had means in his hands, at the time this sale was made, sufficient to supply all his demands, and he seems never to have been consulted as to the propriety of making the sale. It is also remarkable, considering the testimony of John Dorsey, as in the cases, that all three payments should have been made the father of the appellant when he was under age, and the chances taken for his making the conveyance after arriving at his majority; and the more so when the purchaser failed even to take a receipt for the payment of any part of the purchase money, when he assumes to have paid the whole amount. Such proof of payment, in any case, would be regarded with suspicion, and the chancellor, before he would enforce such a contract made with one under age, must have evidence more satisfactory than is to be found in this record, both as to payment and satisfaction. The evidence shows conclusively that the infant obtained a horse of the value of \$150. This amount should be accounted for. The judgment is reversed, and the cause remanded, with directions to adjudge to the appellant and her mother, who has dower in the same, the one undivided half of the house and lot in controversy, and requiring the parties in possession, defendants to the action, to account for the rent while they have had possession or the beneficial use of the property, allowing them such sums as were expended in making necessary repairs, if any, required to preserve the property from decay. From the rents will be deducted the sum of \$150, with interest from the time the horse was received, and, if these rents will not satisfy the same, the interest of the infant will be rented out until the same is paid, or, if the property is indivisible, the whole property can be sold, and the proceeds divided according to the rights of the parties. The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion." It further appears that this last-named suit, upon the filing of the opinion aforesaid, was referred to the master commissioner for the purpose indicated in the opinion, but that no report was made pursuant thereto, and the case seems to have remained upon the docket in the Hardin circuit court; and on the 1st day of May, 1891, John C. Dorsey, etc., instituted this action in the Hardin circuit court against Ann Swann, as sole devisee and executrix of John J. Swann, seeking to recover judgment for the \$450 referred to in said deed, less a credit of \$50 alleged to have been paid by Swann to extinguish the Duncan claim to one-half of the house and lot aforesaid, alleging a promise upon the part of Swann to pay said sum made within less than five years prior to the institution

of this action. The defendant demurred to the petition, and also by answer denied the promise, and pleaded the statute of limitations; and, after issue formed and proof taken, the action was submitted, and judgment rendered dismissing appellant's petition, and from that judgment appellant prosecutes this appeal. The suit of Dorsey, etc., against Duncan, seems to have been consolidated with this suit, and so treated by the court below, although appellee's contention is that it never was so consolidated.

It seems from this record that the purchase money for the Duncan house and lot was not in fact all paid, but by agreement the payment was to be postponed until the controversy between Duncan and Dorsey was settled. It also appears that the proof and report as to improvements, payment, etc., allowed by the opinion of the court, supra, was never executed, but the case remained on the docket until after the institution of this suit. We also think it satisfactorily appears that this suit was consolidated with the aforesaid suit of Dorsey, etc. This suit was filed May 1, 1891. It will be seen that this suit was based upon a promise on the part of Swann to pay the aforesaid sum of \$450, less \$50, which he had paid, or agreed to pay, to extinguish the Duncan claim. The defendant denied the promise, and also pleaded the statute of limitations against the claim sued on. After the issues were made up and proof taken, the court dismissed appellant's petition, and from that judgment this appeal is taken. It will be seen from this record that Swann and Dorsey are both dead, and the action is between the representatives of same. It seems to us that the proof of promise to pay is fairly well sustained, but, aside from that, it seems to us that the claim of appellant was not barred by the statute of limitation. The final termination of the rights of the Duncan heirs to one-half of said house and lot would be the time from which the statute of limitation would run, and that issue never was settled until shortly before the death of J. J. Swann, and finally determined by his purchasing the Duncan claim at the sum of \$50, for which it is conceded that he is entitled to credit; and, although this suit is based upon a promise to pay, yet, as defense was made under a well-settled rule of this court, plaintiff is entitled to such relief as it appears he is entitled to under the proof in the action respecting the essential matters in dispute. We are not inclined to hold, however, that the lien for the deferred payment on the Duncan lot extends to the other land embraced in the deed, nor do we think that the \$450 should be held to bear interest, except from the date of the institution of this suit. For the reasons indicated the judgment appealed from is reversed, and the cause remanded, with directions to render a judgment in favor of plaintiff against the appellee, to be made, however, of assets

in her possession devised to her by J. J. Swann, for which appellant may have execution; and, as to her liability on account of property received and disposed of, no judgment is rendered. The judgment shall be for \$450, with interest from the 1st of May, 1891, subject to a credit of \$50, as set out in the petition, to wit, August 11, 1890. The court will also adjudge to appellant a lien on one-half of the house and lot described in the deed for the payment of the judgment hereinbefore directed to be rendered, and adjudge a sale thereof upon such terms, either as to the whole house and lot or a part thereof, as the court may deem most advantageous to all parties; and the cause is remanded for proceedings consistent herewith.

#### MANN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 8, 1897.)

##### BAILIFFS—FEES AND COMPENSATION.

Where plaintiff, having been appointed a special bailiff by a circuit court for that purpose, proceeded to another county, and arrested certain witnesses for the commonwealth, which witnesses were dieted, lodged, and transported 190 miles at his expense, for which he duly made out his sworn account, and presented it to said court, he is entitled to an allowance therefor, under Ky. St. § 1142, providing that in such cases "said bailiff shall be allowed by the judge a reasonable compensation for said service, not to exceed that allowed sheriffs for conveying prisoners to the penitentiary," and Ky. St. § 361, authorizing an allowance to sheriffs of mileage, and the actual necessary expenses for feeding, lodging, and transporting a prisoner to the penitentiary.

Appeal from circuit court, Knox county.

"To be officially reported."

Action by S. H. Mann against the commonwealth of Kentucky. Motion for allowance of mileage and expenses for transporting witnesses. Plaintiff appeals from an order overruling said motion. Reversed.

Marcum & Pollard, for appellant. W. S. Taylor, for the Commonwealth.

LEWIS, C. J. In a prosecution for murder, of the commonwealth, plaintiff, against Joe Adkins and Jesse Fields, defendants, pending in the Knox circuit court, an order was made at the April term, 1895, thereof, appointing James H. Hudson and S. H. Mann special bailiffs, and directing them to proceed to Breathitt county, and summons, arrest, and bring to the court, by the 10th day of that term, witnesses for the commonwealth, whose names were recited, numbering more than 30 persons. As appears from the affidavit of appellant, S. H. Mann, he did, in obedience to said order, go to Breathitt county, and there arrested 10 of said witnesses, besides having summoned, as town marshal of Jackson, Breathitt county, 30 witnesses; that the witnesses so arrested by him were dieted, lodged, and transported 190 miles at his expense, for which he made out an account, sworn to, and presented the same to the

Knox circuit court at its January term, 1896, and moved said court to allow his claim. This is an appeal from the order of court overruling said motion. Section 1142, Ky. St., provides "that in the trial of any felony case, in this commonwealth, when the case has been called, and either party is not ready for trial, because of the absence of any witness, or witnesses, in any county other than that in which the said court is sitting, and having been duly subpoenaed, and failing to appear, the circuit judge thereof, be, and he is hereby empowered, to appoint a special bailiff to summon said witness, or witnesses, and who shall have power to arrest, and bring said witness or witnesses immediately before said court. Said bailiff shall be allowed by the judge a reasonable compensation for said service, not to exceed that allowed sheriffs for conveying prisoners to the penitentiary." Section 361 authorizes an allowance to sheriffs of mileage, and the actual necessary expenses for feeding, lodging, and transporting a prisoner to the penitentiary. In our opinion, appellant showed himself clearly entitled to an allowance at the same rate allowed by that section to sheriffs, for the services rendered and expenses incurred by him under said order, though it is the province of the court to determine, according to the proof of services rendered, the amount to be allowed. Therefore the court erred in disallowing his entire claim. The judgment of the court below is therefore reversed, and the cause remanded for proceedings consistent with this opinion.

#### BRAMEL v. BYRON.

(Court of Appeals of Kentucky. Dec. 8, 1897.)

PRINCIPAL AND SURETY—AUTHORITY OF AGENT OF SURETY.

Under Gen. St. c. 22, § 20, providing that "no person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing," one whose name was subscribed to a note as surety, in his immediate presence and by his express direction, but without written authority, by his wife, who was in the habit of signing his name for him and doing all his writing for him, was not liable thereon.

Appeal from circuit court, Mason county.

"Not to be officially reported."

Action by John W. Bramel against William Byron to recover on a promissory note bearing his name as a surety. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. M. J. Cochran, for appellant. James N. Kehoe and C. D. Newell, for appellee.

PAYNTER, J. The pleadings admit that William Byron was surety on the note upon which this action is brought; that his name was not written by himself, but that it was subscribed to the note in his immediate presence, and by his express direction, by his wife; and that she was in the habit of signing his name for him, and doing all his writing for him. The sole question presented is

whether he can be held liable on the note under the statute, which reads as follows: "No person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing signed by the principal, or if the principal do not write his name then by his sign or mark, made in the presence of at least one credible attesting witness." Gen. St. c. 22, § 20. The mere fact that the party who signed Byron's name to the note was his wife does not impart validity to the act, any more than if his name had been signed by a stranger under the same circumstances. In other words, the question of his liability is not affected the one way or the other by reason of the fact that the person who signed his name was his wife. This court has held that where one subscribes the name of another to an obligation as security, although done under his direction and in his presence, unless done by written authority, it does not make him liable on such obligation. This court has ruled that in such cases the party who writes the name is acting in the absence of written authority which the statute requires in order to bind the party as surety whose name is thus subscribed to the writing. *Billington v. Com.*, 79 Ky. 400; *Simpson v. Com.*, 89 Ky. 412, 12 S. W. 630; *Dickson's Adm'r v. Luman*, 93 Ky. 614, 20 S. W. 1038; *Wilson v. Linville* (Ky.) 27 S. W. 857. Counsel for appellant concedes that this court has given the interpretation to the statute we have stated, but insists that the court has erroneously interpreted the statute, and should change its ruling. Counsel presents his reasons in a strong and persuasive way, but we feel that the law as settled by this court in cases referred to should be followed in this case. If this court had given meaning to the statute which was not intended by the legislative department of the government, many opportunities have been presented for amending it to meet the views which counsel urges. Under the facts as stated in this case, there is no question but what, if Byron had been a principal in the note, it would have created a liability on him. But the court has been construing a statute which was designed to protect persons from the acts of others who sought to bind them as sureties. The judgment is affirmed.

#### WILLIAMSON'S EX'R v. GREEN.

(Court of Appeals of Kentucky. Dec. 9, 1897.)

CLAIMS AGAINST DECEDENT—EVIDENCE.

Upon a suit against an executor to recover for services rendered the testatrix, evidence of a statement made by the executor during a contest over the probate of the will, to the effect that, if the contestants won, he would advise the plaintiff to put in his claim against the estate, is inadmissible.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action by Ann Maria Green against Jane Williamson's executor. From a judgment

for plaintiff, the defendant appeals. Reversed.

Bronston & Allen, for appellant.

WHITE, J. Appellee, Ann Maria Green, brought this suit in the Fayette circuit court against appellant, the executor of Jane Williamson, on an account for \$4,500, for services rendered by appellee to Miss Jane Williamson in her lifetime and for nine years. The defense admitted that appellee rendered some service, but denied the account or any part of same; pleaded that appellee lived with Miss Williamson as one of the family, and without any intention to charge or any intention on the part of the decedent to pay; that, during all these years, appellee was furnished with board and clothing and all other things used, and her medical bills were paid for her by decedent. They deny that appellee did any labor of any kind, and say that servants were furnished who did the household work; and they also plead a full and final settlement of the account of appellee, by Miss Williamson, in her lifetime, agreeing to, and did, give to appellee, by will, the sum of \$300, which sum appellant has paid. This answer was controverted by reply, and the case was tried on the issue, before a jury, which resulted in a verdict for appellee for \$250. Appellant's reasons and motion for new trial having been filed and overruled, he has prosecuted this appeal.

The reasons assigned for a new trial are errors in the admission of testimony excepted to by appellant, errors in giving and refusing to give instructions, and that the verdict is not supported by the evidence, and is contrary to law. The appellee, over the objection of appellant, was permitted to prove by witnesses Conley and Green certain statements of Dr. Price, the executor, made while a contest was on trial over the probaton of the will. These statements, as proven, were that, if the will was broken, the contestants should not have anything; that he would advise appellee and Sallie Green to make out big claims against the estate for services, and he would help them get it. It seem to us the admission of this evidence was error. Dr. Price, who, it is claimed, made the statement, is a party to this case only as executor, and, at the time it was admitted, Price had not testified at all. We think this evidence did not elucidate any point in issue. The only point it could make was to tend to prejudice the minds of the jury against Dr. Price, who is the residuary legatee.

We find no serious objection to the instructions given. They fairly present the law. The proof introduced shows that Miss Williamson, testatrix, was quite old and infirm, and lived alone with her servants till she sought appellee, and took her there to live with her. The proof of appellee shows that,

when testatrix took appellee to live with her, appellee was not in good health, suffering with asthmatic trouble, and was living with her brother-in-law, and had to work out on the farm; that testatrix and appellee were cousins, and testatrix took appellee to her home, and clothed and fed her, and testatrix kept a servant to do the cooking and washing, and in this way the two women lived for several years; that about three years before testatrix died, she was quite ill, and required attention; that, about a year before testatrix died, appellee fell and broke her arm, and then her sister, Sallie Green, was sent for, and remained till the death of testatrix. During the last illness of testatrix, these two sisters and two other ladies were almost constantly there, besides others shown to have been there at times. It seems that testatrix's illness was old age and the consequent debility, and the medicines given were simply resting and soothing powders and stimulants. There was considerable contrariety in the testimony as to the value of these services; some of the witnesses proving the services were fully worth the amount claimed, \$4,500, while others proved that the amount given under the will, \$300, was full and ample pay for the services. The amount of recovery as fixed by the jury is reasonably within the proof as offered. Appellant proved by Dr. Price, the executor, that, during the lifetime of testatrix, he was called to her bedside, as was also appellee and Sallie Green. Testatrix said, "I want to give Sallie Green \$100, to make her equal with Ann Maria, to whom I have given \$300 in my will;" and then testatrix gave Price \$100, and directed it be given to Sallie Green, which was done; and then testatrix told Price to pay Sallie another \$100 in addition to the amount given her in the will. Testatrix then asked Sallie Green and Ann Maria, in the presence of Price, if they were both satisfied; that she wanted them satisfied for what they had done for her in waiting on her and staying with her. They both said they were entirely satisfied. Witness Price also testified that, after the death of testatrix, he had paid appellee the \$300, and took her receipt for same. Witness stated to appellee at the time that this was in full satisfaction of all claims against the estate of Miss Jane Williamson for services of every character, and it was so understood by them. The appellee was called as a witness in rebuttal, and on examination admitted all the above facts proven by Price, except as to the agreement that the payment of the \$300 by Price was in full. She said there was nothing said about its being in full, but that at that time she did not know she had a claim against the estate; she did not then know she was entitled to anything, but was so informed afterwards. From a careful reading of the whole record, we are inclined to the opinion that the verdict of the jury may



have been caused by the admission of this incompetent evidence of Conley and Green; the verdict of the jury being, in our opinion, decidedly against the weight of testimony. Under these facts, in our opinion, the court should have granted appellant a new trial. The judgment is reversed, and cause remanded, with directions to set aside the verdict and judgment, and grant appellant a new trial.

### COMBS v. COMBS.

(Court of Appeals of Kentucky. Dec. 9, 1897.)

**EJECTMENT—DECLARATION—DESCRIPTION—APPEAL—RECORD—PRESUMPTIONS.**

1. In an action to recover a parcel of land and damages for the wrongful holding thereof, which parcel is alleged in the petition to be within the boundaries of a larger tract, it is sufficient if the latter piece be described, without a precise description of the particular parcel.

2. In an action to recover land and damages for the wrongful holding, defendant in an amended answer alleged adverse possession. *Held* that, as the court instructed the jury on that subject, and defendant on appeal did not urge any failure of plaintiff to deny in his reply the allegation of adverse possession, the court on appeal would take it for granted that an issue was properly made, especially as the transcript did not purport to contain the full proceedings.

Appeal from circuit court, Perry county.

"Not to be officially reported."

Action by William Combs (Yellow) against William Combs (Buck). From a judgment entered on a verdict for plaintiff, defendant appeals. *Affirmed*.

**E. E. Hogg**, for appellant. **John L. Scott & Son**, for appellee.

**LEWIS, C. J.** Appellee brought this action to recover 50 acres of land and damages for wrongful holding of it by appellant, which is alleged to be within boundary of a tract of 400 acres described in the petition and owned by appellee. Upon trial the jury returned a verdict in favor of plaintiff, which was followed by judgment that he recover of defendant the land as described in the petition. But, as no bill of exceptions accompanies the transcript, and appellant in record disclaimed intention to file any, the inquiry on this appeal is simply whether the pleadings authorized the judgment. It seems to us, having in his petition described the tract of 400 acres, and alleged he was owner of it, appellee was not required to describe with precision the particular parcel within boundary thereof of which appellant was, as averred, in wrongful possession; for, if appellee was such owner of the entire tract of 400 acres, he was entitled to recover any part of it in wrongful possession of appellant, without regard to particular location or quantity. However, if the petition had been defective in that respect, the omission was supplied by the answer, in which was set out and described the parcel, containing 50 acres, claimed by and in possession of which was appellant. So the issue was

made, and under instruction of the court tried and determined, whether appellee was owner and entitled to possession of the entire tract, including the parcel claimed by appellant. It appears in an amended answer appellant alleged he was in adverse possession of the land claimed by him in this action at the time appellee acquired title to the 400-acre tract. But, as the court particularly instructed the jury on that subject, and counsel does not now urge apparent failure of appellee to deny by reply that allegation, we take it for granted an issue was made by pleadings and on the record, especially as the transcript before us does not purport to contain full proceedings of the case. Judgment affirmed.

### DE WITT v. MOORE et al.

(Court of Appeals of Kentucky. Dec. 15, 1897.)

**HUSBAND AND WIFE — SALE BY HUSBAND OF WIFE'S PROPERTY.**

1. The sale by the husband of a piano bought by him for his wife, who controlled and managed it, and had possession of it at the time of the sale, did not pass the title, and the wife is entitled to the piano as against the purchaser.

2. The wife is not entitled to personal property sold by the husband to another, the evidence showing that both the title and possession were in the husband.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by John H. De Witt against S. T. Moore & Co. and others for the recovery of personal property. Judgment for defendants, and plaintiff appeals. *Reversed*.

**Ed. M. Lewis** and **H. T. Wilson**, for appellant. **Abbott & Rutledge**, for appellees.

**GUFFY, J.** The appellant, John H. De Witt, instituted an action in the nature of a claim and delivery against S. T. Moore & Co., for the recovery of a piano then in Moore & Co.'s possession. It appears it was only stored there; and afterwards Parthenia Brewer was made a party to the suit, and she claimed the piano as her property, she having been once the wife of T. F. Brewer. She also instituted suit against John H. De Witt for the recovery of some household furniture, claiming that as her separate estate. The two suits were consolidated and transferred to the chancery division of the circuit court; and, upon final hearing, the court adjudged in favor of the said Parthenia Brewer, who, it appears, had, after the institution of the suit, married one — Self. The proof conduces to show that a great many years ago the said Parthenia Brewer had inherited a considerable amount of property from her father's estate, which she had, however, given over to the possession and control of her husband, who, it seems, had engaged in distilling and in keeping a livery stable, and had lost the whole of it, or nearly so. It also appears

that she and her husband had boarded for a considerable time with De Witt (the appellant), and owed him a considerable board bill. It also appears that De Witt was then keeping an hotel in the city of Louisville. De Witt based his claim to all of the property in contest upon a bill of sale from T. F. Brewer, and that most of the property was given in payment of board bill, though he claimed to have furnished Brewer and his wife some money. It is manifest that Brewer bought the piano of D. P. Faulds, and paid for the same. But it also appears that the piano was bought for his wife; at least, she seems to have controlled and managed the same up to the time of the institution of the suit to recover the same. The proof conduces to show that the appellee Parthenia Self (née Brewer) had in fact possession of the piano, and it was held under and by her authority at the time of the sale to appellant; and, taking all the proof into consideration, we think she was entitled to the piano, and so much of the judgment as adjudges it to her is affirmed.

As to the other property involved, and for which the appellee Self (née Brewer), instituted suit and recovered, we think the proof sustains the claim of appellant to all that property, and the title, as well as possession, was in fact and in law vested in appellant's vendor, T. F. Brewer, and appellant was entitled to the same. It therefore follows that the court erred in adjudging that property to the appellee Self; and the judgment so adjudging the said property is reversed, and the cause remanded, with directions to dismiss the petition of Parthenia Brewer against the appellant, John H. De Witt, and for proceedings consistent herewith.

#### LOUISVILLE TRUST CO. v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Dec. 15, 1897.)

ADMINISTRATORS — JURISDICTION TO APPOINT — SPECIAL DEMURRER — ACTION UNDER STATUTE OF ANOTHER STATE.

1. Where the petition in an action by an administrator affirmatively shows that the county court appointing the administrator had no jurisdiction to grant administration, the objection may be made by special demurrer.

2. A right of action given by a statute of another state for a death caused there does not confer upon a county court in Kentucky jurisdiction to appoint an administrator of the decedent, when he was not a resident of Kentucky, and left no assets to be administered in Kentucky.

3. Where it does not appear from the petition in an action by the administrator of a nonresident decedent to recover damages, under the statute of another state, for his death caused there, that the decedent had no assets in the county in Kentucky in which administration was granted, or that there were no debts or demands owing to him there, it does not affirmatively appear that the county court had no jurisdiction to make the appointment, and therefore the question cannot be raised by special demurrer, but must be made by plea to the jurisdiction.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Action by the Louisville Trust Company, administrator of James Hall, against the Louisville & Nashville Railroad Company, to recover damages for personal injuries. Petition dismissed on demurrer, and plaintiff appeals. Reversed.

O'Neal & Pryor and B. F. Proctor, for appellant. Lyttleton Cooke, for appellee.

DU RELLE, J. Suit was brought by appellant, as administrator of James Hall, for damages for the negligent killing of its intestate, in Sumner county, Tenn., the petition being based upon a statute of that state giving a right of action for such killing, as well as for the pain and suffering endured before the intestate's death. A special demurrer to the petition as amended was sustained, the ground for the demurrer being stated to be because it appeared from the petition that the court had no jurisdiction,—the petition showing affirmatively that plaintiff's intestate at the time of his death, and previous thereto, resided in Tennessee; that he died in Tennessee; that the negligence by which he lost his life occurred in Tennessee; that the cause of action was given by a Tennessee statute, and no similar cause of action is given by any Kentucky statute; and, furthermore, that it appeared from the petition that the defendant was operating its railroad in Tennessee; and that the intestate left no assets in Kentucky to be administered. The second ground stated for the special demurrer is that it appeared from the petition that the intestate left a widow, and the statute giving the cause of action gave the right of action therefor to the widow, and that it did not appear that she had ever waived her right of action, or consented that the appellant should qualify as administrator, and that the Jefferson county court had no power to appoint an administrator, as the intestate left no assets in Kentucky to be administered.

The first question presented is whether the judgment of the county court is conclusive in this proceeding as to its jurisdiction to appoint the administrator, or whether its action on that behalf can be collaterally attacked in the manner in which it has been attempted in this case. In *Jacob's Adm'r v. Railroad Co.*, 10 Bush, 271, it was held that "the proceedings of the county court in matters of probate and administration are not conclusive as to the jurisdiction of the court, because such jurisdiction may be collaterally called in question where the proper averments are made; but in such cases the onus is upon the party raising the issue to show that want of jurisdiction." We are of opinion that, where the pleading itself affirmatively shows facts which would deprive the county court of jurisdiction to grant administration, the question of want of jurisdiction in the county court might be raised by special demurrer, as has

been done in this case; for, if want of jurisdiction to appoint the administrator may be averred and proved by the defense, it necessarily follows that, if the petition itself affirmatively shows such want of jurisdiction, the question may be raised by special demurrer, pointing out the averments which take from the defense the burden of proving the lack of jurisdiction. This court has never, so far as we are informed, held that a county court had power to grant letters of administration upon a mere right of action given by such a statute as the one under consideration, where the decedent was not a resident of the state, left no assets to be administered in this state, or the injury had not been inflicted in this state. In *Bruce's Adm'r v. Railroad Co.*, 83 Ky. 174, the intestate was, at the time of his death, a resident of this state; and it was there held that his administrator appointed in the county of his residence could bring an action in this state upon a cause of action given by the statute of Tennessee, in which state he had been killed by the negligence of the defendant company, the operation of that statute not being by its terms or by fair construction restricted to that state. That case was followed by *Wintuska's Adm'r v. Railroad Co.* (Ky.) 20 S. W. 819. In each of those cases the county court had undoubted jurisdiction to appoint the administrator, as the decedent had been a resident of the county in which administration was granted. Ky. St. §§ 4849, 3894. So, in *Brown's Adm'r v. Railroad Co.* (Ky.) 80 S. W. 639, it was held that though the decedent had been a nonresident of this state, but had been killed in the state, the statute which gave the right of action to the administrator necessarily implied a right to have an administrator appointed by the local courts for that purpose alone, though there might be no other necessity or right or authority for such an appointment; and Judge Grace, delivering the opinion, said: "We deem the court of the county where the injury was done, and where the man died, the proper court to entertain such jurisdiction." In the case of *Railroad Co. v. Shively's Adm'r* (Ky.) 18 S. W. 944, no such question appears to have been made, and we must assume that the administratrix in that case was appointed in the county of her intestate's residence. In the syllabus in the case of *Railroad Co. v. McDonald's Adm'r*, 13 Ky. Law Rep. 781, nothing whatever appears to show that the decedent was a nonresident of this state. On the contrary, the presumption is that, as the syllabus recites that the administrator appointed in this state was the proper person to bring the suit, the administrator was properly appointed in the county of the intestate's residence, or in the county in which his estate was.

Nor do we consider it material that the defendant (appellee), being a citizen of Kentucky, could have removed this suit, if brought by a Tennessee administrator in a Tennessee court, to the federal court. But

while it has been settled that the representative of a resident of Kentucky negligently killed in another state may bring suit in Kentucky under the statute of the foreign state, and that a representative of a nonresident of Kentucky negligently killed in Kentucky may be appointed in the county in which the injury occurred, under authority of the necessary implication of the statute giving the right of action, in our opinion the doctrine has been extended as far as it should be; and we do not believe that it was intended to authorize the appointment in any county of this state through which a railroad might run of an administrator of a nonresident negligently killed in another state, for the sole purpose of bringing suit upon a cause of action created by the statute of such foreign state, although our statutes show legislation of a kindred nature.

It remains, therefore, to inquire whether the petition affirmatively shows that the Jefferson county court had no jurisdiction. It does show that appellant's intestate was, at the time of his death, a resident of Tennessee, that the negligence and the injury occurred in Tennessee, and that the cause of action sued upon was given by a statute of that state; but we are unable to find in either the petition or the amendments any averment that appellant's intestate had no estate in Jefferson county, or that there were no debts or demands owing to him there. This being so, we cannot assume, upon a demurrer to the jurisdiction, that the county court had no jurisdiction to make the appointment. On the contrary, we must assume, in the absence of averment and proof to the contrary, that facts were made to appear to the county court authorizing the appointment to be made. The question should have been made by plea to the jurisdiction, and not by demurrer. We are of opinion, therefore, that the demurrer to the jurisdiction should have been overruled, and the appellee required to plead. For the reasons stated, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the jurisdiction, and for further proceedings consistent with this opinion.

#### McCOY v. GOUVION.

(Court of Appeals of Kentucky. Dec. 8, 1897.)

PROMISSORY NOTES—FRAUD—NEGLIGENCE—ESTOPPEL.

Defendant was unable to read or distinguish papers without his glasses. He was president of a certain school board, and H. was the treasurer. It was customary for H. to present certain papers relating to the schools to defendant to be signed by him. H. presented to defendant, who was then without his eyeglasses, a large number of papers and orders to be signed, and with them a note, in such manner that defendant could not distinguish it from the other papers, and believing the same to be one of said orders, and that he was signing said orders as president of the school board, signed his name to the note. No consideration passed to defendant. Held, defendant was estopped by his negligence to de-

ny his execution of the note in the hands of an innocent third party.

Appeal from circuit court, Kenton county.  
"To be officially reported."

Action by Christena Gouvion, executrix, against W. G. McCoy and J. W. Healy, on a promissory note. Judgment for plaintiff, from which defendant McCoy appeals. Affirmed.

Harvey Myers, for appellant. H. O. Thiesen, for appellee.

LEWIS, C. J. Appellee, executrix of Frank Gouvion, brought this action on a promissory note for \$500, executed October 6, 1891, due one day after date, to the testator by W. G. McCoy and J. W. Healy. Defense to this action is set up in the answer of appellant, McCoy, substantially as follows: He was at the date of the note very nearsighted, and unable to read or distinguish papers without his glasses. That he was president of the school board of West Covington, and defendant Healy was its treasurer, and it was customary for said Healy to present orders on the treasurer of said town, and other papers pertaining to the management of the schools, to appellant to be signed by him; and, on the occasion of the signature to the note in controversy, said Healy presented to appellant, who was then without his eyeglasses, a large number of papers and orders, on the treasurer of West Covington, to be so signed; and that, with said orders and papers, said Healy had surreptitiously placed the note in question in such manner that appellant could not distinguish it from the other papers, and, believing the same to be an order on the treasurer of West Covington, and that he was signing said orders as president of the school board, affixed his name to the note, and not otherwise. That no consideration moved him to sign said note. His signature was procured by the fraud of Healy, in the manner stated, and he did not know he had executed the note for three or four years afterwards, when payment was first demanded of him. On trial of general demurrer to the answer which was sustained by the lower court, it must, of course, be assumed that, although appellant did as admitted,—put his genuine signature to the note,—it was done without consideration; and that, by reason of the fraudulent device of Healy, he was induced to do so in ignorance of the purport and effect of his act. However, it is not stated in the answer, nor does it otherwise appear, that appellee's testator, the payee of the note, connived at or knew of the alleged fraudulent act of Healy. But it is manifest that he parted with his money upon faith that appellant, as well as Healy, executed the note and were bound thereby, which belief was confirmed by payment of annual interest for three years succeeding date of note, as shown by indorsements thereon.

It thus appearing that both the payee and security on the note, as appellant evidently was, having acted without intentional wrong, the question arises whether the former shall suffer loss of his money, or the latter be compelled to pay a note he ignorantly, and without intention to be bound, signed. Plainly and justly, that one should be required to sustain the loss who was guilty of fault. The payee committed no wrong, and appellant cannot be charged with and made accountable for any fault unless it be of the character that estops him from denying due execution of the note. To constitute an estoppel ordinarily, there must be knowledge of the fact and of its natural effect, and also intention that the other party should act upon it. But in *Bigelow, Estop.* p. 476, it is stated that "it seems to be settled that a party's ignorance of the truth of the representation made will not remove the estoppel if he was bound to know the fact, or if his ignorance is the result of gross negligence"; and numerous authorities are cited in support of the rule. In *Griffith v. Wright*, 6 Colo. 248, it was held that gross and culpable negligence upon the party sought to be estopped, the effect of which is to work a fraud upon the party setting up the estoppel, supplies the place of intent. In *Boynton v. Braley*, 54 Vt. 92, it is held to be that there is no estoppel when silence is the result of ignorance of the facts, unless the party is guilty of gross negligence in not knowing the facts. In *Taylor v. Fox*, 16 Mo. App. 527, it was held that a person who is sui juris will not, in absence of a fraud, be permitted to avoid his written obligation by showing that he did not read it or hear it read. In this case, appellant, according to his own statement, had opportunity and means, by use of his eyeglasses, to ascertain and know the nature of the note at the time he signed it. Moreover, in the ordinary discharge of the duties of the office of trust he held, it was his duty to inspect each paper before signing it. And it does not therefore afford to appellant an excuse for failure to examine the note before signing it that Healy deceived and overreached him, because the fraud could not have been committed if ordinary and reasonable care had been used by appellant; but, rather, it was not only rendered possible, but actually invited, by his own culpable negligence. In our opinion, appellant, taking his own statements as true, is now estopped to deny he executed and is bound by his signature to the note, and demurrer to his answer was properly sustained. Judgment affirmed.

CITY OF HENDERSON v. McCLAIN.  
(Court of Appeals of Kentucky. Dec. 9, 1897.)  
MUNICIPAL CORPORATIONS—EMINENT DOMAIN—  
DAMAGES—WAIVER—PLEADING—REPLY.  
1. Bill of Rights, § 14, provides that no man's property shall be taken or applied to public use

without the consent of his representatives, and without just compensation being previously made to him. Const. § 242, provides that municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, "injured," or destroyed by them, which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. *Held*, that such provisions abolish the requirement of direct physical injury to the property in order to establish a claim for damages, and where a municipal corporation, in making improvements, such as grading a street, takes, "injures," or destroys private property, compensation must be made, unless consent has been given.

2. The property owner does not lose the right to claim compensation after the property has been injured, taken, or destroyed, by failure to sue for an injunction, etc., until the damages to result therefrom have been estimated and paid.

3. Where affirmative averments of an answer are controverted by a reply, and the answer is subsequently withdrawn, and then refiled, such averments of the answer are not left without a denial by reply.

Appeal from circuit court, Henderson county.

"To be officially reported."

Action by Helen McClain against the city of Henderson. From a judgment for plaintiff, defendant appeals. Affirmed.

Clay & Clay, for appellant. Yeaman & Lockett, for appellee.

DU RELLE, J. The appellee brought suit against the city of Henderson, alleging that she was the owner of a lot of land fronting on Center street, and had easy and free access to and use of that street in going to and from her residence; that the appellant, in pursuance of an ordinance of its common council, caused the street to be excavated in front of and adjoining her property, up to the line thereof, to such an extent and depth as to ruin her fence and inclosure, wholly destroying her access to and use of the street, leaving the surface of her lot from 8 to 10 feet above the street and sidewalk, and the entrance to her dwelling barred by a high, perpendicular bank, so that her only ingress and egress is by an alley; that the dwelling is so situated upon the lot that the lot cannot be graded so as to give access to the street, and that, to protect the lot from constant caving, which would finally destroy the house, would require the construction of a wall along its whole front, at great expense; that by notice to the city, delivered to its mayor, she objected to and protested against the excavation before it was made, and gave notice that she would be damaged thereby, and would seek to hold the city responsible. A demurrer to the petition was sustained, and an amendment filed, which, after the answer was filed, and a reply thereto, was withdrawn by the appellee, and the appellant thereupon withdrew its answer, and moved to dismiss the petition. The order sustaining the demurrer was set aside, and the demurrer over-

ruled. Appellant then filed its answer, and a trial was had, which resulted in a verdict for appellee.

As there is no bill of exceptions, and as the record does not show that the instructions were objected to, the only question presented to this court is the sufficiency of the petition. Without determining the question whether this petition presents a case of partial destruction of the property by the city, amounting to an invasion of private rights, within the rule in the cases of *City of Louisville v. Louisville Rolling Mill Co.*, 3 Bush, 424, and *Kemper v. City of Louisville*, 14 Bush, 90, we shall consider whether the rule of *Wolfe v. Railroad Co.*, 15 B. Mon. 404, *Keasy v. City of Louisville*, 4 Dana, 154, *Railroad Co. v. Brown*, 17 B. Mon. 763, and *Bridge Co. v. Foot*, 9 Bush, 284, that a municipal corporation has authority to grade or regrade a street for a public purpose without incurring responsibility to the owners of abutting lots, although the street might be raised several feet above the level of the lot, and that the citizen must submit to such incidental disadvantages as resulted therefrom, has been altered by section 242 of the present constitution. The general rule was, as stated in *Dill. Mun. Corp.* § 990, that: "Municipal corporations, acting under authority conferred by the legislature to make and repair, or to grade, level, and improve, streets, if they keep within the limits of the street, and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, trespassed upon, or invaded, for consequential damages to his premises, unless there is a provision in the constitution of the state, in the charter of the corporation, or in some statute, creating the liability." The constitution of 1850 provided, in section 14 of the bill of rights, that no "man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." The present constitution, in addition to the section just quoted, which is contained in section 13 of the bill of rights, provides, in section 242: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction." The adoption of this section, in addition to the provisions of section 13, in our view undoubtedly indicated an intention to change the organic law of the state, and to abolish the requirement of direct physical injury to the property in order to establish a claim for damages. The language used is that municipal corpora-

tions shall make just compensation for property taken, injured, or destroyed by them. The city undoubtedly has the right to take private property, having the right of eminent domain. It also has the undoubted right to improve the streets for the public use, in proper manner, when thereto authorized by legislative authority. It, however, in making the improvements, it takes, injures, or destroys private property, compensation must be made, unless consent has been given. This exact question appears to have been decided in several of the states in which new constitutions, containing similar provisions, have been adopted in recent years. In Illinois the old constitution contained a provision similar to that contained in section 13 of our constitution. By the constitution of 1870 the provision was made to read, "Private property shall not be taken or damaged for public use, without just compensation;" and, while the rule under the former constitution had been held as in the section quoted above from Dillon, it has been held in numerous cases that the new rule introduced by the present constitution required compensation in all cases where it appears "there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." *Rigney v. Chicago*, 102 Ill. 64. It was there held "that the introduction of that word [damage], so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organic law of the state, and abolished the old test of direct physical injury to the corpus or subject of the property affected." This doctrine was approved by the supreme court of the United States, in an opinion delivered by Mr. Justice Harlan, in the case of *City of Chicago v. Taylor*, 125 U. S. 162, 8 Sup. Ct. 820. Referring to the *Rigney* Case, he said: "The conclusion there reached was that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question. The case of *Railroad Co. v. Reick*, 101 Ill. 157, is in point on this question of damages; and the case of *City of Chicago v. Union Building Ass'n*, 102 Ill. 379, also reviews the authorities, and approves the doctrine in *Rigney v. City of Chicago*,

*supra.*" In Missouri a similar constitutional provision has been adopted, and a similar construction given. *Sheehy v. Railway Co.*, 94 Mo. 574, 7 S. W. 579. In Pennsylvania a constitutional provision was adopted in 1874 exactly similar to section 242 of our constitution, which has been construed in *Borough of New Brighton v. Peirsol*, 107 Pa. St. 280, as the provision of the Illinois constitution. In a number of other states which have adopted the same or similar constitutional provisions the courts have gone as far or further than the Illinois courts in permitting recovery for consequential damages in such cases. See *Dill. Mun. Corp.* (4th Ed.) §§ 990-995a, inclusive, and notes. We conclude that, under the averments of the petition in this case, admitted by the demurrer to be true, there was a right of recovery.

But it is argued on behalf of appellant that there is no legal right or equity in a person who dedicates land for street purposes, or in his assignee, to compensation for the original establishment of a grade line, and the reduction of the natural surface of the street for street purposes to such line, for the reason that, when dedicated unconditionally, the dedicatory must be supposed to have contemplated and consented that a grade should be established, and the inequalities of the surface brought to some proper level, and to have embraced in his grant or dedication the right to establish such a grade. This question, however, is not presented by the record. If the law be, that consequential damages are not recoverable for the original establishment of the grade of a street which has been dedicated (and this question is expressly not here decided), the fact that such establishment is original is matter of defense; and such fact does not appear in this record.

It is further urged that certain averments of the answer pleaded as an estoppel are undenied by any reply. It is not necessary to consider the sufficiency of the averments, if they have been denied, as the evidence has not been brought to this court. To the answer originally filed, a reply was filed, controverting the affirmative averments. After the amended petition was withdrawn, the answer was also withdrawn by appellant, in order to insist upon a motion for a judgment dismissing the petition. This motion being overruled, and the order sustaining the demurrer having been set aside, the same answer, or a copy of it, was again filed, and it is now contended that those averments are undenied. We do not concur in this contention. While they were a part of the record, the averments were traversed, and the fact that they were withdrawn, and again filed, does not render a second traverse necessary.

A further contention is that appellee lost her right to compensation by not instituting a suit for an injunction to prevent the in-

jury to her property until the damages to result therefrom had been estimated, and paid her. But in response to this it is sufficient to say that the inhibition of the constitution is not against the citizen, but against the municipality, and forbids the latter from taking, injuring, or destroying property without previously making compensation therefor. To say that the citizen's right of recovery was barred because the municipality failed to perform its duty, would be to permit it to take advantage of its own wrong. For the reasons given, the judgment is affirmed.

# RICHMOND et al. v. HARRIS et al.

(Court of Appeals of Kentucky. Dec. 8, 1897.)

DOWER—LAND CONVEYED BY HUSBAND—RIGHTS OF GRANTEES.

1. Under Ky. St. § 2141, which provides that, "when the lands are not severally held by different devisees or purchasers, it shall not be necessary to assign dower out of each separate portion, but an equitable allotment may be made in one or more parcels in lieu of the whole," a widow cannot maintain a suit for dower in a tract of land assigned by her husband, when the remaining estate is sufficient to furnish her dower, both in such remaining estate and in the portion alienated.

2. In a suit for dower interest in land conveyed by the husband, and thence to defendants under a general warranty, the defendants are entitled to prosecute a cross bill against the heirs of the husband for indemnity in consequence of such allotment.

Appeal from circuit court, Floyd county.

"To be officially reported."

Suit by Sarah Harris and others against Isaac Richmond and others for dower. Judgment for plaintiffs, and defendants appeal. Reversed.

W. S. Harkins, for appellants. James Goble, for appellees.

BURNAM, J. This suit was instituted by appellee to have dower assigned to her in a tract of land to which her deceased husband held title and possession during coverture. Appellants answered, alleging that the title to the land in question had been conveyed by the husband of appellee by general warranty deed to his sons J. P. Harris, Jr., and R. W. Harris, and that subsequently these vendors had sold and by general warranty deed conveyed the title to the land in question to them, but admitting that appellee had not united in the conveyance; alleging, further, that the tract of land was not worth at the date of the alienation exceeding \$1,000, and that at the date of the death of the husband of appellee he held title to and was seised of a much larger and more valuable tract, worth at least \$9,000 at the date of his death, and upon which he resided with his wife and children previous to his death, and which his family had continued to occupy subsequently thereto; that this tract of land was ample to secure to appellee all the dower

to which she was entitled in the real estate owned by her deceased husband at the time of his death, and that which he had alienated previous thereto by conveyances in which she did not unite. They also made their answer a cross petition and counterclaim against the heirs at law of J. P. Harris, deceased, and sought to recover of them, by way of contribution, such an amount as would indemnify them for the broken covenant of warranty of their ancestor, in the event appellee succeeded in having dower allotted in the tract owned and held by appellants under the conveyance of her deceased husband. Appellee filed general demurrer to this answer and cross petition, which was sustained, and judgment entered allotting dower in the tract of appellants. From that judgment, this appeal is prosecuted.

Under the common law, a widow was entitled, at her election, to have dower assigned her in each separate tract of land owned by her husband during coverture; but courts of equity have departed from this inflexible rule of the common law, and have required widows to accept an assignment of the whole of their dower out of the estate of which their husbands died seised, and which was ultimately liable to sustain the whole charge of her dower right in the lands conveyed with general warranty, when an equitable allotment could be made in one or more parcels, and the interest of the estate of the decedent required it to be done. See *Lawson v. Morton*, 6 Dana, 471, and *Wood v. Keyes*, 6 Paige, 478. And, in recognition of this plain principle of equity, the lawmaking power enacted section 2141 of the Kentucky Statutes, which provides: "Where the lands are not severally held by different devisees or purchasers, it shall not be necessary to assign dower out of each separate portion, but an equitable allotment may be made in one or more parcels in lieu of the whole." And this court construed this statute in the case of *Morgan v. Conn*, 3 Bush, 58. In that case the decedent had sold 100 acres of land off of a 400-acre tract, and the question was whether dower should be assigned the surviving widow out of the remaining 300 acres, or whether a pro rata should be assigned her out of the 100 acres which had been sold. The court held that as there was nothing in the record to show that any injustice would be done her by assigning her dower in one body out of the land owned by decedent at his death, and as this course would protect both the purchasers and the heirs, and avoid the trouble and expense of another suit, her dower should be laid off out of that part of the tract which remained unsold and owned by decedent at the time of his death. And there is no reason apparent to us why this equitable doctrine should not prevail in cases where dower is sought in separate and distinct tracts which have been conveyed by the decedent

as well as in cases where the entire tract has not been disposed of. Such, we think, was the manifest intention of the statute *supra*, the purpose being, as far as practicable, to protect the rights of devisees and purchasers; and in our opinion, where an equitable allotment of dower can be made out of lands held by the husband at his death, and the interest of decedent manifestly requires it to be done, it is the duty of courts to so allot, and thereby avoid injustice to purchasers and the circuitry and expense of suits against the estate of the grantor's representatives or heirs on broken covenants of warranty. This, however, should be required only in instances where no injustice will be done the widow; and if the lands owned by decedent at his death are not sufficient to furnish appellee dower in such tracts, and in the tracts which had been alienated by him in which she had not united, it should not be so required. The question, from this aspect, is one of fact. In the event all the dower to which appellee is entitled cannot be allotted out of the home tract, and it becomes necessary to subject appellant's land to her claim, they are entitled to prosecute their cross bill against the heirs at law for indemnity, in consequence of the allotment of dower in the land held by them under warranty deeds from the deceased husband. For the reasons indicated, the demurrer of appellee should have been overruled, and the judgment is therefore reversed, and cause remanded for proceedings consistent herewith.

#### STRONG v. JONES.

(Court of Appeals of Kentucky. Dec. 9, 1897.)  
ELECTION CONTESTS—DEMURRER—APPEAL—RECORD—REHEARING.

1. Where, in election contest proceedings, depositions are taken and filed by both parties, after which a demurrer to the notice is sustained, and the proceedings dismissed by the county board of contest, and on appeal to the circuit court the demurrer is overruled, such depositions are properly before the court, and either party is entitled to have them read.

2. Where, on a former hearing, the court of appeals adjudged that an appeal by the contestant of an election from the decision of the county board of contest to the circuit court should have been dismissed as not taken in time, a petition for rehearing on the ground that the entire record and entries of the county board show that its final order was made a month later than the date thereof, which, if true, would have made the appeal in time, will be overruled when the court is convinced, from an examination of the authorities and the record, that the opposite party was duly elected to the office contested.

"Not to be officially reported."

On petition for rehearing. Overruled.  
For former report, see 42 S. W. 752.

H. L. Wheeler and G. W. Gourley, for appellant. White & Roberts and Day & Williams, for appellee.

PER CURIAM. The appellee, Jones, instituted contest proceedings against the appel-

lant, Strong, who had been duly returned as having been elected jailer of Lee county. Jones claimed that he was elected, and, moreover, that appellant was not a citizen of Lee county, and for that reason not entitled to the office, even if he (Jones) was not entitled to it. The appellant, Strong, demurred to the notice, which demurrer, however, was not acted upon until after the taking and filing of the depositions by both parties, after which the demurrer was sustained by the county board of contest, and the proceedings dismissed. Jones prosecuted, or attempted to prosecute, an appeal to the circuit court, which court overruled the demurrer of Strong, and rendered a judgment to the effect that neither party was entitled to the office in question, and ordered an election. Thereupon Strong prosecuted an appeal with supersedeas to this court, and Jones obtained a cross appeal, and contended that the office should have been adjudged to him. It is the contention of Jones' counsel that the circuit court properly overruled the demurrer of Strong, and that, after the demurrer was overruled, no testimony could be heard or considered, upon the idea that the demurrer confessed the averments of the notice served on Strong, and that the notice contained allegations sufficient to entitle Jones to the office in contest. We do not concur in the contention of Jones' counsel, but think that the depositions taken by each party, and filed with the board of contest before the final action of said board, were properly before the circuit court, and that each party was entitled to have the same read and considered. This court has heretofore held that the appeal of Jones to the circuit court should have been dismissed for the reason that the bond was not executed until after the expiration of 60 days from the final action of said county board, and reversed the judgment, with directions to the circuit court to dismiss the appeal of Jones (42 S. W. 752), the effect of which would be to give the office to Strong, or rather leave him in unquestioned possession thereof. Since rendering the opinion aforesaid, appellee, Jones, has filed a petition for rehearing, and insists that, taking the entire record and the different entries therein, the same shows that the final action of the county board was taken the 12th day of February, and for that reason the appeal was in time. He also files some affidavits in support of his contention. It is true that the record is somewhat contradictory. Some dates and entries made by the contesting board tend to show that the final action must necessarily have been on the 12th of February, or at least at a later date than the 12th of January. But it is also true that the final order is dated the 12th of January, 1895, which was copied and filed at the time of the execution of the appeal bond in the circuit court. It is not necessary to determine whether this court should now be required to examine the record of the county board, and determine from the various entries and dates when the final order was made, and



then hold that the record as a whole contradicts the entry, and shows, as a matter of fact, that the final order was not made at the time it bears date, but a month later, for the reason that it would be of no benefit to appellee, Jones, to grant a rehearing in this case. We have examined the entire record, and authorities relied on by appellee, Jones, and are clearly of the opinion that appellant, Strong, under the law and facts as disclosed by this record, was entitled to a judgment adjudging that he had been duly elected jailer of Lee county, and, if a rehearing was granted, the only result would be that this court would reverse the judgment of the court below, and direct it to enter a judgment adjudging appellant, Strong, to have been duly elected jailer of Lee county, and entitled to the office. For the reasons given, the petition for rehearing is overruled.

### HARTHILL v. COOKE'S EX'R.

(Court of Appeals of Kentucky. Dec. 15, 1897.)

LANDLORD AND TENANT—FAILURE TO REPAIR—JUDGMENT ON PLEADINGS.

1. If the rented premises were rendered dangerous to health by reason of the landlord's failure to put the plumbing in good order, and to make other repairs, as he covenanted to do, and the tenant left the premises, after notice to the landlord that he would do so if the repairs were not made, he was not liable for rent after such abandonment.

2. Where an issue had been made by answer and reply, and a jury impaneled and sworn, and the defendant was ready to introduce proof, it was error to render judgment for plaintiff on the ground that the answer did not state a defense, no objection being made thereto by demurrer or motion.

3. Where a written lease provides that a holding over by the lessee for 80 days shall be construed as a renewal of the lease on the same terms and conditions for another 12 months, such holding over is a renewal upon the part of the lessor of his covenant to make repairs.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Action by George E. Cooke's executor against Alexander Harthill to recover rent. Judgment for plaintiff, and defendant appeals. Reversed.

F. Hagan, for appellant. Helm & Bruce, for appellee.

GUFFY, J. This action was instituted against the appellant to recover a balance of rent alleged to be due from appellant from October 1, 1892, to January 20, 1893, at the rate of \$800 per year, payable monthly, and for \$2.45 for repairs of water fixtures, etc., and \$1 for repairing windows. The action was instituted upon a rent lease of date January 20, 1890. The seventh clause of the lease reads as follows: "(7) Should the lessee hold over at the termination of this lease (without any written agreement indorsed on this lease, and signed by both parties) for thirty days, such holding over shall be construed as renewal of the lease on same terms and conditions for another twelve months, and

shall be binding upon both parties, any law or custom to the contrary notwithstanding." The following stipulation is also added to said lease: "Lessor agrees to whitewash cellar under kitchen, and put hanging shelf, paint kitchen floor and pantry, varnish 1st and 2nd floor rooms, paper front hall, put the waterworks and plumbing in good order, clean the chimneys, put on outside fastenings on cellar door, ventilator in water-closet to be put in order, put in all broken glass. Geo. E. Cooke." It is alleged in the petition that the appellant continued to hold the premises more than 30 days after the termination of the first and also second year, without written agreement signed by both parties, and until the 1st of October, 1892; and it is claimed in the petition that the appellant thereby became liable for the rent at the rate stipulated in the lease until the end of the year, which would be the 20th of January, 1893. The first paragraph of the answer is a specific denial of the various items for rent and repairs set up in the petition. The second and third paragraphs read as follows: "Par. 2. For further answer he says that the plaintiff stipulated, covenanted, and agreed, in his said lease so made with him at the time named in the petition, that he would put the waterworks and plumbing in good order, clean the chimneys out, put on outside fastening to the cellar door, ventilator in the water-closet to be put in order, and put in all broken glass. He says that the plaintiff failed and refused to perform his contract, covenants, and agreements, and did not put the waterworks and plumbing in good repair, and did not put the ventilator in the water-closet in order, and the same became foul, nasty, disagreeable, and unhealthy, and rendered the occupation of the said house so disagreeable and uncomfortable and dangerous to his family's health that they could not in safety dwell in said house. He says he notified the plaintiff frequently of the bad condition of the water-closet and plumbing works, and the unhealthy condition of the house, and requested him to fill his contract with him, and put same in repair and good order; and that he refused to put same in good order. He says there escaped from said plumbing work noxious gases and vapors that permeated the whole house, and rendered the same unfit for a dwelling, and hurtful and dangerous to his health and the health of his family, and because of said bad condition of the plumbing work, and refusal to repair the same, and to remove said cause of discomfort and unhealthiness, he was compelled to remove from said house. He further says that certain walls of said house became and were saturated with foul and noxious dampness, absorptions from leakages, and bad and defective plumbing work, which caused the house to be filled with noxious gases, and made the same disagreeable and unhealthy, and dangerous to life to those dwelling in the same. The said plumbing works were never put in good order as he agreed to do, and

plaintiff never complied with his said contract with defendant, all of which plaintiff had full notice of, and was often requested to fulfill his contract, but failed to do so; and because of his failure to comply with his agreement defendant gave him notice that, if not complied with, he would leave the premises, which he did. He says that he was and is thereby released from the payment of said rent, or any part of the same. Wherefore he prays that the petition be dismissed, and he have judgment, and for all further and proper relief. Par. 3. For further answer he says that the said house was unhealthy, and the walls of same damp, and gave out noxious and hurtful gases, and the same became and was an unhealthy and disagreeable house, and that, same being so unhealthy, disagreeable, and uncomfortable, that it became and was dangerous to his health and life and dangerous to the health of his family. The waterworks and plumbing of same was so defectively done as to cause the same to become full of bad odors and noxious and unhealthy gases and vapors and dampness, dangerous to the health of himself and family. That the plaintiff was duly notified of these defects and condition of said premises and refused to remedy the same. Said premises being unhealthy, unpleasant, and disagreeable, and plaintiff refusing to remedy same, he abandoned the said premises, to plaintiff; all of which he pleads as a defense to payment of any further rent. Wherefore he prays that petition be dismissed, and he have judgment for costs, and all proper relief." The reply may be considered a traverse of all the averments of the answer, except the stipulation in the lease aforesaid. It appears that Cooke, the lessor, died pending the action, and that it was revived in the name of the appellee herein. Upon the calling of the case for trial, it appears that appellant filed exceptions to depositions, which it does not appear were acted upon. A jury was impaneled and sworn, and the case stated, and thereupon the plaintiff (now appellee) moved the court for a judgment upon the pleadings, which motion was sustained by the court, over defendant's objection, and his express desire to introduce proof, and judgment rendered for the plaintiff for the several amounts claimed; and, appellant's motion for a new trial having been overruled, he prosecutes this appeal.

The contention of appellee is that the answer presented no defense at all, hence the judgment was properly rendered. The contention of appellant is that the answer presented a defense, and, if sustained by the proof, that he would have been entitled to a verdict. It seems to us that the answer presented a defense to the action, and it seems to have been so regarded by plaintiff at first, as is evidenced by the reply filed. If the answer did not constitute a defense, or was not sufficiently definite, these questions could have been raised by demurrer or by proper motion. The issue was really made up by

the pleadings, and a jury impaneled and sworn, and the case stated, and, the defendant being ready and anxious to introduce proof in support of his plea, it was error for the court to render a judgment in favor of plaintiff under the state of pleadings as they existed. Under the contract filed, and as understood, as it appears, by both parties, the fact of holding over 30 days was a renewal of the written contract, and, consequently, a renewal upon the part of the lessor to do the things stipulated to be done in the contract; and the answer clearly specifies the same, and shows that the lessor was notified of his failure, and of the intolerable condition of the house, and of appellant's intention to abandon same unless the repairs were made; and, if the allegations were true, appellant was entitled to prove the same, and thus justify his abandonment of the premises, and would, therefore, not be liable for any rent after such abandonment. Judgment reversed, and cause remanded, with directions to award appellant a new trial, and for proceedings consistent herewith.

#### HALL v. CORNETT.

(Court of Appeals of Kentucky. Dec. 17, 1897.)

PLEADING—TIME FOR FILING REPLY—HARMLESS ERROR—RELEASE AFTER INSTITUTION OF ACTION.

1. The court did not abuse its discretion in permitting a reply to be filed after the swearing of the jury and the stating of the case, though no reason appears of record for the delay, it being filed at the appearance term.

2. In an action against H., on a note executed by M., for the price of logs, on the ground that H., who bought the logs from M., had assumed its payment, in which H. relied on certain false representations by M., and plaintiff's agreement by reason thereof, to release him, the admission of plaintiff's testimony as to whether or not he made certain false representations to M. was harmless error.

3. It was harmless error to give an instruction authorizing a verdict for plaintiff in excess of the amount sued for, the verdict returned being within that amount.

4. It was error to charge that an alleged agreement to release defendant, to be a defense, must have been entered into before the institution of the suit.

Appeal from circuit court, Harlan county.  
"Not to be officially reported."

Action by A. B. Cornett against Charley Hall. Judgment for plaintiff, and defendant appeals. Reversed.

Howard & Clay, for appellant.

GUFFY, J. This action was instituted in the Harlan circuit court by the appellee, Cornett, against the appellant. It is substantially alleged in the petition that on November 14, 1891, W. R. Maupin and W. R. Ballue, under the name of W. R. Maupin & Co., executed and delivered to plaintiff their two promissory notes, one due the 15th of December thereafter, and the other due January 15, 1892, for the sum of \$280, which were executed in consideration of poplar trees on Day's Branch. It is further alleged

that Maupin & Co. were engaged in the business of cutting and banking saw logs, and that they executed and delivered to plaintiff their aforesaid notes, and that he sold them poplar trees for each of the aforesaid two notes given, on which trees he retained a lien to secure the payment of said notes, and that afterwards, on the — day of —, Maupin & Co. sold said poplar trees to the defendant, Hall, subject to plaintiff's said lien, and at the same time defendant assumed the payment of the aforesaid two notes. Afterwards, on the — day of —, defendant entered into a contract with plaintiff by which it was agreed that defendant should cut, haul, and bank said poplar trees, which right to do plaintiff then and there gave defendant, and thereby released his said lien on said timber for the payment of the aforesaid notes; and at the same time, for and in consideration of the said timber, and in consideration of plaintiff releasing his said lien on same, the defendant agreed to pay off the aforesaid two notes as soon as he could cut, haul, and bank, and sell and receive pay therefor. He says that no part of said notes has been paid, except \$127.13, paid by defendant on the — day of —, 1893, which ought to be placed as a credit on the notes due December, 1891. He says that, at the same time he and defendant entered into the aforesaid contract, he also agreed, and made part of the same contract, and in part consideration of defendant agreeing to pay off said notes, that plaintiff released W. R. Maupin & Co. from any further liability on said notes, and he took defendant for payment of same, which defendant agreed to pay. Wherefore he prays judgment for \$560, subject to a credit of \$127.13.

The defendant demurred to the petition, which demurrer was overruled. It is alleged in the answer that during the year 1892 the defendant entered into a contract with W. R. Maupin & Co., by which he purchased several standing poplar trees on Day's Branch of Crank's creek of Martin's Fork of Cumberland river, which trees had been sold by plaintiff to Maupin & Co.; that he was not informed by any of said parties that any lien existed on said trees when he purchased same from Maupin & Co., but that at the time the trade was consummated between defendant and Maupin & Co. he knew that Maupin & Co. owed plaintiff for the purchase price of said trees, and that it was agreed by plaintiff and defendant when said trade was made that he was to exchange other poplar timber he owned on Crank's Branch at the price of \$2.25 per tree for plaintiff's timber, which had been sold to Maupin & Co. on Day's Branch, which defendant made use of at the price of \$2.50 per tree, and the timber so exchanged and sold to plaintiff was to go as a credit on the notes executed by Maupin & Co.; that defendant was to go to work in

cutting and banking said timber, and the timber of defendant and that sold by plaintiff to Maupin & Co. was to be counted, and settlement made; that he has frequently made demand on plaintiff to go and count their respective timber, and make settlement, which plaintiff has failed and refused to do; that he has a sufficient number of poplar trees on Crank's Branch to more than pay for timber cut and removed on Day's Branch; that he is now, and has at all times been, ready to comply with said contract. He says he never assumed the payment of the two notes sued on, or agreed to do so, other than as above stated; that he has never made any cash payment on either of the two notes, except money derived from the sale of the trees sold by plaintiff to Maupin & Co. Wherefore he prays to be dismissed, etc.

It further appears that defendant filed an amended answer, in which it is denied that he has cut and hauled and banked the timber described in plaintiff's petition, except 57 trees; and he says that at the time he made and entered into the contract with Maupin & Co., by which he sold to him poplar trees on Day's Branch, and in consideration of which he assumed the payment of said notes, said Maupin & Co. fraudulently represented to this defendant that there were 240 trees which passed to him under his purchase, for which defendant agreed to pay the two notes, amounting to \$560; that said representation as to the number of said trees was false, and was known by them to be false at the time they made it, and same was made for the purpose of inducing defendant to assume the payment of said notes; that said defendant, believing and relying on said statement to be true, was thereby induced to enter into said contract, and assume the payment of the said notes, when in fact there were only 80 trees which passed to defendant under said contract, which said Maupin & Co. well knew at the time they made said representation to defendant, and which fact defendant was ignorant of; and shortly afterwards, and as soon as he discovered that the timber was not there as represented, he notified said Maupin & Co. and this plaintiff of that fact, and that plaintiff then agreed and promised to release him from all liability under said contract, except for the timber actually used by him, which defendant promised and agreed to pay for at the rate of \$2.50 per tree, which plaintiff then agreed to accept, and look to Maupin & Co. for the remainder of his debt. The timber actually used by him was 57 trees, amounting to \$142.50, which is all that he has used or claims title to, and that he paid plaintiff on said amount \$127.13, which was paid prior to the institution of this suit, and plaintiff promised and agreed to accept as payment for the remaining \$15.37 other timber owned by defendant on Crank's creek at the agreed price; that

he is now, and has been at all times, ready, able, and willing to pay the balance, and now tenders same in satisfaction of said sum. Wherefore he prays to be dismissed.

It appears that, after the swearing of the jury and stating the case, the plaintiff was allowed to file his reply, in which it is substantially denied that plaintiff has sufficient knowledge or information to form a belief as to whether Maupin & Co. fraudulently represented to defendant, or represented to him at all, that there were 240 trees, or any other number, which passed to him under his said purchase, or that said representation as to the number of said trees was false, or was known by them to be so at the time they made same, if they were made, or that such representation was made for the purpose of inducing defendant to assume the payment of the note sued on, or as to whether defendant believed said representation to be true, or relied upon said statement as being true, or that he was thereby induced to enter into said contract to assume the payment of said notes; denies that only 90 trees passed to said defendant under said contract, or that said Maupin & Co. well knew, at the time or at all that there were only such number of trees, or that shortly afterwards, or at all, defendant notified said Maupin & Co. or plaintiff of that fact, or that plaintiff then, or at all, agreed or promised defendant to release him from all further, or from any, liability under said contract, or that defendant promised or agreed to pay him \$2.50 per tree, or any sum, for the trees taken by defendant, or that he agreed to accept or look to Maupin & Co. for the remainder, or any part, of his debt, or that the timber actually used by defendant was 57 trees, or any other number less than all that was included in the boundary embraced in his contract with Maupin & Co., or that the sale of same only amounted to \$142.50, or any sum less than what all of said trees were worth, or that is all that defendant has used; denies that defendant has paid of said amount the sum of \$127.18 prior to the institution of this action, or that he has paid any sum at any time, or that he agreed or promised to accept in payment for the remainder other timber owned by defendant on Crank's creek, or elsewhere, at an agreed price, or at any price, or that defendant has at all times, or at any time, been ready and willing to pay plaintiff any sum in any way.

The affirmative averments in the reply were controverted of record. A jury trial resulted in a verdict and judgment in favor of plaintiff for \$580, subject to a credit of \$127.18. The grounds relied on by appellant for a new trial were in substance as follows: (1) Because the court erred in overruling demurrer to the petition; (2) because the court erred in permitting plaintiff to file reply to defendant's answer after the commencement of the trial; (3) because the

court erred in giving to the jury on behalf of defendant instruction No. 1, and in refusing to give to the jury instructions Nos. 2 and 8, offered by defendant; (4) because the court refused to admit competent evidence upon the trial; (5) because the verdict of the jury is not sustained by sufficient evidence; (6) because the verdict of the jury is contrary to law. The motion for new trial having been overruled, appellant has prosecuted an appeal to this court.

We cannot say that the court was guilty of abuse of discretion in allowing the reply to be filed, although no reason appears of record for the delay in filing the same. It appears that the reply was filed at the appearance term of the action. We do not think the court erred in the admission or rejection of testimony to the prejudice of the substantial rights of appellant, although the statement of plaintiff as to whether or not he made false representations to Maupin & Co. was not competent; but as to that admission we do not think it prejudiced the substantial rights of the appellant. It is further insisted by appellant that the court erred in giving and refusing instructions. The court erred in fixing the extent of plaintiff's recovery at \$580 in instruction No. 1; but we deem that error to have been a mistake as to the amount, and it could not reasonably have prejudiced appellant. The court further erred to the prejudice of appellant in instructing the jury to the effect that the alleged agreement for release between plaintiff and defendant, to be a defense, must have been entered into before the institution of the suit, under the pleadings and proof in the case. Instructions Nos. 2 and 3, offered by defendants, should have been given. For the reasons indicated, the judgment appealed from is reversed, and the cause remanded for a new trial on principles consistent with this opinion.

#### WARFIELD et al. v. ERDMAN.

(Court of Appeals of Kentucky. Dec. 17, 1897.)  
VENDOR AND PURCHASER—LIEN FOR STREET IMPROVEMENT—SPECIFIC PERFORMANCE.

1. Under Ky. St. § 2839, part of charter of cities of first class, which provides that a lien for public improvement shall exist from the date of the apportionment warrant, a lien for a street improvement does not exist at the date of the sale of property where the work is not received by the city until after the sale, as the apportionment warrant cannot issue until the work has been received.

2. That the vendor, with the intention that the purchaser should rely upon the representations, fraudulently represented that the property was assessed at \$12 per foot, and was of a high smooth elevation and level grade, and desirable for residence, when in fact it was assessed at only \$10 per front foot, and was below a level and unsuitable for residences, which representations were in fact relied on by the purchaser as true in making his purchase, constitutes a good defense to an action by the vendor for specific performance.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by C. W. Erdman against N. W. Warfield and Gus F. Rothenbarger for specific performance of a contract for the sale of real estate. Judgment for plaintiff, and defendants appeal. Reversed.

Speckert, Kreiger & Baldrick, for appellants. James Quarles, for appellee.

WHITE, J. This action was brought by the appellee, C. W. Erdman, in the Jefferson circuit court, against appellants, N. W. Warfield and Gus F. Rothenbarger, for the specific performance of a written contract of sale of certain real estate in the city of Louisville, Ky. The written contract was filed with the petition, and also a deed from appellee and wife, duly executed and acknowledged, was tendered to the property. The appellants denied the right to specific performance, because, as they allege, before entering into the contract the appellee falsely and fraudulently represented to them—and upon the truth of said statements they relied—that said property was assessed for taxation at \$12 per front foot, and was smooth and of high elevation, and suitable and desirable for residence building; and that, after the said written contract was signed,—in fact, the next day,—they learned that said property had been assessed at only \$10 per front foot, and that the same was broken, and below a level, and unsuitable for residences. Appellants also allege as a defense that, by the contract of sale, the title was to be good and no incumbrances beyond the amount of the purchase money; and that there was a lien for street improvements against said property for the sum of \$383.73, which work was completed for and received by the said city on August 22, 1894; and that by the contract of date June 1, 1894, the said property was to be free of incumbrance; and that, in any event, this sum of \$383.73 should be credited on the purchase price. This second defense was presented by way of an amendment, which the court, on motion of appellee, refused to permit to be filed. The court sustained demurrer to the answer, and judgment was rendered for specific performance, and for recovery against appellants of the unpaid purchase money, and for a sale of the property to satisfy the lien, etc. From that judgment, appellants prosecute this appeal.

The questions presented by this appeal are: Did the original answer or the answer as amended present a defense to this action for specific performance, the contract being admitted. The amendment states that the improvement was completed and received by the city engineer on the 22d day of August, 1894, after this written contract was made, in June. By section 2839 of the Kentucky Statutes, which is part of the charter of cities of the first class, a lien for public improvement shall exist from the date of

the appointment warrant; and, as the appointment warrant could not issue till the work had been received, it necessarily follows that the lien for improvement was not in existence on the day this contract of sale was made, and therefore could not be pleaded as a set-off against the purchase price. The amended answer presenting this question only, the action of the court in refusing to permit same to be filed was not error.

By the demurrer to the answer it is admitted that the appellee (plaintiff below) falsely, fraudulently, and dishonestly represented and stated to appellants that the property they proposed to sell was valued by the assessor, and so assessed on his books, at \$12 per front foot, and that the same was of a high, smooth elevation and level grade, and desirable residence property; and it is also admitted by the demurrer that these representations were false and untrue, and were so known by appellee when made, and were made for the purpose and intention that appellants would rely upon these statements as true; and that appellants did rely on these statements as true, and so signed the contract of purchase. This being an action for specific performance, does this answer present a defense? We are of opinion that it does, and the demurrer thereto should have been overruled. Judgment is therefore reversed, with directions to overrule the demurrer to the answer, and for further proceedings.

# KENTUCKY LIFE & ACCIDENT INS. CO. v. FRANKLIN.

(Court of Appeals of Kentucky. Dec. 18, 1897.)

ACCIDENT INSURANCE - WEEKLY INDEMNITY - WANT OF CARE ON PART OF INSURED.

1. A policy indemnifying insured against loss of time "in a sum not exceeding \$25.00 per week, or the money value of his time, for such period of continuous disability as shall immediately follow the accident and injuries aforesaid, not exceeding, however, fifty-two consecutive weeks from the time of the happening," entitles the insured to weekly payments after satisfactory proof of the injuries, and he is not required to wait until his disability has ceased, or until the end of a year, before bringing his action for loss of time.

2. A condition requiring insured to use "due diligence for his safety and protection" requires him to use only such care as prudent persons are accustomed habitually to use, and it was for the jury to say whether insured, who, while hunting was sitting on a rail fence with his gun cocked, when a rail turned, resulting in the discharge of the gun, was in the exercise of such care.

3. The fact that plaintiff, who was insured as a "grocer, with desk and counter duties," was injured while hunting, does not deprive him of the right to recover, in the absence of anything to show that he was following the "occupation" of a hunter.

Appeal from circuit court, Hickman county.

"To be officially reported."

Action by Thomas L. Franklin against Kentucky Life & Accident Insurance Com-

pany on an accident insurance policy. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. L. Husbands, for appellant. Thomas H. Hines, Thomas G. Poore, and E. T. Bullock, for appellee.

HAZELRIGG, J. This action was brought by appellee for indemnity under an "accident" insurance policy issued to him by the appellant, in which he was insured as a "grocer, with desk and counter duties." He was seriously injured on March 24, 1894, by the accidental discharge of a shotgun in his own hands, or which fell from his own hands, while out hunting birds and other game. The provisions of the policy are to the effect that, if the insured sustains bodily injuries effected through external, violent, and accidental means, which alone produced death, the company would pay the wife of the insured the principal sum of \$5,000; and if by such means he sustained injuries which should immediately and wholly disable him, and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then, "on satisfactory proof of such injuries, he [shall] should be indemnified against loss of time thereby in a sum not exceeding \$25 per week, or the money value of his time, for such period of continuous total disability as shall immediately follow the accident and injuries aforesaid, not exceeding, however, fifty-two consecutive weeks from the time of the happening." There are many other provisions of the policy, but with them we are not now concerned. It is admitted that the insured was wholly disabled for many weeks, and that the means were accidental. The suit was filed on July 3, 1894, for the weekly indemnity provided for in the policy, and sought to recover the sum of \$25 per week from the date of the injury up to the filing of the petition. The defense of the company was: (1) Under the contract, the language of which on the point involved we have quoted, the weekly indemnity was not to be paid until the expiration of the 52 weeks after the accident, if the total disability continued that long, or at least it was not due until such disability ceased, and therefore this suit was prematurely brought. This question was raised by demurrer to the petition, that pleading showing that the total disability had not ceased. (2) That one of the conditions of the policy sued on was that the insured "would use due diligence for his personal safety and protection," whereas he had not done so, but, on the contrary, at the time of the accident, "he was sitting on a fence, with a double-barreled shotgun in his hands, with one or both hammers cocked, when a rail turned, and he fell off, and the gun was discharged, causing the injury," etc. (3) That the plaintiff was only insured as a "grocer, with desk

and counter duties," and that a condition of the policy was that "if the insured was injured or disabled while doing or performing any act or thing pertaining to an occupation classed by the company as more hazardous than the occupation under which he was insured," he should then be entitled "only to indemnity in such more hazardous class that the premium paid by him would pay for in such more hazardous class," and that the company "has a class called a 'Hunter' class, embracing all those engaged in the occupation of hunting, and which is more hazardous," etc. And, lastly, the answer called in question the value of the time of the insured.

None of these defenses seem to require any very serious consideration or present any real difficulty. There is nothing whatever to indicate that the weekly indemnity was not to be paid weekly. The language clearly imports weekly payments after satisfactory proof of the injuries received, and there is no complaint here of the want of such satisfactory proof. It does not appear that vexatious suits were brought for this weekly indemnity. We think the insured did not have to wait until his disability ceased, or until the end of a year, before bringing this action for loss of time. If he had so waited, he would likely have been met with plea of limitation, based on a condition, found in fine print on the back of the policy, "that no action shall be maintained nor recovery had for any claim or part thereof upon or by virtue of this certificate after the lapse of six months from the death or injury of said member." Upon making the necessary proof of injury, we think he was entitled to the weekly indemnity provided for in the policy, and, in the absence of any agreement to the contrary, this should be paid to him weekly, in accordance with what we think is the natural import of the language used in the policy. And this would also seem more in accord with the probable intention of the parties to the contract, and certainly more in accord with the probable needs of the injured beneficiary, whose loss of time is sought to be made up to him by weekly indemnity. Further, we cannot say, as matter of law, that the insured was guilty of "want of due diligence for his safety and protection" on the occasion in question. This expression required of the insured no higher degree of diligence or care than prudent persons are accustomed habitually to use. The requirement is not inconsistent with mere inadvertence, or with running such risks as prudent and cautious persons are in the habit of running. *Keene v. Association*, 161 Mass. 149, 38 N. E. 891; *Stone v. Casualty Co.*, 34 N. J. Law, 371. It may be that prudent and cautious persons carry their guns cocked, and mount places in the manner the insured did, and, if so, there has been no breach of this condition of the policy. This question was properly submitted to the jury in unobjectionable instructions.

It is true, as contended, that the occupation of the insured is stated to be that of "grocer, with desk and counter duties." But the question of whether he "was injured while doing an act or thing pertaining to the occupation of a hunter" was submitted to the jury. This was as much as the company could ask. It seems to us the language of the condition upon which the indemnity was to be reduced has reference to acts or things done in following an occupation or business, and not to individual acts. So far as this clause goes, a merchant, lawyer, physician, etc., might go fishing, and, if drowned accidentally, there might still be a recovery under the policy. *Stone v. Casualty Co.*, 34 N. J. Law, 371; *Eggenberger v. Association*, 41 Fed. 172. Lastly, the jury's finding of value accruing to the insured from the loss of time is sustained by the evidence. The judgment is affirmed.

ATKINS et al. v. HEOBERLIN et al.  
(Court of Appeals of Kentucky. Dec. 16, 1897.)

FRAUDULENT CONVEYANCES—PREFERENCE OF CREDITOR.

A transfer of goods by an insolvent debtor in payment of a debt, though intended as a preference, is valid, unless suit is brought to have it declared to operate as an assignment under the statute; and the goods cannot be attached as the property of the debtor.

Appeal from circuit court, Lawrence county.  
"Not to be officially reported."

Action and attachment by L. M. Atkins and others against O. T. Heoberlin and others. Verdict and judgment in favor of Rice & Co., claimants of attached property, and plaintiffs appeal. Affirmed.

Alexander Lackey, for appellants. J. M. Riffe and R. T. Burns, for appellees.

BURNAM, J. O. T. Heoberlin did business as a merchant under the firm name of O. T. Heoberlin & Co., and the business was conducted by A. J. Heoberlin, the father of O. T. Heoberlin, as his agent, under this written authority: "This certifies that I have this day appointed my father, A. J. Heoberlin, my agent to buy and sell goods in my name, and he is hereby authorized to contract and be contracted with in my name, and I hereby bind myself to be responsible for all such contracts from and after this date. This, November 15, 1892. Oscar T. Heoberlin." O. T. Heoberlin & Co. owed W. A. Rice & Co. \$40, and A. J. Heoberlin, the agent, owed them \$63.29. The father and agent sold out the entire stock of goods to one Murray, and at the same time it was agreed that Murray should let Rice & Co. have \$103.29 worth of goods out of the stock so sold him in payment of the amounts due to them by the father and son, and that he (Murray) should have credit for that amount on the purchase. Murray thereupon sold and delivered to Rice & Co. \$103.29 worth of goods, which were boxed up, marked, and the possession thereof delivered to the appellees, and were by them shipped to

their place of business at Fallsburg, Ky. When this box of goods arrived at Louisa, Ky., it was seized by the marshal of Louisa under an attachment which had been sworn out by the appellants herein against O. T. Heoberlin & Co., upon the ground that that firm did not have property sufficient to pay their debt, and that their demand would be endangered by delay, and obtaining judgment and return of no property found; and the goods were sold under the attachment, and the proceeds appropriated by the appellants. Thereupon appellees filed their petition to be made parties to the attachment suit of appellants against Heoberlin & Co., and set up their claim of ownership to the goods seized and sold under the attachment, alleging that they had acquired title and possession before the date of the institution of the suit, or the suing out of the attachment, and making their answer a cross petition, and praying judgment against appellants for \$103.29. Their claim was resisted and denied, and, the pleadings being made up, the issue was submitted to the jury, who decided in favor of appellees. The court submitted the issue to the jury under proper instructions, and the evidence conclusively establishes the sale and delivery as alleged by appellees. We think the testimony conduces to show that Heoberlin & Co. were insolvent, and that they intended to, and did, give to appellees, Rice & Co., a preference over other creditors in the arrangement made by them with Murray to secure the payment of the debts due them; but this is not a suit on the part of appellees assailing the preferential act of the statute of 1856, and asking that the sale operate as an assignment of the property of Heoberlin & Co. for the benefit of all their creditors. The only issue made by the pleadings is as to the genuineness of the sale and delivery thereunder. We think the verdict is supported by the weight of the evidence, and the judgment is therefore affirmed.

LOUISVILLE & N. R. CO. v. WHITLOW'S ADM'R.

(Court of Appeals of Kentucky. Dec. 10, 1897.)

ACTION FOR TORT—CONFLICT OF LAWS.

Plaintiff's decedent was killed in Tennessee, where contributory negligence will not defeat the action, but goes in mitigation of damages only, and the action for damages for the injury was brought in Kentucky, where contributory negligence will defeat such an action. *Held*, that the liability for damages is governed by the laws of Tennessee.

Appeal from circuit court, Warren county.  
"To be officially reported."

Action by — Whitlow, administrator of the estate of T. P. Whitlow, deceased, against the Louisville & Nashville Railroad Company. From judgment in favor of the plaintiff, defendant appeals. Affirmed.

PAYNTER, J. While T. P. Whitlow was in the service of the appellant as brakeman on one of its trains he is alleged to have

been killed by gross and willful negligence of the servants and employes of the appellant in charge of the train. At the time of his death he was a resident of this state, and his father qualified as his personal representative in the Warren county court. That the personal representative had the right to maintain the action, if the liability existed under the laws of Tennessee, cannot be questioned. *Bruce's Adm'r v. Railroad Co.*, 83 Ky. 174; *Wintuska's Adm'r v. Railroad Co.* (Ky.) 20 S. W. 819. He seeks to recover by virtue of the statute of Tennessee authorizing a recovery when death results from the wrongful act, fault, or commission of another, and the law as settled in that state in the administration of the statute. It is a well-settled principle in all civilized countries, so far as we are aware, that in matters *ex contractu* the *lex loci contractus* governs the construction and the validity of the contract, and that the *lex fori* governs the remedy. This principle is so familiar it would be waste of time to cite elementary authorities or adjudged cases in support of it. As an amplification of the doctrine, it may not be inappropriate to quote from *Scudder v. Bank*, 91 U. S. 406, wherein it is said: "Matters bearing upon the execution, the interpretation, and the validity of the contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. A careful examination of the well-considered decisions of this country and of England will sustain these positions." We can see no reason why the doctrine as established as to actions *ex contractu* may not be applied to actions *ex delicto*. There seem to be but few decisions on the question. In the case of *Nonce v. Railroad Co.*, 33 Fed. 484, it was held that there is no distinction on the subject between actions *ex contractu* and *ex delicto*. *Herrick v. Railway Co.*, 81 Minn. 11, 16 N. W. 413, was an action *ex delicto*, and the court held that the law of the place where the right was acquired or the liability incurred governs as to the right of action, while all that pertains merely to the remedy is controlled by the law of the state where the action is brought, thus recognizing the principle as the same where the right of action is *ex contractu* or *ex delicto*. The question presented to the court is whether the Kentucky or Tennessee law as to contributory negligence applies. Under the Tennessee law, if the intestate was himself guilty of negligence that contributed to his injury and death, yet if the defendant was guilty of negligence which was the direct and proximate cause of the intestate's injuries and

death, then the plaintiff is entitled to recover, but the damages recoverable should be reduced or mitigated by reason of the intestate's contributory negligence. Under our law, if the intestate was guilty of such contributory negligence except for which his injuries and death would not have occurred, then there can be no recovery. Contributory negligence, under our rule, is never applied to the mitigation of damages. The question is whether the contributory neglect relates to the right or to the remedy. The right to plead a counterclaim or a set-off relates to the remedy. In *Davis v. Morton*, 5 Bush, 160, it was held that the defendant was allowed to plead a set-off to a note, although not allowed by the laws of Tennessee, where the note was executed. Under our system of pleading, counterclaims in certain cases are allowed. A counterclaim, under our system of pleading, is a cause of action against the plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition. A set-off is a cause of action upon a contract, judgment, or award in favor of the defendant against plaintiff, or against him and another, and it cannot be pleaded except in an action upon a contract, judgment, or award. The defendant who pleads a counterclaim admits the contract or transaction, and seeks a recovery on his counterclaim growing out of it. The defendant who pleads a set-off admits his liability on the cause of action stated in the petition, but claims he is entitled to a credit by way of set-off. The plea of the statute of limitations generally relates to the remedy. In pleading the statute of limitations, the defendant admits that the cause of action or liability existed, but says that the plaintiff has slept too long on his rights, and his right to recover is barred. This is a defense which arises after the liability is incurred. The existence of the right to plead a counterclaim, a set-off, or the statute of limitations does not show that the cause of action did not exist, but, on the contrary, admits its existence. When we say that a counterclaim or a set-off is a matter relating to the remedy, we mean that if they exist they may be relied upon as a defense to the action. Suppose, however, that, under the *lex loci contractus*, they did not exist, we could not say that, had the transaction occurred in the state, the liability therefor would have existed. Therefore they are available as defenses in this state. To do this would be to utterly disregard the *lex loci*. It would be creating a liability or cause of action when none existed in the place where the transaction or contract took place. To make our meaning clear, suppose that the set-off pleaded was a note which was void under the laws of the place where executed, or for some cause did not impose any liability on the plaintiff; the



court would not adjudge that it was binding on the payor because it would have been so had it been executed in this state.

From all the facts attending the injury, it must be determined whether the defendant has incurred a liability for damages and the extent of it. The law of Tennessee must govern in fixing the liability and the quantum of recovery. It would be strange to apply the law of Tennessee in determining the question of liability, and take the law of the forum to fix the measure of recovery. It would be stranger still for the court to hold that the law of Tennessee should govern in fixing the liability; then apply the law of Kentucky, which would prevent a recovery, although a recovery is authorized by the law of Tennessee. It would be in one breath declaring the Tennessee law should determine the liability, and in the next instant adjudging that Kentucky law shall determine the liability and defeat a recovery. Suppose that, under the laws of this state, contributory negligence was not available in an action for the negligent killing of a human being, but in Tennessee it was. Could it be said, in an action brought in this jurisdiction for the negligent killing in Tennessee, that the law in that state allowing such a plea was not available as a defense because it related, not to the right of action, but to the remedy? It could not be said it pertained to the remedy. It would be a fact that would in part determine the question of liability or of the right of action. The conduct of the intestate is part of the facts from which the liability of the defendant is fixed, and measures the relief to which the personal representative is entitled. *Bruce's Adm'r v. Railroad Co.* was an action under the Tennessee statute. The court said: "We are of the opinion the action can be maintained and recovery had in this state in the same manner, for the same cause, and to the same extent as if the action had been brought and prosecuted in the state of Tennessee, where the cause of action arose." If contributory negligence is available to defeat a recovery in this case, then the plaintiff cannot recover in the same manner and to the same extent as if the action had been brought in Tennessee. *Railroad Co. v. Graham's Adm'r*, 98 Ky. 688, 34 S. W. 229, was an action under the statute of Alabama for a negligent killing. The court held that the measure of damages, as determined by the decisions of the Alabama supreme court, should be applied in the case. The case of *Johnson v. Railroad Co.*, 91 Iowa, 248, 55 N. W. 66, is cited by counsel for appellant to sustain his contention that Kentucky law of contributory negligence should prevail. The injury in that case occurred in Illinois, and the action was brought in Iowa. The doctrine of comparative negligence prevailed in Illinois, and the Iowa court refused to follow the rule. The court disposed of the question in a few lines as to whether the doctrine of comparative negligence which had

been established by the decisions of the courts of Illinois should prevail in that case. Kinne, J., took no part in the decision. Robinson, J., expressed no opinion on the question, but said that it was not necessarily involved in a determination of the case. *Knight v. Railroad Co.*, 108 Pa. St. 250, and *Herrick v. Railroad Co.*, 31 Minn. 11, 16 N. W. 413, are cited by the court to sustain its conclusion. In neither of these cases cited was the same question involved which the Iowa court adjudged, nor was there a similar question involved in them. The question in *Knight v. Railroad Co.* presents the right to maintain an action against a foreign corporation to recover damages in an action ex delicto for negligence causing the death in another state. The court held that such an action could be maintained. The Pennsylvania court recognized the correctness of the doctrine of *Herrick v. Railroad Co.*; and the court in the latter case said: "Whenever, by either common law or statute, a right of action has become fixed and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. \* \* \* The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought; and we think the principle is the same whether the right of action be ex contractu or ex delicto." Of course, there is no question of public policy involved in the case, because we have a statute of the same general import of the statute of Tennessee. *Dennick v. Railroad Co.*, 103 U. S. 11, was an action for injuries resulting in death, and the court held it was transitory. The court said: "It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." At the time the injury was inflicted the right of action became fixed, and a legal liability was incurred. The liability which the plaintiff seeks to enforce was incurred by virtue of the law of Tennessee. The law of contributory negligence, as adjudged in this state, cannot be applied so as to alter or affect the right of action which arose in Tennessee. For these reasons the judgment is affirmed.

**BROWN v. BUNGER.**

(Court of Appeals of Kentucky. Dec. 15, 1897.)

**ATTORNEY AND CLIENT—AUTHORITY TO COMPROMISE SUIT.**

An attorney employed "to bring suit or settle by suit or compromise a claim for damages," and who was to receive a fee "equal to one-half of any amount received by suit or compromise," had no authority to make a compromise without the consent and approval of the client, especially after he had instituted suit.

Appeal from circuit court, Hardin county.  
"Not to be officially reported."

Action by Emma G. Brown against Henry Bunker to recover damages for a criminal assault. Judgment for defendant, and plaintiff appeals. Reversed.

Hobson & O'Meara, for appellant. J. D. Irwin and R. L. Stith, for appellee.

**GUFFY, J.** This is an appeal from the Hardin circuit court sustaining a compromise made, as alleged, by R. L. Stith, who was attorney of record for this appellant at and for some time after the institution of her suit against the appellee. The cause of action set up in the petition was an alleged criminal assault by the appellee upon the plaintiff, resulting, as she alleged, in very serious damage, which was set out in the petition. After the appellee had answered, the alleged compromise was entered into, and upon calling of the case for trial, March 27, 1896, the following order was entered: "Emma G. Brown, Plaintiff, vs. Henry Bunker, Defendant. This cause coming on for trial, came defendant by attorney, and moved to file agreement and settlement of the action, and to dismiss the same, to which plaintiff, by J. P. Hobson, by attorney, objected. Came R. L. Stith, and filed statement of himself as attorney for the plaintiff, and also filed written contract of himself and Emma G. Brown. Came plaintiff by attorney, and filed contract. Ordered, that said agreement of settlement and written contract signed by R. L. Stith and Emma G. Brown be, and the same are, part of the record in this case. It is admitted that R. L. Stith, attorney for plaintiff, has settled this case by payment to him of \$40 by defendant, Bunker, and that Bunker shall pay the costs. It is also admitted that R. L. Stith has offered to pay plaintiff \$20, as per contract, which is refused, and now tenders said \$20, and offers to pay same to plaintiff or her attorney, J. P. Hobson, which is also refused. Plaintiff objects to the settlement as made by R. L. Stith, it appearing that same was made without her consent, and insists on a trial of the cause, she having objected to the settlement when she learned of it, to which defendant objects. After hearing the evidence and argument of counsel, the settlement as made by R. L. Stith with defendant as shown by receipt filed herein for \$40 and costs, said settlement is now sustained and confirmed by the court, and said

action is now dismissed settled, and that defendant, Bunker, recover costs about said motion, and may have execution; to all of which plaintiff, E. G. Brown, objects, and excepts, and prays an appeal to the court of appeals, which is granted. Came plaintiff, and tendered statement of evidence and bill of exceptions, which was signed by the judge, filed, and made part of the record." The statement of R. L. Stith referred to in the foregoing order recites the fact of the alleged compromise, with a statement that he was authorized to make it. It appears also that before the foregoing, to wit, March 5, 1896, the plaintiff notified the defendant that she would not stand the compromise made by him and Stith, and that the case was set for the next Tuesday, and that she would be ready for trial. The two papers, one signed by R. L. Stith and the other by Emma G. Brown, were filed, and relied on in support of the authority of Stith to make the compromise. Said papers read as follows: "I am this day employed by Emma Brown to bring suit for damages against Henry Bunker, or settle same by compromise, and, if I settle same by suit, or compromise said claim, I am to have a fee equal to one-half of any amount recovered by suit or compromise. June 4, 1896. I hold duplicate signed by Emma Brown. If nothing is made, nothing shall be paid him. R. L. Stith, Atty." "I have this day employed R. L. Stith, Atty., to bring suit or settle by suit or compromise a claim for damages against Henry Bunker, and I am to pay him a fee equal to one-half of any amount recovered by suit or compromise, and, if nothing is made, nothing is to be paid him. June 4th, 1896. Emma G. Brown."

The sole question presented for decision is whether or not the attorney Stith was authorized to make the compromise in question without the consent or ratification of the appellant. It seems clear to us that the writing above quoted did not authorize the attorney Stith to compromise this suit without the consent and approval of the plaintiff therein, and especially so after he had in fact instituted the suit. It results, therefore, that the court below erred in sustaining the compromise and dismissing the action; and that judgment is therefore reversed, and cause remanded, with directions to set aside said judgment, and hold the alleged compromise or settlement to be null and void, and for further proceedings consistent herewith.

**KENTUCKY NAT. BANK v. BRAMLETT et al.**

(Court of Appeals of Kentucky. Dec. 18, 1897.)

**BILLS AND NOTES—COLLATERAL SECURITY.**

The K. bank held certain shares of stock belonging to B. as collateral security for his notes. B. sold certain of the shares to P., and at the instance of the president of the bank P.'s note therefor was executed directly to the bank,

and deposited with it as collateral in lieu of the shares sold, B. writing his name on the back thereof; and payments of interest made by P. to the bank on this note were to be credited on B.'s notes. At the request of the president of the bank, the last of several renewals of P.'s note was signed by B. under P.'s signature, it being represented that this was merely for the convenience of the bank. In an action on this note, held that, as it appears that B.'s original indebtedness has been paid in full, there can be no recovery, the mere fact that B., when urged to pay this note along with the others, asked indulgence, without repudiating this note, not being sufficient to overcome the undisputed evidence that it was held as collateral merely.

Appeal from circuit court, Nicholas county.  
"Not to be officially reported."

Action by the Kentucky National Bank against George Bramlett and another on a promissory note. Judgment for defendants, and plaintiff appeals. Affirmed.

W. G. Dearing and Humphrey & Davie, for appellant. O. P. Chenault, W. S. Pryor, Hanson Kennedy, and John P. Norvell, for appellees.

HAZELRIGG, J. This is a suit upon a note for the sum of \$6,400, executed to the appellant bank by the appellees Potts and Bramlett. The answer pleads that the note was executed without any consideration, and was obtained by fraud, covin, and deception. The facts connected with the execution of the paper are set out with minuteness, and, if shown to exist, clearly constituted a bar to any recovery. They are too numerous to be given in detail, but, in brief, are these: On or about September 1, 1887, Bramlett, who lived in Nicholas county, Ky., bought 500 shares of stock in the Commonwealth Land & Lumber Company at Louisville at the price of \$17,500, for which he executed his three promissory notes, due at some time in the future. The promoters of the land and lumber company and the owners of the stock sold Bramlett happened to be the president of the appellant bank and its attorney, and the notes of Bramlett were either executed directly to the bank, and the money thus obtained by him with which to pay for the stock, or to the company, and discounted by the bank. This is not material, as we shall presently see there was nothing improper or irregular in this transaction. The stock sold to Bramlett was left with the bank as collateral security, and very shortly he paid to the appellant, through the Exchange Bank of Sharpsburg, Ky., the sum of \$5,000. On about November 1, 1887, Bramlett sold to appellee Potts 100 of his shares of stock at the price of \$6,250, for which Potts' note was taken, and at the request of appellant's president he placed this note in the bank as additional collateral security for his two remaining notes, it appearing that his first note, which was for \$5,833, had been fully paid at this time. This note was executed to the bank at the instance of Fetter, the president

of the bank, who suggested that, as the bank held the stock as collateral which Bramlett had sold, it should also hold the Potts note in the form in which it was taken. It was signed alone by Potts, and was, of course, the property of Bramlett, but on delivering it to the bank Bramlett indorsed his name on the back of it. As both Bramlett and Potts supposed they had "a sure thing" in this stock, it was not expected that Potts would be called on to pay his note, but it was to be renewed until sufficient money was realized to pay it from a sale of the property owned by the company. But it was stipulated that Potts was to pay the interest on his note regularly, and this payment was to go to Bramlett's credit on his notes in appellant's bank. Under the arrangement, Potts from time to time paid to the bank for Bramlett some \$2,200 in interest. This note was renewed a number of times, until finally, on May 27, 1893, it was renewed (some unpaid interest being included) for the sum of \$6,444.80. This is the note sued on in this case. The change of form occurred in this way: A blank was sent to Potts and Bramlett to sign, with directions from Fetter, the president, to execute it by Bramlett signing under the name of Potts, as a mere matter of convenience to the bank. Bramlett refused to so sign, but, upon being written to by the attorney of the bank, whom he knew to be his friend, assuring him that the request of the bank was all right, and that Fetter had assured him (the attorney) that all proper credits would be given Bramlett, the latter did so sign the note, and continued to sign in the same form until the last renewal. That the note sued on was left with the bank as collateral security only, and that, at the request of Fetter, it was executed to the bank, which already held as collateral the stock for which it was given, are facts which are fully shown by the witnesses Bramlett, Judge Hargis, and Potts, and are entirely uncontradicted by any witness. Bramlett's payments to the bank on his notes were made by checks, drafts, etc., and by these he shows that he has fully paid off his entire indebtedness to the bank for which the Potts note was left as collateral. Checks and drafts were produced by Bramlett for the inspection of the jury and counsel, amounting to something over \$23,000, to which add the Potts interest paid for his benefit, and we have a sum fully sufficient to have discharged Bramlett's entire indebtedness to the bank. There is nothing to show to the contrary. The only witness introduced on this point by the bank is its cashier at the time of these transactions. He says that the Potts note was discounted to the bank in the usual course of business, and the proceeds placed to the credit of Bramlett, and the money drawn out by checks purporting to be signed by Bramlett. He does not connect Bramlett personally with the transaction, and he does not produce the checks or books of the bank, although Bram-

lent testified that he had not drawn out a cent from the bank on any check, or ever received credit for a dollar on account of the Potts note. It is true, the cashier says he has searched recently for the checks, and cannot find them; but certainly Bramlett's account at the bank, if it shows credit for the proceeds of the Potts note, might have been exhibited, and this account might also have shown in what way, and probably in whose favor, the alleged Bramlett checks were drawn. Fetter, the president of the bank at the time of these transactions, does not testify. The only circumstances supposed to be unfavorable to Bramlett's contention is that, when the bank was pressing him on his notes, and threatening by frequent letters to sue him, mentioning in some of the letters the Potts note along with the others, Bramlett was urgently begging time on all the paper, and did not then repudiate the Potts note, or in terms deny his being bound to the bank on it. A history of Bramlett's frantic appeals during the panic to avert a suit against him on these notes, which, in view of his other heavy obligations, must have resulted in his financial ruin, is only evidence that he was willing to continue the status as it was, and to renew the Potts paper, or even let the bank suppose he would pay it, in order to avert pending disaster. But during all this time he did owe the bank largely, and it was immaterial whether his payments were to be made on the Potts note or otherwise, so long as the original purchase price of his stock remained unpaid. At most a bare inference might be drawn, in the absence of explanation, that he owed this Potts note; and in a sense he did owe it, or was under obligation to make it good, so long as the debt for which it was pledged remained unpaid. But when it is established beyond doubt that the whole of Bramlett's debt to the bank has been paid, and that he never owed the Potts note, but in fact owned it all the time, the inference to be drawn from the correspondence goes for nothing.

In answer to the points raised by counsel for appellants, we have no doubt of the sufficiency of the allegations of fraud and want of consideration as made in the answer, nor of the competency of the testimony of Bramlett and Hargis, in detailing the transactions with Fetter, the president of the bank. Nor was the plaintiff deprived of a fair trial because one of the jurors seems to have been under some pecuniary obligation to Bramlett, and answered that he was not. He probably was not at the time he was accepted as a jurymen. The trial court at any rate had better opportunity to judge of his fitness as a jurymen. If the case were at all doubtful under the proof presented, there might be some weight in the objection, but the verdict could not have well been otherwise than for the defendants. The instructions presented the law of the case to the jury very clearly, and without error. The judgment must be affirmed.

# CLARK COUNTY v. WINCHESTER & S. TURNPIKE ROAD CO.

(Court of Appeals of Kentucky. Dec. 8, 1897.)

CORPORATIONS—TURNPIKE COMPANIES—DISTRIBUTION OF STOCK.

Where a county subscribed \$2,900 to the capital stock of a turnpike company authorized to issue such stock to the amount of \$6,000, and the cost of the improvements made was \$200 in excess of such amount, the corporation was properly adjudged to issue the stock thereof to the several subscribers in proportion to the respective sums paid by each.

Appeal from circuit court, Clark county.

"Not to be officially reported."

Action by Clark county against the Winchester & Stoner Turnpike Road Company. From a judgment awarding the shares, plaintiff appeals. Affirmed.

Hathaway & Cardwell, for appellant. J. M. Benton, for appellee.

PAYNTER, J. Clark county acquired the Clark & Montgomery turnpike road. It was desired by the county and C. P. Ecton and others, who were interested in having a good turnpike road, to have the location of the road at points changed, and the old road improved. The appellee, Winchester & Stoner Turnpike Road Company, a corporation, was organized, and the county by proper order subscribed to the capital stock of the new corporation \$2,900, conditioned that enough of the stock would be taken by Ecton and the friends of the road so that the proceeds thereof, together with the sum to be paid by the county, would make such improvements of the road as was contemplated. The road was to be capitalized in an amount equal to the sum expended for the purpose of making the improvements, \$2,900 of which stock was to belong to Clark county and the balance to those who furnished the money to improve the road. C. P. Ecton seems to have furnished all the money that was necessary to do the work other than that which the county had appropriated. He paid it to others for the improvement, or did the work himself. He superintended the improvements, and expended the sum necessary to complete them. The question in this case is as to the amount of stock to which he is entitled under the contract with the corporation and the county. The court found that he had expended in money and labor \$6,200 in doing the work and in paying the necessary expense of constructing the road, and of this sum the county had paid \$2,900. The court adjudged that the shares of the capital stock should go to C. P. Ecton and Clark county in proportion to the sum expended as above stated, and we are of the opinion that the court below did not err in fixing the total cost of the construction and repair of the road. As we agree with the lower court in its conclusion, we deem it unnecessary to go into a discussion of the facts in relation to the items in dispute. The highest amount of stock to be issued by the Winchester &

Stoner Turnpike Company is \$6,000. The expenditures exceeded that amount \$200. The court adjudged the shares to which C. P. Ecton and the county were each entitled, and by doing so it fixed the number of shares so as to make the total greater than the company was authorized to issue. But they were given to the parties in proportion to the sums which each had paid; hence, the order was not prejudicial to either. The corporation will have to issue stock according to the rights of the parties as determined by the judgment of the court, having due regard for the provision of the charter which limits the amount of the capital stock. The judgment is affirmed.

**CHENAULT et al. v. QUISENBERRY et al.**  
(Court of Appeals of Kentucky. Dec. 15, 1897.)  
**EXCEPTIONS, BILL OF — ADVERSE POSSESSION —**  
**TITLE PAPERS AS EVIDENCE.**

1. Where appellants presented their bill to the court within the time fixed, they are not prejudiced by the delay of the court in signing same.

2. In an action for trespass involving the title to land, it was error to give an instruction authorizing a recovery by proof of possession prior to 1855, when the plaintiff's ancestor, under whom they claimed, had in that year deeded all his interest to another, and there was nothing to show a reconveyance.

3. While title papers may be used to show boundary and extent of possession, there must be an actual entry and possession thereunder before they can be so used.

Appeal from circuit court, Wolfe county.

"Not to be officially reported."

Action by E. Quisenberry and others against D. W. and E. Chenault and others to recover damages for cutting timber. Verdict and judgment for plaintiffs, and both parties appeal. Reversed on original appeal, and affirmed on cross appeal.

J. B. White, B. F. Day, and C. P. Chenault, for appellants. Edward W. Hines and Rodney Haggard, for appellees.

**WHITE, J.** This action for trespass for cutting timber on land claimed by appellees was brought by appellees in the Wolfe circuit court against appellants, claiming about 1,760 acres of land. The suit was originally brought in equity, with injunction, but was transferred to law, and tried before a jury. The defense to the action was a denial of title in appellees, a claim of title by appellants by possession by themselves and from those under whom they claim for 30 years, and for 7 years with title of record deducible from the commonwealth; that the deeds under which appellees claim are champertous; and also the statute of limitations of 15 years, by peaceable adverse possession of the land for that period before the bringing of this action. Upon this issue the case was tried before a jury, and a verdict returned for appellees, and judgment was rendered accordingly. Appellants' reasons and motion for new trial having been overruled, they have appealed to this court.

Counsel for appellees, in their brief, object to this court's considering the bill of exceptions filed, because the same was not signed, approved, and filed in the proper time. The record shows that this bill of exceptions was prepared and tendered to the court within the time prescribed by law, and this, we think, is all appellants could do. They presented the bill to the court within the time fixed, and for some reason beyond their control the court took time to consider the bill before signing same, and ordering it to be filed, and made part of the record. We think the bill properly in the record, and will consider same. It appears that on the trial it was shown by appellees: That they are the heirs of F. B. Quisenberry, deceased, and that F. B. Quisenberry in the year 1855 purchased of the Elkins heirs all their right and interest in 10,000 acres of land, as the said heirs derived title from Enoch and Ezechial Elkins. The boundary of this land is not given in this deed. That appellees obtained the legal title in 1893 from other of the Elkins heirs, the said deeds reciting that the consideration had been theretofore made by F. B. Quisenberry in his lifetime. That F. B. Quisenberry purchased the interest of John V. Grigsby in this land at commissioners' sale of the Clark circuit court in 1890. Appellees exhibited as evidence a copy of the record of an action in partition in the Owsley circuit court between the heirs Lewis Grigsby, Enoch Elkins, and Ezechial Elkins, which was filed in 1849. This record contains a plat of the division had in that case, allotting to the several heirs their lands, and the report of the commissioners, which was confirmed. That plat and report of division and proof shows that it does not cover the land here in controversy. Appellees also introduced in evidence two deeds from Thomas Duckham, attorney in fact for Samuel Drake, one dated November 16, 1835, the other dated June 9, 1837. Both of these deeds recite that a sale of the land was made September 27, 1828. These deeds are to Lewis Grigsby, Enoch and Ezechial Elkins. The deed of 1835 appears to embrace the land in contest, while the one dated in 1837 does not clearly express the boundary. By its reading there is something omitted. From Duckham the title is traced back to the commonwealth, except that there was no deed from Vancouver, who purchased from the original patentee, to Duckham, who deeded to Drake, thus leaving this break in title. However, appellees introduced also a suit in the Owsley circuit court of F. B. Quisenberry against John D. Spencer on a note for \$740 for land, dated October 18, 1854, and due October, 1855, but asserted no lien on any land. The defense in that case shows, or rather alleges, that there was at that time an action on the equity docket between the same parties concerning the same land, which was admitted by reply, but the result of that action between Quisenberry and John D. Spencer the record read does not show. However, appel-

lees did show that F. B. Quisenberry sold to Spencer 3,160 acres of his boundary out of the 10,000-acre survey. But it is shown by some witnesses that this sale to Spencer, after the suit on the note, was compromised by a division of the land, and that Quisenberry was to take back the land west of the creek, and Spencer to retain that on the east side; but there is no deed conveying this back to Quisenberry. Appellees' proof tended to show that this land was in the possession of one Bush, an agent of F. B. Quisenberry, and, after his death, of appellees, but Bush did not reside on the land. The testimony tended to show that for many years there had been brush fences, and others more substantial, thrown across the ravines between the hills, so that cattle could not stray off; but these fences, as they were called, were but few, and some of them, at least, were far from the lands in contest. The appellants on the trial showed they were in the actual possession of the land, living on same, when this suit was filed; exhibited patents from the state of Kentucky, issued in 1876 and 1877 upon surveys made and orders of the county court made in the year 1874. Appellants also introduced in evidence a deed from F. B. Quisenberry to John D. Spencer in September, 1855, for 3,160 acres of land,—his entire interest in the 10,000-acre tract; also deed from Duckham to Quisenberry and Bush, made April 15, 1837, which, by its description, covers the land east of the creek, and adjoining the land in contest. Appellees also introduced many witnesses as to possession, and as to when it began, etc.

At the conclusion of the evidence the court held that appellees had failed to show paper title deducible from the commonwealth, and gave to the jury the following instructions, viz.: "The court instructs the jury that, if they believe from the evidence that the plaintiffs, or those under whom they claim, have by themselves, their agents or tenants, been in the actual, peaceable, continuous, and adverse possession of the land described in the petition, claiming the same as their own, to a well-defined, marked, or natural boundary, for fifteen years, at any time before the institution of this action, and that the defendants, by themselves, their agents or employes, entered upon said land, or any of it, and cut or removed the timber therefrom within two years before September 20, 1893, the jury will find for the plaintiffs such damages as they believe from the evidence they have sustained by reason of the cutting and removing said timber, not exceeding in all five thousand dollars; and, unless they so believe, they will find for the defendants." Instruction 2: "The patents, deeds, and bonds permitted to go to the jury in evidence are to show boundary and extent of possession." We are of opinion that instruction No. 1 is erroneous, in that it permits a recovery by proof of possession prior to 1855, when the proof shows that F. B. Quisenberry, the ancestor of appellees, deeded all interest he had in the land to John D. Spencer,

and there is no proof as to a reconveyance. We are also of opinion that instruction No. 2 is erroneous. There is no proof that appellees were in the actual possession of this land under the papers referred to, claiming to a marked or natural boundary as represented by the deeds. Title papers may be used to show boundary and extent of possession, but there must be shown an actual entry and possession under the paper title before they can be so used. Judgment reversed on the original appeal and affirmed on the cross appeal. Cause remanded, with directions to grant appellants a new trial, and for proceedings consistent herewith.

### LOUISVILLE SCHOOL BOARD v. SUPER-INTENDENT OF PUBLIC INSTRUCTION.

(Court of Appeals of Kentucky. Dec. 8, 1897.)  
SCHOOLS—CENSUS—APPORTIONMENT OF PUBLIC FUNDS—CITY OF FIRST CLASS—SPECIAL LEGISLATION—SUFFICIENCY OF EVIDENCE.

1. Ky. St. § 4375, provides that the apportionment of the school fund to each school district in the state is to be based on the returns of the various county superintendents. Section 2974 provides that in cities of the first class the returns to the state officials shall be made by the school board. *Held*, that since the purpose of the last section is to make the school board stand in the place of the county superintendent, who is expressly relieved from any duty in respect to such city schools, returns of the school board of a city of the first class should be used in ascertaining the amount of funds to which said city is entitled.

2. Ky. St. § 2974, requires a census of the children of school age to be taken at least once in every five years, and a return to be made to the superintendent of public instruction at the time other school trustees are required to make their returns. For the years in which this census is not taken, the board shall, when such returns are required to be made, prepare for the superintendent of public instruction a report of the number of children of school age shown by the last census, with such an increase as is ascertained to be the annual increase of the children of the district upon averaging the yearly increase during the five years next preceding the filing of the report. *Held*, that while for the year when an actual census is taken, a return of the census must be made to the superintendent, yet, for a year in which no census is taken, no other return is required to be made than a certificate of the number of children as shown by the preceding report, with such an increase as has been ascertained by the method prescribed by said section; since section 4449, requiring trustees of school districts to certify a list of all children residing in the district, specifying the "name, age, sex," etc., does not apply to cities of the first class.

3. Const. § 186, providing that "each county in the commonwealth shall be entitled to its proportion of the school fund on its census of pupil children for each school year," does not require an actual census each year as a condition precedent to the right of a county or school district to receive its share of the school fund according to the number of school children therein.

4. Ky. St. § 2974, providing that, in cities of the first class in a year in which a census is not taken, the previous census, with such an increase as is ascertained to be the annual increase of the children of the district upon averaging the yearly increase during the five years next preceding the filing of the report, shall be used as a basis for the apportionment of that city's school fund, does not provide for an unjust or

necessarily inaccurate method of ascertaining the proximate number of children in such city.

5. In arriving at the ratio of increase under said section, it is not proper to take into account the increase caused by an addition of territory to the city since such former census.

6. Legislation directed to cities of the first class is not special legislation, even though there be but one city of that class in the state.

7. The census list of the school children taken by authority of the school board is *prima facie* correct, but the superintendent is not estopped to question its accuracy by the fact that one distribution of the school fund has been made based on such list.

8. The fact that the combined population of other cities, when so aggregated as to equal the supposed population of a certain city, is shown to furnish a much smaller school list of pupil children than that shown by the school census of such city, is not sufficient to overturn the work of the officials making the lists in question.

9. The fact that, in a school census, the number of school children listed as being 6 years of age was 9,208, and the number listed as being 19 years of age was listed as 9,285, while the average of all ages between 6 and 19 was only 5,000, together with the fact that a large number were returned as "unknown" or "names unknown," is sufficient to justify the court in finding that said list should be cut down.

Appeal from circuit court, Franklin county.  
"To be officially reported."

Application of the Louisville school board for a writ of mandamus to compel the superintendent of public instruction to apportion the city's share of the public school fund. From an order granting the writ, but limiting the relief, both plaintiff and defendant appeal. Affirmed.

R. H. Blain, for appellant school board. W. S. Taylor, for appellant superintendent.

HAZELRIGG, J. The chancellor granted the mandamus sought in this case by the appellant, the Louisville school board, against the superintendent of public instruction, but limited the relief sought by directing the superintendent to apportion and estimate the board's share of the school fund to the enumeration of children of pupil age less by some 10,000 than is claimed by the board. Of this the board complains; and of the order granting the mandamus, or affording the board relief at all, the superintendent complains.

It is argued by the superintendent, in the first place, that as, under the general law (section 4375, Ky. St.), the apportionment to each school district of its pro rata share of the school fund is to be made by the state official upon the returns of the various county superintendents, and as no such returns have been made here, but only returns from the school board, therefore the motion should have been refused absolutely. We think, however, that, on inspection of section 2974 of the Statutes, will show clearly that, where a city of the first class establishes and maintains a common-school system, its school board stands in the place of the county superintendent, and it is its duty to make a return of the number of children of school age to the state superintendent. The county superintendent is expressly relieved of any duty

with respect thereto, and is enjoined from having any control thereof.

In the second place, it is argued that this board has not made such a return to the superintendent as the law requires. The statute on this behalf (section 2974) requires a census of the children of school age to be taken at least once in every five years, and a due return of this census is to be made "to the superintendent of public instruction at the same time other school trustees are required to make their returns. \* \* \* For the years in which this census is not required to be taken, the board shall, at the time such returns are required to be made, prepare, mail, and cause to be placed in the hands of the superintendent of public instruction a report, duly certified, of the number of children of school age, as shown by the last preceding report or census, with such an increase or addition to that number as is ascertained to be the annual increase of the children of the district upon averaging the yearly increase during the five years next preceding the filing of the report; provided, however, that the board may cause an actual census to be taken in any of such years, and so report to the superintendent, as heretofore required to be done, in every fifth year." The complaint is that only the number of the children coming within the school age were certified to the superintendent by the board, and not the name, age, sex, etc., as required of "other trustees," under the general law (section 4449). If it be conceded that such a return only has been made, it would be in exact accord with the statute. The contest here is over the enumeration for the year 1897, and, as there was an actual census in 1896, no other return is required to be made in 1897 than a certificate of the number of children as shown by the last preceding report or census, with such an increase as has been ascertained by the process pointed out in the statute. All this has been done. There is no pretense that the census or returns of 1896 or 1897 have been withheld in any way, or an inspection of them denied to the superintendent. On the contrary, they have been fully exhibited, and no complaint was made in 1896 of the manner of the return of the census of that year or its results. We agree with the superintendent, however, that, for the years an actual census is required to be taken, a return of the census is to be made to the superintendent.

It is argued, in the third place, that, even if appellant has complied with the law in the respects indicated, yet that law, in so far as it dispenses with an actual census, is in violation of the constitution, and is special and discriminating legislation. So much of section 186 of the constitution as is supposed to affect the question reads as follows: "Each county in the commonwealth shall be entitled to its proportion of the school fund on its census of pupil children for each school year." We do not regard this section as demanding an actual census each year as a condition

precedent to the right of a county or school district to receive its share of the school fund according to the number of school children therein. The chief purpose in view was to declare each county entitled annually to a share of the fund in proportion to the number of pupil children living therein. The exact manner of ascertaining the number was not the subject-matter in view. Even the general school law provides that, if there has been a failure of the trustees or county superintendents to furnish the required reports for the current year, the returns of the previous year are to be taken as the basis for distributing the fund. The law has in view the interests of the pupils and the continuous maintenance of the common schools. It is not to be construed as erecting conditions upon which their rights are to be affected and the schools crippled. If, however, this plan of obtaining the annual increase in the number of children in a given locality by statistical processes is shown to be grossly unjust to other school districts, it would be declared to be repugnant to the equality of distribution demanded by the law. But in view of the practical difficulties in the way of obtaining an accurate census of the children in a large city, and the usual favor with which statistical information of this character is reported by those informed on the subject, we do not regard the plan provided for in the statute as necessarily inaccurate, or in any wise unjust to other districts where an actual census may be readily obtained. In cities as large as that of Louisville, even an actual census furnishes only approximately accurate results. Hundreds of young men and girls within the ages of 6 and 20 live in out of the way rooms and over business houses. They belong to no family, and are at work or idling at one place to-day and at another to-morrow. The number may be ascertained with quite as much accuracy by taking the census carefully once in five years, and averaging for the intervening four years, as by attempting an actual census every year. Besides, this process saves, for the benefit of the children, an annual cost of some \$8,500. Nor is such legislation to be regarded as special because it, in fact, applies alone to the city of Louisville, that being the only city of the first class in the state. Many and different powers, rights, and privileges are conferred in the various charters of the cities of the different classes within the limits of the state; but, nevertheless, the laws conferring these powers and rights are said to be general and uniform, because they operate in all alike within specified classifications. It is proper to state here that, when there has been an addition of territory to the city since some former census, the consequent increase of children is not to be taken into the account in fixing the ratio of the natural increase. But, while there is some contention in this case that the ratio has not been arrived at properly, we do not find the process in fact adapted subject to serious objection.

We are of the opinion, therefore, on the whole case, that the mandamus was properly awarded, and the only remaining matter of dispute is, can the superintendent question the returns of the board?

The census of 1896 was not called in question at the time, and the distribution of the school fund was made according to the lists of children then furnished. We do not think, however, that the superintendent on that account is estopped to question the accuracy of the lists if they are in fact fraudulent or grossly and manifestly inaccurate. No effort is made, or can be made, to upset the distribution of the former year; but, when those returns are sought to be made the basis of distribution for the current year, their integrity and accuracy may be the subject of judicial investigation. This is not subjecting the action of the Louisville officials to any test not applicable to other similar officers. The lists must be accepted by the superintendent as being *prima facie* correct, but, in this direct proceeding against the superintendent, he may at least demand that he be not required to furnish more money to the Louisville district than the testimony shows it is in fact entitled to. Whether more is demanded than its *pro rata* share is a question not free from difficulty. There is no evidence of fraud, nor can the fact that the combined population of other cities, when so aggregated as to equal the supposed population of the city of Louisville, is shown to furnish a much smaller school list of pupil children, be regarded as sufficient to overturn the work of the officials making the lists in question. This fact might raise a suspicion or cause an investigation, but in itself is wholly inadequate to show either fraud or mistake. There are, however, some facts shown in this case which require a correction of the lists. It appears that, under a misapprehension,—obtained, perhaps, from the blanks sent out from the office of the superintendent,—the census was commenced and proceeded with until, perhaps, one-third of it was completed, by taking the names of all children between the ages of 6 and 20, inclusive, when, by later instructions, those beyond the age of 19 were to be excluded. While this error was attempted to be corrected, it is manifest from the sheets before us that several thousand names have been taken when the person was at least 20 years of age, and have been returned as of the age of 19. In this way the number of children listed as being 19 years of age are reported at 9,285; while those below that age, excluding those at the age of 6, average each about 5,000 in number. This is wholly inexplicable, except upon the hypothesis that persons of the ages of 19 and 20 have been set down as of the age of 19; and this is shown clearly by a number of the lists before us. Instead of being more, the list of those at 19 ought to have been less. So, with respect to those taken at the age of 6. It is possible, from the statistics before us, there ought nat-



urally to have been a few more of these than at the other ages. But we find the number of those at 6 put down at 9,208, when the number at 7 is put at 5,462,—a difference wholly unaccounted for, and contrary to reason or the usual statistical results. It appears, also, that a large number have been returned as "unknown," or "names unknown"; and while this is shown to have resulted from want of opportunity to get the names in some of the factories, shops, etc., still it is not in accordance with the statute. The question of what is shown to be the correct list has received the attention of the learned and painstaking chancellor in this case, and the estimates we have made lead us to believe that the conclusions reached by him on the point mentioned are substantially correct, and that, instead of there being some 82,000, there are only some 71,713 children shown to be of pupil age within the city of Louisville. The judgment below is therefore affirmed.

**FORD, Clerk, v. STONE, Auditor.**

(Court of Appeals of Kentucky. Dec. 15, 1897.)

**CLERKS OF COURTS—COMPENSATION.**

The penalty of 10 per cent. prescribed by Ky. St. § 4091, for failure to pay taxes, is neither a fine nor a forfeiture, within the meaning of Ky. St. § 1721, which provides that "as additional compensation for services in commonwealth case, each circuit clerk shall receive from the state treasury 10% of the amount of all fines and forfeitures recovered in their respective courts and paid into the state treasury."

Appeal from circuit court, Franklin county.  
"To be officially reported."

Action by Thomas B. Ford, clerk, against S. H. Stone, auditor. Judgment for defendant, and plaintiff appeals. Affirmed.

W. S. Pryor and Thomas B. Ford, for appellant. W. S. Taylor, for appellee.

**WHITE, J.** This is an appeal from a judgment of the Franklin circuit court upon an agreed state of facts. From the agreed facts we learn that the commonwealth of Kentucky, by the attorney general, instituted a suit in the Franklin circuit court on the 16th day of March, 1897, against the Louisville Bridge Company, for the recovery of taxes due the commonwealth by said company in the sum of \$4,208.98, and 10 per cent. penalty on said sum for its failure to pay said taxes according to law. Said company was duly summoned; that thereafter, on the 17th day of May, 1897, the said company did pay to said W. S. Taylor, attorney general, \$4,208.92, and 10 per cent. penalty, amounting to \$420; that this money was paid into the treasury by said attorney general, and of this sum the appellant, Ford, claims the sum of \$42, being the amount he claims to be due him under section 1721, Ky. St., which reads as follows: "As additional compensation for services in commonwealth cases, each circuit

clerk shall receive from the state treasury ten per cent. of the amount of all fines and forfeitures recovered in their respective courts and paid into the state treasury, but not until so paid in." It appears that this section allows to circuit clerks 10 per cent. of fines and forfeitures recovered in the circuit courts of which they are clerks. It does not appear that there ever was a judgment rendered in the Franklin circuit court for the recovery of the taxes, penalty, or fine, as provided by section 4091, against the Louisville Water Company. We are of opinion that the penalty of 10 per cent. provided by section 4091, Ky. St., as attaching to taxes unpaid, does not come within the scope or meaning of fines or forfeitures, as provided in section 1721, allowing clerks part thereof as compensation. Wherefore the judgment of the circuit court is affirmed.

**TURNER et al. v. NEW FARMERS' BANK'S TRUSTEE.**

(Court of Appeals of Kentucky. Dec. 15, 1897.)

**ASSIGNMENTS FOR CREDITORS—COLLATERAL ATTACK ON APPOINTMENT OF TRUSTEE—REFUSAL TO PERMIT ANSWER TO BE FILED—CONTEMPT.**

1. The right of plaintiff to sue as trustee for creditors cannot be called in question by defendant on the ground that the order appointing him was fraudulently procured, as the order of appointment, having been made in another action, cannot be collaterally attacked.

2. It is error to refuse to permit defendant to file an answer tendered in due time and proper manner, though it may contain libelous and scandalous matter, as an answer thus tendered is not subject to inspection until it has been filed, and any improper matter may then be stricken out.

3. The refusal of defendant to withdraw from the record an answer which the court has refused to permit him to file is not a contempt of court, as an answer which has not been filed cannot be withdrawn.

Appeal from circuit court, Montgomery county.

"To be officially reported."

Action by Columbia Finance & Trust Company, as trustee of the New Farmers' Bank of Mt. Sterling, against Thomas Turner and others. Judgment for plaintiff, and defendants appeal. Reversed.

Thomas Turner, for appellants. Stone & Sudduth, for appellee.

**LEWIS, C. J.** In 1893 the New Farmers' Bank of Mt. Sterling made a deed of assignment for the benefit of creditors to R. B. Young. But John Evans and others instituted an action to have him removed and another designated person appointed trustee in his stead. The Columbia Finance & Trust Company, a corporation located in Louisville, was, however, appointed trustee, and as such brought the present action in the Montgomery circuit court, January 5, 1894, against Thomas Turner, his trustee under a deed of assignment made by him and other defendants. In the petition various

items of indebtedness on account of money loaned by the New Farmers' Bank to Thomas Turner, amounting to about \$1,300, are set up, and judgment asked therefor. An injunction is also prayed for restraining him and the trustees from collecting, and the obligors paying to them, proceeds of a certain sale bond transferred by Thomas Turner to the New Farmers' Bank as security for the debts sued on. January 20, 1894, being the sixth day of that term of court, Thomas Turner and the trustees tendered and moved to file their joint answer to the petition. But, objection being made by plaintiff, the court on the seventeenth day of the term, overruled the motion to file the answer. At the same time the following order was made: "Said defendants and their counsel are required to withdraw said answer from the record, and to replead such defense or defenses as they may have herein, leaving out the libelous and objectionable matter in the first and second paragraphs of said answer, to which said defendants excepted." On a subsequent day of the term defendants tendered and moved to file an affidavit in which it was stated they declined to withdraw from the records the answer tendered because they believed it contained a legal defense to the action, and, if withdrawn, they could not appeal, and test whether it was proper to be filed. They further stated that, without waiving their exceptions to rulings of the court, they then tendered and offered to file said answer, except the first and second paragraphs thereof, as their defense to the action. But the court refused to permit the answer, thus altered, to be filed. On the thirtieth day of the term a rule was ordered against Thomas Turner to answer at next term for contempt in failing to obey the order requiring him to withdraw the answer. To all said orders a bill of exceptions was tendered, which, however, the judge did not sign at that term of court. On the second day of the succeeding term Thomas Turner filed response to the rule, but it was decided insufficient, and on a subsequent day he was fined \$20 for the alleged contempt. He also filed an affidavit that the presiding judge would not, on account of personal prejudice, afford him a fair trial, and asked an election to be held to choose a special judge to preside in the case. But the regular judge refused to vacate the bench or permit such election. And it may as well be now said he, in our opinion, did right in that respect, because the affidavit ought to have been filed and motion made, if at all, before the objectionable rulings were made. On the sixth day of the April term judgment was rendered for the amount of the debts sued on, for perpetuation of the injunction, and payment to plaintiff of proceeds of the sale bond to the extent of the amount claimed in the petition.

We have thus presented a judgment ren-

dered against defendants as if by their default, though present in court, and offering at the time and in manner prescribed by the Civil Code to file an answer containing prima facie a valid defense to a portion, if not the whole, of the debts sued on. To sanction proceedings of a court of justice so depriving a party of his right to plead and defend an action against him, they should appear to be unquestionably legal and proper under the circumstances. In the second and third paragraphs of the answer, which are the only parts of it objected to, the manner in which plaintiff, Columbia Finance & Trust Company, was appointed trustee of the New Farmers' Bank is stated, and averment made that the order of appointment was procured fraudulently and against protest of all parties having an interest in the matter. The facts stated would be a proper and legitimate subject of judicial investigation in an action or direct proceeding for removal of plaintiff as trustee. But those facts do not, nor can, constitute a defense to the present action, because the order of appointment, having been made in another and distinct action, cannot be collaterally called in question. Nevertheless a defendant to an action has the unqualified right to have his original answer filed, if tendered in due time and in proper manner. And the plaintiff has no right to object, nor the court authority to listen to his objections, to the filing. In fact, the plaintiff is not permitted in open court to inquire, nor the judge to officially know, what the original answer contains before being filed, if tendered at the time fixed by the Civil Code for filing it. After the answer is duly and regularly filed, it is subject to inspection of the plaintiff, and he may then, as provided by section 121, Civil Code, move to have any irrelevant or redundant matter stricken from it, or the court may then expunge anything of an insulting or scandalous character. The error of the lower court in refusing to permit the answer filed was the cause of the irregular proceedings which followed, resulting finally in a judgment as by default. But, even if the court had been right in that respect, we see no reason why, when defendants offered to file the answer, except the first and second paragraphs, as their defense, it should not have been done. Nor do we see how their failure "to withdraw the answer from the record" could have been an act in contempt of court, or, indeed, how the answer could have been withdrawn, when in fact it had not been made part of the record, or even filed in court. What the defendant asked, and the court ought to have granted at the outset, was an exception of record to the ruling, with a view to an appeal therefrom. But, though at the first term refused, two bills of exception were at the April term of court signed by the judge, and are now before us, showing the rulings complained of and the answer tendered by defendants. If

the answer had been filed, plaintiff could have moved to strike from it the first and second paragraphs, and, that motion being sustained, as doubtless would have been done, the defendants could have gotten benefit of such defenses as were properly pleaded in other paragraphs of the answer. But, in our opinion, by reason of the error of the court in refusing to permit the answer filed, and subsequent rulings, the defendants have been deprived of substantial rights. The judgment is therefore reversed, and case remanded, that the answer in question may be filed, and other proceedings had consistent with this opinion.

#### HARRISON'S EX'X v. TAYLOR et al.

(Court of Appeal of Kentucky. Nov. 13, 1897.)  
EXECUTORS AND ADMINISTRATORS—SALE OF LAND  
TO PAY DEBTS—DESCRIPTION OF LAND  
IN JUDGMENT.

1. In an action by the executrix, defendant was entitled to a judgment for the sale of testator's land to satisfy her debt, which had been ascertained and determined in an action to settle the estate.

2. It was error to refuse the executrix reasonable time to file reply to the answer and counterclaim of defendant seeking a sale of testator's land to pay her debt.

3. A judgment for the sale of land must properly describe the land to be sold.

Appeal from circuit court, Marion county.

"Not to be officially reported."

Action by Octavia Harrison, executrix of W. B. Harrison, against Elizabeth Taylor and J. C. Glazebrook. Judgment for defendants, and plaintiff appeals. Reversed.

Finley Shuck, for appellant. J. P. Thompson, for appellees.

LEWIS, C. J. We see no reason why appellee is not in this action entitled to judgment for sale of the land left by W. B. Harrison, deceased, to satisfy her debt, the amount of which was ascertained and determined by judgment rendered in the action brought by appellant, as executrix, to settle the estate, and affirmed by this court. But it was error of the lower court to refuse reasonable time for appellant to file her reply to the answer and counterclaim of appellee asking such sale. The judgment of sale was defective because the land directed sold was not properly and sufficiently described. For these reasons that judgment is reversed, and case remanded for further proceedings consistent with this opinion.

#### QUISENBERRY v. THOMPSON et al.

(Court of Appeals of Kentucky. Dec. 17, 1897.)  
HUSBAND AND WIFE—LIABILITY OF WIFE'S SEPARATE ESTATE FOR HER DEBTS.

The separate estate of a married woman is not liable for her debts, contracted even for necessities, unless such be the agreement at the time of the contract.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Consolidated actions by B. F. Thompson and others against Sarah F. Quisenberry upon certain promissory notes executed by defendant, and seeking to subject defendant's separate estate in land to the payment thereof. Judgment for plaintiffs, and defendant appeals. Reversed.

G. E. Coons, for appellant. W. B. White, for appellees Young & Hazelrigg. O'Rear & Bigstaff and F. E. Fogg, for appellee Thompson.

GUFFY, J. The three appellees instituted separate actions in the Montgomery circuit court against the appellant, the object sought in each case being to subject the separate estate of the appellant to the payment of their several debts, alleged to have been contracted for necessities for the family of said appellant, she being a married woman, with a living husband; said claims alleged to have been evidenced by writings signed by her.

It is alleged, in substance, in the petition of appellee Thompson that on and prior to the 20th of July, 1894, he had been a regular practicing physician, and rendered services to the said appellant, which were necessary to her and her family, amounting to some \$365, and that on the 20th day of July, 1894, the said appellant, by her said writing of that date, which she signed and delivered, promised and agreed to pay plaintiff one day thereafter the sum of \$366.50, but has failed and refuses to pay any part thereof. Said note is filed, and reads as follows: "\$366.50. One day after date, I promise to pay Dr. B. F. Thompson three hundred sixty-six <sup>50</sup>/<sub>100</sub> dollars, for value received. July 20, 1894. Sarah F. Quisenberry." It is also alleged in the second paragraph of the petition, in substance, that at the time of the execution of the note, and at the time of the rendering of the services aforesaid, the appellant was the owner of a certain tract of land in Montgomery county (describing same), in which she owned a separate estate. It is further alleged that said appellant intended by said writing to bind her separate estate for the payment of the debt sued on, and intended thereby to bind the estate described. Plaintiff prays for a sale of enough of said land to pay his debt. The defendant filed a demurrer to the petition, which was overruled, with exceptions. The answer of appellant, in substance, denies that the plaintiff rendered services which were necessary to her and her family, amounting to said sum, or any sum; and avers that the alleged services named were rendered for her husband and his family, and same were rendered years ago, and before June 1, 1894; and at the time they were rendered she was a married woman, wife of Martin Quisenberry; and said services for which the note sued on was executed were not rendered for her, nor rendered under any contract made with her, in writing or otherwise, and the note sued

is without consideration. In the second paragraph it is averred that she is the owner of a life estate in the land described in the petition, and same is her separate estate; but she denied that she intended, by the said writing sued on or otherwise, to bind her separate estate for the debt sued on, and denied that said land, or any of it, was liable for plaintiff's debt. In the third paragraph it is alleged that she and her husband were housekeepers, with a family, residing on the last-named tract described in plaintiff's petition, and her interest in same is not worth as much as \$1,000, and she claims same as a homestead, and alleges that her husband is not the owner of any land, and the debt sued on was created long after she acquired the said land; wherefore she prays that plaintiff's petition be dismissed. The plaintiff entered a demurrer to the answer, which was overruled, with exceptions. Plaintiff's reply is a denial that the note sued on was without consideration, and he also denies that the services covered by said note were for the husband of defendant and his family, except that some part of it might have been for some members of the family, who were children of appellant, and part of her family. It is also averred that all of said services were necessary for said appellant and her family; and it is also claimed in the reply that the land is worth \$2,500, and that the husband is the party entitled to claim homestead, he being the head of the family.

The appellees Wells & Hazelrigg allege in their petition: That the appellant, at the time of the making of the contract hereinafter set out, was the wife of J. M. Quisenberry. That by a writing dated July 1, 1887, which defendant executed and delivered to plaintiffs, she promised and agreed to pay plaintiffs \$236.48, due one day after date, with interest from July 1, 1887, which is entitled to credits of \$24.45, \$100, and \$26, dated, respectively, September 9, 1887, March 8, 1888, and February 6, 1889. That on August 8, 1898, plaintiffs instituted an action on said note, and obtained a personal judgment for the aforesaid sum; and sued out an execution against the parties, which was returned "No property found." That said judgment and interest amounts now to \$210.13, and is wholly unpaid. That the original note is filed in said action in the Montgomery circuit court, and cannot now be filed, but same is referred to, and copy is herewith filed. That the consideration for which the said Sarah F. Quisenberry executed and delivered said note was for goods, wares, and merchandise furnished her, which were necessary for her own use and that of her family. Said goods, wares, and merchandise are described in the account filed, and marked "A." as fully as if set forth in words and figures. That said Quisenberry is the owner for life, for her separate use, of the following tracts of land, lying on the waters of Step Stone creek, in Montgomery county (giving boundary). That plaintiffs

are entitled to a lien on her said interest in said land to satisfy their debt. Wherefore they pray judgment subjecting said interest of defendant in said land, or so much thereof as may be necessary to pay their debt. Appellant demurred to the petition, which was overruled, with exceptions. Afterwards said plaintiffs filed an amended petition, in which it is averred that the said defendant, Sarah F. Quisenberry, intended to bind her separate estate described in the petition, and credit was extended her, for the goods and merchandise sold her, on the faith of her ownership of the property described in the petition; and defendant J. M. Quisenberry is insolvent, and was at the time of furnishing the said necessities and since that time. The answer admits the execution of the said note and the obtaining of the judgment, and alleges that the said defendant (now appellant) was, at the time she signed said writing, and at the time plaintiff recovered judgment thereon, a married woman, and the wife of Martin Quisenberry, who was then, and is still, living; and she pleads her coverture in bar of said judgment, and in bar of plaintiff's recovery herein, and says said judgment is void as to her, and denies that said necessities were furnished for her own use or that of her family, or sold to her under any contract made in writing signed by her. In the second paragraph it is alleged, in substance, that it has been more than two years since the plaintiffs sold said goods named in the petition, and said account is barred by time, and she pleads and relies on same in bar of plaintiffs' recovery. In the third paragraph she admits that she is the owner of a life estate in the land described in the petition, and same is her separate estate, but it is not liable to plaintiffs' debt. In the fourth paragraph she pleads the homestead act, and avers that her interest is not worth as much as \$1,000, etc. In the fifth paragraph, she denies that by the execution of the writing she intended to bind her separate estate described in the petition, and denies that credit for the alleged necessities was extended to her for the goods and merchandise on the faith of her ownership of the property described in the petition, or that any credit was given to her on the faith of her being the owner of said property as her separate estate. Plaintiffs demurred to the second, third, and fourth paragraphs of defendant's answer, and also moved to strike out of the first paragraph of the answer so much as was embraced between the letters A and B and C and D, to which defendant objected. The court sustained the motion to strike out so much of the answer as was embraced between the letters A and B, and overruled said motion as to that part of said answer which was embraced between the letters C and D. To this ruling of the court both plaintiffs and defendant objected. The court also overruled the demurrer of plaintiffs, with exceptions. Plaintiffs, in their reply, denied that

said account is barred by the statute of limitations, and alleged that the account was closed up by the note mentioned in the petition, and that appellant had made several payments on same, and promised to pay all of same. For reply to the third paragraph, they deny that her said separate estate is not liable to plaintiffs' debt. For reply to the fourth paragraph, they deny that her said interest in the land, to wit, 81 acres, is not worth as much as \$1,000, and aver that it is worth at least \$2,500, and deny that appellant is entitled to a homestead, and claim that her husband alone is entitled to claim homestead, he being the father and the head of the family.

It is alleged in the petition of Young & Hazelrigg that the defendant (now appellant), by a writing dated January 22, 1894, executed and delivered to plaintiffs, agreed to pay them \$53.95 three months thereafter, with 8 per cent. per annum until maturity, and that defendant's husband is alive. Wherefore they pray to be adjudged a lien upon said life interest in said land of defendant, and that same, or enough, be sold to satisfy their said debt, interest, and costs. The note referred to in the foregoing petition reads as follows: "\$53.95. Mt. Sterling, Ky., January 22, 1894. Three months after date, we, or either of us, promise to pay to the order of Young & Hazelrigg, Traders' Deposit Bank, Mt. Sterling, Ky., fifty-three <sup>95</sup>/<sub>100</sub> dollars, at their office at Mt. Sterling, for value received, with interest from maturity at the rate of eight per cent. per annum, and attorney's fees if suit be instituted on this note. Sarah F. Quisenberry." Defendant's demurrer to the petition was overruled. The answer admits that defendant executed the note sued on, but says that at the time she signed said note she was a married woman, wife of Martin Quisenberry, who was then, and is still, living, and by reason thereof is not bound on said note, and pleads her coverture in bar of any judgment on said note. In the second paragraph she denies that the consideration of said note was for necessities for her and her family, except some of her sons purchased said goods, but not upon her order, in writing or otherwise, and not by any contract made by her; and the note sued on is without consideration. In the third paragraph she says it is true she owns a life estate in the land mentioned in the petition, and that her interest in said land is her separate estate, but denies that plaintiffs are entitled to a lien upon said land, or any of same, to secure the payment of said debt, interest, and costs, and denies plaintiffs' right to sell said land, or any of it, to satisfy said debt or note. In the fourth paragraph she states that she and her husband are housekeepers, with a family, and reside on the tract of land described, and her interest in same is not worth as much as \$1,000, and the debt was created long after

she acquired the said land, and claims said land as a homestead. In the fifth paragraph she alleges that more than two years has elapsed since the purchase of said goods, and same is barred by the statute of limitation, which she pleads. Plaintiffs' demurrer to the answer was overruled, with exceptions. The reply of plaintiffs admits the coverture of defendant, but denies that by reason thereof defendant is not bound on said note; denies that the goods for which the note sued on was executed were not sold and delivered to her upon her order or writing, or that the note sued on was without consideration. For reply to the fourth paragraph, they deny that her said interest in the 81-acre tract of land is not worth as much as \$1,000, or that she has any homestead right in same. For reply to the fifth paragraph, they deny that more than two years had elapsed since the debt sued on herein was due, or that same is barred by time or the statute of limitation.

In May, 1895, the foregoing three cases were consolidated, and ordered to be docketed and prosecuted under the style of "B. F. Thompson, etc., v. Sarah F. Quisenberry, etc."

The question of the power of a married woman to charge her separate estate with debts contracted for necessities for herself and family has been ably argued at great length by counsel, but we deem it wholly unnecessary to enter into a discussion of that question. We take it to be a well-settled rule of law that the separate estate of a married woman is not liable for her debts, contracted even for necessities, unless such be the agreement at the time of the contract, or evidenced by writing showing that such was the contract executed by her. The evidence in these consolidated cases fails to establish or show that the appellant ever agreed by contract, either express or implied, that the debts herein sued on ever were to be a charge upon her separate estate, or that her interest in the real estate in question should be subjected to the payment of the debts in suit. It is questionable if any such contract is sufficiently averred in either of the petitions filed. But, if it be conceded that the petitions make sufficient allegations in that behalf, yet they are explicitly denied, and the evidence wholly fails to sustain the contention of appellees. In fact, the evidence and circumstances rather tend to negative the claim that it ever was the intention or expectation of appellant that the debts should be a charge upon her separate estate. The proof is by no means clear that the plaintiffs, at the time the debts were created, considered that the separate estate of appellant was chargeable therewith. For the reasons indicated, the judgments appealed from are reversed, and the cause remanded, with directions to dismiss the petitions of the appellees, and for proceedings not inconsistent herewith.

## COLLINS et al. v. ROSENHAM.

(Court of Appeals of Kentucky. Dec. 8, 1897.)

SALES — WAREHOUSE RECEIPT — NEGOTIABILITY —  
BONA FIDE PURCHASER — COSTS.

1. The fact that one bought whisky upon a negotiable warehouse receipt for 40 cents per gallon, cash, from his brother-in-law, who purchased it for 50 cents on four months' time, is insufficient to show any purpose between the brothers-in-law to defraud the original seller.

2. A warehouse receipt is valid in the hands of an innocent purchaser for value without notice.

3. That the maker of a warehouse receipt was not the owner of the warehouse in which the whisky was stored is no defense to the maker in a suit for the whisky by an innocent holder for value of the receipt.

4. The charges of \$69.40 for stenographer and \$85 for commissioner in taking five depositions in New York, covering 96 pages of record, are exorbitant, in the absence of proof that they are the legal fees in that state.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

Action by L. E. Rosenham against Wm. M. Collins & Co. From a judgment for plaintiff, the defendants appeal. Reversed.

Augustus E. Willson, for appellants. Barnett, Miller & Barnett, for appellee.

BURNAM, J. On May 26, 1890, William M. Collins & Co., distillers and wholesale liquor dealers doing business in Louisville, sold to H. A. Dickerson & Co., of New York, 50 barrels of whisky at 50 cents per proof gallon, and accepted in payment therefor the acceptance of Dickerson & Co., due 4 months thereafter, and at the same time issued to Dickerson & Co. their 10 negotiable warehouse receipts, each receipt being for 5 barrels, and in form as follows, the only variation in the receipts being as to the serial numbers, wine gallons, proof, and proof gallons:

W. M. Collins.

J. L. Hackett.

W. M. Collins &amp; Co., Distillers.

Louisville, Ky., May 26, 1890.

Received in our distillery bonded warehouse No. 410, Fifth district of Kentucky, for account and subject to the order of H. A. Dickerson & Co., deliverable only on the return of this receipt properly indorsed, and on payment of the state and government tax that may be due on said whisky, and storage from May 26, 1890, day of —, 188—, at the rate of 5 cents per barrel per month: Five barrels of Greenbrier whisky, entered into bonded warehouse as follows:

Serial Numbers.	Wine Gals.	Proof.	Proof Gals.
4836	46	100	46.00
7	45		45.50
8	47	101	47.47
9	46		46.46
40	47		47.97
			233.40

Warehouse

Stamps. When Made. February, '89.

When Tax is Due.

2  
3

March 5, 1892.

This receipt is issued in deference to the laws of the United States and the state of Kentucky defining and regulating the duties of warehousemen.

Wm. M. Collins &amp; Co.

Attest: —, —, U. S. Storekeeper.

Indorsed: Deliver to L. E. Rosenham or order.  
H. A. Dickerson & Co.

On July 10, 1890, Dickerson & Co. sold the whisky, and indorsed and delivered the warehouse receipts issued to them by Collins & Co. to one Rosenham, a liquor dealer, and brother-in-law of one of the members of the firm of H. A. Dickerson & Co., at the price of 40 cents per proof gallon, or \$205.51. Subsequently Dickerson & Co. became insolvent, and a short time thereafter appellee presented the warehouse receipts to appellants at their place of business, and demanded that the whisky be delivered to him, at the same time tendering the taxes and storage charges due thereon, in conformity with the requirements of the receipts above recited. Appellants refused to deliver the whisky, or to free same, unless, in addition to the charges above named, appellee would pay the purchase price of the whisky for which it was sold to Dickerson & Co. Thereupon appellee instituted this suit, setting up the issue of the receipts by appellants to Dickerson & Co., and that, for value received of appellee, Dickerson & Co. had, in the usual course of business, transferred to him the warehouse receipts in question; that he was a bona fide purchaser of the whisky and receipts, without notice of any claim of appellants against same, and pleading the tender, and the refusal of appellants to comply with the conditions thereof, charging that appellants had converted the whisky to their own use, and seeking judgment. Appellants filed their answer, in which they admit the issuing of the warehouse receipts sued on, but alleged, by way of defense, that they were not the owners of warehouse No. 410, in the Fifth district of Kentucky, in which the whisky sold to Dickerson was stored; that this warehouse belonged to one Walker, and that they had no authority to issue receipts for whisky stored therein; that they had purchased the whisky in question from Walker, and held his receipt for same; that the receipts sued on were not, in fact, warehouse receipts, but that they were intended, and were understood by both themselves and Dickerson & Co., to be mere sale memoranda, and that the whisky which they represented was not to be delivered until the purchase money had been fully paid; that appellee was not the owner of the receipts; that the entire scheme was an attempt to defraud them; and that appellee knew, at the date of the alleged purchase, that Dickerson & Co. had not paid for the whisky, and were not entitled to make a demand for possession under the warehouse receipts. All the affirmative allegations were denied by reply, and appellee pleaded that the receipts in question are in the usual form of negotiable warehouse receipts, that appellants were estopped from setting up that the receipts were issued upon any other conditions than those set forth therein, or from claiming that they were not the owners of warehouse No. 410, Fifth district of Kentucky, or that the receipts were intended by them or understood by Dickerson

& Co. to be anything else than what they appeared to be on their face.

It is evident that Dickerson & Co., at the time they purchased the whisky in question, were insolvent, and, notwithstanding their denials, the evidence conduces to show that they did not expect or intend, at the time they bought the whisky, to pay for it; but there is no evidence which tends to connect the appellee herein with such fraudulent purpose on their part. Appellants had had previous transactions with the firm of Dickerson & Co., having sold them at one time a large block of whisky on the same terms and conditions under which they parted with the title to that in question, and which was paid for in due course; and the only facts upon which appellants rely to fasten upon appellee knowledge of the fraudulent purpose of Dickerson & Co. is the fact that he bought the whisky in July at 40 cents per gallon, cash, for which Dickerson & Co. had in the preceding May contracted to pay 50 cents per gallon on four months' time, and the further fact that he is a brother-in-law of Johnson, one of the firm of Dickerson & Co. But these facts are, manifestly, insufficient to show that a fraudulent understanding and conspiracy existed, as whisky, like most articles of commerce, depends largely for its value upon the necessities of the vendor at the time of making the sale; and certainly the reduction in price of 10 cents on the gallon is not sufficient to establish, *per se*, knowledge on the part of appellee of the fraudulent intentions of Dickerson & Co. at the date of the sale, or that he knew of appellants' claim against the whisky. Especially is this true as the testimony as to the value of the whisky in the New York market at that time is very conflicting.

The evidence shows that the appellants were not only wholesale liquor dealers, but that they were also actual distillers and warehousemen, and that they owned a bonded warehouse in Bardstown, in which whisky was stored, near bonded warehouse No. 410, which belonged to Walker, and in which the whisky in question was stored. And there can be no question that they fully understood the negotiable character of the instruments which they issued and delivered to Dickerson & Co., and that they were liable to pass into the hands of innocent purchasers for value. They are in the usual form of warehouse receipts. They represent that appellants owned bonded warehouse No. 410, Fifth district of Kentucky, that they, as warehousemen, had received into the warehouse, for account and subject to the order of H. A. Dickerson & Co., the whisky in question, and that on return of the receipts properly indorsed by Dickerson & Co., and the payment of the taxes and storage due on the whisky, it would be delivered to the holder of such receipts. Instruments of this kind are *sui generis*. From long use in the commercial world, they have

come to have a well-understood meaning, and the usual, indorsement, or assignment of them as absolutely transfers the general property of the goods or chattels therein named as would a bill of sale; and where a warehouseman issues such a receipt he puts it into the power of the holder to treat on the faith of it. He enables him to say, and to induce others to believe, that he has certain property which he can sell or pledge for the loan of money. And if a warehouseman gives to the party who holds such a receipt a false credit, he will not be suffered to contradict the statement which he has made in the receipt so as to injure the party who has been misled by it. See *McNeill v. Hill*, Woolw. 96, Fed. Cas. No. 8,914.

Appellants seek to avoid the performance of their written agreement by pleading that they were not the owners of bonded warehouse No. 410, Fifth district of Kentucky, and that they consequently had no right to issue the receipts in question; that the receipts, therefore, had no negotiable qualities; that no title passed thereby to Dickerson & Co., and that their assignment of the receipts to appellee invested him with none. To support this novel contention, appellants rely chiefly upon the case of *Cochran v. Ripy*, 13 Bush, 506. But the litigation in that case was not between the issuer or maker of the warehouse receipt—the party who put it in circulation and gave it currency—and the holder thereof, but was between the holder of the warehouse receipt and the innocent purchaser of the whisky without notice of such receipt. The court held in that case that under the statute the receipt did not pass title to goods not in the warehouse, to the injury of third persons; but that decision expressly holds that: "It was not contemplated by the law making power that an innocent party should be denied all remedy upon the contract, or against the party violating the statute. Such an interpretation would defeat the purpose and policy of the statute by aiding the guilty and punishing the innocent." The warehouse receipts issued by appellants were not only negotiable at the common law, but are expressly made so by statute, and are placed upon a footing with bills of exchange, with like remedies thereon. And it is the recognized doctrine, both in this country and in England, that bona fide holders of negotiable instruments for a valuable consideration, without notice of facts which impeach its validity between antecedent parties, hold title unaffected by such facts, and may recover thereon, although, as between antecedent parties, the transaction may be without legal validity. See *Woolfolk v. Bank*, 10 Bush, 514; *Spencers v. Biggs*, 2 Metc. (Ky.) 123; *Kelly v. Smith*, 1 Metc. (Ky.) 316. Having issued and given currency to the negotiable instruments sued on, appellants cannot escape liability thereon at the suit of an innocent purchaser for value,

without establishing by proof that the holder had actual notice that the purchase money had not been paid, and that it was the agreement that it should be paid before the whisky should be delivered. Any other construction would enable appellants to take advantage of their own wrong, and this they have failed to do. But the judgment in this case is erroneous, and prejudicial to appellants in fixing the value of the whisky sued for at 60 cents per gallon. The only evidence in the record which justifies this conclusion is the testimony of the appellee, and the overwhelming weight of the testimony shows that the whisky could not have been worth more than 50 cents per gallon at the date of the demand for its delivery, and the judgment should not have been for a greater amount than 50 cents per gallon.

We also think that the motion of appellants to correct the taxation of costs for taking the depositions in New York should have prevailed. While the agreement attached to these depositions shows that appellants consented that the testimony of the witnesses should be taken in shorthand, and thereafter transcribed in typewriting, there is nothing in that agreement which binds the appellants to be responsible for arbitrary and extravagant charges. There is nothing in this record to show that the charges of the stenographer of \$69.40, and those of the commissioner of \$85, for taking the depositions in New York, are the legal fees authorized for such services under the laws of that state, and these charges for taking only five depositions, which extend over only 96 pages of the record, are so unreasonable and extortionate that they should not be allowed. The judgment should be corrected in this particular, by allowing the usual fees provided by the laws of this state for such services, and the judgment is therefore reversed for the corrections indicated.

#### CLEMMONS v. GROW.

(Court of Appeals of Kentucky. Dec. 16, 1897.)

##### PARTITION FENCES—RIGHTS OF ADJOINING LAND-OWNERS AS TO REMOVAL.

1. Ky. St. § 1783, relates to partition fences which exist by agreement or acquiescence. Section 1784 provides for the erection of partition fences under certain conditions. Section 1785 provides the method of repairing partition fences. The first clause of section 1786 provides the conditions under which one cannot be compelled to contribute to the erection of a partition fence, followed by a provision which seeks to regulate the conditions upon which the owner of uninclosed lands may inclose them by uniting his outside boundary fence to the fence of another; the last clause in the section providing that "neither party shall remove same without the consent of the other, except between the first of December and the first of March of the ensuing year." Section 1787 provides that "no such change as named in the last section shall be made unless three months' previous notice, in writing, shall be given to the opposite party by the person desiring to make the same." *Held*, that the pro-

vision of section 1786, which authorizes a landowner to remove his part of a partition fence, between certain dates, on notice, refers to any one of the partition fences named in the various sections of the statute, and is not confined to the partition fence for which, in part, the owner of uninclosed lands is required to pay when he desires to inclose them by uniting his outside boundary fence to the fence of another.

2. The removal by a landowner of a panel of that part of a partition fence erected by him on his own land, so as to detach it from that part of the fence erected by the adjoining landowner, is a removal of the fence, in contemplation of the statute; and such adjoining landowner can no longer treat it as a partition fence, so as to deprive the owner on whose land it is erected from using it as a part of a barbed-wire fence constructed by him along his line,—the statute forbidding the use of barbed wire only in the construction of partition fences.

3. While the statute does not authorize the removal of a partition fence until after the 1st day of December, yet a removal on that day, though unauthorized at the time, has the same effect as a removal on a subsequent day, except that the adjoining landowner may recover nominal damages, or such actual damages as he has sustained by reason of the removal a day earlier than the statute authorized.

Appeal from circuit court, Fayette county.  
"To be officially reported."

Action by Levi Grow against Rankin Clemmons. Judgment for plaintiff. Defendant appeals. Reversed.

J. M. Tanner, for appellant. Saml. M. Wilson and J. R. Morton, for appellee.

PAYNTER, J. The parties to this action own adjoining and inclosed lands. By a verbal agreement, a partition fence was built by them. Grow constructed his part of pickets, and Clemmons constructed his part of rails,—what is commonly called a "worm fence." Clemmons' fence appears to have been built upon his own land. On August 31, 1894, he gave Grow a notice in writing that he would proceed, after the 1st of the following December, to remove his part of the partition fence. On December 1st, Clemmons removed the panel of his fence which united it to the part of the partition fence which Grow had built. On the same day he erected fence posts on his own land the entire distance of the partition fence. In doing so, he put the posts in the corners of the worm fence, so far as it extended; and from that point he planted posts on his own land, but near the picket fence. Part of the distance, he placed three strands of wire; and the balance, only two. The kind of partition fence which existed between the lands of the parties is described in section 1783, Ky. St. (section 4, Act Feb. 20, 1893). That section relates to partition fences which exist by agreement or acquiescence. Section 1784, Ky. St., provides for the erection of partition fences under certain conditions. Section 1785, Ky. St., provides the method of repairing partition fences. The first clause in section 1786, Ky. St., provides the conditions under which one cannot be compelled to contribute to the erection of a partition fence. This is followed by a provision which seeks to regulate



the conditions upon which the owner of uninclosed lands, who desires to, may inclose them by uniting his outside boundary fence to the fence of another. The first clause of section 1786 would more appropriately appear in section 1784. The last clause in section 1786 is as follows: "Neither party shall remove same without the consent of the other, except between the first of December and the first of March of the ensuing year." Section 1787 is as follows: "No such change as named in the last section shall be made unless three months' previous notice, in writing, shall be given to the opposite party by the person desiring to make the same." The court does not quite understand why the legislature should attempt to make one, under certain conditions, contribute to the erection of a partition fence, and at the same time allow him to immediately give notice, and remove it. But it cannot be said that that clause of section 1786 which authorizes a party to remove his part of the partition fence between certain dates, upon notice, relates particularly to any one of the partition fences referred to or described in the various sections of the statute. While this clause might more appropriately have been part of section 1787, still the language is comprehensive enough to embrace any one of the partition fences to which we have referred. It cannot be said that it refers alone to the partition fence for which, in part, the owner of uninclosed lands is required to pay when he desires to inclose them by uniting his outside boundary fence to the fence of another, by the doing of which his uninclosed lands will thereby become inclosed. If the section which provides for the removal of partition fences does not relate to the class last described, then it relates to all those which we have enumerated. We therefore conclude that Clemmons had the right to remove his fence between the 1st of December and the 1st of March following the service of the notice. The manifest purpose of the statute was to prevent one who had built part of a partition fence, or who had an interest otherwise in a partition fence, from removing it without notice; thus exposing the crops of his neighbor or exposing the premises of his neighbor to the ravages of stock, or depriving him of the use of it for a time. The time which was prescribed for the removal is a season when it is supposed that the farmer will not have growing crops, and at the same time will allow him to erect a fence upon his own lands for the purpose of inclosing his premises. Therefore the legislature has wisely selected the season during which the removal must take place.

It is insisted by counsel for appellee that the removal of the panel of the fence, as we have described, did not constitute a removal in contemplation of the statute. The worm fence was entirely on the land of Clemmons. Grow had notice that he could no longer enjoy the use of that fence as a partition fence;

that, if he desired to continue to have his lands inclosed, he could not look to Clemmons to aid him, and share the burden and expense of the partition fence, but that he would be required to build one himself along the line where Grow's part of the fence had existed. As the rails were upon Clemmons' land, he had the right to permit them to remain at that place, or to take them elsewhere, as he chose. When the fence was detached from that of Grow, it could no longer, in fact or in law, be regarded as a partition fence. If Clemmons had the right to remove it, he certainly had the right, if he chose to do it, to build another in close proximity to the line between his own and the lands of Grow; and in doing so he could utilize the fence which was on his own land, and he did so. It seems to us that that did not invest it with the character of a partition fence. We think there was a removal or a change, so that it could no longer be treated or regarded as a partition fence. While it remained a partition fence, Clemmons had no right to use barbed wire in repairing it, neither could he use it in the construction of a new one, without the consent of Grow. The legislature has not attempted to prevent the owner of land from erecting fences of barbed wire, except partition fences. If Clemmons had the right to build a fence along his line, then he had the right to build it of rails and barbed wire, or either. If Grow desired to continue to have his land inclosed, he had the right to build whatever kind of fence he desired. If he did not desire to do this, but wanted to allow his land to be inclosed in part by a fence which Clemmons had erected, it did not give him the right to dictate to Clemmons what character of fence he should build. It is true that Clemmons removed the fence one day earlier than he was authorized under the law. He did it on the 1st day of December. The law did not require him on the day following to do an idle thing,—to put up the panel of fence which he had removed, and immediately tear it down, in order to say that there had been a removal of the fence. The right to remove on that day existed, and Grow was aware of his continued purpose to no longer maintain a partition fence. Had Grow sought to do so, he might have maintained an action against Clemmons, and recovered nominal damages, because of the removal on the 1st day of December; or, had he sustained actual damages in consequence of the removal a day before Clemmons was authorized to make it, a recovery could have been had on that account. The judgment is reversed for proceedings consistent with this opinion.

#### WEATHERFORD v. BOULWARE.

(Court of Appeals of Kentucky. Dec. 15, 1897.)  
WILLS—CONTINGENT REMAINDER—CONSIDERATION FOR DEED.

1. A devise of land to M. for life, and at her death to "descend to her heirs, or to such of them as shall be then living, and the descendants of

any that may leave issue," and, if all her children die without issue, to "descend to the heirs of my sister," creates in W. and A., the children of M., a contingent remainder, which they may sell and convey.

2. W. and A. having agreed, during the life of M., to convey each to the other one-half the land devised, W., who alone survived M., cannot have her deed to A., executed pursuant to that agreement, canceled, on the ground that A. never conveyed to her the other half the land, and in fact had no interest which he could convey, as she might have compelled him at any time to execute a deed which would have passed his contingent interest; and, as her title is now perfect without such a deed, she cannot complain.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action by Mary E. Weatherford against M. L. Boulware to set aside a deed. Judgment for defendant, and plaintiff appeals. Affirmed.

James T. A. Baker and John Roberts, for appellant. Burwell K. Marshall, for appellee.

WHITE, J. This action was begun in the Jefferson circuit court by the appellant, Mary E. Weatherford, against M. L. Boulware, the widow and devisee under the will of A. T. Boulware, seeking to set aside and declare void a certain deed made by appellant and her husband to A. T. Boulware, dated December 30, 1873, to certain lands in Jefferson county. The petition recites that in 1856 Abraham Hite died, in Jefferson county, leaving a will, which was duly probated, and reads as follows: "In the name of God, amen. I, Abraham Hite, being of sound mind and disposing memory, do make, ordain, and publish this as my last will and testament, hereby revoking all others: \* \* \* Item: My estate being small, while it is my desire to leave a competency for the support of my beloved wife always subject to her control, therefore I give and bequeath unto my said wife, during her natural life, all my property, of every kind or description whatsoever, real, personal, or mixed. This I do the more freely from a full knowledge of her natural regard for my said daughter and her children. Item: It is [my] further wish that, after the demise of my said wife, my whole property devised to her, which may not have been expended as a means of support, shall descend to my said daughter, Matilda Boulware, during her natural life. It is my further will that, after the demise of my said daughter, all my real estate shall descend to her heirs, or to such of them as shall be then living, and the descendants of any that may leave issue. Item: It is my further will that should all the children of my said daughter die without issue, that the real estate devised to them shall descend to the heirs of my sister Polly Cartmell. In conclusion, I hereby nominate and appoint my said wife executrix, hereby excusing her from giving security or undergoing any other trouble

that can be dispensed with by the forms of law." It is further alleged that the above-mentioned Matilda Boulware was the mother of appellant and of A. T. Boulware, and died in April, 1894; that this appellant and A. T. Boulware were the only children that Matilda ever had, and were the grandchildren of Abraham Hite. The petition alleges that A. T. Boulware died in December, 1893, and before their mother, Matilda. It is also alleged that in 1873, appellant being then a married woman, and so continuing till 1894, being ignorant of the law, and having full confidence in her brother, A. T. Boulware, and thinking that he understood the law, she trusted him and relied upon him (her husband being a man of no business capacity); and that on the 30th day of December, 1873, she and her husband made a deed to her brother of 50 acres of the 99½ acres owned by Abraham Hite in Jefferson county, Ky. (giving boundary), and the same land devised to Matilda Boulware for life by the will; that the deed from her to her brother was made in pursuance of a written contract, filed with the petition. But she alleges that her brother never made a deed to her as provided by said contract, and that her deed was therefore without consideration and void. The petition alleges that, at the date of the deed, neither she nor her husband nor her brother had any interest in the 99½ acres that could be conveyed; and that, if a deed had been made to her, no title would have passed; and that, her brother, A. T. Boulware, having died before his mother, Matilda, he never had any interest in or title to the land he agreed by the written contract to convey; that the conveyance of said land was the only consideration ever made or pretended to be; that the conveyance not having been executed during the lifetime of the brother,—and indeed, if the same had been executed, it would have passed no title, as the brother, A. T. Boulware, never in fact had title to the land agreed to be conveyed,—the entire consideration failed; and the prayer was for a cancellation of the deed made by her to her brother, and that it be adjudged void. It is alleged that the brother died without issue, and appellee is the devisee of his will. To this petition, and again after amendment, the court sustained a demurrer; and, the appellant declining to plead further, her petition and action were dismissed, and from that judgment this appeal is prosecuted.

We are of opinion that, under the will of Abraham Hite, the appellant and A. T. Boulware were vested with a contingent remainder in the land, and had a right to sell same and convey this right by deed. As it is shown by the petition that A. T. Boulware agreed in writing to convey to appellant his share, or half, appellant might at any time have compelled a deed to have been made to her, and, so far as this record shows, having failed to demand a deed during the

lifetime of her brother, and now he having died, and the title of appellant being perfect without this deed being made, we see no reason why her deed to A. T. Bouliware should be canceled or declared void for any reason. When this deed was made, the contingency existed as to both, and they had even chances, and it cannot be said there was either fraud in the contract or failure of consideration. Finding no error, the judgment is affirmed.

**BALL et al. v. MAYSVILLE & B. S. R. CO.**  
et al.

(Court of Appeals of Kentucky. Dec. 16, 1897.)

**EMINENT DOMAIN—RAILROADS—LIEN TO SECURE JUDGMENT FOR DAMAGES—RECEIVERS.**

1. A judgment against a railroad company for damages to abutting property, resulting from the construction of the road in a street so as to obstruct ingress and egress, and to cause, necessarily, smoke, soot, and cinders to be thrown upon the property, being for the taking of private property for public use, is a lien upon the entire road in the nature of a vendor's lien.

2. Since a railroad cannot be severed, but must, if sold under judicial process, be sold as an entirety, such a lien must, to be effective, exist upon the entire road.

3. The rights of a lessee of the road are subordinate to such a lien.

4. In an action by a judgment creditor, under Ky. St. § 814, for the appointment of a receiver of a railroad, a lessee of the road, whose rights are subordinate to plaintiff's lien, may be enjoined from using the road.

5. The fact that plaintiff failed to obtain personal judgment against the lessee, as he might have done at the same time he obtained judgment against the lessor, does not deprive him of the right to have the road placed in the hands of a receiver for the purpose of enforcing the judgment he has obtained, or take away his lien.

6. The fact that the equipment of a railroad may be insufficient to enable a receiver to operate it does not deprive a judgment creditor of the right to have a receiver appointed.

Appeal from circuit court, Mason county.

"To be officially reported."

Action by W. W. Ball and others against the Maysville & Big Sandy Railroad Company and the Chesapeake & Ohio Railroad Company to have the road of the former company placed in the hands of a receiver, and to enjoin the latter company from using the road. Judgment for defendants, and plaintiffs appeal. Reversed.

E. L. Worthington, Garrett S. Wall, and L. W. Robertson, for appellants. Wadsworth & Cochran, for appellees.

**PAYNTER, J.** As judgment creditors of the Maysville & Big Sandy Railroad Company, on returns of "No property found," the appellants instituted this, an equitable action, against the Maysville & Big Sandy Railroad Company, by which it sought to have the road placed in the hands of a receiver, and also relief by injunction. The judgments were rendered for damages resulting, respectively, to the abutting properties—real estate—of the appellants, situated in the cities of

Maysville and Dover, Mason county, Ky., by the construction and prudent operation of the railroad on the streets upon which the property abuts. The manner in which the railroad was constructed unreasonably obstructed ingress and egress to and from the street, and the prudent operation of it caused smoke, soot, and cinders to be thrown in and upon their property. It is hardly necessary to add that the constitution of the state only allows private property to be taken when for public use, and then only when just compensation is previously made. It is no longer an open question in this state that the damages resulting to property in the manner indicated is a taking of private property for a public use, and for which compensation must be made. In *Stickley v. Railroad Co.*, 93 Ky. 327, 20 S. W. 262, the court said: "Where the proximity of the road to the dwelling is such as to prevent the reasonable ingress and egress to and from the premises, to cause necessarily soot and cinders to enter the dwelling, then it becomes a taking of private property for public use, and for which compensation must be made." If thus damaging the property is a taking, in the meaning of the constitution, then there should be a remedy commensurate with the injury resulting from the invasion of private rights. If the person so injured simply has a legal claim for such injury, the railroad company may be wholly insolvent, and a recovery of a personal judgment will not, in any degree, enable the party to be compensated for the property taken. The taking implies that there has been an appropriation or deprivation of something. Should the owner be compelled to surrender such property right without retaining a claim upon it for compensation, it can be taken against his will, when done by constructing the road along the street on which his property abuts, without any security that he will ever be compensated for it. As he cannot tell, until the road is constructed, the extent of his damages, he cannot, by an injunction, prevent its construction. *Fulton v. Transfer Co.*, 85 Ky. 640, 4 S. W. 332. Will it do to hold that he cannot prevent the invasion of his rights before the road is constructed along the street; then, when it is done, say that he has no right greater than that afforded him by a personal judgment, maybe against an insolvent corporation? It seems that a court of chancery, when the taking of the property is accomplished, as was done in this and similar cases, will not protect the owner by restraining the appropriation of the property, because the extent of the injury cannot be ascertained until the railroad is constructed. Now, when the injury has been ascertained, can a court of chancery afford to say that, notwithstanding it was not proper to prevent the invasion of private rights, still there is no equitable right which will enable the owner to pursue that which was taken from him, and claim a lien upon it to the extent of the injury? It would seem that courts of equity would be

established for little purpose if they are powerless, in the first instance, to prevent the invasion of private rights, and, in the second, to give an adequate remedy for the injury it could not prevent. We are of the opinion that the appellants have a lien in the nature of a vendor's lien on the Maysville & Big Sandy Railroad for their judgments. From the character of the property, the lien must necessarily exist on the entire line of railroad, as there cannot be a sale of only that part of the railroad which fronts on the property without serious injury to the owners of the road and the rights of the public, for whose use the private right must, for just compensation, yield. If there could be a sale of such sections of the road as are in front of the properties injured, then it would necessarily follow that there could be a severance, and possession taken of such parts thus sold by the purchaser.

It appears that the Chesapeake & Ohio Railroad Company is in possession of the Maysville & Big Sandy road under some sort of arrangement, the nature of which is unknown to the appellants. Whatever may be the nature of the contract between the companies, the Chesapeake & Ohio Railroad Company cannot acquire any rights which will interfere with the rights of the appellants to enforce the collection of their judgments. The liens of the appellants are superior to the claims of all others, except they be of a similar nature. If it were otherwise, then the Maysville & Big Sandy Railroad Company could lease or sell its line of road, and defeat the collection of the claims of those whose property had been taken in the construction and maintenance of the road. The purchaser or lessee takes the road with the burdens on it. It was said in *Stickley v. Railroad Co.* "that a railroad company which enters upon and appropriates the land of another to its own use, without right, cannot transfer its corporate privileges to another, so as to justify a continuance of the wrong in its vendee, as if the latter were an innocent purchaser." In *Insurance Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138, the court said: "It is not in the power of the railroad, by alienation or otherwise, to defeat this constitutional guaranty, and the alienee, purchaser, or successor will be required to take notice of the provisions restricting the power to take or damage private property for public use, and be held to take subject to the burthen cast upon the railroad by, through, or under which the interest is acquired. It by no means follows, as seems to have been supposed in some of the cases, that a right of action would exist against the new company, who might, as successor to the original railroad company, become possessed of the franchise and property; but when a mortgagee or successor company insists upon a continuation of the use, or where there is an appropriation of that part of the railroad whereby the damage has been occasioned,

the right of the lot owner to compensation out of the res is absolute." *Lewis, Em. Dom. § 421*, says: "The owner's claim for just compensation is paramount to any right which can be derived by or through the party making or seeking the condemnation. Different courts work out this result in different ways, but we believe all concur in reaching it in one way or another. Some courts hold that the claim for compensation is in the nature of a vendor's lien, and, as such, is prior to any right which the party condemning can acquire or transfer. Others hold that no title passes until payment, and, consequently, that a mortgage or conveyance by the party condemning conveys nothing to the grantee except such possessory rights as the former may have." Section 814, Ky. St. (Act 1890), provides that: "After an execution on a judgment against any company owning or operating any railroad in this state shall be returned by the proper officer 'No property found,' in whole or in part, the plaintiff therein may institute an equitable action against said company in the circuit court of the county in which said judgment was rendered, to place its road and property in the hands of a receiver; and the court, upon a petition showing said return and the failure to pay said judgment, upon the service of summons upon said company, shall appoint some suitable person as receiver of said company, and, as such, take possession and control of all the road and property belonging to and operated by said company, including all rolling stock thereof." It does not require argument to show that the appellants are entitled to have a receiver appointed of the property of the Maysville & Big Sandy Railroad Company, under the statutes quoted. Owing to the character of the claims which have been put in judgments, the rights of the Chesapeake & Ohio Railroad Company are subordinate to them, and must yield to their superiority. If the appellants fail to realize these judgments by having the railroad placed in the hands of a receiver, then, if they do not desire to enforce their lien upon the railroad, the question may arise as to the right of the court by injunction to prevent the use of the railroad in front of their respective lands until the judgments are paid; but we do not now decide that question. Upon the facts alleged in the petition, which, on demurrer, are assumed to be true, the Chesapeake & Ohio Railroad Company may be enjoined from the use of the Maysville & Big Sandy Railroad because its rights are subordinate to those of the appellants, as we have said. If the court is without authority to restrain the Chesapeake & Ohio Railroad Company from using the line of railway, then the receiver would be powerless to take possession and control of the road, and the attempt to collect the judgments through the medium of a receiver would be abortive.

It is contended that appellants might have obtained personal judgments against the

Chesapeake & Ohio Railroad Company at the same time the judgments were obtained against the Maysville & Big Sandy Railroad Company for the damages sustained, and, as they failed to do so, they have lost their right to proceed in equity to enforce their judgments. The statute we have quoted answers that contention. Besides, independent of the statute, the fact that appellants may have been entitled to maintain such action against the Chesapeake & Ohio Railroad Company did not destroy their liens, hence not their right to enforce them in such manner as the law or equitable principles authorize. It does not appear in the petition what equipment the Maysville & Big Sandy Railroad Company owns that may be used in its operation. Counsel for appellants suggests the difficulties the receiver would have in operating the road in case the equipment was insufficient. If such be the case, that would indicate that appellants might have trouble to collect their judgments through a receiver; but it does not prevent them from making the effort to so collect their judgments. It is also suggested that the interests of the public are, in certain contingencies, to be considered. The right of the citizen to own, possess, and enjoy his property must yield to the superior right of eminent domain, which is an essential attribute of sovereignty. To exercise it is an inherent power of the government. In the exercise of the right the citizen must be justly compensated for his property. If the public interests are to stand between the rights of the citizen and an effective equitable remedy to enforce that right, then it is possible to take private property for public use without compensation; it would be disregarding the organic law of the state, and destroying the property rights of the citizen. The legislative branch of the government does not seem to think the public would suffer by placing the property of a company owning or operating a railroad in the hands of a receiver when it permits executions on judgments to be returned "No property found." The taking of the property occurred under the constitution of 1850. The judgment is reversed, with directions that the order sustaining the demurrer to the petition be set aside, and the demurrer overruled, and for further proceedings consistent with this opinion.

#### MORRIS v. SANDERS et al.

(Court of Appeals of Kentucky. Dec. 7, 1897.)

DEED—RESERVATION—DILIGENCE—COSTS.

1. Where a grantor reserves to himself in a conveyance of land the tan bark then growing on the land, and the right to enter to cut and remove the same, he must exercise the right so acquired within a reasonable time.

2. Where a temporary injunction is made permanent, costs will not be adjudged against defendants who had not participated in the tort enjoined.

Appeal from circuit court, Edmonson county.

"Not to be officially reported."

Action by Mason Morris against T. S. Sanders and others. From a judgment for defendants, plaintiff appeals. Reversed.

E. W. Hines, J. S. Lay, and Wright & Sturgeon, for appellant. P. F. Edwards, for appellees.

GUFFY, J. The plaintiff in this case alleged that he was the owner of a certain boundary of land in Edmonson county, and that the defendants were unlawfully entering upon same, and cutting and carrying away tan bark and other valuable timber, and he sought and obtained an injunction enjoining them from further trespass. He also sought to recover \$200 damage for the injury. This petition was filed May 23, 1891. The defendants denied the trespass, and it may also be conceded in a general way denied the title of plaintiff to the land described in his petition. The defendant Sanders, however, admitted the entry and cutting upon the land described, and claimed the right to enter, and peel and remove the chestnut oak tan bark, upon the land in question. It appears that the land in contest was once owned by William B. Morris, A. W. Garrison, and Samuel Stubbins, and that on the 27th day of February, 1865, the said Garrison, Morris, and Stubbins sold and conveyed the land to Gibson & Tyler, and that appellant is the remote vendor of Gibson & Tyler. In said deed of conveyance is the following clause: "It is furthermore distinctly understood that the parties of the first part reserve to themselves all the chestnut oak bark now growing on the land hereby conveyed to the parties of the second part, and free ingress and egress in and from said land to cut, stack, preserve, and remove said bark, and privilege of making and using such landings upon Green and Nolin rivers as may be necessary, and right to erect shanties to shelter their hands and laborers and teams while engaged in cutting trees and saving and cutting the bark; but the trees, when stripped of their bark, are to be the property of the parties of the second part." The following expression is also contained in the deed: "The reservation of the bark, and privilege of cutting and removing it, are for the equal benefit of A. W. Garrison and Mary Stubbins, as executor of the aforesaid, exclusively, and W. B. Morris is to have no interest therein." The appellee Sanders claimed to have purchased the interest of the heirs of Garrison in and to the said tan bark, and the privileges thereunto belonging, shortly before the institution of this suit. The heirs of Stubbins were, on their own petition, finally made parties, and asserted their rights to the bark in connection with the said Sanders. The case was finally transferred to equity, and upon final hearing the court dismissed plaintiff's petition, and from that judgment this appeal is prosecuted.

It may be fairly construed under the pleadings and proof that the issue tendered and tried was the right and title of Sanders and the Stubbins heirs to the tan bark in question. It is claimed by appellant that he and those under whom he claimed had been in the actual adverse possession of the land and bark for more than 15 years prior to the institution of the suit, all of which was denied by the appellees. It seems clear to us that the law required Garrison and Stubbins to remove the tan bark reserved in the deed within a reasonable time, and that under the facts in this case their right to enter and remove the tan bark, or transfer such right to enter, terminated many years before the institution of this suit. This case is wholly unlike the case of *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802; and, inasmuch as the right of Garrison and Stubbins to enter and take possession of the tan bark had long since expired, it follows that the court erred in dismissing appellant's petition. It does not satisfactorily appear, however, that any of the defendants except T. S. Sanders had entered and cut any timber on the land in question; hence no judgment for costs should be rendered against the defendants named in the first petition, and against whom the injunction was issued. The court erred in dismissing appellant's petition as to Sanders and as to the Stubbins heirs. The judgment appealed from is therefore reversed, and the cause remanded, with directions to perpetuate the injunction against T. S. Sanders, and for judgment against him for \$50 for the timber and bark and trespass charged to have been committed by him, and also adjudge his claim and that of the Stubbins heirs to the tan bark to be invalid; and as to the other defendants the action to be dismissed, without prejudice, and for further proceedings consistent herewith.

#### NEWTON'S EX'R v. CECIL.

(Court of Appeals of Kentucky. Dec. 7, 1897.)

ACTION AGAINST EXECUTORS—AFFIDAVIT—ELECTION.

1. It is not error to deny motion to require plaintiff to elect, where the petition states but one cause of action, though stating it in different paragraphs in different forms.

2. Affidavit is not necessary in an action against an executor on a compromise made by him with plaintiff, as where recovery is sought on a demand against the estate.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by A. D. Cecil against Mary Jane Newton's executor. Judgment for plaintiff. Defendant appeals. Affirmed.

H. M. Haskins and Sweeney, Ellis & Sweeney, for appellant. Geo. W. Jolly and Horace Jolly, for appellee.

GUFFY, J. It is alleged in the first paragraph of the petition in this case that the

plaintiff and Mary Jane Newton entered into a contract in 1881, whereby it was agreed that they would engage in farming operations jointly, and said Newton would furnish her farm, containing about 277 acres, about 175 acres of which was cleared and in suitable condition for cultivation, and also furnish teams and farming implements and seeds to be sown and planted, and that plaintiff house and feed at her house. The plaintiff, on his part, was to cultivate said farm in good husbandlike manner, and keep same in good condition, and raise from year to year thereon crops of corn, oats, clover, wheat, tobacco, etc., care for the same, and market the crops, and buy, feed, and sell cattle, sheep, and hogs; the proceeds arising therefrom, after deducting expenses, to be equally divided between them, and, if loss occurred, to be borne in the same proportion. The contract was made for an indefinite time, its termination not being fixed, but was to exist as long as agreeable to the parties. Under the terms thereof, the business was continued until the death of said Newton, which occurred 23th day of December, 1892. Plaintiff and said Newton had from time to time, usually once a year, made settlements of their partnership business, dividing the crops so raised and proceeds arising from stock sold, etc. Before the death of said Newton, it was agreed between plaintiff and Miss Newton, in reference to the crops to be raised thereafter, that a certain part of the farm (perhaps about 50 acres) was to be sown by plaintiff in clover, which was done in the spring of 1892, for the purpose of raising hay, seed, and for pasture for their stock in the year 1892 and subsequent years. In the fall of said year it was agreed that a certain part of said farm, perhaps about 65 acres, was to be sown in wheat, to be matured in the summer of 1893, which was accordingly done. There was also growing on the farm, at the time of her death, 26 acres of meadow sowed the year before, and at her death they jointly owned the hogs and cattle on said farm. Plaintiff, at the time of her (Miss Newton's) death, as he had been before, was living on said farm and controlling same. At the January term of the Daviess county court, the last will and testament of said Newton was duly probated, and defendant, B. T. Field, was named and appointed executor thereof; and, after said qualification and entering upon his duties as such executor, he approached the plaintiff, and represented that he desired to divide the land, and make a sale of it, as soon as possible, and to obtain immediate possession, and, knowing the contract subsisting between plaintiff and Miss Newton, he proposed to plaintiff that, if he would surrender possession of the farm and his interest therein, he would make just and satisfactory compensation and payment to plaintiff for his rights and interest to the use of the

farm and his said growing crops. The plaintiff agreed to said proposition, and thereupon it was proposed by the defendant that the appraisers who had been appointed by the county court to appraise the personal estate of said Newton should appraise and fix the value of said crops, and he (defendant) would at once pay the amount fixed by them to plaintiff. Allen Reid and K. Y. Berkshire were duly appointed by said court, and duly qualified, and at the request of defendant, on the — day of May, 1893, appraised and fixed the value of said crops; that is, clover and wheat. They fixed the value of the wheat crop at \$780, and the value of the clover at \$250, making a total of \$1,030; and the interest of plaintiff therein they fixed and valued at \$515. The said Reid and Berkshire duly rendered their award in writing, duly signed and duly delivered to defendant, and he now has the same, which he is called on to file. Thereby defendant, as such executor, became indebted to plaintiff in the sum of \$515, with interest from May, 1893; and defendant, after said award was made, agreed to pay the same, but afterwards refused to do so, and no part has ever been paid. Plaintiff, pursuant to said agreement, and relying upon defendant's promise, did, about the 1st of March, 1893, surrender to defendant possession of said farm, clover, and wheat, and all rights under said contract with Miss Newton. He has fully performed and discharged in good faith all his part of said contract with defendant. In the second paragraph of the petition the contract is again alleged, in substance, together with the allegation as to plaintiff's interest in the clover and wheat. The contract between plaintiff and defendant, as to the surrender of the farm, etc., was agreed upon, and surrender was made by plaintiff, which surrender was of reasonable value, and worth the sum of \$1,000, which sum defendant agreed to pay; wherefore plaintiff prayed judgment against defendant, as executor of Mary Jane Newton, for the sum of \$515, with interest from the 1st of March, 1893, until paid. The defendant moved the court to require plaintiff to elect which cause of action he would prosecute, and his motion was overruled. Afterwards defendant moved the court to require plaintiff to elect which paragraph of his petition he would prosecute, which motion was overruled. Afterwards defendant demurred to the second paragraph of plaintiff's petition, which demurrer was overruled. Thereupon defendant filed an answer and set-off. The substance of the answer is, in effect, a denial of the agreement set out as to the contract between plaintiff and Miss Newton, and also as to the contract set up as to the defendant, and also pleaded a counterclaim. By agreement, the affirmative matters in the answer were denied of record, except so much as pleaded the set-off. A trial resulted in a verdict for \$125 for the clover, and

\$390 for the wheat, total \$515, less note for \$219, making a verdict for \$296, upon which judgment was rendered for \$295.89, in favor of plaintiff against defendant as executor, which appears to be a few cents less than the verdict warranted, which we presume is a clerical misprision or mistake of the clerk in copying the record.

The substance of the grounds relied on for a new trial are as follows: (1) Because the court erred in overruling defendant's motion to require plaintiff to elect which cause of action he would prosecute; (2) because the court erred in overruling defendant's motion to require plaintiff to elect which paragraph of the petition he would prosecute; (3) the court erred in overruling defendant's demurrer; (4) the court erred in permitting plaintiff to testify as to certain transactions, and erred in allowing him to testify at all, and erred in allowing him to testify as to the agreement between himself and defendant as executor as to the manner in which his interest in the alleged crops was to be ascertained, and erred in allowing plaintiff to testify as to the value of the clover on the land, and what interest he had in it, and erred in allowing Reid and Berkshire to testify as to the value placed upon the clover and wheat crops by them, and erred in permitting incompetent evidence and excluding competent evidence; (5) the court erred in refusing to allow defendant to prove what the wheat crop was worth in the market when matured and harvested; (6) the court erred in refusing to allow the defendant to prove that the basis of estimate upon which Reid and Berkshire made their calculation as to the value of the wheat was erroneous and far too much; (7) the court erred in giving instructions 1, 2, and 3, inclusive; (8) because the court erred in refusing instructions Nos. 1, 2, 3, and 4 asked by defendant; (9) because the court erred in overruling defendant's motion for peremptory instruction; (10) because the verdict was for too much, and more than plaintiff's fair value for his alleged interest in the crops.

The petition in fact states but one cause of action, although stated in different forms; hence, the court did not err in overruling appellant's motion to require plaintiff to elect, nor did the court err in overruling the demurrer to the second paragraph of the petition, nor do we think the court committed any error prejudicial to the substantial rights of appellant in the admission or rejection of testimony, nor in giving or refusing instructions. The action was based upon a contract or compromise made with appellant; hence no affidavit was required, for the reason that the plaintiff was not seeking to recover on a demand against the estate, but simply upon a contract or agreement entered into with the appellant, which, from the evidence in this case, was one that he had the right to make, and which in fact

was a proper and judicious settlement of the claim set up by the appellee. Judgment affirmed, with damages.

SHAVER v. SOUTHERN OIL CO. et al.  
(Court of Chancery Appeals of Tennessee. Sept. 18, 1897.)

APPEAL—REVIEW—FINDINGS OF FACT—CONTINUANCE.

1. Where the parties agreed to submit a case to the chancellor, as a jury, on the pleadings and oral evidence, his findings of fact, if supported by any material evidence, are conclusive on appeal.

2. On an application for continuance because of the absence of a material witness, the affidavit must show what testimony the witness would give.

Appeal from chancery court, Fentress county; T. J. Fisher, Chancellor.

Suit by E. Shaver against the Southern Oil Company and others. From the decree, complainant appeals. Affirmed.

Snodgrass, Robinson & Eaton and D. L. Lansden, for appellant. Smith & Smith, O. Conatser, and Ingersoll & Peyton, for appellees.

WILSON, J. The original bill in this cause was filed May 11, 1896, to reform a lease from one William Reagan to complainant; to recover possession of an oil well on the leased premises from certain of the defendants, alleged to have it in possession; and to have a reference for an account, to ascertain the damages sustained by the complainant by the wrongful possession and use of the leased premises by the defendants. The lease claimed under by the complainant is dated May 11, 1896, and purports to be copied in full in the bill. It is signed by the maker, William Reagan, under mark, and is attested by S. H. Pile and J. L. Reagan. It was probated before the clerk of the county court of Fentress county, on the proof of the attesting witnesses, July 8, 1893, and was registered the same day. In the body of the lease, as copied, complainant appears as lessor, and Reagan as lessee, and this change of position of parties is averred to have been the result of a mistake of the draftsman; and it is asked that the instrument be reformed so as to make it show that complainant is lessee and that Reagan is lessor. The lease describes the land leased, and provides for the payment of \$50 cash, and to turn over to the lessor one-tenth of all the oil or valuable minerals produced and saved from the premises. It contains many other stipulations not necessary to be mentioned, but among them a stipulation on the part of the lessee to commence operating for oil and other minerals within 90 days from the date of the lease, and that he is to commence operations and bore one well on the premises within a year from its date, unavoidable delays excepted; and, in the event

of a failure to complete one oil well within the time above limited, the option is given the lessor to declare a forfeiture of the lease, unless upon written notice the lessee agrees to pay \$100 per year rental for the premises during the delay, at his residence; and a failure to pay this agreed rental, as liquidated damages for the delay as agreed upon, was to work an annulment of the lease. The lease, as copied in the bill, with its certificate of probate and registration, does not appear to be signed by complainant, nor does it appear to have been assigned by him to any one. The bill alleges that in May, 1893, the defendants entered upon the leased premises for the purpose of drilling and operating for oil thereon; that they did bore a well thereon, from which they had pumped large quantities of oil, which was wasted, to complainant's damage \$3,000, and that they were still in possession of the premises, claiming the right to operate thereon for oil, gas, and other valuable minerals. It further alleges that the lessor, Reagan, June 28, 1896, conveyed in fee the premises leased to complainant to defendant James Wood and wife, reserving a life estate therein; a copy of which conveyance, it is said, will be filed on or before the hearing. It then avers that the lessor, Reagan, in January, 1893, died intestate, and that February 7, 1893, defendant Boles was appointed and qualified as his administrator. It is insisted in the bill that the \$100 rental mentioned in the lease is not due, no demand having been made therefor; but the \$100 is tendered with the bill, subject to the orders of the court. Boles and Wood and wife are asked to interplead, if necessary, to the end that the court may determine to whom the rentals stipulated for in the lease, if any be held to be due or to become due, shall be paid; that the lease be reformed in the particular specified; that the deed of William Reagan to Wood and wife be modified or removed, to the extent that it is a cloud upon the title of complainant; that the defendants be removed from the premises leased to complainant and the oil well thereon, and their pretended claim, if they have any, be removed, as a cloud upon his title; that his rights under his lease be declared to be superior to the claims of defendants; and that he have a decree for his damages. And a writ of possession is asked for, if necessary, to put complainant in possession; and there is a prayer for general relief. Mrs. M. G. Cusack, one of the defendants, July 24, 1896, filed an affidavit for the purpose of having an order on the complainant to file with his bill the original lease under which he claims. The purport of this affidavit is that the original lease contains many material interlineations and erasures, made long after the lease was taken, which do not appear on the same as copied in the bill, and that she cannot properly present her defenses until after an inspection of the original lease; and to this



end an extension of the time is asked for presenting her defenses. Based upon this affidavit, the master made an order on the complainant to file his original lease within 20 days, and the time for defendants to answer was extended. The original lease, as filed in obedience to this order, appears to be signed by the complainant. It also appears to have been transferred by complainant to one Edward L. Hall, of Jamestown, N. Y., the place where complainant resided. Various defendants, August 17, 1896, demurred to the bill, after the original lease was filed, on two grounds: (1) The bill shows on its face, and the exhibit thereto (being the original lease), that the complainant had no interest in the alleged leased premises, because, prior to the day he filed his bill, he had transferred his interest in the lease to Hall; (2) that the bill and original lease show that the latter contains numerous interlineations, erasures, and alterations, which make it appear that it is not the contract and lease of William Reagan. Shortly after this, to wit, September 5, 1896, complainant filed what appears on its face to be an original injunction bill against the defendants. It is properly an amendment to his original bill. The main object of this amended bill was to get an injunction restraining the defendants from pumping and piping oil from the well they had bored on the premises alleged to have been leased to the complainant. To this end, after stating the contents of his first bill, he avers that some of the defendants are nonresidents, that a number of them are insolvent, that they knew of his lease when they entered upon the premises and bored the well, and that he would suffer irreparable damage if they were permitted to continue their operations on the premises. A fiat for an injunction was granted on the averments of this bill, and one was issued and served. Both bills were answered by the defendants, except Boles, administrator of William Reagan; the chancellor having overruled the demurrer to the original bill.

The defendants, in their answer, deny every single, material averment of merit in the bill and amended bill. The substance of their answer is that William Reagan never executed and delivered the lease claimed and sued upon by the complainant, and that the lease that was obtained from William Reagan, and which was only conditionally obtained, was procured by fraud and false representations made to old man Reagan, who was at the time old, deaf, and in feeble health. The further contention of the answer is that the terms of the pretended lease had never been complied with by complainant, and that, therefor, under its conditions, the lease had been forfeited, and that the lease which was signed by old man Reagan was repudiated by him before its delivery, and that his repudiation was known to Pile, the agent of complainant, as well as to complainant himself. Various other particulars of the fraud

and wrong perpetrated in connection with the alleged lease are alleged in their answers,—as, for instance, it is alleged that the complainant never signed the lease until long after the lease under which defendants claim. It is admitted in the answers that William Reagan conveyed the premises to James Wood and wife (Mrs. Wood being his daughter),—reserving, however, a life estate therein,—that William Reagan died, that Wood and wife leased to Mrs. Cusack, and that Mrs. Cusack leased to the defendants composing the Southern Oil Company. It is further insisted in the answer that the complainant is estopped from asserting any claim under his pretended lease, by reason of the fact that he stood by while defendants were expending large sums of money and labor in boring and developing the well on the premises, known as the "Bobs Bar Well," without notifying them of his pretended lease. Under the facts, they aver, they are rightfully in possession of the premises and the well.

October 2, 1896, defendants gave notice that they would move for a dissolution of the injunction, on bill and answer, before chancellor Fischer; designating the day and place. The court below, October 20, 1896, dissolved the injunction, on bill and answer; requiring the defendants to give bond, as a condition precedent to the dissolution. February 17, 1897, the parties, by their counsel, agreed to waive notice, and submit the cause to a jury under proper issues, to be made up from the pleadings under the direction of the court. April 21, 1897, the parties, by an agreement, waived the demand for a jury, and in lieu thereof it was agreed that either party might introduce such oral proof before the chancellor on the trial as they saw proper, and that the chancellor might decree on the record and such oral proof as was introduced. The chancellor heard the cause April 23, 1897, upon the pleadings, the exhibits thereto, and the oral testimony adduced by agreement of parties. He held: (1) That, when the lease sued on in this cause was executed, it was agreed that there should be a provision in it prohibiting the lessee, his vendees or assigns, from entering into or upon the inclosed land of Reagan, and that said provision was not inserted in said lease, on account of fraud, accident, or mistake, and that the lease, without said provision being therein inserted, was put in escrow with one Joel Reagan for a period of 60 days, at the end of which time complainant was to pay the \$50 mentioned in the lease, and take the lease, and that the complainant before the end of 60 days did pay \$50, and receive said lease, without said provision being inserted therein as originally agreed upon between him and Reagan. (2) He found as a fact that while said lease was thus in escrow, and before said provision in regard to entering upon the inclosed lands of Reagan was inserted therein, to wit, June 26, 1895, Reagan repudiated said lease, and refused to take under same as its provisions were then, and on the 26th day of June, 1895, sold the tract of land described in the lease to James

Wood and wife. (3) That, on the day the lease was taken from escrow by Shaver, he was notified by Joel Reagan, the party holding the same, that William Reagan had repudiated the lease, on account of said provision not being inserted therein, and that Shaver took the lease knowing that the same had been repudiated, and delivered it to S. H. Pile, who on July 3, 1896, inserted therein the following words, to wit: "The said parties agree not to go inside of the inclosure of the lessor without the consent of the first party." And after these words were inserted in the lease, and on the same day, the lease was attempted to be proven by S. H. Pile and Joel Reagan, the subscribing witness thereto, and was then placed on the register's books by the said S. H. Pile, and that at the time the said words were inserted in the lease, and at the time the same was proven by Pile and Joel Reagan, the said Pile was the owner of a one-half interest in the lease with complainant, under a parol contract with Shaver. (4) That S. H. Pile was the owner, by verbal agreement, of the one-half interest in the lease, and was the agent of complainant to whom it was given, and that Pile knew that the well spoken of in the pleadings in this cause was being drilled, and that a large amount of money was being expended thereon, and made no objection, and gave no notice to the operators of their intention to rely upon the lease here involved until after said well had been drilled and completed, and then gave no notice except the filing of the bill in this cause. (5) He further found as a fact that complainant, mentioned in the lease, never signed it until the 21st day of February, 1896, long after the death of William Reagan, and after William Reagan had deeded the land to James Wood and wife, and after the lease was executed to M. G. Cusack, and after the completion of the well described in the pleadings in this cause, and known as the "Bobs Bar Well," and that on the same day, to wit, February 21, 1896, the complainant transferred to Edward L. Hall all his interest in said lease, which was before the filing of the bill in this cause. Upon these findings, the court was of opinion, and adjudged and decreed, that the complainant was not entitled to the relief sought in his bill, nor to any relief, and thereupon dismissed the bill, and taxed the complainant with the costs. He further held, upon motion of defendants, that it was a proper cause for a reference to the master to ascertain the damages sustained by the defendants by reason of the wrongful suing out of the injunction by the complainant. From this decree the complainant prayed and obtained an appeal to the supreme court, which was granted. It is proper to state that before the cause was taken up for trial before the chancellor the complainant desired to continue the cause, upon the ground that a pro confesso had at that term been taken against Boles, administrator of William Reagan, and that hence the cause was just at issue. The court, however, put the complainant to his election as to whether he would announce,

"Ready for trial," or apply for a continuance. To this action the complainant excepted, and thereupon offered his own affidavit in support of an application for a continuance. The application was disallowed, the court holding that the affidavit therefor was insufficient; and to this action of the court the complainant excepted. The parties went to trial, and submitted their oral evidence before the court, and the court found as before recited. The errors assigned by complainant are:

First. The chancellor erred in forcing complainant into trial, over his objection, at the April term, 1897. Under this error it is insisted that the bill sought a decree against the estate of William Reagan, deceased, for damages, his administrator being made a party; and, as the bill was taken for confessed at that term against the administrator, it was then just at issue.

Second. He erred in refusing the application for a continuance based upon the application of complainant.

Third. He erred in holding that the provision with respect to not going inside the inclosure of William Reagan, which was left out of the lease to complainant, was left out through fraud, accident, or mistake, and in dismissing the bill for this reason.

Fourth. Error in holding that, while said lease was in escrow, William Reagan repudiated it. It is said under this error that the only condition of the escrow was that it was to be delivered at any time within 60 days, upon payment of the \$50. The \$50 was paid within 60 days, and therefore it is insisted that, the condition of the escrow being complied with, it was not within the power of the lessor to repudiate or disaffirm the contract. It is further insisted in this connection that the holding of the chancellor to the effect that on the day said lease was taken from escrow by complainant he was notified by Joel Reagan, the party holding it, that Reagan had repudiated it on account of a provision not being inserted therein, and that complainant took it knowing that it had been repudiated, and delivered it to Pile for registration, was immaterial, and that, therefore, it was error to dismiss the bill for this reason. The argument is that it could make no difference if the lessor was without authority to repudiate the lease, or that he attempted to do so, and that the lessee was notified of the attempt, and took the lease with such attempt.

Fifth. Error in holding that inserting the words, "The party of the second part agrees not to go inside the inclosure of the party of the first part without his consent," after the lease had been delivered, and at the time of its being proved for registration, vitiated the lease, because, it is argued, said provision was inserted in good faith, and without fraud, and was a voluntary agreement to comply with the wishes of the lessor, though he was not obliged to do so, and a compliance with the verbal statement or promise

of the lessee made to William Reagan at the time the lease was executed, and a response to the evident desire of James Wood, the vendee of the fee, who was present when the lease was proved or registered. It is further said, under this error, that at the time the lease was a good common document, as an executed contract, and the insertion of the clause against the interest of the party making it, without fraud, would not vitiate it. It is furthermore said that, if this omission was through mistake, Pile did right in inserting it, and that, if he had refused, it would have subjected him to pay the costs, on the instrument being reformed.

Sixth. Error in holding that at the time the lease was proven, or at any time, S. H. Pile was the owner of an undivided one-half interest therein by verbal agreement. It is said that this was an error of law apparent upon its face, as, under the statute of frauds, no person can become the owner of an estate in lands by verbal agreement.

Seventh. Error in holding that S. H. Pile, the agent of complainant, knew that the well spoken of in the pleadings in this cause was being drilled, and that a large amount of money was being expended thereon, and made no objection, and gave no notice to the parties of their intention to rely on said former lease until after the well was completed by defendant, and in dismissing the bill for this reason. Under this error it is argued that the record shows that the lease to complainant was recorded July 3, 1896, that defendants began operation in the fall or winter following, and that this registration of the lease was sufficient notice that complainant was claiming the property. In addition, it is insisted that complainant, under the circumstances, was not called upon to speak, even if his lease had not been recorded. It is further argued that the record discloses the fact that defendants not only knew of the former lease to complainant, but that in their own title paper or lease, under which they claim, they contracted to indemnify their vendees against the assertion of any claim or title under the lease to complainant. It is also said that complainant, Shaver, never knew of the drilling of the well until after it was completed, and that under these circumstances no question of estoppel could arise.

Eighth. The holding of the chancellor that complainant never signed the lease until long after the death of the lessor, William Reagan, and until after he had deeded the land to defendants James and Ann Wood, and until after the subsequent lease by defendants Wood, and the drilling of the well by the defendant, was immaterial, and the dismissal of the bill for this reason error. It is said under this assignment that no authority requires the vendee or lessee in an estate in lands to sign the same, and that the promise to pay the consideration for the lease may rest in parol.

Ninth. The chancellor erred in holding that on February 21, 1896, and before the filing of the bill in this cause, complainant had transferred his interest in the lease to Edward L. Hall. The contention is that the only proof in the record which tends to support this finding is that complainant was asked this question, "What did you do on the lease before you transferred it to Hall?" to which he replied, "Nothing, unless you say I did it through Pile." The insistence is that if this can be treated as an implied admission that he transferred it to Hall, or attempted to do so, it does not establish the fact that it was done February 21, 1896, before the filing of the bill in this cause. It is further insisted under this error that, while it is true that there is copied into the record what purports to be a transfer of the lease made on said day, it was not read on the hearing, and was not made part of the record by the bill of exceptions, and cannot be looked to by this court. It is furthermore argued that if said transfer was actually made on February 21, 1896, it was champertous and void, for at that time defendants were actually in the adverse possession of the property, drilling a well.

Tenth. Error in not reforming the lease so as to make Reagan the lessor. It is said that this was a clerical error on the part of the draftsman. Under the facts in the case, it is insisted by complainant that the chancellor should have reformed the lease with respect to the matter herein mentioned; that he should have given a decree setting up the superiority of the lease over any claim of defendants, and a decree placing them in possession of the well, and giving them damages for the waste of oil, and for costs, etc.

With respect to all these matters it is only necessary to say that we have read all the evidence in this record with great care, and in our opinion it absolutely sustained all the findings of the chancellor. Under pleadings and facts in the record, the parties agreed to leave the issues of fact raised by the pleadings to the chancellor, as a jury, and his findings of fact are conclusive, where supported by any material evidence. Nor do we think he committed any error in declining to grant the continuance asked for, based upon the affidavit of complainant. This affidavit sought a continuance on the ground of the absence of a witness named Matt Penny-cuff, who, as stated in the affidavit, was in the state of Kentucky,—beyond the jurisdiction of the court. The affidavit fails to state what the complainant expected to prove by said witness; nor can we see, in view of the nature of the contentions involved in this case, how any evidence that Mr. Penny-cuff might have given could have changed the result. The weight of the proof shows that the lease relied upon by the complainant was procured by one Pile from old man William Reagan, who was very old, very deaf, and very feeble; and it is not pushing

the legitimate inferences deducible from the evidence to say that the feeble old man was greatly overreached in the matter. It is not disputed that the clause materially affecting the lease was inserted by Pile when he went to prove the paper and have it registered. Nor is it a matter of serious dispute that at the time this bill was filed the complainant had assigned all his interest in the lease to one Hall. We cannot concur in the argument that there is no proof in the record sustaining the assignment which was made February 21, 1896, except the question and answer thereto appearing in the brief of counsel for the appellant. The record shows that the chancellor heard the cause, by consent of parties, upon the pleadings, exhibits thereto, and the oral evidence adduced by the parties; and the original lease, filed by the complainant himself in obedience to the order of the master, contains this transfer by him, and the transfer is dated on the date indicated. We do not deem it necessary to enter into a discussion of the propositions of law and citation of authorities relied upon by appellant. The controlling questions in the case are of fact, and the facts developed by the testimony repel the claim of the complainant. There is no error in the decree of the chancellor, and it is affirmed, with costs.

BARTON and NEIL, JJ., concur.

Affirmed orally by supreme court November 10, 1897.

#### CITY OF DAYTON v. DAYTON COAL & IRON CO.

(Court of Chancery Appeals of Tennessee.  
Sept. 10, 1897.)

##### MUNICIPAL CORPORATIONS—VOID CHARTER—TAXATION—SUBSEQUENT ORGANIZATION—EFFECT.

1. The organization of an alleged municipal corporation under Act 1877 was void, where the certificate of the sheriff holding the election was not indorsed on the application for charter, and registered with it, as required by the statute.

2. A city having no legal existence had no authority to levy taxes.

3. The invalidity of a tax levied by an illegally organized city was not cured by Acts 1895, c. 117, § 25, under which the city was subsequently chartered and organized, providing that the new organization should be vested with the title and ownership of all the property, claims, and assets of the old; it further providing that nothing therein contained should be construed as "a legislative recognition of the validity or invalidity of the previous charter."

Appeal from chancery court, Rhea county; T. M. McConnell, Chancellor.

Bill by the city of Dayton against the Dayton Coal & Iron Company, to collect a tax. The bill was dismissed, and complainant appeals. Affirmed.

S. W. Swabey, for appellant. Burkett, Miller & Mansfield, for appellee.

BARTON, J. The question in this case is as to the validity of a charter under which

a former supposed municipal corporation of the town of Dayton acted. The complainant is a municipal corporation organized under chapter 117, Acts 1895. It has filed this bill to collect a tax from the defendant, on its business as a merchant, on an average stock of \$15,000, which tax was levied by the former municipality of Dayton in the year 1891; section 25, c. 117, Acts 1895, under which act complainant was chartered and organized, having provided that the new corporation should be vested with the title and ownership of all the property, claims, and assets of the old. The defense is that the former body, whose authorities levied the tax in question, has no power or authority to do so, having no legal existence. It is undisputed that the charter of this alleged municipal corporation did not have the return of the sheriff or officer holding the election indorsed thereon, as required by law, and that no such certificate was registered as was required by the act of 1877, under which this supposed municipality was sought to be chartered and organized. This was wholly wanting. As was decided in the case of Ruohr v. Athens, 91 Tenn. 20, 18 S. W. 400, this was fatally defective; and there was no such corporation, in contemplation of law, and the persons assuming to act thereunder had no authority to levy the tax sought to be collected. It is insisted, however, that the act of 1895 cured this defect; but if such void proceeding could by an express act be given any vitality, which we doubt, the act of 1895, in express terms, provided "that nothing in the act contained should be construed as a legislative recognition of the validity or invalidity of the previous charter." There is therefore nothing in this contention. The chancellor dismissed the bill. His decree is affirmed, with costs.

WILSON and NEIL, JJ., concur.

Affirmed orally by supreme court October 23, 1897.

#### PATE et al. v. MAPLES et al.

(Court of Chancery Appeals of Tennessee.  
June 5, 1897.)

##### ATTORNEY AND CLIENT—COMPENSATION—PARTITION—EXECUTORS AND ADMINISTRATORS.

1. Under Shannon's Code, § 5035, which provides in substance that in partition cases the court may order fees for attorneys for both parties paid out of the common fund, it is not an abuse of discretion to refuse to tax the fund with the attorney's fees of adult defendants whose interests are not assailed by the complainants.

2. An executor cannot bind the estate for payment of a retainer fee, but only fees for services rendered.

3. Attorneys who have been retained to conduct litigation, and who stand ready to render all needed services therein, are not affected, as to their right to compensation, by the fact that their client, without notifying them, has also consulted other attorneys.

Appeal from chancery court, Knox county; H. B. Lindsay, Chancellor.

Bill by Frank Pate and others against S. R. Maples, executor of Pleas Pate, deceased, and others. There was a decree, from which D. R. Nelson and others appeal. Modified.

D. R. Nelson, S. P. Fowler, J. A. Fowler, and Jourolmon, Welcker & Hudson, for appellants. Washburn, Pickle & Turner, for appellees.

WILSON, J. This is a contest over what are reasonable fees to be allowed certain attorneys who appeared under regular employment, and rendered professional services in the cases, and whether some of them are entitled to be paid this fee out of the funds of the estate being wound up and settled in the suit. Upon a reference, the master reported what compensation should be allowed the executor, and the fees to which the attorneys were entitled, and upon other matters referred to him. Exceptions were filed to this report by complainants, directed to the fee reported in favor of D. R. Nelson, as solicitor for the executor, and of Henderson, Jourolmon, Welcker & Hudson and D. R. Nelson, as counsel for the executor and receiver, as being excessive and unreasonable. Cordelia Belle Pate, by her guardian ad litem, also excepted to the fees reported in favor of these attorneys, and also to a fee reported in favor of Attorneys Mynatt & Fowler, provided it was meant to be reported as a charge against the estate, as being excessive and unreasonable, but that, if it was to be a charge against the interest of the parties who employed them, she had no complaint to present. Certain of the defendants excepted to the fee reported in favor of Washburn, Pickle & Turner as excessive and unreasonable. They also excepted to the fees reported to Messrs. Nelson and Henderson, Jourolmon, Welcker & Hudson, and to the compensation reported in favor of a guardian ad litem representing one minor interested in the estate. The executor and receiver excepted to the report because the compensation reported for him was insufficient. The cause came on for hearing, February 17, 1897, before the chancellor, upon the report of the master, and the exceptions thereto, in connection with the entire record. It appears that the guardian ad litem of one of the exceptants excepted to the report on the ground that he had been given no notice of the taking the account, and, before the court acted on the report and the exceptions thereto, certain of the solicitors, to wit, Messrs. Nelson and Henderson, Jourolmon, Welcker & Hudson, representing defendant Maples, and Mynatt & Fowler, representing the other defendants in the case, agreed in open court to release to the ward of said guardian ad litem one-eighth of relators' fees, if any, that were allowed them for services in the cause, to be taxed to the general fund of the estate. In consideration of this agreement, the court overruled the exceptions of the guardian ad litem to the re-

port. Acting upon the other exceptions of the parties, he reduced the fee reported by the master to Washburn, Pickle & Turner to \$500 for services rendered complainants in this cause and in the administration of the estate of Pleas Pate, deceased, and decreed that Henderson, Jourolmon, Welcker & Hudson and D. R. Nelson be allowed a fee for services rendered the executor and receiver in the cause of \$200, and that D. R. Nelson be allowed a fee of \$300 for services rendered the executor, outside of this cause, and that the fees aforesaid be paid out of the general funds or assets of the estate administered in this cause. The master had reported that a fee of \$300 should be allowed D. R. Nelson under his general retainer, and for consultation and advice to the executor and receiver, and a fee under his retainer and for services in the contested will case, and a fee of \$25 in the Cummings Case, and that Henderson, Jourolmon, Welcker & Hudson and D. R. Nelson were entitled to a fee for all their joint services in the case of \$350. He sustained a fee of \$50 reported for the guardian ad litem. He held that Mynatt & Fowler, attorneys for some of the defendants, were not entitled to have their fees taxed against the general funds of the estate, and that he had no power or jurisdiction to adjudge the amount of their fees, or how they should be paid, as between them and their clients. The master had reported that \$87.60 should be allowed defendant Maples as executor, and \$71.25 as receiver. The chancellor increased his allowance to \$250. As thus modified, the report of the master was confirmed. From this decree, reducing the fees of Messrs. Nelson and Henderson, Jourolmon, Welcker & Hudson, D. R. Nelson appealed to the supreme court, and has assigned error. Mynatt & Fowler appealed from so much of the decree as held that the court was without jurisdiction to adjudge their fee, and that it could not be charged against the general funds of the estate. The case is before us on the complaint of these solicitors.

The error assigned by appellant Nelson is that the chancellor erred in reducing his fees, and that of Henderson, Jourolmon, Welcker & Hudson and himself, as found and reported by the master. The error assigned by Messrs. Mynatt & Fowler is that the court erred in refusing to adjudge their fee at the figures reported by the master, and to decree that it was a charge against the general funds of the estate of Pleas Pate, deceased, being wound up and distributed in this case.

In order to understand the question to be determined, it is necessary to give a brief outline of the facts and the nature and cause of this suit. It appears that Pleas Pate, a colored man, died in Knoxville in June, 1894. He possessed a considerable estate, much the greater part of it being houses and lots in the city. He left a last will of great length, and rather peculiar in some of its provisions. He had numerous relatives and heirs at law,

but gave his property in his will to only a portion of them. The defendant Maples and one Jones were nominated as executors of his will. Jones, it seems, declined the trust, but Maples, the will having been probated in common form, qualified as executor in July, 1894, and took charge of the estate. Most of his property, under the provisions of the will, was to be sold, and the executor retained appellant Nelson as his counsel. At this stage some of the excluded heirs instituted a contest to set aside the will, under an issue of *devisavit vel non*, in the circuit court, and the issue was made up in that court. Appellant Nelson, under his retainer by the executor, attended to these matters and prepared to sustain the will. In addition, during the time and since the qualification of the executor, he had given him such advice, in respect to his duties and their discharge under the terms of the will, as was deemed proper; and owing to the nature of the will, and the situation and character of the property, the executor, it appears, deemed it appropriate to frequently consult his counsel. After this issue was made up in the circuit court to try the will suit, to wit, October 27, 1894, an agreement was entered into and reduced to writing and signed between eight of the heirs of Pleas Pate. It need only be stated that this agreement, after reciting the death of Pleas Pate, testator, that he had named in his will certain of his relatives as his heirs therein to his property, that one of his named heirs thereunder had since died, and that the suit had been instituted to contest the will, provided for a compromise of all matters growing out of the estate of the deceased, Pleas Pate, and the subsequent death of one of his legatees and devisees, and for the disposition of all of his property not specifically given in the will. This agreement divided the estate into 18 shares, and named the parties entitled to them, and the parties signing it agreed that the estate should be divided as therein stipulated, provided that the suit to contest the validity of the will of Pleas Pate be dismissed, and that the parties bringing the same pay the costs and expense incident thereto, and provided, further, that all the parties declared to be legal heirs by the will of said Pate sign it, and that all the heirs of Guthrie Atchley, one of his named heirs, who had died, consented to abide by it. It was further stipulated in this agreement that all expenses of the administration of the estate of the deceased, Pate, including counsel fees incurred in protecting it, and in having the will of the deceased construed and the estate distributed, were to be paid out of the general estate, and the remainder to be divided as provided in the agreement. After this agreement, to wit, November 22, 1894, a number of the parties designated as heirs or share takers in it entered into an agreement in which they accept the former one, and further say and stipulate that in considera-

tion of the fact that the parties to the first agreement had retained Washburn, Pickle & Turner and Eugene Holtsinger as attorneys to represent them in the administration of said estate, and in carrying out and executing said first agreement, the fees of said attorneys for their services in connection with the subject should be charged to and paid out of the estate, as part of the expenses of its administration, and that if they employ any other attorneys in connection with the estate they would pay them out of their individual shares. They say that this agreement was made to avoid burdening the estate with additional attorneys' fees. All this time Maples was moving along under the guidance of his counsel in the discharge of his duties as executor. But after these agreements were signed, to wit, June 12, 1895, the parties signing the first agreement filed the bill in this case against Maples as executor, and all the parties signing the second agreement, and perhaps others, who were minors, the guardian of some of whom had signed the second paper. This bill set out the fact of the death of Pleas Pate, testator, the will suit, and the agreement of assent; that it was to the interest of the minors and all parties to abide by them; the qualification of Maples as executor, and that he was collecting the rents, etc.; that his bond was insolvent, as well as utterly insufficient in its penalty; that he was claiming that under the will he was entitled to have the possession and control of the real estate of the decedent and to take its rents and profits. It alleges that the provisions of the will of Pleas Pate touching his real estate, except such parcels as are specifically devised therein, vest the absolute title in them, and that the attempt of the testator to limit the right by authorizing the executor to sell the real estate and hold the proceeds as an undistributable fund is void and of no effect, inasmuch as it is an attempt to create a perpetuity in said fund, and asks for a construction of said will. It also avers that said real estate is of such a character and description that it is not susceptible of partition among those entitled to it, and that it should be sold for partition. The bill is accompanied by a schedule of the real estate, and it is shown thereby that it consists of small town lots, most of them having houses and stores built for the purpose of renting.

The bill, based upon its averment of the insolvency of the executor and the insufficiency of his bond, and that upon a proper construction of the will he is not to take the possession of the real estate and to take its rents and profits, asks that a receiver be appointed to take charge of the real estate not specifically devised, and rent it out, and receive the rents, etc., until it is sold under the orders of the court. The object of this bill, therefore, may be taken as having these purposes: (1) To construe the will of Pleas Pate; (2) to have the court elect for the minors to take

under the agreement herein stated; (3) to have a receiver appointed to take charge of the real estate, and rent it out, until sold by order of the court; (4) to sell the real estate for partition among those entitled under the agreement.

All the parties interested in the estate of the deceased, Pate, were brought under the operation of the agreement for its division into 18 shares. The executor employed appellant Nelson, in connection with Messrs. Henderson, Jourlmon, Welcker & Hudson, to represent him as such, and defend his rights and those of the estate as represented by him, and to resist the appointment. Some of the heirs made defendants to the bill employed Messrs. Mynatt & Fowler. It is sufficient to say that the chancellor appointed a receiver to take charge of the real estate, and rent it out, pending the litigation, and otherwise look after it, but he appointed the executor receiver, and after his appointment he acted as such under the orders of the court. He also continued to act and make his reports as executor in respect to the general assets in his hands, and not coming under his receivership. It seems that Messrs. Nelson and Henderson, Jourlmon, Welcker & Hudson, and especially the first-named solicitor, was counseled with and represented the receiver, and assumed that they were his regularly retained counsel. It appears, however, that the receiver also went to the firm of Washburn, Pickle & Turner for advice and counsel, which was given. It is apparent, we think, from the evidence, and we so find, that the receiver retained the appellant attorneys as his counsel; that they rendered him such service and gave him such advice as he called for, and were ready to give him such professional service and advice as his position and duties demanded. The real estate was sold under the orders and decrees of the court by its master. The estate, of all sorts, amounted to between \$10,000 and \$12,000, although we infer that it was believed at the outset, by all the parties interested in it, to be much larger. The foregoing is a sufficient general outline of the case to enable us to see the real nature of the contentions before us.

We will first dispose of the case of Messrs. Mynatt & Fowler. It appears that their clients have all, except possibly one, transferred their interests in the estate, and, as we infer that they are insolvent, it is important to these attorneys, if they can, to have their fees taxed as a charge against the general estate. Otherwise we take it, from their assignment of errors and briefs, that with respect to their fee they will have to depend upon that sort of hope which, it is said, deferred "maketh the heart sick." These gentlemen were employed, we infer, at first by their clients to institute the will contest or to represent them in it. When the agreement was made, and their bill was filed, they were employed to answer it for them. In their answer they practically concurred in the bill and sanctioned

its prayer. We are not prepared to say, under all the facts in the record, that the fee reported by the master was unreasonable in amount. The question, however, of importance to them is the source of its payment. Is it payable out of the general funds of the estate? That is their insistence. Their main argument is that this is a bill for the sale of real estate for partition, and that in such a case, under the act of 1887, c. 183, it is the duty of the court to charge the fee of counsel representing defendant to the estate, unless the facts warrant different action on his part, and that the facts appearing in this case affirm the propriety of enforcing the statute. The act cited provides, in substance, that in all partition cases the court may, in their discretion, order the fees for the attorneys for both parties to the suit to be paid out of the common fund, when the property is sold for partition, and to be taxed as costs in cases where it is divided in kind among the parties entitled. Shannon's Code, § 5035. Under this statute it is manifest, from its plain terms, that it is in the discretion of the court to allow or disallow, as a charge against the general estate, the fees of defendant's counsel in partition cases, and, this being so, the rule applies that the exercising of the discretion lodged in a chancellor will not be reversed upon appeal, unless it clearly appears that it has been abused. We cannot see that it was abused in this case.

As a general rule, and it is a sound one, which should be applied in all cases where it is reasonably possible and practical, attorneys should look to the clients that employ them for their fees. And we think, when adult defendants in a partition suit, whose rights or interests are not assailed, and who concur in the purpose of the bill or petition, employ their own counsel to represent them, that they should pay them, and that it would present a grave question, if the judge should tax the fee of the counsel to the general estate partitioned, whether it would not be abuse of his discretion. Certainly, in such a case, some peculiar fact or equity ought to appear in it before the estate should be operated with such fees. In the case at bar the clients of these appellants had entered into an agreement with their co-heirs and co-legatees before this bill was filed that, if counsel other than those designated in the agreement was employed by any one or more of the heirs, the parties so employing them should pay them. This agreement is in harmony with the general rule that parties retaining attorneys should pay them. There is no error in the decree of the chancellor refusing to tax their fee against the common fund. The reference to ascertain the fee of these attorneys was unnecessary and unauthorized. As we see it, their clients were sui juris and competent to contract, and this being so, and they being responsible for the fee, its amount was a matter between them and their attorneys.

If it was not agreed upon at the time of ordering the performance of the services, but was left to be determined by the nature and character of the litigation and the extent of the services, and settled upon the basis of what was reasonable, it was a matter, upon their failure to agree, of contest between them alone. The writer of this opinion believes that, where parties competent to contract employ attorneys, the question of the amount of the fee is a matter between them, and is not a matter of reference in a case where other parties and their rights are involved. Of course, the exceptions are recognized, such as partition cases and cases of the administration of estates, where the attorney appears for the representative of the estate. But the same rule is or ought to be that while his lien for his fee will in proper cases be declared on the property or recovery secured, its amount, in the absence of a contract or agreement, is the subject of contract between them. Neither do we think that the appellants were entitled to have their fee a lien, under our authorities. Judge Cooper in the case of *Garner v. Garner*, 1 Lea, 29, held that this lien cannot be extended to services which merely protect an existing title to property, and that it only applies when there has been an actual recovery. The same doctrine was affirmed in *Sharp v. Fields*, 5 Lea, 326, Judge McFarland delivering the opinion. For the reasons stated there is no error in the decree of the chancellor as to these appellants, and their appeal or writ of error is dismissed, with costs.

We now come to the errors assigned by appellant Nelson. As stated, the master reported, under the proof, that this appellant was entitled to a fee of \$300 under his general retainer and for consultation and services, \$300 for his retainer and services in connection with the contested will case, \$25 fee in the *Cummings Case*, and that *Henderson, Jourlmon, Welcker & Hudson* and appellant Nelson were entitled to a fee of \$350 for all services in this case. These fees as reported appear to be, in the main, supported by the greater number of witnesses examined, and, in a sense, by the weight of the evidence. It is settled in this country, departing from the old English rule, that an attorney or barrister can recover reasonable compensation for his service upon a quantum meruit. *Weeks, Attys.* 532, 563. And when retained, and a part of the services is performed, and he stands ready to perform all the services embraced in his contract of employment, he may recover the whole fee contracted for. *Myers v. Crockett*, 14 Tex. 257; *Cantrell v. Chism*, 5 Sneed, 116. And if an attorney is dismissed or ignored by his client without cause, before completing his employment, he may recover his fees as if he had fully performed his contract, presupposing, of course, that he stands ready and willing to perform the services which

he contracted to render. *Kersey v. Garton*, 77 Mo. 645; *Cantrell v. Chism*, 5 Sneed, 116. So counsel who have prepared a case for hearing are entitled to full fees, although the case may be disposed of by the parties on grounds not included in the issues as made up. Authorities supra; *Bates v. Desenberg*, 47 Mich. 643. But we know of no such rule or law, especially in this state, that authorizes a trustee or executor to retain counsel and pay him a pure retainer fee. He may retain counsel, and, if service be rendered under the retainer, the counsel can recover for such services, and services may include advice, and simply because the legal knowledge of an attorney is the most valuable part of his equipment, or, commercially speaking, "his stock in trade." Under the facts of the case, and the evidence directly bearing on the point, in view of the foregoing principles, we think the fee of \$300 reported by the master in favor of appellant Nelson, for services in the contested will case, was reasonable, and should be allowed. But we think the fee of \$300 reported in his favor under his general retainer, and for advice, as it is stated by the master, cannot stand. It seems to have been predicated upon the idea that a fee was due him as a retainer. For his advice, up to the institution of the will suit, he is entitled to compensation. In view of the fact that the will suit was instituted a short while after the qualification of the executor and his entering upon his duties, we think, under the evidence, \$100 should be allowed him for advice and counsel. After this bill was filed, *Henderson, Jourlmon, Welcker & Hudson* and appellant Nelson represented the executor and receiver. They were employed by him, and they stand ready to render all needed services, and therefore the fact that he may have consulted another firm of attorneys, without notifying them that he dispensed with their services, cannot affect their right to reasonable compensation. The master reported that a fee of \$350 should be allowed them. The proof amply sustains his report, and this sum should be paid them; and it is so ordered. There is no controversy as to the fee of \$25 allowed in the *Cummings Case*. As herein modified, the decree of the chancellor will be affirmed. The costs of the appeal, as to these appellants, will be paid by the estate.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, October 30, 1897.

TENNESSEE MOUNTAIN PETROLEUM & MINING CO. et al. v. AYERS et al.

(Court of Chancery Appeals of Tennessee.  
July 7, 1897.)

CORPORATION—RIGHTS OF STOCKHOLDERS.

1. A stockholder cannot, without authority from the corporation, join it with himself as com-



plainant in a bill to wind up the corporation and sell its property.

2. Where a corporation has abandoned business for years, and has no known board of directors or other officers, a stockholder may file a bill in behalf of the corporation for the purpose of preserving its property, without first demanding that the corporation itself bring suit.

Appeal from chancery court, Bledsoe county; T. M. McConnell, Chancellor.

Bill by the Tennessee Mountain Petroleum & Mining Company and T. A. Atchison against W. H. H. Ayers, R. B. Schoolfield, and others. Complainants obtained a decree. Defendant Schoolfield appeals. Modified.

W. D. Spears, for appellant. V. C. Allen, for appellees.

NEIL, J. This is a bill filed by one stockholder in the name of himself and the corporation against the remaining stockholders and an alleged trespasser upon the lands of the corporation, for the purpose of enjoining waste and recovering the land, and for other purposes. There was an original and an amended bill, and subsequently an amendment made on the minutes of the court below. These amendments were made to meet demurrers filed by the defendant R. B. Schoolfield. In order to a proper understanding of the case, it will be necessary to set out the substance of these pleadings. The original bill was filed in the name of the corporation and T. A. Atchison against W. H. H. Ayers, L. H. Thickson, S. H. Tarr, J. W. Plummer, H. W. Hart, R. B. Schoolfield, and P. A. Schoolfield. It charged that the Tennessee Mountain Petroleum & Mining Company had been created a corporation by an act of the legislature of Tennessee passed on the 8th day of June, 1865; that T. A. Atchison, W. H. H. Ayers, L. H. Thickson, S. H. Tarr, J. W. Plummer, and H. W. Hart were by the aforesaid act of the legislature, together "with their associates, successors, and assigns," constituted a body politic and corporate, by the name of Tennessee Mountain Petroleum & Mining Company, with full powers and privileges under the laws of Tennessee, for the term of 99 years; that the object and purposes of the corporation were to engage in mining, manufacturing, and refining, and boring for petroleum, salt, etc.; that the charter provided for the election of a president and other necessary officers; that the corporation was given the right to buy, rent, or lease suitable lands or other property necessary for its business; that the charter members met immediately after the charter was perfected, and organized, but the names of the officers are not given; that by the charter the capital stock was fixed at \$500,000, but that "complainants do not know whether any stock was issued to the incorporators or not," and complainants charge that said T. A. Atchison, W. H. H. Ayers, L. H.

Thickson, S. H. Tarr, J. W. Plummer, and H. W. Hart were the original stockholders in said company; that on the 9th day of January, 1866, said corporation purchased from Andrew J. Berrian a tract of land described in the bill, and now in controversy, and received his deed therefor; that the tract of land above referred to is the property of the Tennessee Mountain Petroleum & Mining Company; "that the stockholders and owners are the original incorporators, as herein shown, so far as complainant is advised, and so far as the record shows"; that the corporation was in the peaceable possession of the land above referred to from its purchase, in 1866, until the — day of —, 1890; that on this latter date the defendant P. A. Schoolfield entered upon the land, and, "without any valid title, contract, or agreement," began to commit waste on the land, by cutting and removing valuable timber and removing tan bark from the premises, and that he was so engaged at the filing of the bill; that the defendant R. B. Schoolfield, in the year 1890, caused the land to be entered upon the books of the entry taker, and obtained a grant from the state of Tennessee, and was, at the filing of the bill, setting up a claim to the land by reason of the grant thus obtained; that P. A. Schoolfield had entered upon the land under some kind of a contract with R. B. Schoolfield. The bill further proceeds: "Complainant charges that his title is superior to said recent grant to Schoolfield, and that said Schoolfield's grant is invalid. Complainant charges that said company, the Tennessee Mountain Petroleum & Mining Company, has a good and sufficient title to said land, and that the defendant Schoolfield has no valid title or claim upon said land." The bill then continues: "Complainant T. A. Atchison now comes and charges that the Tennessee Mountain Petroleum & Mining Company is an insolvent corporation, and is not, nor has it been for the past twenty years, engaged in the business for which it was created. In fact, said company has only purchased the real estate herein described, and obtained some leases for other lands, and has not for the past twenty years done any act or business looking to the development of their said property; and that the company only owns the real estate herein mentioned, and has no property that it derives any income from; said tract of land being situated on Cumberland Mountain, and no part of the same being cleared, cultivated, or developed in any way, the same being unimproved mountain lands; and he charges that the taxes paid on the same have been advanced by individual stockholders or owners. Complainants charge that said company had never realized a single dollar from the corporate property, and that the purposes and intent of the corporation have been long since abandoned, and the stockholders gone to

parts unknown. Complainant charges that the corporate property is not worth anything to the company in its present shape, that the object for which it was purchased has been long since abandoned, and that it is now a source of loss to the company, instead of an income. Complainant Atchison would here state that he knows of no debts against the corporation except the money advanced by the stockholders for taxes, but he charges that the fund advanced to pay purchase price by original incorporators is due them, and that said tract of land is all the property of the corporation, and that it is decreasing in value on account of waste that is being committed by irresponsible parties on said land." The bill further charges that the bark cut off of the trees on the land by P. A. Schoolfield was worth at least \$250. The prayer of the bill is that an injunction be granted to restrain P. A. Schoolfield from committing waste and removing bark from the trees on the land, and for an account of the bark and timber cut, and that R. B. Schoolfield's claim be declared a cloud upon the complainants' title, and removed. This is the prayer upon that branch of the case. The bill also contains the following prayer in the name of T. A. Atchison: "Complainant T. A. Atchison also prays that said corporation be wound up, that said land be sold under a decree of your honor's court, that the parties who have paid the taxes of the corporate property be reimbursed, and the residue of the proceeds of sale be divided amongst the parties entitled, according to their respective interest." W. H. H. Ayers, L. H. Thickson, S. H. Tarr, and J. W. Plummer, having been proceeded against as non-residents, were made parties by publication. Defendants Hart and the two Schoolfields were made parties by process.

At this stage of the case P. A. Schoolfield entered into an agreement, signed by himself, and by V. C. Allen and N. Q. Allen as solicitors for complainant, to the following purport: That P. A. Schoolfield should take all the proceeds of the tan bark theretofore peeled off of the trees on the land in controversy, and that complainant should release all claim for compensation or damages against the said P. A. Schoolfield for any timber or bark theretofore removed, and that complainant would pay all costs incident to making P. A. and R. B. Schoolfield parties, and that complainant should refund to Schoolfield all taxes paid by him on the land. The instrument then proceeds: "And in consideration of the above P. A. Schoolfield and R. B. Schoolfield quitclaim all their interest or claim in any of the land described in complainants' bill, and surrender the possession of said land to complainants." But this was not signed by R. B. Schoolfield. The next step taken in the case was a demurrer by R. B. Schoolfield. This demurrer contains the following grounds: "(1) That the bill cannot be maintained to recover the land,

by the Tennessee Mountain Petroleum & Mining Co., because the bill shows on its face this company was never organized, and its capital stock never subscribed, and because its property, its organization and franchises, if it ever had any, has long since been abandoned, and because the bill shows on its face that it was brought without the authority, knowledge, or consent of said corporation, or any agent, and by a person without authority to represent it. (2) That said bill cannot be maintained to wind up the incorporation as an insolvent corporation, because such bill can only be maintained on behalf of the state, by relation of the attorney general, and by making the corporation defendant; and this defendant Schoolfield is not only not a necessary party, but not a proper party, to such a proceeding. (3) That this bill cannot be maintained by T. A. Atchison against defendant R. B. Schoolfield, because, before suit for redress of grievances of a corporation as against a third party by a stockholder can be maintained, he must allege and show that he has requested it to sue, and it has declined to do so. The bill on its face shows that T. A. Atchison has no other interest in the land than as a stockholder of said corporation. (4) That the bill cannot be maintained at all, in any view, because it seeks alternative relief, when the two grounds are not in accord, but are wholly antagonistic to each other, to wit, the winding up of this corporation as an insolvent and abandoned corporation; also seeking to recover in its possession a tract of land which is said to be in the possession of a third person. This is multifarious."

The matters arising on this demurrer came on to be heard before the chancellor on March 9, 1892, and before action was taken thereon by the chancellor the complainants asked for and were granted 30 days to file an amended bill, returnable to the June rules, 1892, and judgment upon the demurrer was suspended until the filing of the amended bill. Thereupon, on the 22d of March, 1892, an amended bill was filed in behalf of the same parties appearing as complainants in the original bill and against the same defendants there proceeded against as defendants. This amended bill, after reciting the substance of the original bill, contained the following additional matter: That since the filing of the original bill the defendant R. B. Schoolfield had, by his solicitor, W. D. Spear, alone demurred to complainants' original bill (and then proceeded to set out the substance of the demurrer); that on the 20th day of August, 1891, the complainants and P. A. Schoolfield had compromised their controversy (and then proceeded to set out the substance of the compromise as above); that they had learned since the filing of the original bill that on the 9th day of January, 1891, the defendant R. B. Schoolfield had conveyed to defendant P. A. Schoolfield all the interest or claim he had to the land in controversy, and exhibited the deed with the amended bill. This bill then proceeds: "Com-

plainants charge that R. B. Schoolfield has, as will be seen by the papers exhibited with this bill, no claim on the land in controversy, he having conveyed the same; and they now charge that said R. B. Schoolfield has no interest in this controversy at the present time." The prayer of this bill, after the prayer for process, says: "That said compromise be made effective by a decree of this court, and that the demurrer of R. B. Schoolfield be stricken from the file, as he has no interest in this litigation; and that the prayer of the original bill as to the sale of real estate is reiterated and repeated here, and, if mistaken in their special prayer, they pray for general relief." Process was again issued for the two Schoolfields and for Hart, and publication made for the nonresidents. All of these failed to appear except R. B. Schoolfield, and judgment pro confesso was entered against them. R. B. Schoolfield again filed a demurrer. This demurrer presented the following grounds: "(1) The bill, on its face, shows that Schoolfield has no interest whatever in the controversy; that he is not only not a necessary party, but not even a proper party. (2) That neither the original nor supplemental bill can be maintained in the name of the corporation, because they show on their face that said corporation was never organized. (3) Because said original bill and supplemental bill show that said corporation had abandoned its organization and the land. (4) The bill cannot be maintained by Atchison, because said Atchison has no interest in the land. (5) Said Atchison cannot maintain said bill as a stockholder, because he fails to show that he has requested the corporation to bring the suit, or to take any steps looking toward the relief sought by the bill. Atchison cannot maintain the bill to wind up the corporation as an insolvent corporation—First, because he shows no interest; second, because this can only be done by the state on relation. The state is a necessary party. The objects and purposes as well as the relief sought by said bill are twofold: to wind up said corporation as insolvent, and to recover in an action of ejectment said land. This cannot be done in the same bill, as the relief sought in the two aspects presented are wholly antagonistic to each other." These matters came on to be heard before the chancellor September 6, 1892. Thereupon the court decreed as follows: "That the first, fourth, and fifth causes of demurrer be sustained, with leave to complainants to amend of record. All other causes of demurrer are overruled." Thereupon the following was entered of record as an amendment to the bill: "Complainants charge that R. B. Schoolfield, although having no real interest in the land sought to be sold, and the cloud removed therefrom, in this cause, yet complainants charge he is setting up some kind of claim thereto. The nature and extent of the same is now unknown to complainants, and said respondent is required to answer and disclose the nature and character of his said claim. Complainant Atchison charges that the

organization of said corporation was completed by the election of a president, secretary, and treasurer, but complainant does not now remember which of said incorporators were elected to said positions. Complainant Atchison charges that he and the other members of said corporation did subscribe for stock of said corporation, and that complainant Atchison has paid in on said stock five hundred dollars, and to the extent of the money paid in complainant Atchison charges he has an interest in said land, and he charges, on information and belief, that on the purchase of said tract of land each of said incorporators paid on said purchase four hundred dollars, and that complainant Atchison and respondent Hart have each paid out considerable money in paying the taxes on said land. Complainant charges that he could not apply to or request the corporation to bring this suit, because the members have died, and gone to parts unknown, so that complainant Atchison does not know anything of said parties or their heirs." R. B. Schoolfield was allowed 60 days to answer. He failed to answer, and judgment pro confesso was taken against him. Thereupon the cause came on to be heard on March 8, 1893, upon the bill and its amendments, and judgment pro confesso as to all of the defendants. The court decreed: First, that the interest of the non-resident defendants was the same as that of complainants; second, "that complainant Tennessee Mountain Petroleum & Mining Company, composed of the following stockholders or owners, T. A. Atchison, W. H. H. Ayers, L. R. Thicksen, S. H. Tarr, J. H. Plummer, and H. W. Hart, are entitled to recover the following tract of land," describing it, being the tract of land in controversy, and a writ of possession was awarded; third, that a compromise had been effected whereby R. B. and P. A. Schoolfield were released from any liability on account of tan bark and timber cut and removed from the land. The decree then proceeds: "It further appearing to the court that it is an insolvent corporation to the interest of said stockholders in said corporation and the creditors of the same, that the same should be wound up, and the real estate hereinbefore described being all the assets of said corporation: It is therefore ordered, adjudged, and decreed by the court that the clerk and master of this court sell to the highest and best bidder, at the court house door in Pikeville, Tenn., the tract of land hereinbefore described, after having advertised the same as required by law, on a credit of one and two years, except the sum of fifteen per cent., which will be required to be paid down by the purchaser on the date of sale. The purchaser will be required to execute notes bearing interest from date for the deferred payments, with good security, and a lien will be retained on the land to secure the unpaid purchase money." The cause was also referred to the master to report the amount of taxes due, and, if any had been paid, who had paid them, and other liabilities of the corporation;

also the amount of fees due to complainants' attorney, and publication was directed to be made for creditors. On August 25, 1893, the master filed his report, in which it appears that he sold the land to H. W. Hart, trustee for T. A. Atchison, at the price of \$100. On the 6th day of September, 1893, this sale was confirmed, and title devested "out of the complainant and respondents to this cause, and vested in the aforesaid purchaser, H. W. Hart." Reference for taxes was renewed. At this stage of the cause R. B. Schoolfield prayed an appeal to the supreme court. This appeal was granted, and the cause transferred to that court, but it was there dismissed, as being premature, and an order was entered in the supreme court remanding the cause to the chancery court for further proceedings. When the cause reached the chancery court again, the report for taxes was made, showing that R. B. Schoolfield had paid taxes to the amount of \$72.60 on the land in controversy, and that T. A. Atchison had paid \$18.85 taxes. The next thing that appears in the case is a judgment upon the purchase-money notes made by Mr. Atchison, and a sale of the land ordered to pay the judgment. The next thing in order was the report of the master upon counsel fees, to the effect that \$100 should be paid to complainants' counsel, but that the taxes should first be paid out of the purchase money before the counsel fees.

At this stage of the case, R. B. Schoolfield again prayed an appeal to the supreme court, and this prayer was granted, and the cause is now before us. The errors assigned are as follows: "(1) The court erred in failing to sustain the demurrer to the original bill. (2) The court erred in failing to act on said demurrer, either by sustaining or overruling the same before final decree after the same was called up by the defendants, and action on it suspended by the court to permit complainants to file an amended bill. (3) The court erred in allowing the complainants to file an amended bill, and giving them thirty days to prepare the same; the court not knowing what amendments were intended or would be filed. (4) The court erred in not sustaining defendants' demurrer to the original bill on the coming in and filing of complainants' amended bill; said action on said demurrer being suspended until then, and the allegation of the amended bill not being responsive to the grounds of demurrer, and having no tendency to cure the defect in the original bill. (5) The court erred in overruling the second and third causes of demurrer to complainants' original and amended bill. (6) The court erred in entering judgment pro confesso and final decree against the defendant R. B. Schoolfield, having previously sustained the first, fourth, and fifth grounds of demurrer to complainants' bill, which was, in effect, a dismissal of said bill as to respondent Schoolfield. (7) The court erred in allowing complainants to amend of record after having sustained said first, fourth, and fifth grounds of

demurrer to said bill. The bill should have been dismissed."

The errors assigned are highly technical, and we shall not undertake to dispose of them separately. There is really only one question in the case, and that is whether the complainant Atchison is entitled to maintain a bill in his own name for the corporation, or to use the name of the corporation as complainant, to recover the land from the defendant R. B. Schoolfield. So much of the bill as undertakes to bring the corporation before the court in the manner appearing in the pleadings for the purpose of winding it up as an insolvent corporation is merely void. It is true, the defendants other than R. B. Schoolfield have not appealed, and that question is not before us, so far as immediately affects their rights; but it becomes necessary to dispose of it, as it bears upon the defenses put forward by Mr. Schoolfield. It needs no argument or authority to support the proposition that a stockholder cannot, on his own account, join the corporation with himself as complainant in a bill, without authority from the corporation, and under these circumstances have its property legally sold, without specifying any debts whatever. It being determined, then, that so much of the bill, with its numerous amendments, as undertakes to effect this result, is void, it may be treated as surplusage. Having reached this point, we have a bill before us which charges, in substance, that the corporation had once been organized, but that the names of its officers were all unknown to the complainant stockholder; that the purposes for which it had been organized had been abandoned; that the corporation owned no property other than the tract of land in controversy, and described in the bill; that the complainant stockholder Atchison, together with four of the defendants, constituted all the stockholders; that three of these had removed, and their residences were unknown, or that they were dead; that one other was a resident, and made defendant; that by reason of the facts stated it was impossible for the complainant stockholder to apply to the corporate authorities for permission to bring this suit; that the defendant R. B. Schoolfield had caused the land to be entered in the entry taker's office, and had procured a grant therefor from the state of Tennessee; that this grant was illegal, because the land really belonged to the corporation; that R. B. Schoolfield had, subsequently to procuring this grant, conveyed his interest in the land to P. A. Schoolfield; that P. A. Schoolfield had conveyed to the corporation and to complainant Atchison, but that the aforesaid R. B. Schoolfield was still, notwithstanding these facts, setting up some sort of claim to the land, though in fact he had none; that this claim constituted a cloud upon the title, and that it should be removed. Can such a bill be maintained? The question turns upon whether complainant Atchison has the right either to sue in his own name or to use the corporate

name in suing, in order to remove the cloud, and quiet the title to the land.

Of course, the general rule is as insisted by the defendant. *Deaderick v. Wilson*, 8 Baxt. 108; *Boyd v. Simms*, 87 Tenn. 771, 11 S. W. 948; *Gas Co. v. Williamson*, 9 Heisk. 314; *Wallace v. Bank*, 89 Tenn. 630, 15 S. W. 448; *Moulton v. Connell-Hall-McLester Co.*, 93 Tenn. 377, 27 S. W. 672; 1 Mor. Priv. Corp. §§ 238-241, incl.; 4 Thomp. Corp. §§ 4490-4503, incl. But there are many instances in which a demand upon the corporation will be excused as a preliminary requisite to the bringing of the suit of a shareholder to enforce the rights of the corporation. 1 Mor. Priv. Corp. § 242; 4 Thomp. Corp. § 4504. One of the instances in which a demand upon the corporation is excused occurs in cases like the one we have before us. Says Judge Thompson, in the work just referred to, at section 4305: "It has been held that such a request may be dispensed with where the corporation has abandoned its business, and ceased to appoint officers [citing *Crumlish's Adm'r v. Railroad Co.*, 28 W. Va. 623, and *Thompson v. Stanley* (Sup.) 20 N. Y. Supp. 317], but not where, after the expiration of the charter, its corporate existence is continued for the purpose of winding up its affairs. It has been held that, where a Tennessee corporation has been dissolved by a foreclosure sale of its franchises, but its existence is continued by a statutory provision for a term of five years, during which suit may be brought in its name to wind up its affairs, a bill by stockholders is well filed under the federal equity rule 94, if it appear that the suit is not a collusive one, and that the plaintiffs have applied to such of the late directors as they can reach to bring the suit, and they have refused; and that the stockholders may, in their individual right, sue the receiver to call him to account [citing *Lafayette Co. v. Neely*, 21 Fed. 738]. So, where a corporation had for years done no business, had elected no officers or directors, and its president, whose estate it was sought to charge for misappropriating its estate, had had the entire control and management of the corporation until his death, and there was no one to whom a request to bring the action in the name of the corporation could be addressed, except his personal representative, it was held that the making of such a request was not excused [citing *Thompson v. Stanley* (Sup.) 20 N. Y. Supp. 317]." Surely, it would be a mockery of justice in the present case, when the corporation has ceased to do business for a long term of years, and has no board of directors that can be approached, and, indeed, when its board of directors is not known, and all the incorporators are brought before the court, and a third person is trying to make way with all the property of the corporation,—we say it would be a mockery if, in such a case as this, a stockholder could not sue in behalf of the corporation and his co-corporators. The corporation is in existence, to be sure, under the

state of facts above set out (*Parker v. Hotel Co.*, 96 Tenn. 252, 34 S. W. 209), but it is in such a situation that it is impossible to approach any one in its behalf to get its consent. We may add that, although it does not appear that any certificate of stock was issued to the complainant, yet, having subscribed for stock, and paid in his money, he was, nevertheless, a shareholder, and entitled to maintain the rights of that position. *Cartwright v. Dickinson*, 88 Tenn. 476, 478, 482, 12 S. W. 1030. We may also add that under our statute an ejectment may be brought not only against those who are in adverse possession of land, but "against any person claiming an interest therein." *Shannon's Code*, § 4972. In its leading aspects, a bill to remove a cloud is substantially equivalent to ejectment, and was so treated by the chancellor in this case. At all events, under an equitable construction of the statute, we think a bill to remove a cloud would lie against a person asserting a claim of right to land under the circumstances set forth in the bill. The result is, the decree of the chancellor must be affirmed, with costs of this court and the court below, in so far as it decrees a recovery of the land. The decree, however, will be so worded as to show that the recovery is in the name of T. A. Atchison, for the use and benefit of the corporation and the shareholders mentioned in the pleadings. Decree accordingly.

BARTON and WILSON, JJ., concur.

Affirmed orally by supreme court, November 17, 1897.

#### GRAHAM v. GUINN.

(Court of Chancery Appeals of Tennessee.  
June 5, 1897.)

#### REFORMATION OF NOTE—FRAUD—LACHES—ESTOPPEL.

1. The buyer of a half interest in a printing-press outfit agreed to pay therefor one-half the original cost, and half the expense of moving it. The seller falsely represented that the original cost was \$375, whereas it was only \$150. The expense of moving the outfit was \$15. The buyer gave his note for \$195 to the seller. Three months later the buyer discovered the fraud, and notified the seller that he would pay only one-half the original cost. About a month later the outfit was destroyed by fire, and about nine months thereafter the buyer brought this suit. Held, that equity would reform the note so as to reduce it to half the original cost of the outfit and the expense of moving it.

2. The buyer was not guilty of laches.

3. The fact that a short time before the suit was brought the buyer settled with the seller certain accounts between them for receipts and disbursements of their printing business was not inconsistent with his intent to seek reformation of the contract.

Appeal from chancery court, Polk county; T. M. McConnell, Chancellor.

Suit by W. B. Graham against W. A. Guinn to reform a contract, on an allegation of fraud. From a decree for complainant, defendant appeals. Affirmed.

J. L. Smith and Mayfield & Son, for appellant. G. G. Hyatt, for appellee.

NEIL, J. A bill to reform a contract, on an allegation of fraud. The facts shown by the record are as follows: In August, 1894, Guinn sold to Graham a one-half interest in a printing-press and newspaper plant, called the "Benton News," in Polk county. The contract was that Mr. Graham was to have the half interest at one-half the price the press and plant had cost Mr. Guinn, with one-half of the expense of moving it from Charleston, a neighboring town. Mr. Guinn falsely stated to Graham that the original cost price was \$375, and the expenses \$15; and, believing this statement, Graham executed his note for \$195, that being half of the aggregate of \$375 and \$15,—that is, half of \$390. The proof shows that the original price was only \$150, and the expense of moving, together with a new composing stone and some new material, which were lumped in with the other expenses, was \$15. Upon the execution of this note, Graham and Guinn became joint owners of the property, and ran it together until January, 1895, when the plant was destroyed by fire. About three months after the note was executed, Graham became aware of the fraud that had been practiced upon him, and thereupon accosted Guinn upon the subject. What transpired in that conversation and subsequent conversations is best told in the language of complainant, Graham, who says: "I told him he had obtained the note by fraud and misrepresentation, and that I would not pay more than half of the cost to him of the outfit, which was what he agreed to take; that I had placed confidence in his statement as to what it cost him, and had been deceived. I proposed to either purchase from Mr. Guinn his half of the outfit, or sell him mine, on the basis of \$150, the amount it cost him. He was teaching at the time, and said he could not take charge of the paper until his school was out, which would be about three weeks, and agreed that we would adjust the matter one way or the other as soon as school had expired. I rested content with that agreement until his school was out. I then approached him on the subject again. He said he wanted a certain horse which I owned, and he agreed to take the horse in full payment of the outfit, if I would pay Mr. Barrett, the person who sold the outfit to him (the horse was worth \$75 or \$80), and, in addition to that, he would give me all that was due the firm for local and other advertisements, or dues for subscriptions, which he said would bring the price of the press and outfit down to \$150. But he wanted to reserve some small amounts due the firm from some parties in Cleveland, amounting to \$4 or \$5. I refused to have him reserve anything pertaining to the business, as I couldn't afford to have any further business relations with him. Besides, I believed at the time that he had collected a part of this money, and failed to account for it. This made him angry, and he said he would collect the note for \$195; that

he would collect it, no difference how he obtained it." Again he says, when interrogated upon the subject: "As above stated, we agreed at one time to adjust the matter on a basis of \$150, and he agreed to my proposition to either pay me my part, or sell his to me, on that basis; or, in other words, if he purchased from me, he would take it back, and refund the money which I had paid to him. He said at the time that he would decide as soon as school was out which he would do. After his school was out he tried to let me have his part, and that he would rate the whole outfit at a price which he considered not more than \$150, provided that I would take the amount due us for advertisements and subscriptions, and he would take my horse in payment at \$90; but he wanted to reserve certain accounts due us, which amounted to \$4 or \$5. We would doubtless have traded, if he had not desired, in the contract, to make this reservation." Again he says: "After I had ascertained that Guinn had practiced a fraud upon me, and by misrepresentations obtained the note, I told him I wouldn't pay him more than one-half of what the outfit cost him, but that we must adjust the matter; that I would pay him on the basis of \$150 for the outfit, or I would sell it to him: all I wanted was the money I had expended refunded to me, and I would charge nothing for the time I had devoted to the business. He was teaching school at the time, and said he couldn't take charge of the paper for three weeks, but would do one way or the other after the expiration of his school. Q. This is the same discussion mentioned in your direct examination, is it not? A. One of the same, but there were others." Again he is asked this question, and answers as follows: "Q. Did you at any time offer or tender the money to the defendant for one-half interest in the press, etc.? If so, state when it was, where it was, and how much you tendered him. A. I had paid him \$35, and I, at various times, told Mr. Guinn I would pay the balance of one-half the cost of the outfit, viz. one-half of \$150, which I felt was the contract, notwithstanding he had obtained my note, through false representations, for a larger amount. After he sued me on the note, I tendered him the balance of the money which I considered I was justly due him on the basis of our contract, together with half the cost of moving same. I also added interest, and counted out the money before the court, and offered to pay the cost to that time, and am yet ready and willing to pay it." How often such conversations occurred between the parties does not appear. It does appear that the complainant learned definitely about the 4th or 5th of December, 1894, by a letter from one W. T. Barrett, that this fraud had been practiced upon him. Three weeks from that time, allowing for the expiration of Mr. Guinn's school term, would bring us down to about the 23d of December, 1894. The newspaper outfit was destroyed by fire in January, 1895. The exact date does not appear. On the 9th of August, 1895, a settlement of their

newspaper affairs was had between the complainant and the defendant, and at that time the defendant fell in debt to the complainant in the amount of \$23, and this sum was credited on the note on that date, in the following language: "Credited by balance on settlement, August 9, 1895. \$23." The complainant gives the following account of this credit: "Q. In what way was the \$23 with which you are credited on August 9, 1895, paid? A. Part in cash, and the other part in labor of my two sons, at \$1.25 each per week, half of which was chargeable to Guinn. Q. How was this amount credited to you on settlement of some of these accounts, or on a settlement of the account due your sons for labor? A. I expended nearly all the money necessary to run the paper. When I collected money, I charged it to myself, and gave myself credit for the amount paid out by me, together for the labor of my two boys, at \$2.50 per week, for both my boys did all the work of printing the paper. Mr. Guinn generally kept the money he collected, and we would settle the amount I paid out more than the collections, and the amount Guinn had collected, added together and divided by two, which gave the amount which Mr. Guinn was indebted to me; and, as he would never pay it, it became a credit on the amount I was justly due Mr. Guinn. I didn't authorize Mr. Guinn to credit this amount on the note after I found out the fraud which had been practiced on me, for I didn't consider the note valid. Q. Then this was a settlement on collections made by both of you and the labor of your sons, and in this way it was agreed \$23 was due you, was it not? A. I do not remember the exact amount in any one settlement, but that is the way in which we settled." The defendant's account of the settlement is embraced in the following questions and answers: "Q. Did Graham and yourself have any settlement of your newspaper affairs? If so, when was it? And, if anything was said about your note at that time, what was it? A. Our final settlement was had on August 9, 1895. At that time Graham said he aimed to pay as soon as he could. Q. Was anything credited on the note at that time? A. There was credited \$23, as a balance on settlement."

This transaction, it will be remembered, was long after the destruction of the newspaper plant by fire. In view of the relations existing between the parties at that time, we cannot believe that the complainant, Graham, made the statement attributed to him by the defendant, to the effect that he would pay the note as soon as he could. Nor do we think that the complainant directed the credit to be entered upon the note. From various facts in this record, not necessary to detail here at length, we think that the complainant's deposition is entitled to more credit than the deposition of the defendant, and that the complainant's deposition, as above quoted, states the true facts of the settlement. To summarize the facts upon this point, it appears that the complainant discovered the fraud that had been practiced up-

on him about three months after he purchased an interest in the paper; that he thereupon approached the defendant upon the subject, and accused him of the fraud, and showed him the proofs that he had, consisting of letters from defendant's vendor, Barrett; that defendant at that time substantially admitted that he had misrepresented to the complainant the amount he had given Barrett for the paper, and agreed that at the end of three weeks he would settle with the complainant on the basis of the original purchase price from Barrett, \$150, either by selling out to complainant, or by buying him out; that at the expiration of three weeks complainant again spoke to defendant upon the subject, and they endeavored to settle the matter by complainant taking the plant on the basis of the original purchase price from Barrett (that is, \$150), but, in arranging details, failed to agree, and that thereupon negotiations were broken off, the defendant saying that he would insist upon collecting the note as originally written, \$195; that within a month from this time the newspaper was destroyed by fire, but that during that interval the complainant and defendant continued to run the paper; that on August 9, 1895, the parties had a settlement on the basis of charging each with his collections and crediting each with his expenditures, and that on this settlement the defendant fell in debt to the complainant in the sum of \$23; that this \$23 was not paid by the defendant to the complainant, but applied by him on the indebtedness of the complainant to him for the purchase price of the half interest of the plant; that defendant, of his own motion, credited this amount on the note; that the matter rested in this way until the 16th of September, 1895, when the defendant sued the complainant before a justice of the peace on the note; that upon this suit being brought the complainant offered the defendant the amount he conceived to be due, with interest, but the defendant refused it; that the suit was continued until October 12, 1895, and in the meantime, on the 10th of October, 1895, the present suit was brought. Under this state of facts, is the complainant entitled to a reformation of the contract?

The correction of mistakes in written instruments, occurring by accident, fraud, or otherwise, has been one of the acknowledged branches of equity jurisprudence from the earliest history of the court. *Andrews v. Gillespie*, 47 N. Y. 491. This jurisdiction exists—First, where there is a mutual mistake; second, where there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties. *Jackson v. Magbee*, 21 Fla. 622; *Kilmer v. Smith*, 77 N. Y. 227; *Savings Institution v. Burdick*, 87 N. Y. 40; 3 Pom. Eq. Jur. § 1376, and cases cited. This relief has long been recognized and administered in Tennessee. *Barnes v. Gregory*, 1 Head, 236; *Kelley v. McKinney*, 5 Lea, 164; *Deakins v. Alley*, 9 Lea, 494; *Talley v. Courtney*, 1 Heisk. 718; *Johnson v. Johnson*, 8 Baxt. 261; *Davidson v.*

Greer, 3 Sneed, 385; *Bailey v. Bailey*, 8 Humph. 230; *Helm v. Wright*, 2 Humph. 72; *Perry v. Pearson*, 1 Humph. 431; *Wood v. Goodrich*, 9 Yerg. 266. The principle on which courts of equity rectify an instrument so as to enlarge its operation, or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence, on the ground of an omission by mutual mistake, or on the ground of mistake of one party when superinduced by the fraud of the other, in the reduction of the agreement to writing, is that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing; and upon clear proof of these terms the court will compel the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole agreement, as actually intended to be made, shall be truly expressed and executed. 2 *White & T. Lead. Cas. Eq. pt. 1*, pp. 1006, 1007, citing *Hunt v. Rousmaniere's Adm'r*, 1 Pet. 1; *Oliver v. Insurance Co.*, 2 Curt. 277, Fed. Cas. No. 10,498. As stated in 2 *Pom. Eq. Jur.* § 870: "Reformation is appropriate when an agreement has been made or a transaction has been entered into or determined upon as intended by all parties interested, and in reducing such agreement or transaction to writing, either through the mistake common to both parties, or through the mistake of the plaintiff, accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction. In such a case the instrument may be corrected so that it shall truly represent the agreement or transaction actually made or determined upon, according to the real purpose and intention of the parties." Or as correctly stated in a note to *Page v. Higgins* (Mass.) 5 *Lawy. Rep. Ann.* 158 (s. c. 22 N. E. 63): "A court of equity will restrict the operation of a deed to the actual intent of the parties, by ordering the deed to be reformed, or by enjoining a party from availing himself of the deed beyond the mutual understanding and intention of the contract;" citing *Wilcox v. Lucas*, 121 *Mass.* 21; *Broadway v. Buxton*, 43 *Conn.* 282; *Beardsley v. Knight*, 10 *Vt.* 185; *Shattuck v. Gay*, 45 *Vt.* 487; *Tabor v. Cilley*, 53 *Vt.* 487; *May v. Adams*, 2 *New Eng. Rep.* 204, 58 *Vt.* 74. And again: "Deeds may be reformed, not only in cases where the mistake consists in the omission or insertion of words or clauses contrary to the intention of the parties, but in cases where the parties understood what language was contained in the deed, if they believed the description corresponded with the actual boundaries intended, and were mistaken therein;" citing *Johnson v. Taber*, 10 *N. Y.* 319; *De Riemer v. Oantillon*, 4 *Johns. Ch.* 85; *Bush v. Hicks*, 60 *N. Y.* 298; *Bailey v. Woodbury*, 50 *Vt.* 166; *Tabor v. Cilley*, 53 *Vt.* 487; *May v. Adams*, supra. In our own case of *Barnes v. Gregory*, supra,

the deed gave a description of the land, and stated that it contained 30 acres, more or less; but, by the fraud of the defendant, he led the complainant to believe that there was only 30 acres, and that that was the result of a survey made the day before. The complainant—the sale being made by the acre—was induced to accept settlement on that basis; a part being cash, and part in notes. The deed and the notes were fully understood by the parties at the time; that is, they intended to write the deed, and it was written, and they intended to make the settlement as it was made. But this state of mind and this willingness on the part of the complainant were brought about by the fraudulent misrepresentations made to him by the defendant, and relied upon by the complainant. A reformation was granted. It appeared in that case that the complainant did not know exactly the number of acres contained in his own tract, and that the survey had been made the day before by the defendant, in fact, with the surveyor, to ascertain the acreage. The same thing occurred, in substance, in *Deakins v. Alley*, supra, in general terms. So in the present case the complainant intended to execute, and the defendant intended to receive, a note for \$195. But this state of willingness upon the part of the complainant was superinduced by the fraudulent statement of the defendant that these figures represented one-half of the value of the property agreed upon as a basis of the contract; that is, one-half of what defendant had agreed to give Barrett, together with one-half of the expense of moving the plant. Under the authorities above cited, and on principle, we think there is no doubt that the complainant is entitled to a reformation, unless he has too long delayed action, or has so acted under the contract as to affirm it in the form in which it was written.

We shall now consider this question: Do the facts above stated show that the complainant too long delayed to avail himself of his right to a reformation, or that by his conduct he affirmed the transaction in its original form? As already stated, the basis of this action is that the complainant was induced to sign the contract, in the form in which it was signed, by reason of fraud practiced upon him by the defendant. Reformation of contracts is one of the methods by which a court of equity relieves persons from the consequences of fraud practiced upon them. Prof. Pomeroy, in the opening section of his discussion on actual fraud, in enumerating the reliefs which are granted for this cause in equity, states as a second ground the following: "(2) The affirmative relief of reformation, by which a written instrument is corrected, and perhaps re-executed, when, through fraud of the other party, it failed to express the real relations which existed between the two parties." 2 *Pom. Eq. Jur.* § 872. In order to entitle one to this relief, he must act with promptness, as



in all other cases where affirmative relief in equity is sought on the ground of fraud. Upon this subject Prof. Pomeroy says: "All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party, upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it was still existing and binding, he thereby waives all benefit of and relief from the misrepresentation." 2 Pom. Eq. Jur. § 897. And again the same authority says: "The injured party must assert his remedial rights with diligence and without delay, upon becoming aware of the fraud. After he has obtained knowledge of the fraud, or has been informed of facts and circumstances from which such knowledge would be imputed to him, a delay in instituting judicial proceedings for relief, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as an acquiescence; and this may be, and generally will be, a bar to any equitable remedy. To this rule there is one limitation. It applies only when the fraud is known, or ought to have been known. No lapse of time, no delay in bringing a suit, however long, will defeat the remedy, provided the ignorant party was during all this interval ignorant of the fraud. The duty to commence proceedings can arise only upon his discovery of the fraud, and the possible effect of his laches will begin to operate only from that time." *Id.* § 917. And see *Lawrence v. Dale*, 3 Johns. Ch. 23. Or, as stated in a note to the last-mentioned case, reported in 1 New York Chancery Reports, 530: "When a party, with full knowledge, or with sufficient notice or means of knowledge, of his rights, and of all the material facts, lies by for a considerable time, or abstains from impeaching the transaction, so that the other party is induced to suppose that it is recognized, it is acquiescence; and the transaction, although originally impeachable, becomes unimpeachable in equity;" citing *Cholmondeley v. Clinton*, 2 Mer. 171, 361; *Honner v. Morton*, 3 Russ. 65; *Selsey v. Rhoades*, 1 Bligh (N. S.) 1; *Vigers v. Pike*, 8 Clark & F. 562, 850; *Character v. Trevelyan*, 11 Clark & F. 714; *Odlin v. Gove*, 41 N. H. 465; *Bassett v. Manufacturing Co.*, 47 N. H. 426; *Peabody v. Flint*, 6 Allen, 52; *Fuller v. Melrose*, 1 Allen, 166; *Tash v. Adams*, 10 Cush. 252; *Briggs v. Smith*, 5 R. I. 213; *Cobb v. Hatfield*, 46 N. Y. 43 S.W.—48

533. As to what delay would make it incumbent upon the court to deny relief, it cannot be determined by any set rule, but must be determined upon the facts and circumstances of each particular case. We have not had access to any case where the question rested upon an application to reform a contract. All of the cases which we have had an opportunity of examining were cases of rescission, but the principle, as we have already settled, must necessarily be the same. There is one case, however, in this state (*Kelley v. McKinney*, 5 Lea, 164), where the court allowed a reformation after the expiration of 10 months from the time when knowledge first came to complainant. In that case the deed complained of was made on the 15th of December, 1874, and conveyed to the complainant 60 acres only, when it should have conveyed 80 acres. The complainant received the deed at the time with the remark that it would not do, and afterwards refused to register it, and filed a bill for reformation on the 9th of October, 1875. In that case the court granted the relief without raising the question of lapse of time. If we go to cases of rescission for illustration, we find in the case of *Donelson v. Weakley*, 3 Yerg. 178, it was held that where there was mutual indulgence upon both sides,—to the one for the performance of an executory agreement, and to the other for the payment of the consideration,—there might be a rescission, even after the lapse of six years, for a continuing cause. In the case of *Scott v. Johnson*, 5 Helsk. 614, it appeared that the complainant, Nancy M. Scott, sold to the defendant, Johnson, a tract of land on the 7th of May, 1862; that she placed the deed in the hands of her agent, Brinkley, to hand to Johnson and receive the money; that Johnson, contrary to the agreement between himself and complainant, fraudulently paid to her agent a portion of the consideration in Confederate money; that, upon knowledge of this fact being brought to her attention, she immediately complained of the fraud, but that she was then about to go South; that it was dangerous at that time to institute proceedings to repudiate Confederate money, owing to the state of the country; that she told her agent to take the money South, and do the best he could with it; that he lent it out, except \$2,000, which he appropriated to the payment of her debts; that in 1863 she returned to Memphis, and gave notice to the defendant that she intended to repudiate the trade, and brought with her a note for \$10,000, which was part of the consideration; and that she finally brought suit on the 6th of April, 1866. It was held by a divided court that she did not come too late, and that the rescission might be granted; also, that the act of lending the money, under the circumstances, would not preclude her. This case goes to the very verge of the law. We have not been able to find that it has ever been cited with approval upon this

point since it was decided. We think it doubtful if it can be sustained upon principle. In *Peck v. Bullard*, 2 Humph. 41, it was held that rescission would not be granted after the lapse of nine years from the sale of land by an agent, and after the lapse of seven years from the conveyance by the vendor himself, upon the discovery by the latter that his conveyance covered more and better land than he thought, even if the vendor's agent was fraudulently misled by the purchaser; the facts being such as the purchaser could not have concealed, and such as the vendor might at any moment have acquired full knowledge of. In the case of *Knuckolls v. Lea*, 10 Humph. 576, 586, it is stated in general terms that the complainant should have sought his remedy as soon as he ascertained that it was needed for the effectuation of justice to himself, but an examination of that case will show that the complainant had ratified the trade by paying several of the notes. Moreover, the trade was made on the 22d of April, 1837, and the complainant in that case did not make complaint until the 9th of November, 1839, and alleged in his bill that he had discovered the fraud practiced upon him soon after entering into possession of the premises, and the bill was not filed until nearly two years after such discovery. In *Campbell v. Foster*, 2 Tenn. Ch. 402, the rescission was not applied for for over two years, and during that interval the complainant cestui que trust had used the money and sold the land received in exchange, permitted valuable improvements to be put on the land conveyed by him in exchange, and expressed no disapproval of the trade at any time up to his death; the bill having been filed by a trustee representing the complainant estate. The case of *Blackman v. Stone*, 3 Tenn. Ch. 370, 379, passed off on the idea, as to this subject, that the cross complainant, Stone, had affirmed the transaction by acting upon it. The case of *Chadwell v. Winston*, Id. 110, went off upon the same idea, it there appearing that the parties acted under the contract for several years. The time in the present case is less than that in any of the cases mentioned, except the case of *Kelley v. McKinney*, supra, which was 10 months. Here the time is the same, from January until October, but the complainant in the case we are now deciding made instant complaint of the fraud. He was asked to delay three weeks by the defendant, and granted the delay. This was a case of mutual indulgence. At the expiration of that time they attempted to adjust their matters, and disagreed. Within a month the subject-matter of contract was destroyed. It was not contrary to the complainant's position in the matter that he should continue to act with the defendant in the use of the newspaper plant, because he was not seeking a rescission, but only a reformation of the contract, insisting upon his right to retain the half interest in the prop-

erty under the contract as originally made, and only denied the defendant's right to compel him to pay more than was agreed upon originally. It was not inconsistent that the defendant should meet the complainant, and settle their expenses and collections. Furthermore, the complainant having fully informed the defendant of his dissatisfaction with the contract and his intention to have it reformed, and his purpose not to pay the amount which he had been fraudulently induced to agree to pay in the note, the defendant being thus put upon his guard, and not at all misled as to complainant's purposes, we do not think that under these circumstances the delay to institute the actual litigation seeking a reformation was too long.

The chancellor granted the complainant the relief he sought, and in addition to this found that the complainant was indebted to the defendant in the sum of \$82.50, being half of the original \$150, and a half of the expense item of \$15, and that this was entitled to a credit of \$35 entered upon the note, and gave the defendant a decree against the complainant for the balance, with interest from the 6th day of August, 1895, amounting to in all \$50.80. There is no error in this of which the defendant can complain. The result is that the decree of the chancellor will be in all things affirmed. The costs of this court will be paid by the defendant. The costs of the lower court will be paid as decreed by the chancellor.

WILSON and BARTON, JJ., concur.

Affirmed orally by supreme court October 27, 1897.

#### GRADY v. NEWMAN.

(Court of Appeals of Indian Territory. Jan. 14, 1898.)

CHattel Mortgages—Possession by Mortgagee—Right to Redeem—Estoppel—Assignments.

The assignee of a chattel mortgage providing that the mortgagor should retain possession until the maturity of the debt, who obtained possession of such property, before condition broken, under promise to the mortgagor that he might redeem, and that on payment of the debt the possession should be restored to him, was estopped to set up an alleged anterior title in a suit by the mortgagor for the cancellation of such mortgage and the recovery of such property and damages for its retention, in which it appeared that such debt had been more than paid by the use of such property and the conversion of a portion thereof by such assignee, and therefore it was not error to treat him as a mortgagee in possession.

Appeal from the United States court for the Central district of the Indian Territory; before Justice C. B. Stuart, February 22, 1896.

Suit in equity by Charles Newman against John M. Grady. From a decree in favor of plaintiff, defendant appeals. Affirmed.

R. Sarils, for plaintiff in error. E. Calkins, G. B. Denison, and N. B. Maxey, for appellee.

CLAYTON, J. This suit was brought on the equity side of the docket in the court below by Charles Newman, the appellee, to set aside and cancel a certain promissory note for \$239.45, and a chattel mortgage to secure the payment of the same, both executed by him to one Charles Lang on the 31st day of August, 1891, which said note and mortgage were afterwards, and before maturity, for the consideration of \$100, assigned to John M. Grady, the appellant, who took possession of the mortgaged property. Both Lang and Grady were made parties defendant to this suit, but no service was had on Lang. The complaint alleges that the aforesaid note and mortgage were executed by Newman while he was in such a state of intoxication as to be legally incapable of entering into a contract, and that Lang, the mortgagee, fraudulently assisted in bringing about this condition; and, further, that at the time that Grady, the appellant, purchased the said note and mortgage and took possession of the said property, he (Grady) was told, and otherwise had notice of, the above facts. Prayer for the cancellation of the note and mortgage, and for possession of the property, and damages for its retention. The answer of Grady denied all of the allegations of the complaint, and alleged: First, that the mortgaged property was not the property of Newman at the time of the execution of the note and mortgage aforesaid, but that it belonged to and was owned by him (Grady); and, second, that the note and mortgage were duly, and without fraud, executed to Lang, and without notice assigned by him to Grady, and that Newman had wholly failed to pay off or discharge the same. Prayer for the possession of the mortgaged property and costs. Upon the issues proof was taken, and the cause referred to a master, with direction to state an account between the parties. The master found from the proof, as shown by his report, to wit: "That on the 31st day of August, 1891, plaintiff, Newman, executed to defendant Chas. Lang his promissory note for the sum of \$239.45, due and payable on the 30th day of September, 1891, and that on the same date plaintiff executed a chattel mortgage in favor of said Lang to secure said indebtedness. \* \* \* That under the said mortgage, plaintiff, Newman, was to retain possession of said property until the 30th day of September, 1891, when the said promissory note should fall due. That at the time plaintiff executed said promissory note and mortgage he was indebted to the said defendant Lang in the sum of \$239.45. That at the time plaintiff executed said promissory note and mortgage he was sufficiently sober and in possession of his faculties to understand the nature and extent of his acts, and that he at that time understood the nature and contents of the instrument in question. That on the 10th day of September, 1891, said defendant Lang, for and in consideration of the sum of \$100, assigned the said note and mortgage to

the defendant, John Grady; that plaintiff notified and requested said Grady not to buy said note and mortgage before said Grady had paid any consideration therefor, but that said notification and request was made by plaintiff, Newman, on the ground that he could not redeem the mortgaged property after such assignment, and not upon the ground that said mortgage and note had been fraudulently obtained from him. That said Grady thereupon assured plaintiff that he could redeem said payment of the debt at the time that the same should fall due. That thereupon said Grady paid said Lang the said consideration of \$100 for said note and mortgage, and at once, and before the debt or note was due, took possession of said property described in said mortgage, and has had possession thereof since said date." In stating the account, the master, treating appellant, Grady, as a mortgagee in possession, gave him credit for the face value of the note, with interest, and charged him with the rents and profits of the mortgaged property, and with the value of certain portions of it that he (Grady) had converted to his own use, and consumed. The balance, as shown by the master's report, left Grady in debt to Newman in the sum of 92 cents; that is, that the mortgage debt had been overpaid by that amount. Exceptions were filed to this report, which were overruled by the court, and exceptions duly saved.

The above facts found by the master are amply sustained by the proof. Appellant himself admits that at the very time of the assignment of the mortgage to him by Lang, Newman was protesting on the ground that he would not be permitted to redeem, and that he told him he should have that right, and, upon payment of the debt, the possession of the premises would be restored to him. And, in addition to this, the mortgage itself, in express words, conveyed all of the mortgagor's "household goods" contained in the mortgaged house, and the proof is that appellant took possession of these goods at the time he possessed himself of the premises, and as to them there is no pretense but that the title was in the mortgagor. The court, in its decree, found that Grady took possession of the premises under the mortgage before the debt secured thereby became due, and that the said debt had been more than paid by the use and conversion of the mortgaged property taken by Grady, and that the said debt had been fully satisfied, and that Newman had the right to redeem. The court then decreed a surrender and cancellation of the mortgage and a delivery up of the possession of the premises, and judgment for 92 cents and costs against Grady. To all of which exceptions were duly saved. It is contended by counsel for Grady that the proof in the case showed that the title to the mortgaged property at the time of the execution and assignment of the mortgage, as well as at the time of taking possession, was in him (Gra-

dy), and therefore the court erred in declaring him to be a mortgagee in possession of the mortgaged premises, and in charging him with the rents and profits of the premises. The proof upon the question of the appellant having been the owner of the premises at the time of the execution and assignment of the mortgage is not convincing, but, be that as it may, there is another reason why this contention cannot prevail. We are of the opinion that in a court of equity an assignee of a mortgage, in possession of the mortgaged premises, the assignment having been made before conditions broken, and possession taken with a promise to the mortgagor that he might redeem, is estopped from setting up his outstanding anterior title as against the mortgagor. 2 Herm. Estop. p. 1022, § 901; *Bank v. Bronson*, 14 Mich. 361; *Renshaw v. Taylor*, 7 Or. 315; *Schumaker v. Hoeveler*, 22 Wis. 43. "A party who accepts a mortgage made to him is estopped to deny the power of the mortgagor to make the conveyance, nor can he set up title anterior to his mortgage." 2 Herm. Estop. § 901; *Brown v. Combs*, 29 N. J. Law, 36; *Tartar v. Hall*, 3 Cal. 263; *Conklin v. Smith*, 7 Ind. 107. "An estoppel in pais is called into existence by the acceptance of possession under a deed only when it is accepted in one of the relations which imply an obligation to return or surrender possession, and a sort of allegiance to him under whom or in subjection to whose interest it is held, such as the relation of landlord and tenant, trustee and cestui que trust, mortgagor and mortgagee." 2 Herm. Estop. § 846. And more especially is this true when, as in this case, possession is obtained under the mortgage with the express promise of the assignee of the mortgage to the mortgagor that "he may redeem, and upon payment of the debt the possession of the mortgaged premises will be restored to him." In this case both were claiming title. Neither had paper title, so constructive notice cannot be claimed. The mortgagor was in possession, holding adversely to the assignee of the mortgage, and under these circumstances the mortgage was used by the assignee for the purpose of obtaining possession, but the possession was not surrendered by the mortgagor until the assignee had promised him that he might redeem, and on payment of the debt the possession would be returned. The mortgage in this case provides that the mortgagor shall retain possession until the debt shall become due. The conditions of the mortgage had not yet been broken, and therefore neither the mortgagee nor his assignee were entitled to possession. We repeat, under these circumstances Grady was estopped from setting up his anterior title, and therefore the court below did not err in treating him as a mortgagee in possession. The decree of the court below is affirmed.

SPRINGER, C. J., and THOMAS and TOWNSEND, JJ., concur.

# YOCUM v. CARY.

(Court of Appeals of Indian Territory. Jan. 14, 1898.)

CONTRACTS—DISSOLUTION OF PARTNERSHIP—BILLS AND NOTES—PAROL EVIDENCE TO VARY WRITING—VERDICT BY DIRECTION.

1. On the dissolution of a partnership, the partners effected an absolute settlement, and determined the amount to which each was entitled. The retiring member conveyed to the other his entire interest, and the remaining member, by the same written instrument, assumed the liabilities, and agreed to pay the retiring partner the balance due him, according to certain terms therein expressed, for which he at the time made his notes. In an action on one of such notes, it appeared that the writings referred to contained no ambiguities, but were plain and certain; and no fraud, accident, or mistake was claimed. *Held*, that parol evidence was inadmissible to vary the terms of such writings.

2. It was the duty of the court to direct a verdict for plaintiff, where defendant in an action on a note, by reason of his admissions, had the burden of proof, and all the legal proof was in plaintiff's favor, and none in favor of defendant.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice C. B. Kilgore, February 4, 1896.

Action by J. D. Yocum against J. H. Cary. From a judgment for defendant, plaintiff appeals. Reversed.

Mosely & Smith, M. D. Herbert, and Furman, Herbert & Hill, for appellant. A. C. Cruce and Stuart, Gordon & Halley, for appellee.

CLAYTON, J. This is an action to recover a balance of about \$2,000 due on a promissory note made by Cary, the appellee, to one Andrew Moore, dated June 6, 1893, and payable November 1, 1894, for \$2,500. There was an indorsement of a payment on the note as follows: "June 10, 1893. By credit as per amt. due from statement of \$ rendered, five hundred and forty-three &  $\frac{10}{100}$  (\$543.10). [Signed] Andrew Moore." The note, after maturity, and for a valuable consideration, was assigned to Yocum, the appellant. Simultaneously with the delivery of the aforesaid note to Moore, the following contract of dissolution of partnership was executed (the contract, however, was not mentioned in the pleadings): "The State of Texas, County of Grayson. Know all men by these presents, that I, Andrew Moore, of the county and state aforesaid, a member of the firm of Cary & Moore, doing a general merchandise business in the town of Chickasha, in the Indian Territory, have this day, for and in consideration of the sum of \$8,000, to me paid, and to be paid, by J. H. Cary, of Chickasha, in the Indian Territory, as follows: \$4,500 cash; one note for \$500, due November the 1st, 1893; one note for \$500, due November the 15th, 1893; and one note for \$2,500, due November the 1st, 1894; each of said notes to bear interest from date at

the rate of ten per cent. per annum, to be executed and signed by the said J. H. Cary, and payable to the order of Andrew Moore, at Denison, Texas,—bargained, sold, and conveyed, and delivered, and by these presents do bargain, sell, convey, and deliver, to the said J. H. Cary, all my right, title, and interest in and to the stock of merchandise belonging to Cary & Moore, situated at Chickasha, in the Indian Territory, and all claims, notes, and accounts due and to become due the said firm of Cary & Moore; the said Cary being authorized to collect any and all claims due the said firm, and the said Cary to assume all indebtedness due by said firm to any and all persons whomsoever; the said firm and partnership heretofore existing between the said Cary & Moore having been by this transaction dissolved, the said Andrew Moore retiring from said firm. Witness my hand this, the 6th day of June, 1893. Andrew Moore. Witness: A. Y. Barnes." The cash payment of \$4,500 and the two \$500 notes mentioned in the agreement had, from time to time, been paid; and, as above stated, a payment of \$543.10 had been made on the last-mentioned note, of \$2,500, leaving due and unpaid the sum of \$1,956.90 and interest. To recover this balance due on the note, the appellant brought his action at law in the court below. To this action the appellee, by an amended answer, after admitting the execution of the note, set up the following defense: "The defendant further says that there was no consideration for the execution of said note, and alleges the fact to be that for several months prior to the execution of said note the said Andrew Moore and this defendant were partners in business under the firm name of Cary & Moore; said Moore having put into said business about the sum of four thousand dollars. That a short time prior to the execution of said note the firm of Cary & Moore had become indebted to various wholesale houses in the sum of about thirty thousand dollars. The assets of said firm consisted of a stock of goods worth from six to eight thousand dollars, and various notes and accounts upon their numerous customers, aggregating about the sum of thirty-six thousand dollars. The creditors of said firm were pressing for the collection of their debts, and in this state of affairs the said Moore informed this defendant that there must be some settlement of said partnership business, so that he (Moore) could retire from said firm, be relieved of its obligations, and withdraw from its assets payment for the money he had put into said business. Thereupon the said Moore and the defendant made of said partnership business as accurate an estimate of its debts and liabilities and assets as was possible at that time to make, and this defendant thereupon assumed said thirty thousand dollars indebtedness, and the said Moore transferred to defendant his interest in said business for the following purposes: The said Cary was to collect the notes and accounts

due the said firm, take charge of their merchandise, pay their indebtedness, and pay to the said Moore his part (which was one-half interest) of whatever it should be determined that said firm had earned as profits while engaged in business. An estimate was made by the said Moore and defendant of the assets of said firm, and it was believed by them at the time that, after payment of the obligations of said firm, there would be a profit remaining of about five thousand dollars, which should be the joint property of the said Moore and this defendant. Said note was executed to cover said supposed profits, which could not then be accurately ascertained. There was no other consideration for its execution, and it was executed upon the express condition that it should only cover what should ultimately be determined to be one-half the profits of said firm. Said eight thousand dollars consisted of notes and accounts which are owing by numerous parties, former customers of said firm, an exact statement of which cannot now be furnished by defendant, but a list of which he is willing to make and file with the papers in this case. Said notes and accounts are owing by parties out of whom nothing can be collected by law, although some of it is owing by parties who defendant believes will pay if they are ever able. For these reasons, defendant says the consideration of said note has wholly failed; and in order to be released of the vexation, importunities, and harassments of the said Moore and the plaintiff, he here offers to the said Moore and plaintiff one-half of said notes and accounts, and he asks that they be compelled to accept the same, and that defendant be discharged with his costs. Third. Defendant says that, in addition to the credit which appears upon said note sued on, there should be a further credit of five hundred dollars, which was paid on or about the — day of —, 189—." A demurrer to the answer was interposed, overruled, and exception duly saved. No motion was made to transfer the case to the equity docket, and the court proceeded to try it at law; calling a jury for that purpose. The defendant, by his answer, having admitted the execution of the note, the court, we think, properly held that the burden of proof was on him, and gave to him the opening and closing arguments. Upon the trial there were only two witnesses produced,—the defendant, Cary, for himself, and Moore, the payee of the note, for the plaintiff, Yocum. Early in the testimony of defendant, it was developed that the aforesaid contract of dissolution, called a "bill of sale," had been executed, and was in his possession. He was asked by counsel for plaintiff: "Have you got the bill of sale that Andrew Moore executed and delivered to you? A. Yes, sir. Q. Have you got it with you? A. No, sir. Q. Where is it? A. In my safe." The testimony of this witness further developed the fact that this safe was in his house, just across the street from where the

trial was being had, and that the paper could have been procured within five minutes. The following objections to the witness' testimony, and rulings of the court thereon, were then made: "Counsel for Plaintiff: We object to any parol testimony tending to contradict that instrument until the instrument is produced. We object to any testimony on the subject. The Court: I will overrule the objection, but will require them to produce the bill of sale. (To which ruling the plaintiff then and there excepted.) Counsel for Plaintiff: The plaintiff objects to any parol testimony on the part of Mr. J. H. Cary [the defendant] with reference to the transaction he had with Mr. Andrew Moore until the bill of sale about which witness testified, and which was executed and delivered to him, is produced, and counsel for plaintiff have an opportunity to see it; and for the further reason that the testimony offered by defendant is secondary, and no predicate has been laid for its introduction." The witness then, over the objection of appellant, was permitted to proceed with his oral testimony relating to the transactions between him and Moore. He admitted the execution of the notes, and the contract of dissolution of the partnership theretofore existing between them, and its delivery to him, and, without producing the instrument of writing, was allowed to testify to the contract between them, substantially as set out in his amended answer supra; and (his was all the testimony introduced by the defendant. The plaintiff then introduced the contract of dissolution, heretofore set out, and a number of letters which the defendant had written to Moore, tending to prove the contract to have been identical with, and embodied in, the written instrument. The jury found for the defendant. Motion for new trial, motion overruled, exception saved, and judgment for defendant.

There are nine assignments of error. We will notice but three of them, to wit, the sixth, seventh, and eighth, which are as follows: "(6) The court erred in permitting the defendant, J. H. Cary, over objection of the plaintiff, to testify to a contemporaneous verbal contract between the said parties, for the purpose of contradicting, varying, and changing the effect and meaning of the same; there being no allegation in the pleading of the defendant showing a mistake, accident, or fraud in executing the said contract, and said contract, upon its face, being clear of ambiguity and self-explanatory. (7) The court erred in not peremptorily charging the jury, under the evidence, to return a verdict for the plaintiff for the amount due on the note sued on, for the reason that there was no evidence to support a verdict for the defendant. (8) The court erred in overruling the plaintiff's motion for a new trial for the foregoing reasons, and for the reason that there was no evidence to support the verdict of the jury, and in that the court erred in permitting the defendant to prove immaterial facts in

support of his alleged evidence, by which he proved a contemporaneous verbal agreement at variance with the terms of the written contract."

As to the sixth assignment of error: The pleadings are silent as to the contract of dissolution. The complaint is a simple declaration on a promissory note, by the indorsee thereof. The answer, without divulging the fact that there was a written agreement upon which the note was founded, set up that the note was based upon certain partnership transactions between the defendant and Moore, the payee of the note, and that it had been assigned to the plaintiff after maturity, thus letting in all of the equities between the parties; that the consideration of the note was a one-half interest of the profits of the firm which prior to that time had been made; that these profits consisted exclusively of notes and outstanding accounts, and that one-half of the money to be collected by the appellee from this source was to constitute the fund out of which the note was to be paid; that these notes and accounts, presumably without fault of defendant, had become worthless; and that, therefore, the consideration of the note sued upon had wholly failed. It is contended by the appellee that this constituted a good equitable defense to the action on the note, and authorized him to introduce parol evidence to sustain it; and he cites as authority in support of this contention the case of *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865. This is the only authority cited by appellee. The facts of this case, so far as the pleadings divulge, are very much similar to those of the case cited; and if the only question were as to the sufficiency of the answer, or as to the admissibility of parol evidence to sustain it, that case would be conclusive of this. Upon the pleadings, they are practically the same; but, upon the conceded proof, they are entirely different. In the case of *Burnes v. Scott* the note sued upon was the only written evidence of the contract, and there had been no dissolution of the partnership, or settlement of its affairs. In this case the partnership had been dissolved, and a full settlement of its affairs had been made; and behind the note there was an instrument of writing, executed simultaneously with it, upon which it was based, and was a part of the same transaction. This instrument set out fully the contract between the parties. It provided for an immediate dissolution of the partnership. For the consideration of \$3,000, it conveyed all of the right, title, and interest in and to the assets, including the notes and accounts, of one of the partners, to the other. It authorized the appellee to collect all claims due the firm, and provided that he should assume all of its indebtedness. By its terms, in consideration of the above, the sum of \$3,000 was to be paid as follows: \$4,500 cash; one note of \$500, due November 1, 1893; one note of \$500, due November 15, 1893; and one note of \$2,500, due November 1, 1894,—all bear-

ing interest from date at the rate of 10 per cent. per annum. The last of the above-mentioned notes is the one sued on in this case, the others having been paid. Under this instrument, which was delivered to the appellee, and accepted by him, and therefore bound him to the same extent as if he had signed it (*Hubbard v. Marshall*, 53 Wis. 327, 6 N. W. 497), he took possession of all of the assets of the firm, and Moore received the cash payment and the notes, and moved out of the country, into the state of Texas. The contract of dissolution and the notes therein mentioned, being part of the same transaction, and having been simultaneously executed, together constituted the written evidence of the agreement. Comparing the agreement, as set out in the written instrument, with the contract set up by appellee's answer, and testified to by him at the trial, it will be seen that they are so widely different that the two cannot stand together; that the alleged parol agreement, if allowed to prevail, will establish a contract at variance with the terms of the written one. It is admitted by counsel for appellee, and is clearly decided in the case of *Burnes v. Scott*, supra, that, in a case like this, at law, parol evidence is not admissible to contradict or vary the terms of a written contract. Is it admissible in equity? There is no ambiguity in the written instrument. It is commendably plain, concise, and certain. It fully and clearly sets out the whole transaction, and fairly and with certainty expresses the consideration of the note. As far as it is concerned, it is self-explanatory and needs no interpretation. There is neither allegation nor proof of fraud in its procurement, or of mistake in any of its provisions. In the admission of parol evidence to vary the terms of a written contract, equity follows the law, and forbids it, except in those cases where it is alleged and proven that the instrument was procured by fraud, or, by some accident, surprise, or mistake, some provision was included in, or omitted from, the written instrument, not intended by the parties. Mr. Pomeroy, in his work on Equity Jurisprudence (volume 2, § 806), referring to the reformation of contracts, says: "No parol evidence can be used to modify the terms of a written instrument, and most emphatically where the instrument is required by the statute of frauds to be in writing, except upon the occasion of mistake, surprise, or fraud. One or the other of these incidents must be alleged and proven before a resort can be had to parol evidence in such cases." The case of *Jones v. Shaw*, 67 Mo. 667, is one very similar to this, except that in that case the note sued on was the only written instrument. In that case the answer to the suit against the maker and indorser of a promissory note alleged that the note grew out of certain partnership transactions between plaintiff and the defendant, which had proved unsuccessful; that it was indorsed by the other defendant with the understanding that it was to be paid only in the

event that the partnership turned out prosperously; that the accounts of the concern were still unsettled, and the maker of the note had paid more than his share of the losses. No other equitable relief was averred or prayed for. The court held that the answer did not state a good equitable defense for either defendant; that parol testimony was inadmissible, under the circumstances, to prove the facts alleged. In this case it is not pretended by the appellee that at the time of the settlement two distinct and several contracts were entered into,—one written, and the other verbal,—or that there was a verbal one supplemental to that which was written. A contract cannot rest partly in writing and partly in parol; and, where it has been reduced to writing, oral evidence of what passed previously, or at the time, cannot be admitted to contradict or vary it. Here there was an absolute settlement of a partnership. The assets of the firm were valued, a balance was struck, the amount due each member was definitely ascertained, and the retiring member made a deed conveying to the remaining member all of his interest in the assets of the partnership, including notes and accounts. The remaining member, in writing, by the same instrument which evidenced his absolute ownership of the firm assets, agreed to assume all of the partnership indebtedness, which indebtedness had been ascertained, and was set forth in the written instrument, and then executed to the other his promissory notes for the balance thus found due. This balance is not only evidenced and acknowledged by the notes, but also by the written agreement executed simultaneously with it. These writings contain no ambiguities. They are plain, and their terms are certain. Nothing is left, by them, requiring the interpretation of a court. Under these circumstances, no fraud, accident, or mistake being alleged or proven, parol evidence was not permissible to vary or contradict them; and, as there are no ambiguities contained in them, no parol evidence was necessary for their explanation. And therefore the trial court erred in admitting the testimony of the defendant, over plaintiff's objection, by which it was sought to change and vary the terms of the written agreement.

As to the seventh assignment of error: This assignment is that the court erred in not peremptorily charging the jury to return a verdict for the plaintiff for the amount due on the note. No such instruction was asked. The only evidence offered at the trial for the defendant was his own. By his pleadings he had admitted the execution and indorsement of the note, thus assuming the burden of proof. The whole of the testimony related to the contract between him and Moore, and was an effort by parol evidence to vary and contradict the written agreement between them, and, as we have above decided, should not have been admitted by the court. Eliminating, then, this illegal proof, and the case

stands, as far as the defendant is concerned, absolutely without evidence to support it. All of the legal proof having been for the plaintiff, and none for the defendant, the court, of its own motion, should have directed a verdict for the plaintiff.

As to the eighth assignment of error: This assignment of error is that the court erred in overruling the plaintiff's motion for a new trial. For the reasons above given, it was, of course, error in the court to overrule that motion. For the errors above set forth, this case is reversed and remanded for a new trial.

SPRINGER, C. J., and THOMAS and TOWNSEND, JJ., concur.

#### ZUFALL et al. v. UNITED STATES.

(Court of Appeals of Indian Territory. Jan. 14, 1898.)

#### BAIL BOND—FORFEITURE—ENTRY OF RECORD—PROCEEDINGS—SUMMONS—CAUSE OF ACTION.

1. On a forfeiture of a bail bond, the summons issued under Mansf. Dig. § 2068, which provides that no pleadings are required, but the clerk shall issue a summons against the bail, is not intended to be a writ of scire facias.

2. The court of appeals in Indian Territory is bound by a decision of the supreme court of Arkansas interpreting a statute, which was rendered prior to the adoption of the statutes of Arkansas for the Indian Territory by Act Cong. May 2, 1890.

3. On a forfeiture of a bail bond under Mansf. Dig. §§ 2064, 2068, which provide that, if the defendant fail to appear, the court may direct the fact to be entered, and the bail bond is forfeited, and that no pleadings are required, but the clerk shall issue a summons against the bail, which shall be executed as in civil actions, and the action proceed as in ordinary civil actions, the bail bond itself is the basis of the action, and must, in connection with the order of forfeiture, present a perfect cause of action.

4. Under Mansf. Dig. § 5026, par. 3, which provides that a statement of a cause of action must be in ordinary and concise language, without repetition of the facts constituting the plaintiff's cause of action; and sections 2064 and 2068, which provide that, if the principal on a bail bond fail to appear, the court may direct the fact to be entered on the minutes, and that no pleadings are required, but the clerk shall issue a summons against the bail,—a forfeited bond which contains the caption, the obligation, the conditions, signatures, and acknowledgments, together with an entry of the court that the principal, upon being called, failed to appear, and made default, fills all the requirements of a good statement of a cause of action.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, February, 1896.

Proceedings on the forfeiture of a bail bond, against George Zufall and another. From an order overruling defendants' motion to quash the summons, they appeal. Affirmed.

G. B. Denison, N. B. Maxey, and J. P. Clayton, for appellants. Clifford L. Jackson, U. S. Atty.

CLAYTON, J. One Charles Keifer, having been duly arrested upon a charge for intro-

ducing spirituous liquor into the Indian Territory, upon examination was held to bail in the sum of \$200 to appear at the December, 1895, term of the United States court for the Northern district of the Indian Territory. His bail bond for that amount, with the appellants George Zufall and W. T. Escoe as his sureties, was duly executed, and he released. On the 3d day of December, 1895 (the appearance term), Keifer, the defendant in the criminal suit, and the principal in this bond, being called, made default. Following is the record entry: "3,218. United States vs. Chas. Keifer. Intro. Now comes the United States, by its attorney, and the defendant, though duly called, comes not, but wholly makes default. Whereupon — and — are thrice duly called in open court to bring the body of said Chas. Keifer into court, and save their recognizance, but they answer not. It is therefore considered and ordered that the United States of America do have and recover of and from the said defendant, Chas. Keifer, and — and —, his sureties, the sum of —, and that they be cited to be and appear at the next regular term of this court, to show why judgment should not be made final, and that a bench warrant issue for the defendant herein." Thereupon a summons was regularly issued, and duly served on the sureties in the bond, the appellants, citing them to appear on the first day of the next term of the court, to show cause why judgment should not be rendered against them. This summons is not made a part of the record of this case, and is therefore not before us; but, as there has been no objections offered to its form, we assume that it was regularly issued and served, and is in the common form of such writs. During the same term of the court, to wit, on the 30th day of January, 1896, the appellants appeared and filed a motion to quash the summons, or, as the motion calls it, "the scire facias." It is as follows (caption omitted): "And now come the defendants George Zufall and W. T. Escoe, and move the court to quash the scire facias issued in this cause, and for grounds of said motion state that the facts stated in the scire facias filed in this cause do not entitle the plaintiff to recover in this cause, for the reason that the bond given by these defendants upon which this scire facias is issued was a bond given for the appearance of defendant Chas. Keifer, to answer to the charge of introducing and selling intoxicating liquors, and that this court had no jurisdiction over said offense, and said bond is therefore void; that said bond was not taken and approved as the law directs, and is therefore void; that the record upon which said scire facias is based is wholly void and insufficient to support a sci. fa. Wherefore the defendants pray the judgment of the court. Denison & Maxey, Attorneys for Defendants Zufall and Escoe. On the same day the cause was heard by the court, on the motion to quash the summons. The motion was overruled, to which exceptions were duly saved; and the



appellants standing on their motion to quash, refusing to further plead, judgment was entered against them, and an appeal duly taken.

That the United States court for the Northern district of the Indian Territory had no jurisdiction over the offense of introducing and selling intoxicating liquor in the Indian Territory, and consequently no power to cause the arrest of, and admit to bail, parties charged with that offense, is abandoned by appellants, as is also the position taken by their motion to quash,—that the bond was void because not taken and approved as the law directs. The only question presented, therefore, to be decided, is, is the record upon which the summons was based void and insufficient to support the judgment?

The statute in force in this jurisdiction (*Mansf. Dig.*) provides:

"Sec. 2064. If the defendant shall fail to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court may direct the fact to be entered on the minutes, and thereupon the ball-bond or money deposited in lieu of bail, is forfeited."

"Sec. 2068. No pleadings are required on the part of the state, but the clerk shall issue a summons against the bail, requiring them to appear on the first day of the next term of the court to show cause why judgment should not be rendered against them for the sum specified in the ball-bond on account of the forfeiture thereof, which summons shall be executed as in civil actions, and the action proceed as an ordinary civil action."

By the above section (2068) no pleadings are required by the government. What, then, is to be taken as its declaration or complaint? If it be true that the entry of the forfeiture made by the clerk upon the record is the complaint of the state, then the entry made in this case is clearly and wholly insufficient. The amount sued for does not appear, the names of the defendants are not mentioned, and nothing is shown connecting them with the particular bond in suit. Nothing is mentioned in the order except the fact that the defendant in the suit in which the bond was executed had failed to appear when called, and that his bail was forfeited. And yet this is all that is required by the law. Section 2064, above set out, calls for nothing more. The language is: "If the defendant fail to appear \* \* \* the court may direct the fact to be entered on the minutes;" and thereupon the bail is forfeited. Under the old practice, a *scire facias* upon forfeiture of a bail bond answered the purpose of both declaration and writ, and, if the facts alleged did not constitute a cause of action, would not sustain a judgment by default. *Miller v. State*, 35 Ark. 276. It is quite clear that the summons mentioned in section 2068 is not intended to be the writ of *scire facias*, because *scire facias*, besides being a writ, was also a pleading. It was the declaration, and,

by the terms of the statute, in cases of this kind, "no pleadings are required on the part of the state."

What, then, is to be taken as the government's complaint in this class of cases? In Kentucky, under a like statute, it has been decided that, as the bail bond or recognizance itself is the basis of the action, it must, in connection with the order of forfeiture, present a perfect cause of action. *Roberts v. Com.*, 7 Bush, 430; *Com. v. Fisher*, 2 Duv. 376. And the supreme court of Arkansas, passing upon this very statute, has adopted the same interpretation. *Thomm v. State*, 35 Ark. 327. And, inasmuch as this decision of the supreme court of Arkansas was rendered prior to the extension of the statute over the Indian Territory, under the rule laid down by the circuit court of appeals for the Eighth circuit, in the case of *Sanger v. Flow*, 4 U. S. App. 32, 1 C. C. A. 56, and 48 Fed. 152, it is binding upon this court, as being the interpreted law as it came to us. The test, then, in this case, is: Does the bail bond, taken in connection with the order of forfeiture entered upon the record, present a perfect cause of action; or, in other words, do the two, taken together, make a good complaint at law, of course omitting the caption, the prayer, the signature of counsel, and the affidavit required by the statute? The bond is not before us, but, inasmuch as no objections were offered to it in the court below, we assume that it was a valid bail bond in the usual form.

In this jurisdiction the requirements for the statement of a cause of action in the complaint is contained in the third paragraph of section 5028 of *Mansfield's Digest*. It must be a statement, in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action. The bond on file in the clerk's office is the instrument sued on. It contains: (1) After the caption and the official title of the officer taking it, the obligation of the principal and his sureties; (2) its conditions; (3) the signature of the parties; (4) the acknowledgment. The entry of the court, made at the appearance term mentioned in the bond, is that the principal, upon being called, failed to appear, and made default. By the bond and this entry, the whole contract, with its conditions, its penalty, and its breach, is fully set out. We think that, so far as the statement in a complaint of a cause of action is demanded, this fills all the requirements of good pleading under the statute. The most critically drafted complaint could not state the cause of action more plainly, concisely, and with less iteration than is here done. True, there are matters stated in the order of forfeiture which it was not necessary to have stated, and, if found in a complaint at law, could have been stricken out on motion. But treating the bond and order as a complaint, and no motion to strike out having been made by the defendants in the court below, and no ob-

jections having been made to the order on that account, and no exceptions saved, this court will not now notice them. In entering the order, the clerk seems to have adopted the form which was used when *scire facias* was the proper writ in cases of this kind, and filling only so much of the blanks in the form as was necessary to comply with the present statute, leaving the balance to stand without erasure. While we hold that the order was sufficient, we think the practice here adopted by the clerk is faulty. The court speaks through its record, and vast interests depend upon the construction of the language used. The misuse of a single word may defeat the whole intention of the court, and therefore the orders of the court should be entered in apt words, concisely, and without any verbosity. As a matter of uniform practice in this jurisdiction, we suggest the following form in all cases of the forfeiture of bail bonds and recognizances hereafter arising:

"United States

'No. — vs.

"John Doe.

"Now, on this day, this cause coming on for trial, and the United States, being present by its attorney, — Esq., announces ready for trial; and the defendant, John Doe, being called in open court, comes not, but wholly makes default. Wherefore the appearance bond (or recognizance) of him, the said John Doe, is declared forfeited. Whereupon John Smith and Richard Roe, his sureties in the said bond (or recognizance), were thrice duly called in open court to bring the body of the said defendant, John Doe, into court, and save their recognizance, but they answered not.

"Wherefore it is ordered that the clerk of this court issue a summons, citing the said John Doe and his said sureties, John Smith and Richard Roe, to appear at the next regular term of this court, to show cause why a judgment in favor of the United States, for the sum of \$——, this being the penalty named in the said bond (or recognizance), shall not be rendered against them, and that a bench warrant issue for the said defendant."

If the forfeiture shall occur after the cause is called for trial or otherwise, the form can be changed to suit the circumstances. The judgment of the United States court for the Northern district of the Indian Territory is affirmed.

THOMAS and TOWNSEND, JJ., concur.

LOWENSTEIN et al. v. GAINES.

(Supreme Court of Arkansas. Dec. 18, 1897.)

SUMMONS—AMENDMENT.

When a summons commanding the defendant to answer on the first day of the next spring term of the court, correct in other respects, contained the unnecessary clause, "which will be

on March 25, 1895," when the term commenced on the 1st day of April, it was error, and an abuse of discretion, to refuse to allow the summons to be amended by striking out said clause, and to dismiss the action.

Appeal from circuit court, Independence county; Richard H. Powell, Judge.

Action by B. Lowenstein and others against Abner Gaines. Judgment of dismissal for defect in summons. Plaintiffs appeal. Reversed.

Yancey & Fulkerson, for appellants. Rose, Hemingway & Rose and Neill & Neill, for appellee.

BATTLE, J. On the 12th of December, 1894, B. Lowenstein & Bro. filed a complaint with the clerk of the Independence circuit court, who issued upon it a summons in the words and figures following:

"The State of Arkansas to the Sheriff of Independence County: You are commanded to summons Abner Gaines to answer on first day of the next spring term of the Independence circuit court a complaint filed against him in said court by B. Lowenstein & Bro., and warn him that upon his failure to answer the complaint will be taken for confessed.

"And you will make due return of the summons on the first day of the next spring term of said court, which will be on March 25, 1895.

"Witness my hand and the seal of said court, this 12th day of December, 1894.

"[Signed] T. H. Dearing, Clerk."

The summons was served on the day of its issue, and was filed with the clerk on the day following. On the 3d day of April, 1895, the defendant, entering his appearance for the special purpose, moved to quash the summons for the reason it was made returnable on a day not authorized by law. Plaintiffs moved to amend by striking out the words, "which will be on March 25, 1895." The court sustained the former and overruled the latter motion, and dismissed the action, and the plaintiffs, after filing a bill of exceptions, appealed.

To bring a defendant within the jurisdiction of a court, process must be issued by the proper officer, warning him of the pendency of the action against him. It must be served upon him by a person authorized to do so, and in the manner prescribed by law. He may, however, submit to the jurisdiction of the court, and waive process, and the service thereof. In that case none will be necessary.

In the case at bar a summons was issued, and was served upon the defendant in due time by the sheriff, and in the manner prescribed by law. There is no objection to the service, and only one to the summons, and that is the words, "which will be on March 25, 1895." The objection to these words is that the clerk thereby made the summons returnable on a day not authorized by law; that is to say, it should have been made returnable on the first day of the spring term of the

Independence circuit court in 1895, which was the 1st day of April, but was made returnable on the 25th of March, 1895.

The error complained of was amenable, as held by this court in *Thompson v. McHenry*, 18 Ark. 537, and *Fisher v. Collins*, 25 Ark. 97. The only question here is, did the circuit court err in refusing to allow the appellants to amend? The statutes of this state provide: "The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case." Sand. & H. Dig. § 5769. They further provide: "The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Id. § 5772.

In the summons in question the appellee was warned to answer on the first day of the next spring term, and that, upon his failure to do so, the complaint would be taken for confessed; and the sheriff was commanded to make due return of the summons on that day, "which," the clerk unnecessarily added, "will be on March 25, 1895." The truth was, the first day of that term was the 1st day of April, 1895,—a week after, and the Monday following, the day specified by the clerk. It was a harmless error. If the appellee had gone to the court house on the 25th of March, 1895, he would have discovered that there was no court to be held then, but on the Monday following. The defect or error did not prejudice his substantial rights, and should have been corrected by amendment. Under the statutes the court erred and abused its discretion in refusing to allow it to be amended and in dismissing the action.

In *Dean v. Swift*, 11 Vt. 331, the clerk committed a similar error. The writ was made returnable to the term of the county court "next to be holden at Bennington, within and for the county of Bennington, on the second Tuesday of December, 1837," when the next term was on the first Tuesday of December. This defect was pleaded in abatement. The county court, after the plea, and on motion of the plaintiff, permitted the writ to be amended so as to be returnable on the first Tuesday of December. Mr. Justice Redfield, in delivering the opinion of the court, said: "We think the amendment was properly allowed by the county court. The writ being made returnable at the next term to be holden, and the term being appointed by general statute, of which all the citizens of the state are bound to take notice, the time was sufficiently definite without stating the day on which the term would begin. The statement of a wrong day might be rejected as surplusage. Hence the amendment allowed was

clearly within our statute of Jeofails, which provides that the several courts shall proceed and render judgment according to the right of the case, notwithstanding any 'defect or want of form' in the writ, process, or other pleading," etc.

The judgment of the circuit court is reversed, and the cause is remanded, with instructions to the court to allow the appellants to amend the summons, and for further proceedings.

#### FOSTER et al. v. HAGLIN.

(Supreme Court of Arkansas. Dec. 18, 1897.)

#### FRAUDULENT CONVEYANCES—BURDEN OF PROOF—REVERSAL ON APPEAL.

1. Where an alleged fraudulent purchaser of a stock of goods brings replevin against an attaching creditor of the vendor, and a fraudulent intent on the part of the vendor is shown, the burden is on plaintiff in replevin to show, by other evidence than notes alleged to evidence the debt for which the goods were sold, that the sale was for a bona fide and adequate consideration.

2. It is error to instruct that the notes were prima facie evidence of indebtedness of the vendor to the vendee of the stock; and the burden of proof is on the attaching creditor to show that they do not represent an actual indebtedness.

3. Where a case has been submitted on an erroneous instruction, prejudicial to the defeated party, though the verdict may be supported by sufficient evidence on the question involved regardless of the instruction, the judgment will be reversed, and an opportunity given to have the question submitted on proper instructions.

Appeal from circuit court, Sebastian county; Edgar E. Bryant, Judge.

Replevin by Edward Haglin against J. Foster & Co. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Action in replevin by Edward Haglin against the sheriff of Sebastian county to recover a stock of merchandise, store fixtures, etc., held by said sheriff under a writ of attachment. The writ of attachment was issued in an action brought by appellants, J. Foster & Co., against Alva Haglin; and, after the commencement of this action of replevin, appellants, being the real parties in interest, were substituted as defendants in place of the sheriff. The facts in the case, so far as necessary to state them, are as follows: Alva Haglin, a brother of appellee, Edward Haglin, was in 1893 and 1894 engaged in the retail grocery business at Ft. Smith. During the progress of such business, he became indebted to the appellants, J. Foster & Co., and other mercantile firms, in various sums. On the 4th of January, 1895, being insolvent, he sold his stock of groceries, store fixtures, and furniture, delivery wagon, mules, and harness to Edward Haglin, and gave him a bill of sale for the same. Shortly after the sale, appellants had their writ of attachment against Alva Haglin levied upon the goods sold by him to Edward, and in this action Edward bases his right to recover upon the purchase from his brother

He testified that this sale was made by his brother to him in satisfaction of indebtedness due from his brother to him, amounting to about \$2,050. At the time this sale was made, Alva Haglin also assigned his notes and accounts to Edward, and Edward stated that this was done to secure an additional indebtedness of \$600 due from Alva to him, after crediting his brother with the price of the goods. To substantiate his testimony on these points he introduced and read in evidence certain notes executed by Alva to him, showing on their face an indebtedness for the amount claimed. Appellants contended that these notes represented a fictitious, and not a real indebtedness, and that this transfer from Alva Haglin to his brother was made to cheat, hinder and delay the creditors of Alva. There was evidence tending to support the contention that the sale was fraudulent. The circuit judge, upon his own motion, charged the jury as follows: (1) "The burden of proof is on the plaintiff to show by a fair preponderance of evidence that he purchased the property from Alva Haglin at a fair price, in payment of a bona fide debt; that is, an indebtedness actually owing him. If plaintiff's debt is in whole or in part feigned or fictitious, and not all in good faith owing to him, that would be a fraud on creditors, and you will find for defendants. But if the debt was bona fide, and the property taken at a fair price in payment thereof, you will find for plaintiff, unless you find that Alva Haglin made said conveyance to defraud creditors, and that plaintiff participated in said fraud." He also gave on his own motion other instructions not necessary to set out, and, in addition, gave, at request of appellee, the following instruction: "The notes introduced in this case are prima facie evidence of indebtedness of Alva Haglin to Edward Haglin, and the burden of proof is on the defendants to show that they do not represent an actual indebtedness." Defendant objected to the giving of this instruction, and saved exceptions. The jury returned a verdict for appellee, Edward Haglin, and judgment was accordingly rendered in his favor for the recovery of the property in controversy.

Charles E. Warner, John S. Little, and Rose, Hemingway & Rose, for appellants. Clendingen, Mecham & Youmans (Ira D. Oglesby, of counsel), for appellee.

RIDDICK, J. (after stating the facts). This is a controversy concerning the title to a stock of merchandise and other personal property attached by the appellants as the property of Alva Haglin. The appellee, Edward Haglin, claims to have purchased the property from his brother Alva, in settlement of indebtedness due from Alva to him. The only question necessary to consider is whether, under the facts of this case, the promissory notes executed by Alva to Edward, and read in evidence, were, as against

the appellants, prima facie evidence of indebtedness from Alva to Edward. The appellants, shortly after the sale to Edward, had caused the property to be seized under their writ of attachment, and contended that the notes read in evidence were based, not on a real, but upon a fictitious, indebtedness, and that the sale of this property to Edward was fraudulent. In support of this contention, they introduced evidence tending to show that Alva, in making the sale, designed to cheat, hinder, and delay his creditors. At the time of the sale, he was indebted to a number of mercantile firms. He paid none of these debts, and, by this sale and the transfer of his notes and accounts to his brother, he divested himself of all visible property. Before the sale, he continued to purchase goods on credit, and to increase his stock of merchandise up to the very day of the sale. Indeed, some of these goods were placed in his store only an hour or two before the transfer to his brother was made. As to those goods purchased shortly before the sale, the evidence tends to show that they were bought with the deliberate intention not to pay for them, and for the purpose of transferring them to his brother Edward. Edward denied that he knew of these purchases at the time of the sale to him, or that he consented to or approved of the conduct of his brother in buying goods under such circumstances. But he admitted that, shortly after the sale, he did know that goods bought on credit the day before had been placed in the store that morning only an hour or two before he purchased. He says that he disapproved of this, and censured Alva for it, and told him that he must pay for those goods. But Alva did not pay for the goods, nor did Edward pay for them or return them. Despite his protestations of honesty, his conduct in this regard seems to us calculated to arouse the suspicion that, if he did not approve of this conduct of his brother, he was yet not unwilling to reap the fruits thereof.

But, apart from the question as to whether Edward participated in or consented to the acts of Alva, we have seen that, from the evidence introduced, the jury may well have found that Alva intended by this sale to defraud his creditors. If they did so find, then the sale could only be upheld in favor of Edward by a showing that he paid an adequate consideration. And the proof of the consideration must go beyond a mere paper acknowledgment of it by one of the parties to the alleged fraud. The promissory note of such a party would be prima facie evidence of indebtedness against him, but, as to his creditors in such a case, the rule would be different. When the creditor has established a fraudulent intent on the part of the vendor sufficient to avoid the sale or conveyance as to him, the burden is then shifted to the vendee, and, to uphold the sale, he must show an adequate consid-

eration. To do this, he must do more than produce the note or receipt in which the dishonest vendor has acknowledged an indebtedness, and must show by other evidence that such note or receipt is based upon an actual and honest debt. *Distilling Co. v. Atkins*, 50 Ark. 289, 7 S. W. 137; *Chipman v. Glennon*, 98 Ala. 263, 13 S. W. 822; *Smith v. Collins*, 94 Ala. 394, 10 S. W. 334; *Bump, Fraud. Conv.* (4th Ed.) § 66, and cases cited. The reasons for this rule are very apparent; for, it being once established that the vendor is engaged in a scheme to defraud his creditor, it would be very unreasonable to allow a note or receipt executed by him to make a *prima facie* case against the creditor, and in support of his own fraudulent act. To do so would in some cases make effectual the dishonest conveyance, though based on nothing but a simulated debt, and render powerless the efforts of the creditors to overthrow the same. The law in such a case wisely imposes the burden upon the vendee to show, by other evidence than the note or receipt of the vendor, an actual and adequate consideration. There is no hardship in this rule, for, if a sufficient consideration has been paid, no one should know the fact and the circumstances connected therewith better than the vendee, the person who paid it. Such matters are peculiarly within his knowledge, and he should produce the proof. If he fails to do so, and proof of the consideration is not made, the conveyance must be treated as one made by the vendor to defraud his creditors, and without consideration, and therefore void as to creditors. Our conclusion is that, under the facts of this case, it cannot be said, as a matter of law, that the notes read in evidence were "*prima facie* evidence of indebtedness of Alva Haglin to Edward Haglin," or that the burden of proof was "on defendants to show that they do not represent an actual indebtedness." The instruction to that effect, given at request of appellee, was therefore, in our opinion, erroneous.

But the appellee contends that the judgment should in any event be affirmed, for the reason that the evidence outside of the notes introduced in evidence clearly shows that such notes were based upon an actual and honest debt. But the evidence on that point is not so convincing as to justify us in saying, as a matter of law, that the notes were based on valid consideration; and we are of the opinion that appellants have the right to submit that question to a jury upon proper instructions. The judgment is therefore reversed, and a new trial ordered.

#### SPRADLING et al. v. McNEES.

(Court of Appeals of Kentucky. Dec. 9, 1897.)

TURNPIKE COMPANIES — BONDS — LIABILITY OF SURETIES — LIMITATIONS — PLEADING — DEMURRER.

1. A bond executed by a turnpike company to the county in the matter of its construction

is for the benefit of the county alone, and no creditor of the turnpike company can maintain an action thereon for a debt due him by the turnpike company.

2. Where a pleading shows that the cause of action set up therein is barred by limitations, it is error to sustain a demurrer to an answer thereto, setting up limitations as a defense.

Appeal from circuit court, Harrison county. "Not to be officially reported."

Action by Harrison county against the Berry & Fairview Baptist Church Turnpike Company, A. J. McNees, A. W. Spradling, and others. From a judgment in favor of defendant A. J. McNees, on his cross petition against defendants A. W. Spradling and others, defendants A. W. Spradling and others appeal. Reversed.

J. T. Simon, for appellants. J. Q. Ward, for appellee.

WHITE, J. This case was before this court on the appeal of Harrison county, and was decided by this court as to that branch of the case. *Harrison Co. v. Berry & Fairview Baptist Church Turnpike Co.*, 12 S. W. 258. On the return of the case to the lower court, appellee, A. J. McNees, filed an answer and cross petition against appellants, in which he alleges that appellants, with himself and another, were the sureties on the bond to the county, as set out in the petition of the county. Appellee alleges that in 1885 he obtained a judgment against the turnpike company for about \$1,500, the exact amount being stated, which is yet unpaid to him; that the turnpike is in the hands of and operated by a receiver, and appellee asks for judgment against his co-sureties on the bond to the county for one-fifth of the said judgments of appellee. To this answer and cross petition of appellee a demurrer was filed by appellants, and was overruled, and then appellants filed answer to the answer and cross petition of appellee. In the answer of appellants they deny the indebtedness of the turnpike company to be as alleged by appellee. They charge that the debt due appellee is one-half only of that charged in the petition, this half to be credited by \$382.72 paid, date unknown, but since the judgment was rendered against the turnpike company, and within the last two years, and by other payments by the receiver, on account of tolls collected. In a separate paragraph it is pleaded that if these appellants were ever liable, which they deny, the liability occurred more than seven years before the filing of this cross petition, and that this claim of appellee is barred by the statute of limitations. A demurrer to this separate paragraph, pleading limitation, was sustained by the court, and appellants excepted. The court, on final hearing, rendered judgment for appellee against each of the appellants separately for \$286.25 and interest, that being the amount ascertained by the court to be their proportionate share of the liability upon the bond. From these three judgments appellants have prosecuted separate appeals.

We are of opinion that the answer and cross petition of appellee states no cause of action, and that the demurrer of appellants thereto should have been sustained. The bond executed to the county was for the protection of the county alone, and, in our opinion, no creditor of the turnpike company could maintain an action thereon for a debt due him by the turnpike company; and if the debt due McNeas, appellee, was for an amount paid upon the obligation of that bond for which all the sureties were bound to the county, the cross petition totally fails to so allege. In any event, if there was any liability of these sureties on this bond at all, it certainly was fixed and certain on the day the road was finally accepted by the county, which the pleading shows was in 1884, which was more than seven years before this cross petition was filed; and again by the cross petition and judgment it is shown that this liability to appellee, McNeas, was of date of 1883; and if this be true as to these appellants, the sureties, this debt was barred by limitations when this cross petition was filed, and the demurrer to this paragraph of the answer should have been overruled. Wherefore the judgments herein are each reversed, and cause remanded, with directions to sustain the demurrer to the cross petition of appellee, McNeas, and for further proceedings consistent herewith.

**FINOK & SCHMIDT LUMBER CO. v. MEHLER et al.**

(Court of Appeals of Kentucky. Dec. 10, 1897.)

**MECHANIC'S LIEN—PRIORITY OVER ATTACHMENT.**

A lien for materials furnished for a building relates back, and takes effect from the time the materials were furnished, and prevails against the lien of a subsequent attachment.

"To be officially reported."

Petition for rehearing. Overruled.

For former opinion, see 43 S. W. 408.

**LEWIS, C. J.** As the lien of appellee, when notice of his claim was given to the owner, related back and took effect from the time the materials were furnished, and it does not appear from the record that his lien was ever dissolved, which it was incumbent on appellant to show, it must prevail against his attachment lien, especially as the owner does not dispute the claim of appellee or contest the validity of his lien. Petition for rehearing overruled.

**ELLIS v. NORTHWESTERN MUT. LIFE INS. CO.**

(Supreme Court of Tennessee. Dec. 15, 1897.)

**REVIEW ON APPEAL—ADMINISTRATION OF ESTATES—DISTRIBUTION—ACTION BY ADMINISTRATOR.**

1. A finding by the court of chancery appeals respecting the domicile of a person at the time of his decease is not subject to review by the supreme court.

2. When an intestate at the time of his death owns property in a state other than that of his domicile, administration must be taken out in that state, in order to collect the funds for the benefit of the estate.

3. Life insurance policies, wherever administered, must be distributed according to the laws of the state in which the domicile of deceased was.

4. A foreign administrator may collect assets, or sue or be sued in his representative capacity, by agreement between the parties.

Appeal from chancery court, Sumner county; J. S. Gribble, Chancellor.

Bill by Mrs. Sallie Ellis, administratrix of the estate of Irby T. Ellis, deceased, and in her own right as widow, against the Northwestern Mutual Life Insurance Company. From a decree of the court of chancery appeals reversing the decree of the chancellor, complainant appeals. Affirmed.

Blackmore, Dismukes & Dismukes, for appellant. Stokes & Stokes and Mr. Pardue, for appellee.

**McALISTER, J.** Complainant filed this bill in the chancery court of Sumner county, in her own right as widow and as administratrix of her deceased husband, to enforce the collection of certain policies of insurance issued upon the life of her husband, and payable at his death to his executors, administrators, or assigns. Irby T. Ellis, the husband of complainant, died, intestate, in March, 1896, at Selma, Ala. Upon the death of her husband, the complainant returned to Sumner county, Tenn., where she had formerly resided; took out letters of administration upon his estate in the county court; and filed this bill, in the chancery court of Sumner county, Tenn., to collect this insurance. Complainant alleged in her bill that the policy of insurance issued by the Northwestern Insurance Company was not in her possession, but was held as collateral security by one Marshall, at Selma, Ala. The court of chancery appeals find as a fact that complainant acquired possession of this policy by sending her attorney to Selma, and paying off the debt to the pledgee, who surrendered the policy to her attorney, and the latter thereupon brought it to Tennessee. On the 7th April, 1896, the two policies issued by the New York Life Insurance Company were also obtained by complainant's attorney, who went to Selma, and paid off certain debts, for the payment of which these policies had been hypothecated. It is proper to say that, when these latter policies were surrendered to complainant's attorney, no administrator had been appointed upon the estate of Irby T. Ellis in Alabama. R. P. Safford qualified as administrator of said estate at Selma, on the 26th May, 1896. Complainant qualified as administratrix in Sumner county, Tenn., on the 11th June, 1896. The contest presented upon the record is between the widow and the foreign administrator over the proceeds of these policies. The Northwestern Mutual Life Insurance Company was the only defendant to

the bill filed by the widow and administratrix in Sumner county, Tenn. The foreign administrator and the New York Life Insurance Company became parties to said proceedings by special agreement entered into between the parties. It was agreed, first, that the injunction should be dissolved, and that said Northwestern Mutual Life Insurance Company should pay the amount of its policy (\$2,038) into the hands of the clerk and master of the court, which was done, and the company was discharged from further liability. It was further agreed that, in order to settle all questions in one suit, R. P. Safford, the Alabama administrator, be made a party defendant, and enter his appearance, which was accordingly done. R. P. Safford, the Alabama administrator, claims that Irby T. Ellis, at the time of his death, was a citizen and domiciled in the state of Alabama, and that, under the laws of said state, policies of life insurance payable to the estate of deceased go to his creditors, and that he is entitled to the proceeds of said policies for the benefit of creditors in Alabama. Complainant Sallie Ellis insists that, at the date of his death, her husband was a resident and citizen of the state of Tennessee, and that, under the laws of this state, the proceeds of said policies would inure to the sole and separate use of the widow, free from the claims of creditors, no children having been born to them. The main question presented upon the record was in respect of the residence and domicile of the said Irby T. Ellis,—whether it was in the state of Tennessee, or in the state of Alabama. However, it was insisted by counsel for Mrs. Ellis that, independently of the question of Irby T. Ellis' domicile, the New York policies being in possession of Mrs. Ellis at the time she qualified as administratrix in the state of Tennessee, and being personal property, they should be distributed according to the laws of Tennessee; and it is further insisted, if she is entitled to recover these policies, she is also entitled to recover the Northwestern policy, under the agreed decree in this cause. The chancellor decreed in favor of complainant Mrs. Sallie Ellis. The court of chancery appeals found as a fact that Irby T. Ellis, at the time of his death, was domiciled in the state of Alabama, and that his personal estate should be distributed according to the laws of that state. That court reversed the decree of the chancellor, and adjudged that the Alabama administrator was entitled to the proceeds of all the policies.

Complainant appealed, and the first assignment made on her behalf is that the court of chancery appeals erred in their finding as respects the domicile of Irby T. Ellis. It is insisted that this finding is a conclusion of law from facts ascertained by them, which is subject to review and reversal by this court. The court of chancery appeals very fully and correctly state the rules of law by which they were guided in this investigation of fact, and their finding is not

subject to review by this court. The element of intention enters largely into the question of domicile, and the ascertainment of this intention is a matter exclusively within the province of that court. It is not a conclusion of law, but an inference of fact to be drawn from the evidence in the record. *Bank v. Evans*, 95 Tenn. 703, 34 S. W. 2.

The second assignment is that an administrator of the deceased holder of a life policy appointed in the state where the policy is, and having possession of the policy, is entitled to recover the amount due thereon, as against an administrator appointed in another state, including that in which the decedent resided at the time of his death. Counsel cite, in support of this proposition, *Insurance Co. v. Smith*, 14 C. C. A. 635, 67 Fed. 694. That was an action at law brought by Mrs. Eudora V. Smith in the United States circuit court for the Northern district of California, as administratrix with the will annexed of the estate of Dr. William T. Smith, deceased, to recover from the New York Life Insurance Company the sum of \$5,000, alleged to be due on a policy of life insurance. The record showed that Dr. Smith died at Chicago, Ill. At the time of the issuing of the policy, and at the time of his death, he was a resident of the state of Illinois. He left, surviving him, a widow, a resident of San Francisco, Cal., and two sons. Smith had formerly lived in California, and had left that state on account of financial and domestic difficulties between himself and wife. Prior to his death, Dr. Smith had sent the policy of insurance for \$5,000, together with the sum of \$5,000, in money, to California, the insurance policy to be held in trust by his wife for the benefit of their minor son, and the money to be paid the wife when she obtained a divorce. No divorce was ever granted. After the death of Dr. Smith, his counsel in California, to whom the policy had been sent, delivered it to Mrs. Smith, as the special administratrix of her husband's estate. It further appears that, three days prior to his death, Dr. Smith, being indebted to one J. B. Murphy, of Chicago, executed and delivered to him, at said city, a transfer, among other choses in action, of the policy of insurance for \$5,000, then in the hands of Dr. Smith's attorney in California. This document was executed and delivered to and accepted by J. B. Murphy, in payment of an indebtedness of Smith to him. Smith afterwards executed a will wherein he bequeathed to the said John B. Murphy, to be first paid out of his estate, the sum of \$3,400 and various other legacies. The executor named in the will declined to act, and thereupon letters of administration upon said estate were issued to the Jennings Trust Company, a corporation existing under the laws of the state of Illinois. The trust company commenced an action against the New York Life Insurance Company in the circuit court of Cook county, Ill., to collect the amount of the \$5,000 policy, which action it was claimed was prosecuted

for and on behalf of the said J. B. Murphy. The policy in question has never been paid. Mrs. Smith's action, as already stated, was commenced in the circuit court for the Northern district of California, against the New York Life Insurance Company; and this company interposed as a defense the proceedings in Illinois, and insisted that the trust company and Murphy should be made parties. Judgment was rendered in favor of Mrs. Smith, 57 Fed. 133. The court, upon these facts, held that the sale or assignment of the policy by Dr. Smith to Murphy did not vest in the latter any interest, legal or equitable, that would authorize him to bring and maintain an action thereon against the insurance company; that, to constitute such an assignment, there must be, first, an intention to assign the debt or chose, and, secondly, this intention must be followed by a delivery of the chose to the assignee. Again, the court said, the policy is personal property, and was in the state of California. The issuance of letters of administration to Mrs. Smith in California was legal. She had the possession of the policy, and was entitled to recover the money thereon. The law is well settled that the administratrix in California, as against the Jennings Trust Company, or any other administrator in any other state, is entitled to recover the money from the insurance company. It will be observed that the policy involved in that case had been sent by Smith to his counsel in California, to be delivered to his wife, to be held in trust by her for the benefit of his minor son, and, at the date of Smith's death, the policy was in California, and not in Illinois, the domicile of Smith. It is well settled that where the intestate, at the time of his death, owns property in a state other than that of his domicile, administration must be taken out in order to collect the funds for the benefit of the estate. It appears from the record in this case that, at the date of Irby T. Ellis' death, all three of said policies were in the state of Alabama, and constituted a part of the assets of his estate. In the case of Goodlett v. Anderson, 7 Lea, 288, the court said, viz.: "We held in the case of St. John v. Hodges, 9 Baxt. 338, after full argument and review of authorities, that notes of the character of the one in question are bona notabilia at the domicile of the intestate's residence, when left there at the time of his death, and that administration taken out in another state, where the debtor resides, does not draw thereto the title or right to the notes, unless they actually come to the hands of such administrator." The court of chancery appeals find "that all of these insurance policies were taken out at Selma, Ala., and all were there, in the hands of different parties, for safe-keeping, or as collateral security, at the time of Ellis' death. The Northwestern policy, about which this suit was first brought, was at the time of the death of Ellis in possession of Mr. Marshall, at Selma, who, after Safford qualified, delivered it to him, but who afterwards, at Mar-

shall's request, redelivered it to Marshall, in whose hands it was at the time the original bill was filed in this case. After that, Marshall delivered it to the attorney of Mrs. Ellis, who brought it to this state, pending the present suit. The two New York Life Insurance Company policies were also obtained by counsel for Mrs. Ellis, April 7, 1896, while on a visit to Selma. While we think it extremely likely that Mr. Dismukes brought these two policies into this state immediately after their procurement by him, in April, 1896, there is no proof on this subject; and we do not know how the fact is, nor where they were when Mrs. Ellis was appointed administratrix, nor when she brought this suit. \* \* \* So that, on these facts, this suit is simply an effort on the part of a Tennessee administratrix to draw into this state for administration, and out of its proper sphere, an asset to which she had no title, and which was not here as a fact, nor under any theory of law." We agree with that court that this cannot be done without destroying all principles of comity between the two jurisdictions. Moreover, we are of opinion that complainant, as widow, is not entitled to the proceeds of these policies, for, wherever administered, the distribution must be made under the laws of Alabama, the domicile of the deceased. Pritch. Wills, p. 59, § 54; Jones v. Marable, 6 Humph. 116; Carr v. Lowe's Ex'rs, 7 Helsk. 84; McCollum v. Smith, Meigs, 342; Petersen v. Bank, 88 Am. Dec. 298. In conclusion, we wish to say that we fully recognize the principle as well settled that a foreign executor or administrator or receiver cannot collect assets or sue or be sued in his representative capacity in this state; but we think this question is entirely eliminated from the case by the agreed decree by which the Alabama administrator is made a party defendant, and allowed to set up his claim to the policies. The decree is affirmed.

#### ORGAIN et al. v. IRVINE et al.

(Supreme Court of Tennessee. Dec. 18, 1897.)  
UNEXECUTED WILL—VALIDITY AS TO PERSONALITY.

When a person desiring to make his last will called in his family physician and a neighbor, and the latter, in the presence of the three, at the dictation of the testator, wrote six clauses of the will, which were read over to and approved by the testator, when, upon being interrupted, the testator postponed finishing the will until the next day, and on the next day the testator was in no condition to complete the will, and died within a short time, without again being in a condition to complete it, and it appeared that the provisions of the will, so far as completed, were the final determination of deceased, which remained unchanged until his death, the writing is a good and valid will as to the personal property devised, but void as to the real estate.

Appeal from circuit court, Montgomery county; A. H. Munford, Judge.

Action by Mary Irvine, next friend, etc., and others, against Orgain and others, administrators, to propound a will. Judgment



for proponents. Contestants appeal. Affirmed.

Burney & Bailey and Leech & Savage, for appellants. John F. House and Daniel & Daniel, for appellees.

McALISTER, J. This record presents a contested will from the circuit court of Montgomery county. The paper writing contested was propounded as the last will and testament of John M. Smith, by Mary Irvine, as the next friend of her three minor daughters. The first item of the alleged will provides for the payment of the debts and funeral expenses of the testator. The second item bequeaths \$2,500 to Anna Stewart Irvine, and \$2,000 each to Grace and Abbie Irvine. The third item provides for the payment of \$1,500 to Miss Harriet Green, and directs that any part of it remaining unused at her death shall go to the three Irvine children. The fourth item devises a tract of land comprising 320 acres to Mrs. Irvine and John Cross, a nephew of testator. The fifth item devises an interest in certain lands to Salem Church, to sell and supply seats for the church. The sixth item provides for keeping up the family graveyard from the income of \$1,000, which he bequeaths for that purpose. The seventh item bequeaths to Wesley Orgain testator's deposit in Clarksville Bank. The proof discloses that, after dictating the sixth item, the testator was interrupted by one of his nephews, and the matter was adjourned, to be resumed the following evening. The testator died, however, in the meantime, and the paper writing was left unfinished and unexecuted. It was not insisted by the proponents that the instrument was valid as a testamentary disposition of real estate, but their contention was that it was valid as a will so far as the personalty was involved. The jury, under the charge of the court, found in favor of the proponents on the first, second, and third items; and declared them the last will and testament of John M. Smith, deceased. Contestants appealed, and have assigned errors. Before proceeding to dispose of the assignments of error, we will give a brief outline of the facts as presented in the record. The testator, John M. Smith, at the time of his death was about 75 years of age. He was childless, and had been for many years a widower. He left an estate estimated at \$45,000, consisting principally of personalty. He was, when the will was written, of sound and disposing mind and memory, and no question is made in the record upon his testamentary capacity. The will, it appears from the proof, was written on the 14th January, 1896. It appears that after the death of his wife the testator took his widowed niece, Mrs. Irvine, and her three infant daughters, to live with him. The proof is clear that he entertained very great attachment for these children, and frequently expressed an intention to set aside a fund

for their education and maintenance in the event of his death. It is shown that a few days prior to his death the testator, after rallying from a severe sinking spell, stated to Mrs. Irvine that he was apprehensive one of these severe spells would take him off, and that he wished to give a sum of money for the education of the children. "I want to be sure," said he, "they get it before my death; and that is not all I intend to do for them. When I come to make my will, I will provide more for them, but I want to give them a sum of money now, and know they get it, before my death, so I will be satisfied the children will receive an education." He expressed a desire in this connection that Dr. Slayden, the family physician, might be requested to draw for testator a deed of gift of some property for the benefit of said children. Dr. Slayden, several days thereafter, came to testator's house on a professional visit, and at the request of testator drafted an instrument purporting to pay out of his estate to Anna Stewart Irvine \$2,500, and to Abbie and Grace Irvine \$2,000 each. The testator also expressed a desire to include in this instrument a provision for Harriet Green. He stated that he had promised his wife on her deathbed to take care of Harriet Green while he lived, and to provide for her against the event of his death. Dr. Slayden told deceased that a provision for Harriet Green must be made on a separate paper. Testator replied that would require him to sign his name three times, two deeds of gift and a will. After further consideration of the matter the testator concluded to make his will, and embrace the whole subject, instead of executing deeds of gift. Dr. Slayden then suggested that testator send for his neighbor Wesley Orgain, and request him to write the will. The will was written by Orgain at testator's dictation, and each item was read over to him, and approved as written. After the sixth item had been written, John Cross, a nephew of testator, came into the room, and remarked to testator that he (Cross) did not know what testator had done, but, if he did not do for him what he had promised, he would sue his estate. Testator replied, "If I owe you anything, make out your bill, and I'll pay it now." The testator became very much excited, it appears, at the conduct of Cross, and said, among other things: "To think that that thing—a boy, I suppose a man he is from his age—would talk to me that way. I went to Columbia, and picked him up, after he was cast off there by his family, and brought him here, and cared for him, and this is the thanks I get." The intrusion of Cross so flustered and agitated the testator that no further progress was made with the will that day. Dr. Slayden and Mr. Orgain left the house with the understanding with the testator that they would return the following day, and proceed with the matter. When Orgain returned the following day, he

found the testator in no condition to understand or transact business, and he continued in that condition until he died, a short time thereafter.

The first assignment made on behalf of the contestants is that the circuit judge erred in declining requests numbered 3, 4, and 6, to "the effect that the entire paper, if any portion can be set up, must be established as the will of Smith, and that this must be done by two witnesses testifying to its execution, or to facts and circumstances identifying it as the will of decedent, and so continued by him as his will up to his death; and that no part of the unfinished paper could be established, because two such witnesses did not testify as to the execution of the entire paper, or to facts and circumstances identifying the entire paper; and that Orgain was not a competent witness to any part of it, because a legatee; and that the real-estate clauses must be found to be his will in fact, as much as any other part of the paper, though inoperative under the statute, because not signed and witnessed as required." The second assignment is that it was error to refuse the request of contestants "to the effect that no part of the will could be set up, because it disposed of real and personal estate to different parties, and that the defeating of the clauses as to real estate, because not in compliance with the statute, caused the whole paper to fail." The fifth assignment is that the court erred in declining to charge request No. 5, "to the effect that, if decedent was interrupted in the preparation of the paper writing, and the proof showed that after this he was in doubt and uncertain whether he would complete the particular paper, or have another prepared as his will, or perhaps adopt some other plan of disposition of his property, such doubt and uncertainty would be in law an abandonment of said paper, and it could not be set up as his will." This last proposition, we think, was fully covered in the original charge. It appearing that the other assignments of error raise cognate questions, which are the determining issues of law in the case, they will, for convenience, be considered together. It will be observed from the statement of the case that the paper writing offered for probate, while testamentary in character, is both unfinished as respects the disposition of the testator's entire estate, and unexecuted as respects its compliance with statutory formalities. It is well settled that the presumption is against the validity of such a paper, even as a testamentary disposition of personalty, while, of course, it is wholly inoperative as a devise of real estate for want of the attestation of two witnesses. The paper writing in this cause was not in the handwriting of deceased, nor was it signed by him; but neither is essential to the validity of a will of personal property. In the leading case of *Guthrie v. Owen*, 2 Humph. 202, this court held that a paper unexecuted, and in some instances an imperfect

paper, may be set up as a testament of personalty where the want of execution or its being imperfect has been produced, not by abandonment, or change of purpose on the part of the testator, but by the act of God, and that is by extreme illness, mental alienation, sudden death, etc., if the paper, as far as it goes, express the will of deceased, continuing to the time of his death; and if upon the face of the instrument it can be seen that the legacies given would not, had the will been finished, have been burdened with charges in favor of others. The court cite the leading case of *Montefiore v. Montefiore*, 2 Addams. 354, 2 Enc. Ecc. R. 342. In that case Sir John Nicholl, who decided that case, uses this language, viz.: "The legal principles as to imperfect testamentary papers of every description vary very much according to the stage of maturity at which these papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually executed by the testator. \* \* \* But, if the paper be complete in all other respects, that presumption is slight and feeble, and one comparatively easily repelled. But where a paper is unfinished as well as unexecuted (especially where it is just begun, and contains only a few clauses or bequests), not only must its being unfinished and unexecuted be accounted for, but it must also be proved (for the court will not presume it) to express the testator's intentions in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it as far as it goes, so that, by establishing it even in such its imperfect state, the court will give effect to, and not thwart or defeat, the testator's real intentions and wishes in respect to the property which it purports to bequeath, in order to entitle such a paper to probate in any case in my opinion." In speaking of this rule laid down by Sir John Nicholl, Judge McKinney said: "In the many cases referred to or existing on this subject there is none, perhaps, which contains language or announces a principle subjecting papers of this description to a severer test when propounded for probate." The court in *Guthrie v. Owen*, 2 Humph. 202, held that the paper writing in that case, although unexecuted, might be set up as a will as to the personalty, although void as to the clauses undertaking to devise realty. Says Mr. Pritchard, in his work on Wills and Administration (section 22), viz.: "There is scarcely any form of paper which may not be admitted to probate as a will of personalty if of testamentary character, and sufficiently proved." "The presumption against an unfinished testamentary paper necessarily decreases in strength as the paper approaches a completed state, but in every case the jury must be satisfied that the unfinished condition of the will is not due to an intention to postpone or abandon the tes-

tamentary scheme, and that there was no change of intention with regard to the provisions of the will. When, however, it is alleged that the formal execution of the will was prevented by the act of God, it is not necessary to show immediate or sudden death, if the jury are satisfied that the paper contains the wishes of the deceased that the testamentary purpose continued until the act of God intervened, and that the delay was from convenience, and not hesitancy." Pritch. Wills, § 209; 2 Williams, Ex'rs (5th Ed.) p. 64. Applying the severe test prescribed by Sir John Nicholl in the Montefiore Case, we think it is made to appear that the testator had come to a final resolution respecting the first three clauses of this instrument, and that by establishing them as his will, the court will give effect to, and not thwart, the real wishes and intentions of the testator. Beyond all question it was his deliberate and well-matured purpose to make a bequest to the Irvine children, as well as make provision for the support of Harriet Green, and this purpose on his part underwent no modification or abandonment up to the time of his death. The benefaction in favor of the Irvine children had been crystallized in the shape of a deed of gift, which would have been signed and executed by the decedent, but, desiring to make provision also for Harriet Green, and thus redeem a promise he had made his deceased wife, he determined it would be more convenient to embrace these subjects in a will. He entered upon the preparation of his will, and dictated these clauses, which were read to him, and distinctly approved. Interrupted at that time by the unseemly interference of his nephew, the matter was adjourned, to be resumed on the following day. In the meantime the act of God supervened, and the will was left unfinished and unexecuted. The clauses of the will established by the jury represent the fixed and oft-expressed purpose of the decedent, and there is no reasonable ground for the belief that these legacies would have been limited or burdened with any interest or trust in favor of another. There is no blending or intermingling of these clauses with any other purpose expressed. They are complete and independent of all other provisions. They are distinctly proved by two witnesses. We can perceive no just view or legal reason why his intention as thus expressed should not be recognized and enforced. Respecting the last, or seventh, clause of the will, in which a bequest of the decedent's deposit in the Bank of Clarksville is made to Wesley Orgain, the proof is insufficient. The only witness to this clause was the beneficiary and draftsman himself. Moreover, Orgain expressly declined to claim under this clause, and so stated on the witness stand. The propositions of law embodied in the requests submitted by counsel for defendant were properly refused. There is no error in the record, and the judgment is affirmed.

## LOUISVILLE &amp; N. R. CO. v. FRENCH.

(Supreme Court of Tennessee. Dec. 18, 1897.)

## RAILROADS — EASEMENT — ADVERSE POSSESSION — ERECTION OF WATER TANK.

1. Whenever it becomes necessary for railroad purposes, a water tank may be erected on land adjacent to the track, being a part of the right of way, though a party has had possession thereof beyond the period of limitations, as the easement of the road cannot be defeated by adverse possession.

2. A plaintiff owning the fee in land forming a part of a railroad easement, must show that the erection of a water tank thereon was not necessary for railroad purposes, where he seeks to recover damages because of such erection.

Appeal from circuit court, Houston county; A. H. Munford, Judge.

Action by George French against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Bufuo & Rudolph, for appellant. Herman Dunbar, for appellee.

WILKES, J. This action was commenced before a justice of the peace to recover damages to a lot lying adjacent to the railroad in Erin, Houston county. On appeal the case was heard before the court and jury, and judgment was rendered for \$100, and the railroad has appealed, and assigned errors. The facts are that the railroad company is entitled to an easement over 100 feet on each side of the center of its track for right of way under its charter provisions. Plaintiff has bought a lot extending over 50 feet of this right of way, and has a deed in fee simple to it. His vendor owned several other lots adjacent, and of which this lot was originally a part, and upon the other portions of the original lot had erected several houses; two as early as 1879, and others at subsequent dates. The lot owned by plaintiff had no house or inclosure upon it, but was a part of the original lot on which the houses had been built on the right of way. In 1896 or 1897 the railroad company erected a water tank upon the vacant lot for railroad use. The court, in substance, charged that, if this lot had been adversely held under color of title by plaintiff and his vendors for seven years or more, his title would be perfect to the land to the extent of his paper boundaries, and the railroad would be liable if it trespassed upon this land to build its water tank. The court refused to charge that there must have been actual adverse possession of this particular lot in a way inconsistent with the easement of the railroad, but said an actual adverse possession of a portion of the lot covered by the original paper title would be sufficient to give title to the extent of the boundaries in the title paper.

There is error in the charge of the court below. It appears from the record that the railroad company, under its charter, has an easement or right of way over 100 feet on

each side of the center of its road, and it has been repeatedly held by this court that a user by an adjacent landowner of the right of way up to the line of the road for an indefinite time is not adverse to the road easement. It may be used for agricultural or any other legitimate and proper purposes. A house may be built upon it and occupied, and it may be inclosed, and the railroad will not lose its easement. The possession for such purposes is consistent with the easement, no matter what kind of a paper title the party in possession may have, and the possession could not be adverse until the railroad may need the premises, and demand them for railroad purposes. Occupancy with a house or inclosure, and cultivation and use, are not sufficient to defeat the easement of the road, inasmuch as the road can only demand and take its full right of way when it becomes necessary for railroad purposes, and until then the possession is not adverse. A person who builds upon the right of way of a railroad does so at his peril, no matter what paper title he may have from a third person. And all persons are affected with notice of the extent of the right of way when it depends upon the charter provisions. This being so, the railroad company has the right to occupy any portion of this 100-foot right of way at any time it is necessary for its purposes as a railroad. A water tank is a species of property necessary for the purposes of a railroad, and there is no question made, or proof introduced, to show that it was not necessary to erect it at this point. We cannot presume that the road would place the tank there for any other purpose than that of a railroad use. If it was erected there to annoy and harass plaintiff, or for any other than a necessary railroad purpose and convenience, that fact should have been shown by the proof. The principles here announced were laid down in *Railway Co. v. Telford's Ex'rs*, 89 Tenn. 295, 14 S. W. 776, and have been repeated in a number of cases in which the question has come before the court in various ways. We are constrained to reverse the judgment of the court below, and remand the cause for a new trial. Costs of appeal will be paid by appellee.

**RIDLEY et al. v. McPHERSON et al.**  
(Supreme Court of Tennessee. Dec. 11, 1897.)

**WILLS—CONSTRUCTION—DEVISE PER CAPITA.**

A deed gave certain lands to grantees to hold in trust for the grantor's daughter, Mary E., during life, and provided that on her death "the lands shall be conveyed by the trustees to the issue of said Mary E. living at her death, and, in default of any such issue living at the death of said Mary E., then upon this further trust: that said land be forthwith conveyed to the grantor, if living, and, if dead, to his right heirs at that time." *Held*, when the said Mary E. left surviving one daughter, and her eight children, and two children of a son who died be-

fore his mother, that the gift to such issue is not substitutional, but they must take per capita, so that each is entitled to one-eleventh of the estate.

Appeal from chancery court, Williamson county; H. H. Cook, Chancellor.

Bill by George C. Ridley and others against Samuel McPherson and others. From a decree of the chancery court and court of chancery appeals, both parties appeal. Reversed.

Henderson & Berry, for complainants. H. P. Folkes, for defendants.

**WILKES, J.** This is a bill to construe a certain deed, made May 27, 1860, by John Starnes to Samuel W. Starnes and John M. McPherson, trustees, and to have the interests of complainants in the lands adjudicated and fixed, and the lands partitioned. The deed gives certain lands to the grantees, to hold in trust for the grantor's daughter, Mary E. McPherson, for her separate use, during life, and provides that at her death "the lands shall be conveyed by the trustees to the issue of said Mary E. living at her death, and, in default of any such issue living at the death of said Mary E., then upon this further trust: that said lands be forthwith conveyed to the grantor, if living, and, if dead, to his right heirs at that time." The life tenant, Mary E. McPherson, has died. She left, surviving her, one daughter, Rebecca Ridley, and her eight children; also the grandchildren John and Samuel McPherson, who are the children of a son of the life tenant, who died before his mother. Mrs. Ridley and her eight children are the complainants in this cause, and the McPherson children are defendants. The question is, who answer the description, "issue of Mary E.," the life tenant, living at her death, and in what way and proportion do they take? The chancellor was of opinion that Mrs. Ridley took one half the real estate, and that the two McPherson children, jointly, took the other half. The court of chancery appeals was of the same opinion, and so decreed, and complainants and defendants have all appealed.

It is insisted for complainants (1) that Mrs. Ridley, being the only living child of Mary E. McPherson, the life tenant, must take the whole estate; (2) if mistaken in this, then the property must pass to all her descendants, per capita, equally, in which event Mrs. Ridley will take, jointly with her eight children, nine-elevenths of the property, and the McPherson children will take two-elevenths. For defendants, it is contended that Mrs. Ridley and the two McPherson children must share the property equally, each taking an interest of one-third, and that the children of Mrs. Ridley take nothing. It is conceded that the precise question involved has not been determined in Tennessee, and that in other jurisdictions the decisions are numerous, and in some conflict. The various views held by different courts may be found

commented upon in 2 Redf. Wills, pp. 355-379, and notes, and 11 Am. & Eng. Enc. Law, 869 et seq., 879, note, and need not be further set out here. The difficulty lies in defining the word "issue," and in determining the probable meaning which the grantor intended to give it; and the confusion arises from the effort, on the one hand, to carry out the supposed intention of the testator, and, on the other, to give to the word its strict legal signification. Mr. Bouvier says the word "issue" includes all persons who have descended from a common ancestor. It has also been said that, unless controlled by the context, it means lineal descendants, without regard to degree of proximity or remoteness from the original stock or source. 11 Am. & Eng. Enc. Law (1st Ed.) 899, and notes; Jackson v. Jackson (Mass.) 11 Lawy. Rep. Ann. 305, and notes (s. c. 26 N. E. 1112); Pearce v. Rickard (R. I.) 26 Atl. 38. When the word appears in a will, *prima facie*, it is intended as a word of limitation, but may, by the context, be shown to be a word of purchase. 11 Am. & Eng. Enc. Law, 877. In deeds and marriage settlements, it is always treated as a word of purchase. 11 Am. & Eng. Enc. Law, 876. In this case it is not insisted by either party that it is a word of limitation, but that it is used as a word of purchase; and it is so treated by the court of chancery appeals. Mr. Redfield, in his work on Wills (volume 2, p. 363), says, in substance, that the real intention of the grantor in using the word should be ascertained and followed; and he is of opinion that not one grantor in a thousand would suppose that by using such a word he would be dividing up his estate among all his descendants who might be living at the time of distribution, in such manner as to permit two or three generations—parents and their children and grandchildren—to share concurrently and per capita, equally, as between themselves. It was his opinion that most testators employ the term in the sense of descending heirs, and that it is most consistent with the testator's intention to hold that the children alive at the time of distribution are intended to take equally, to the exclusion of more remote descendants, unless the latter are issue of a deceased child, in which case they should take the child's share, as representing their parent. Following on the same line, while recognizing the rule as established differently, Lord Loughborough, in *Freeman v. Parsley*, 3 Ves. 42, expressed regret that there was no medium between the rule of total exclusion of grandchildren, and allowing them to share equally with their parent. See, also, 4 Kent, Comm. \*278, note b. These holdings, clearly, are based upon an attempt to follow a supposed intention of the testator to keep the several branches of his descendants equal, rather than upon the strict meaning of the term used. While it is true that the intention should be sought for and followed, it

can only be found in the instrument itself. The court of chancery appeals very pertinently say that if John and Samuel McPherson, the grandchildren of the life tenant, are embraced in the term "issue," there can be no good reason why the eight children of Mrs. Ridley, who are such grandchildren, should not be likewise included in the term, as they stand in the same relation and degree to the grantor, nor why Mrs. Ridley is not also embraced, as she stands one degree nearer the grantor than the great-grandchildren do. Hence it properly concludes that Mrs. Ridley and the McPherson children do not take, equally, one-third. The court of chancery appeals is, however, of opinion that following the suggestions of Mr. Redfield and Lord Loughborough, it is the better ruling to hold that it was the intention of the testator to give to the word "issue" the same meaning as is given under one statute to the words "heirs of the body," thus making it a word of purchase, but at the same time to hold that the remainder-men should take as if the life tenant had been seised of the entire estate, and it had passed according to the rules of descent, thus keeping up equality in the different branches of the family. The court of chancery appeals says in conclusion that it cannot state that such holding is sustained by a majority of the cases of even current authority in the United States, but it seems to be the just rule, in accord with the policy of our laws regulating descents, and more apparently within the intent of the grantor. We can see no reason why the word "issue," as used in this paper (which, though a deed, is, in a certain sense, testamentary in its character and operation), should not receive its strict technical, legal signification. The deed was executed May 27, 1860, and is witnessed by John Marshall and W. G. Marshall, the former one of the most distinguished jurists Tennessee has ever produced, and, it is stated at the bar, was written by him. It bears upon its face, and in its provisions, evidence of legal knowledge, and the technical use of legal terms, by the draftsman. If it was not intended that the word should have its legal signification, it is difficult to see why it was used, and why, if such was the grantor's intention, the remainder was not given to the children of Mary E. who might be living at her death, and the living descendants of those who might have previously died. Such language would clearly have called for the construction which the court of chancery appeals has given. We can see no ground for presuming an intention upon the part of the grantor to keep the several branches of his remote descendants separate, and to bestow his bounty upon them per stirpes, instead of per capita, where he uses a term which embraces all his descendants equally. There is absolutely nothing in the context of this instrument to show that the word "issue" was intended to have an

other than its proper, legal signification. If there were such indications in the context, they would furnish a good ground for giving the word a different meaning. 11 Am. & Eng. Enc. Law, 872, note 1. But in the absence of such indication the word must receive its proper meaning. The case of *Pearce v. Rickard* (R. I.) 26 Atl. 38, is directly in point, and thoroughly considered. In that case the will in controversy provided that on the death of the life tenant, Sarah C. Rickard, the trustee Pearce "should pay over the trust property to her lawful issue then alive." It was held (citing and commenting on very many authorities) that the word "issue," unrestricted by any indication of contrary intention, includes all descendants, and that grandchildren take equally with children, per capita, when there is nothing to indicate that a representative or substitutional taking was intended. It was strongly insisted in that case that the word "issue" should be held to have the ordinary signification of "children," and not a technical one, of descendants generally; but it was shown that such construction was against the overwhelming weight of authority in England and the United States, in the absence of any statutory provision, or any evidence of intention to be gathered from the instrument. See the same case reported in 49 Am. St. Rep. 755. See, also, *Hartwell v. Tefft* (R. I.) 35 Atl. 882; *Soper v. Brown* (N. Y. App.) 32 N. E. 768. The gifts in this case to the issue of the life tenant cannot be considered as substitutional, so that such issue must take per stirpes. A gift to issue is substitutional when the share which the issue are to take is, by a prior clause, given to the parent of such issue, but it is an original gift when not so expressed to be given to the parent of such issue; and the gift in this case falls under the latter head or class. 11 Am. & Eng. Enc. Law, 871, note. It follows that the decree of the court of chancery appeals must be reversed, and the property is decreed equally to the complainants and defendants, as the issue of the life tenant, each taking one-eleventh; and the cause is remanded for further proceedings in the court below. The costs of appeal will be paid by the appellees McPherson.

#### HORNE et al. v. GREER.

(Court of Chancery Appeals of Tennessee.  
Aug. 21, 1897.)

EQUITY—SPECIAL MASTER—QUALIFICATIONS—ACCOUNTING BETWEEN PARTNERS—FINDINGS—WHEN BINDING ON APPEAL—SUFFICIENCY OF EVIDENCE—ESTOPPEL IN PARS.

1. Where a clerk and master is a party to an action for an accounting, it is improper to appoint his deputy a special master to report on the status of accounts, though it is done by consent.

2. The court of chancery appeals or the supreme court is not bound by the concurrence of the chancellor and the clerk and master as to the status of the accounts between parties, where the

clerk and master has not been able to arrive at any definite conclusion, but only made statements of two expert accountants, which differed vitally, or where it is clear that in arriving at results, if any, he has adopted the wrong rule and theory of law.

3. In an accounting between partners, in which the question was whether, as alleged in the complaint, errors existed in the books which were kept by defendant, it appeared that the other members of the firm exhibited to defendant a statement of the firm's accounts which they claimed to be taken from the books; that such statement included a large number of accounts and bills receivable, many of which had been on the books for some time, and some that had been paid, some worthless, and others subject to offsets. One of complainants produced a statement of errors itemized, aggregating \$4,800, in defendant's handwriting, and which such complainant said was agreed to by defendant. He also furnished a paper in defendant's handwriting showing calculations of each partner's interest based on the result of the correction of such errors. Defendant denied that he made said statement of errors, but did not deny that it was correct. No effort was made by him to prove that such items were not on the books, and counted as assets in said statement, or that they were correct. His expert testified that "the books, I think, were about the poorest kept books of any I ever saw." Held to sustain the allegations in regard to errors in the books.

4. In an accounting between partners it appeared that on August 15, 1889, defendant sold his interest to J. conditionally, and took it back on August 15, 1890; that the books were kept by defendant prior to the first-named date, and by J. during the year following; and that, at the time defendant took back his interest, a statement taken from the books was furnished by the firm, showing the profits of the firm during the preceding year; that two of the other three members of the firm had nothing to do with such statement; that defendant said at that time that the business was in bad shape, and he would have to take back his interest to protect himself; that afterwards he and one of complainants went over the books, and agreed to corrections amounting to \$4,600, and, after checking the statements with such complainant, he said that he wanted them to be final and conclusive, as he did not wish to go over them again; that he gave the firm a note at the time he took back his interest, which provided that whatever might be due him on settlement of the partnership should be a set-off to the note. In his answer and cross bill, defendant stated that there was no final settlement, and denied that he was bound by any settlement. He testified that, when he gave his note, he wanted to have it charged against his interest as it appeared on the books; but complainants declined to do so, and the note was so drawn as to await final settlement. He did not testify that any one guaranteed the statement furnished him at that time to be correct, or that he relied on it as such. Held, that the parties were not estopped or bound by such statement.

Appeal from chancery court, Loudon county; H. B. Lindsay, Chancellor.

Bill by J. F. Horne and others against N. H. Greer. From a decree in favor of defendant, complainants appeal. Reversed.

Taylor & Pepper, and Taylor & Roberts, for appellants. E. P. McQueen and Templeton & Cates, for appellee.

BARTON, J. This is a lawsuit involving the winding up and settlement of a partnership which existed in Loudon county, the firm having two departments,—a grain and warehouse business, and a general merchan-

dise business. The original bill was primarily filed on October 2, 1893, by John F. Horne and M. R. Goans, surviving partners of the firm of Horne, Goans & Co., against N. H. Greer, on a note, a copy of which is as follows: "\$1,000.00. Loudon, Tenn., Jan. 30, 1891. Six months after date, I promise to pay to the order of Horne, Goans & Co., for goods this day sold me, with interest from date, one thousand dollars, with interest from date, at the Citizens' Bank, Loudon, Tennessee, for value received. The undersigned principal and indorser of this note, which is filled up before signing, waive demand, notice, and protest thereof; and we agree that if this note is placed in the hands of an attorney at law for collection, or has to be sued on, that we will pay ten per cent. attorney's fees in addition to the principal, which fee shall be added to and become part of the judgment. We also sign with a full understanding of this notice; provided whatever may be due me on settlement of Horne, Goans & Co. shall be a set-off to this note. N. H. Greer." The bill alleged that the complainants and W. A. Horne, deceased, had during the year 1886 entered into a partnership with the defendant to engage in a general mercantile and grain business, under the firm name and style of Horne, Greer & Goans, which was afterwards, about the year 1889, changed to Horne, Goans & Co., and so continued from that date until about 1891, when they ceased to do business; that the assets of the firm were all about disposed of, the defendant Greer purchasing the merchandise on hand for the Loudon Mercantile Company, of which he was a member, for the sum of about \$9,000; that the Loudon Mercantile Company executed its notes for that sum, less a discount allowed, and less the amount of the note sued on, given by the defendant Greer, as part consideration of the purchase of the stock of goods. The bill further alleges that since January, 1891, the firm had done no business; that, at the time it stopped to do business, an estimate was made of the standing of the firm; that afterwards it was discovered that a mistake had been made in the estimate of some \$4,368, and that after correction made it appeared that the defendant was indebted to the firm in the sum of \$16.51; that \$610.52, assets of the firm, had been collected, and not accounted for, but paid into the business prior to the settlement of 1890; that \$461.92 of the firm's accounts had turned out to be insolvent, etc.,—the result of which was, according to the bill, that, on proper settlement, defendant would be entitled to credits on this note to the amount of about \$220.53, leaving the sum of \$770.47 due from him, for which suit was brought, and also for attorney's fees. After the bill was filed, it was amended so as to allege that further errors had been discovered, and that the defendant Greer was entitled to no credits on the note, but was indebted to them for some \$30 to \$50 more.

Defendant filed an answer and cross bill, the material statements of which are as follows: That in August, 1889, the respondent sold out his interest in the business to E. C. Jones, and the former firm of Horne, Greer & Goans was changed, and a new firm was organized, under the name and style of Horne, Goans & Co., composed of the two Hornes and the complainant Goans and E. C. Jones, to whom the respondent had sold his interest; that his interest then amounted to \$1,474.42; that Horne, Goans & Co. carried on the business until it was closed out, as shown; that in August, 1890, E. C. Jones sold his interest, then amounting, after certain accounts were credited, to \$1,474.42, to the respondent, but the respondent took no part personally in the management and conduct of the business until employed, as he subsequently was, by M. R. Goans and W. A. Horne, at a salary of \$50 a month to sell out and dispose of the stock of goods then on hand; that, under this arrangement, the respondent took charge of the goods on the 1st day of October, 1890, at which time the invoice price of the goods amounted to \$8,010.59; that he continued in charge until January 1, 1891, when all the goods then remaining were sold; that the complainant and his partner, Horne, agreed to give the respondent a discount of \$1,000 on the stock of goods then on hand, less than the invoice price of date October 1, 1890; the respondent accepted the offer, and sold the goods to the Loudon Mercantile Company; that although the sale was made in January, 1891, it was to date back to October 1, 1890; that in August, 1890, when the respondent bought the interest of Jones in the firm of Horne, Goans & Co., said firm of Horne, Goans & Co. furnished him with a statement of the condition of the firm and profits for the year, and, when the accounts of Jones and respondent were deducted, it was found that the net interest of Jones in the assets of the firm was \$1,474.42; and that this amount of interest the respondent bought; and the respondent insisted that the complainants were bound by this statement. He denies that the mistakes and errors in the settlement of the business claimed in the bill had been found or were correct; admits the execution of the note, but says in regard thereto: "It was respondent's desire and intention that said \$1,000 should be credited by the firm of Horne, Goans & Co. on the amount due to respondent out of the assets of the firm, but the members of said firm, especially W. A. Horne, declined to do this, and requested and induced the respondent to execute the conditional note now sued on in this cause, to be held and used until the final adjustment of the affairs of the firm; and so, on this understanding, the respondent executed the note." The answer and cross bill further asserts that there had been no final settlement of the affairs of the firm. He says that if there was any estimate of the affairs of the firm made about January, 1891, or of the standing of the individual

members of the firm, he was no party to it, and not bound by it; but he denies the errors. He further says, by way of cross bill, that, on a proper adjustment of the affairs of the firm, there will be due him about the sum of \$494.80, for which he would be entitled to, and seeks, a decree. He files a copy of a statement made, showing the profits of the firm of Horne, Goans & Co. from August 15, 1889, till the time of the dissolution, to have been \$3,150.91.

The answer to the cross bill denies that Greer had ever ceased to be a member of the firm, and says that E. C. Jones was only admitted as his representative, and that the trade between Jones and Greer was a matter wholly between them; that Jones was financially an irresponsible man, and it was not understood that Greer had surrendered his interest in the firm, but that the trade between him and Jones was only conditional; and that Jones remained in the firm as the representative of Greer until Greer took back his interest or resumed his place, in August, 1890, just prior to the winding up of the business of the firm. The answer to the cross bill insists on the truth of the statements in the original bill and the indebtedness of Greer. Proof was taken, and a decree entered by the chancellor, adjudicating certain points, and referring the cause to a special master for an accounting and report.

Before reciting the adjudication of the chancellor in this decree, it will clear the matter to state some of the history of the firm of Horne, Goans & Co. and the firm or firms which it succeeded, and our findings on this line, as a proper settlement of this case involves to some extent these points: In March, 1886, W. A. Horne, J. F. Horne, and the defendant, N. H. Greer, formed a partnership, and went into the grain business, at Loudon, Tenn., under the firm name of Horne Bros. & Greer, in which firm the Horne brothers owned a one-half interest, and defendant, Greer, a one-half. In October, 1886, the complainant Goans, who had been an employé, was admitted as an equal partner, Goans becoming a one-third owner, the Horne brothers owning or holding a one-third, and the defendant, Greer, one-third. The name of the firm, however, continued as Horne Bros. & Greer until September 1, 1887. At this time the name of the firm was changed to that of Horne, Greer & Goans, the Horne brothers owning a third, Goans a third, and the defendant, Greer, a third; and at the same time the business of the firm was extended to that also of general merchandising, which was opened out as a separate department, two separate sets of books being kept, but the interests of the partners remained the same. When the firm of Horne Bros. & Greer was formed, the capital put in was \$1,000 by the Horne Bros., and \$1,000 by Greer. In October, 1886, when Goans was admitted as a part-

ner, not having the money, he executed his note for \$1,000 to the firm as his contribution to the capital stock. In September, 1887, when the firm branched out into the new business of general merchandising, the original amounts of \$1,000 each, paid and put, as above stated, into the grain business, were allowed to remain as the capital stock of that business, the profits which appeared on the books as having been made in the grain business, and which were apportioned among the members of the firm, were carried into the general mercantile business, and placed on books of that concern or department as capital stock paid in. Horne Bros. were credited with \$1,445.54, N. H. Greer with \$1,973.77, M. R. Goans with \$1,157.25; these figures being placed on books of the mercantile department to the credit of these parties, though it was understood that these parties were jointly interested in the entire business, the Horne brothers representing a third, complainant Goans a third, and the defendant, Greer, a third. From that date the profits and losses were to be shared by these respective parties at the ratio of one-third each. The business continued in this shape until August 15, 1889, when, according to the contention of the defendant, Greer, he sold his interest to E. C. Jones, and from that time on his contention is that he ceased to be a member of the firm, though he claims to have repurchased Jones' interest, whatever it was, on August 15, 1890.

The contention of complainants is that, while there was a change in the firm name (it being admitted that at this time, August 15, 1889, the firm name was changed from Horne, Goans & Greer to Horne, Goans & Co.), there was no real sale of the interest of Greer, but that Jones was only admitted as his representative, it being understood that Greer was financially responsible, and that Jones, who had been an employé of the firm, was not. It is insisted by the complainants that they never agreed to any such transfer of interest and the continuance of the business, except by regarding Jones as the representative of Greer. This contention is argued with much earnestness on both sides, and appears to be regarded as one of the strong points of the case. In view, however, of the real facts as they appear in the record to us, we regard the contention more as a war of words than as a matter of material importance. The facts appear to be undisputed that at this time, in August, 1889, respondent, Greer, did make a trade with E. C. Jones. The evidence is that the trade was conditional. He was to become the owner of Greer's interest provided and whenever he paid for it. It is also true that at this time, August, 1889, a publication was made in a paper published in Loudon county, and printed notices were sent out, to the effect that the firm of Horne, Greer & Goans had been dissolved by mu-



tual consent, N. H. Greer retiring; and a further announcement was made, without stating who composed the firm, that the business would be continued at the old stand, under the style and firm name of Horne, Goans & Co. Notice was also sent to the debtors of the firm that the firm of Horne, Greer and Goans had been dissolved, and that the business must be closed up, and all persons indebted to the firm were requested to make settlement. Privileged license for the mercantile department was also taken out in the name of the new firm. But, on the other hand, it is equally as clear that the business was continued and run along the same way, in that there was no closing out or formal sale of the stock of goods, nor a separation of the old accounts from the new. All that seems to have been done at all was that Greer agreed with Jones that Jones should take his interest in the business. A statement had been made from the books which showed a certain amount of profit, making Greer's interest at the time of this trade, according to the books or statement taken from them as it then stood, amount to \$1,827.65. Greer's proposition to Jones was that he would let him have his interest, and Jones was to pay him interest at the rate of 6 per cent.; that Jones was to pay him at the end of each year on the principal until the amount paid liquidated Greer's share with interest; the payments to be made by Jones out of his share of the profits, but that Jones was allowed to take a reasonable amount for living expenses out of his share of the profits, and to pay the balance of his profits to Greer. But, although this statement from the books was made, there is nothing to show that it was agreed or understood to be binding on anybody as a final settlement. There is not a word to indicate that the Horne brothers and Greer understood or agreed that that amount, appearing on these books, should be taken as the correct amount due Greer at that time, as a final settlement. The evidence all shows to the contrary, and shows, at most, that the trade could mean nothing more than that Jones was to step into Greer's shoes. It expressly appears from Greer's own testimony that he was to bear, as a deduction from his interest, as it appeared, whatever losses might result from bad debts; and we think it clear that the agreement was, even as between Jones and Greer, that Jones was to take, when he paid for it, whatever interest Greer might have in the firm on August 15, 1890, based on a correct and final settlement of the affairs of the firm of Horne, Greer & Goans as they stood at that time.

We are further of the opinion that the weight of the evidence shows, as contended by complainants, and we find, that, at the most, the sale was only conditional, and Jones was to become the owner of the interest on paying for the same; but we do not

regard this last statement as material, because it is clear, and we find as a fact, without doubt, that, at the most, Jones was only to take, as stated, the interest of Greer, whatever it might be as of that date, subject, as between the other partners, to adjustment of all errors on final settlement. The business continued in this way until August 15, 1890, about which time a trade was made. Greer having discovered, as he says, that Jones had absorbed for living expenses his entire share of the profits, and for other reasons, he concluded to take back or repurchase his interest, and did repurchase the interest, or made an arrangement with Jones by which he was to be reinstated and to take back the one-third interest, or the Jones or Greer interest, as it may be called, as it then stood. And although, at the time of making this trade, a statement was made and furnished from the books which showed that the firm of Horne, Goans & Co. had made a profit during the past year, yet there is nothing whatever to show that any of the complainants or any of the other members of the firm agreed or represented this statement to be exactly correct, nor was it taken or considered as a final settlement or any settlement of the firm's affairs as they then stood. But the trade and repurchase by Greer were simply to take back the interest as it then stood, and his agreement with Jones was that he should take the interest, and assume all Jones' liabilities in the matter; that the profit, whatever it was or whatever had been made, or however the interest stood, should become that of Greer, and Greer agreed to give or allow Jones \$800 for his year's work, and Jones executed his notes for the difference between that amount and the amount which he had drawn out of the firm on his account. Greer took the interest, and assumed all Jones' liabilities to the firm. When the evidence is fairly considered, this, we think, is clear beyond dispute. So, whatever terms or words may be used in regard to the change made in the firm by these negotiations and trades between Jones and Greer, it cannot, so far as we can see, affect the merits of this case in the least. Neither at the time of the first sale, nor at the repurchase, was there any agreement nor guaranty on the part of the other members of the firm, nor any representations made by them, which could have misled, or which were intended to mislead, or which did in any manner mislead, either Jones or Greer; and the most that can be said is that at one time Jones took the Greer interest, and stood as his representative in all respects, and that Greer subsequently resumed his place, taking back the same interest, subject to all the rights and liabilities that had in the meantime accrued.

So far as a proper and just disposition of this case is concerned, it should be treated as if the Jones incident had never occurred.

When Greer sold the interest to Jones in the first place, Jones took that interest subject to a proper and correct settlement, and subject to all the liabilities that existed against Greer. When Greer repurchased it, he took it subject to all the charges and liabilities that existed against it when he sold it, and to those which had accumulated from that time until his repurchase, and which were chargeable against Jones while the interest was in his hands. The deceased partner, W. A. Horne, it appears, lived at Knoxville, and only had the active management of affairs there, and of the financial affairs, such as negotiating loans, etc., for the firm. The partner J. F. Horne does not appear to have taken any active management in the firm, but only to have been interested with his brother. The direct management of affairs was divided between the complainant Goans, who had charge more particularly of the grain and warehouse business, and of the defendant, Greer, who had charge of the mercantile business, and mainly charge of the books, except during the year from August, 1889, to August, 1890. And as we have already held and found that Jones, in effect, was simply the representative of Greer, the practical result is, and we find, that whatever losses there were due to mismanagement, or failure to properly account for assets in the conduct of the business, they were mainly chargeable to the defendant, Greer, so far as the mercantile department is concerned, and to the complainant Goans so far as the grain and warehouse business is concerned. The materiality of these points will more forcibly appear in the discussion of the report of the special master and of the chancellor, hereinafter to be made.

Proof was taken, and, among others, the depositions of two expert accountants, who, as is generally the case, differ in the results of their reports, and who appear to have pursued entirely different methods in coming to their conclusions. The expert for the complainants, one J. S. Robbins, adopted the method of trying to ascertain the real condition of the firm as it existed on the winding up of the firm's business, by getting at its actual live assets and actual live business, charging each partner with what he had drawn out, crediting him with what he had paid in, and dividing the losses and gains according to the contract of the partnership. The other expert, one Mr. Benham, who, it is to be regretted, displayed a decided partisanship in the matter, adopted the method of trying to ascertain from the books as they stood what the profit and loss of the partnership had been, his method being to take the statement as it appeared on the books August 15, 1889, as correct, and take from the statement as there shown the amount of assets then appearing to be on hand, or rather the amount of merchandise. To that he added mer-

chandise which appeared from the books to have been subsequently purchased. Against this he charged the amount which appeared from the books to have been sold. The amount of merchandise on hand on August 15, 1890, and the difference between these two sides of the account, he declared to be the gross profit, from which he deducted the expenses, and by this method found the net profits of the mercantile department for the year to be \$4,080.94. He pursued the same method with the warehouse department, and, consolidating his statements, showed the net profits for the year ending August 15, 1890, to be \$3,908.78. The deposition of the complainant Goans was also taken, in which he endeavored to show a large amount of errors which had been discovered in the books, which, according to his testimony, the defendant, Greer, had agreed to, and showed statements in Greer's handwriting substantiating his own statements. Other proof was taken. The chancellor heard the cause, and decreed as follows: That the cause be referred to A. S. Henderson, who was a deputy clerk and master, as a special commissioner, with directions to hear such additional proof as the parties should offer, and report status of accounts as directed. As a guidance for the special master, the chancellor decreed that on August 15, 1889, the defendant, Greer, sold his interest in the firm of Horne, Greer & Goans to E. C. Jones, and ceased to be a member of the firm; that on August 15, 1890, the defendant, N. H. Greer, repurchased the interest of E. C. Jones in the firm of Horne, Goans & Co., and became a member of the said firm, owning the one-third interest formerly owned by said Jones therein; that, when said Greer purchased back the one-third interest of Jones in said firm, he did not do so solely upon the faith of the statement of the business of Horne, Goans & Co., but upon that and for other reasons. From these rulings, the special master was directed to hear proof and report under seven heads, to be hereinafter noted in the report of the special master.

The first direction to the special master was to report what amount was due E. C. Jones on the 15th day of August, 1890, as shown by the books, and also as shown by other proof in the case. In reply to this direction, the master reported that on August 15, 1889, N. H. Greer's stock account, which was sold to Jones, was worth \$1,838.85, and he refers to the ledger of Horne, Greer & Goans. On August 15, 1890, E. C. Jones owed the firm, on individual account, the sum of \$1,076.54; and, on the same date, N. H. Greer owed, on his individual account, the sum of \$338.20. These last two items he charges against Jones' interest, and credits him with the amount the interest was said to be worth on August 15, 1889, of \$1,838.85, and further credits him with \$1,827.65, as Jones' one-third share of the profits made during the year, making balance due Jones on Au-

gust 15, 1890, of \$2,251.76. The special master states that this is based on the supposition that N. H. Greer's stock account was on August 15, 1890, worth \$1,838.85, as shown on Horne, Greer & Goans' ledger (page 1); "and I see nothing in this record showing it to be incorrect, and it is also based on the profit and loss account cast up by T. L. Benham, and shown by his exhibits to his deposition." The second direction to the special master was that he should report and show the amount of sale of goods and disbursements of cash from August 15 to October 1, 1890, in the merchandise department; that he would also show the profit and loss for said period. In response, the special master says: "As to the second item in the reference, I report that the sale of goods in the mercantile department from August 15, 1889, to August 15, 1890, amounted to the sum of \$10,945.28. The cash receipts from August 15, 1890, to October 1, 1890, amounted to the sum of \$4,649.37, and the cash disbursements for the same period amounted to the sum of \$4,930.72." He reports a loss in the mercantile department from August 15, 1890, to October 1, 1890, of \$2,050.40. The third direction to the special master was to report whether or not there was a sale of the warehouse business, including its contents and fixtures, to Horne & Goans, and, if so, its price and the date. In substance, he reports that there was on October 27, 1890, a sale of the warehouse business to Horne & Goans, for the sum of \$4,614.92. The fourth direction was for the special master to report the purchases and sales in the warehouse department from August 15, 1890, down to the date when the business of Horne, Goans & Co. in the grain department ceased. He reports the total purchases in this department during this time as \$9,390.47, and total sales for the period of \$8,773.38. The fifth direction was that the special master should report the profit and loss of the grain department from August 15, 1890, under Horne, Goans & Co., down to the date it ceased. On this head he reports that the profit made in this department for that period, according to the statement made by the expert Benham, was \$476.21; that, according to the statement made by the expert Robbins, it was \$578.51. He does not state what his own conclusions were. The sixth direction was that the special master should report the profit and loss of Horne, Goans & Co. from August 15, 1889, down to August 15, 1890. In answer to this, he says that the profit during this period was \$5,482.97. As authority for this statement, he refers to Exhibits A and C to the deposition of T. L. Benham, the expert. The seventh direction was that the special master should report the status of the accounts of the several partners with the firm, and the balance due to or from each other. Under this head, he reported due J. F. Horne and brother, on stock account, \$3,725.52; balance due N. H. Greer, on stock account, \$941.83; and, after deducting the note sued on in this cause, the balance due from M. R. Goans, of \$660.38. He

then says the figures are based on the profit and loss account of the business as the same was cast up by T. L. Benham, an expert accountant, and which, he says, is what the book of accounts of the firm shows. Then follows this statement by the special master: "The following figures are based on the financial statements or statements of assets and liabilities as the same was cast up by J. S. Robbins, an expert accountant, and which he says is what the books of account of the firm show. He then gives figures taken from Robbins' account, from which he figures out that there is due the Horne brothers \$3,725.52, due N. H. Greer \$941.83, due from N. R. Goans \$660.38, but he shows that there is an excess of liabilities over assets of \$2,253.48. This report is then followed or closed with the following statement: "Mr. Goans claims that the statement of assets, as understood and estimated at the time Mr. Greer repurchased from Mr. Jones, proved on final adjustment of the business to be incorrect, in that the assets, instead of being \$30,446.99, were, because of errors in the books, \$27,127.98, making a difference of \$3,319.01. The items comprising this \$3,319.01 are set out in detail in the statement prepared by J. S. Robbins, and exhibited to his deposition in the cause. Mr. Goans also claims that the statement of liabilities as then understood was incorrect, in that the liabilities, instead of being \$27,296.08, were \$28,333.30, making a difference of \$1,037.22. This is also set out in detail by Mr. Robbins in his statements. Mr. Greer claims that these items are not errors in the books, and do not change the value of the books. The most important of these items are traversed by proof, but the proof does not make the matter clear to me. In fact, the questions so far involve the science of accounts that I cannot determine them, and hence have taken the statements of both Benham and Robbins as being correct, and made my figures accordingly; and, to the extent that either of them are wrong, this report will be wrong. Respectfully submitted. July 4, 1896. A. S. Henderson, Special Master."

We note with regret that in a case where the clerk and master is a party, largely and vitally interested, the chancellor has seen proper to appoint his deputy, who is necessarily under the control of the master, and holds his office at his pleasure, a special master to report on the status of accounts between this clerk and master and other parties. No objection appears to have been made to this course; and, while the record does not show it, the explanation may be that the selection of the deputy was by consent of the parties; but it is a practice not at all to be approved, even under these conditions. It is not improper to say, however, that the deputy or special master who made this report has displayed in the main great impartiality; for in the last quotation made in his report it will be seen that he really has not been able to arrive at any conclusions at all, the statement being "that the most important of these items are traversed by proof, but the proof does not make it clear to me. In fact, the question so far

involves the science of accounts that I cannot determine them, and hence have taken the statements of both Benham and Robbins as being correct [although vitally differing], and made my figures accordingly; and, to the extent that either of them are wrong, this report will be wrong." We make this observation in view of the contention, earnestly insisted upon, that there is concurrence of the chancellor and clerk and master in this case, by which this court is bound; and we are of the opinion that, if there was a concurrence on a report so made, it would not have any binding effect upon this or the supreme court. Again, the concurrence would not be binding because, as will be hereinafter more fully shown, if the special master's report can be taken as meaning anything, or that he has arrived at any definite results, it is clear that, in arriving at such results, he has adopted the wrong rule and theory of law, and in such cases this court is not bound. There can be but little controversy as to the facts of this case. When carefully analyzed, the proof shows that the real facts are not open to serious discussion. There was, however, no concurrence on the part of the chancellor on the report of the special master. He did not accept his results nor adopt his figures. The chancellor based his decision on an entirely different theory from that acted on by the special master, and does not appear to be in the least aided, or, in any event, only to a very small extent, by the consideration given the case by the special master, though the decree is worded in a few instances with the evident purpose of showing a partial concurrence, but which we do not think existed as a matter of fact.

The case was finally heard by the chancellor on the 4th of July, 1896, on the report of the special master, exceptions, and on the record. The decree recites and adjudicates as follows: First. It is said that the report of the special master is confirmed, and exceptions overruled, except as hereinafter shown. Second. It is decreed that the complainants have not made out the charges in their bills in regard to the errors complained of by them in the books of Horne, Goans & Co., except so far as they show a return of certain goods to the amount of \$185.50; and it is decreed that to this extent the books will be corrected, but no further. It is further adjudged in this decree that the firm of Horne, Goans & Co. made a profit from August 15, 1889, to August 15, 1890, of \$3,150.91, less the sum of \$185.50, the amount of goods returned; and it is said to this extent the report of the special master, Henderson, is corrected. This decree further recites that the court is of the opinion and adjudges that all parties are estopped and bound by the statement made and handed by complainants to respondent on August 15, 1890, and filed as Exhibit 5 to M. R. Goans' deposition. Third. It is adjudged in this clause of the decree that the respondent, N. H. Greer, by purchasing the interest of E. C. Jones in the assets of the firm of Horne, Goans & Co., on August 15, 1890, became entitled to receive

from the firm the amount of the stock interest of Jones, as shown by the special master's (Henderson's) report; also one-third of the profits, as shown by the statement of August 15, 1890. But there shall be deducted therefrom the individual accounts of E. C. Jones and respondent, N. H. Greer, as the same appears in said special master's report. It is further ordered and decreed that respondent, Greer, is entitled to one-third of all the profits made in the store department and warehouse department after August 15, 1890, until the firm quit business, and that he should be charged with one-third of the losses and expenses on account of bad debts, goods sold at a discount, and cost of conducting business after August 15, 1890. It is further adjudged that N. H. Greer is entitled to be credited with the sum of \$400, agreed to be paid him for selling the stock of merchandise. Fourth. In this clause of the decree it is adjudged that the complainants purchased the grain in the warehouse department as claimed by them in October, 1890, at the price of \$4,614.92. Fifth. In this clause of the decree it was adjudged that the complainants' fifth exception, being exception to item 5 of the report, be sustained, and it was decreed that the profits of the warehouse department after August 15, 1890, and until the sale to the complainants, were \$578.51. Sixth. In this clause the decree proceeds on the basis thus fixed to settle the rights and equities between the parties, and it was decreed that the amount due Greer, as assignee of Jones, on August 15, 1890, after deducting the individual accounts of Jones and Greer, and after reducing the profits up to that date from \$5,482.97, the amount as shown in the special master's report, to \$3,150.91, according to said statement of August 15, 1890, is \$1,474.42. From this sum the chancellor deducted \$400, to be allowed to Greer for selling the goods; one-third of the warehouse department profits after August 15, 1890, \$192.83; one-third of the profit on sales of merchandise department from August 15, 1890, to October 1, 1890, \$126.12,—making a total credit due the respondent of \$2,193.37. Against this sum the chancellor charged the defendant, Greer, with \$1,000, the note sued on; the account of N. H. Greer, for \$34.77; one-third of goods returned, \$61.83; one-third of loss and expenses in mercantile department after August 15, 1890, \$693.47,—making a total deduction of \$1,960.49, and leaving a balance due respondent, Greer, of \$262.88. The chancellor therefore decreed the cancellation of the \$1,000 note, and entered decree in favor of respondent under his cross bill against the complainants for \$262.88. From this decree the complainants prayed an appeal, and assign errors here.

Reviewing this decree by sections, it will be seen that, as to the first section, although it is recited that the report of the master is confirmed except as shown, as a matter of fact the chancellor adopts an entirely different theory and different basis for his report; and while it is true he finds the profit made for the year ending August 15, 1890, and while he finds a

certain sum due respondent, yet his conclusions are based on entirely different figures, arrived at by a different theory, and he evidently relied on entirely different evidence, from that looked to by the special master, even if it may be said that the special master himself came to no definite conclusion. But this will appear more clearly hereinafter.

In the second clause it is said that the complainants have not made out the charges in the bill in regard to the errors complained of in the books, except so far as they show a return of goods to the amount of \$185.50. Upon this point the evidence is overwhelmingly to the contrary. The expert employed on behalf of the respondent, and who evidently did the best that could be done for his employer, himself states that "the books I think were about the poorest kept books of any I ever saw." The complainant Goans produces a statement of the errors, itemized item by item, and aggregating in their net results some \$4,600, which statement is made in the handwriting of the respondent himself, and which statement Goans says was made out, checked, and agreed upon by the respondent, Greer. He also furnishes a paper in Greer's handwriting, showing calculations of the respective standing of the different partners' interest, based on the result of the correction of these errors. Respondent, in a very general way, denies that he made out or is responsible for this statement of errors, but he does not undertake to deny that the statement is correct. It appears that the statement made out August 15, 1890, included, among other assets, a large amount of accounts and bills receivable. It turned out afterwards, when the effort was made to close up the business and collect these, that these accounts and bills, many of which had been on the books for some time, and some of which had been carried along for several years, through the different changes of the firm's name, had been paid or settled; but the proper entries showing this had not been made on the books, and hence, when the statement of August 15, 1890, was made, they appeared as living assets, and were so counted in that statement; but as the effort was made to collect them, to get the business straightened out, it was found that they did not exist. In some instances these accounts or claims had been paid; in other instances there were offsets; and in some instances the claims were insolvent. As we have stated, a list of these things appearing in the handwriting of respondent, and itemized item by item, was furnished in the statements of Mr. Goans, one of the complainants, and a statement of the same items was furnished by the expert Robbins. Some of the items were also proved by other witnesses. In fact, there is no evidence to the contrary but that these items appeared on the books as assets of the firm when the statement of 1890 was made, and there is no pretense of any proof but that they were erroneous. No effort was made on behalf of the respondent to prove either that these items were not on the books, and counted as assets in that

statement, nor to prove that they were correct. This finding of the chancellor was obviously incorrect, and without any proof to sustain it.

Again, in this second clause, as we have seen, the chancellor adjudged and decreed that the firm of Horne, Goans & Co. made a profit from August 15, 1889, to August 15, 1890, of \$3,150, less the sum of \$185.50, amount of goods returned; and it is said that to this extent the report of the special master was incorrect. Now, the special master, in his report, stated that he reported the profits in both branches of the business from August 15, 1889, to August 15, 1890, to be \$5,482.97, and he bases this statement upon Exhibits A and C to the deposition of the expert T. L. Benham. The chancellor based his conclusion on entirely different evidence, and on an entirely different theory, his theory being that the parties were all bound by the statement made up from the books on August 15, 1890, which did show the profits stated by the chancellor of \$3,150. As we have seen, this result was arrived at by the parties from their books, on the basis of the difference between the assets and liabilities as they appeared on the 15th of August, 1890, on their books, and the assets and liabilities as they appeared in August, 1889. Now, as has been seen, this statement was not warranted by anybody to be correct. Errors to a very small amount were found in the warehouse books; and errors to a very large amount were found in the mercantile books, the books of which the defendant himself had had charge prior to August 15, 1890, and which his representative and assignee, and subsequently assignor, had charge of for the year ending August 15, 1890; and, as we say, it is proved beyond a reasonable doubt that there were errors in these books to the amount of about \$4,600; and hence the finding of the chancellor on the theory adopted by him is entirely without foundation or without proof to support it.

The special master's statement that the profit amounted for that period to \$5,482.97 is based, as he says, upon certain exhibits filed by the expert Benham. The methods used by Benham in arriving at these results are clearly shown in his testimony. He admits that the books were the poorest kept books he ever saw. He shows that he discovered some instances of omissions to make entries; testifies that, although there was an attempt at (as the contract of the partners had provided for), a system of double-entry bookkeeping, it was simply impossible to test the books by this system, and that they were not correct. He did not, as he states, undertake to go back to the books and original entries, and he states that the cash account was utterly unreliable, and he could do nothing with it; and yet, after these admissions, he adopted the system we have referred to, of charging in the mercantile department the stock of goods and merchandise on hand as shown by the inventory made on the 15th of August, 1889, or as shown by the statement appearing on the books as of that date. To

this he adds, as he states, the amount of all other merchandise bought. As against this, he credits the cash and credit sales as appearing on the books for that year, and the stock of goods on hand, as shown by inventory of August, 1890; and the difference, he concludes, was the profit made. From this gross profit he deducts the expenses, and his conclusion is that the difference was the net profit made on the mercantile department. The warehouse department he treats in the same way. This method of arriving at profits is, of course, theoretically correct, and might well be adopted and relied on if it appeared that the books had been correctly kept. But, as we have seen, it is indisputable that the books were not correctly kept. The books themselves show this. No trial balance can be made. Errors have been discovered and demonstrated. We have no means of telling how many goods were purchased which were not entered on the merchandise account, nor how many sold; nor can we know that the expense account was correctly stated. In fact, it is shown that the books were entirely unreliable. Mr. Benham himself states, and there is no contradiction, that the assets were not on hand to show this profit.

It inevitably results that the method pursued is unreliable, because the books were wrong, or that there has been some waste or stealing of the assets of the partnership. It is clearly demonstrated to our minds that the books were wrong. Whether they were wrong to the extent to cover the discrepancy or loss of assets that Mr. Benham's statement would show, we have no means of knowing; but the pleadings do not contain any charges of embezzlement, breaches of trust, misappropriation, or wrongful conversion of the property of the firm by any of the members. None of the witnesses on either side insist upon such a theory, nor have counsel in argument made deliberate charges to this effect, and we therefore have no reason to take this view ourselves; but, if it should be taken, it must inevitably result that for the charges that appear in the mercantile department while the respondent, Greer, had charge, he would be primarily responsible, and it would be incumbent upon him to account for the losses of assets. It likewise follows that during the year ending August 15, 1890, while Jones had charge of the mercantile department, it would be incumbent upon him to account for the loss of assets, he being in charge; and the respondent, Greer, as his assignee, having assumed his place and liabilities, would in his stead, in the settlement of the partnership, have to account for such loss during the time. But we think it the better view to take, and the one to which, in any event, we are driven by the failure of the parties to make charges of wrongful conversion and misappropriation, that the books were wrong, as it is clear that they were, and the statement of the expert

Benham based on the assumption that the books were correct is therefore utterly unreliable, and was erroneously looked to by the special master in making his report.

In the latter part of the second clause of the decree, the chancellor recites that he is of opinion, and adjudges, that all parties are estopped and bound by the statements handed by complainants to respondent on August 15, 1890, and filed as Exhibit 5 to M. R. Goans' deposition. This holding was certainly a material modification of the chancellor's own decree when he ordered the reference, in which he held that, when Greer purchased back the one-third interest of Jones in the firm, he did not do so solely upon the faith of the statement of the business of Horne, Goans & Co., but upon that and for other reasons. Now, it is without contradiction that the two Hornes had nothing to do with and knew nothing about this statement, did not authorize it, and never agreed to its correctness. Greer himself does not swear that anybody guaranteed it to be correct, nor that he relied upon it as such. It is proved by Mr. Jones that, at the time of the trade, Mr. Greer said to him that the business was in bad shape, and that he would have to take back his interest to protect himself. Moreover, as we have found, he with Mr. Goans went over the books, and agreed to corrections amounting in the aggregate to \$4,600; and, after checking with Mr. Goans these statements, he said that he wanted them to be final and conclusive, as he did not wish to go over them again, showing conclusively that he was not relying on the statement furnished on August 15, 1890, as an estoppel. His letters and correspondence show that there was no estoppel. The note which he gave, and which was sued on, and the written proposition he made in reference to the purchase before the note was given, show conclusively there was none. In his answer and cross bill he says there was no final settlement, and denies that he was bound by any settlement. Mr. Greer states in his deposition that, at the time he gave this note, he wanted to have it charged against his interest as it appeared on the books, but that the complainants declined to do this, and the note was so drawn as to await a final settlement of the affairs of the company. But without further details, we find that there were no fraudulent misrepresentations made by the complainants or any one authorized to represent them; that they did not guaranty the correctness of the statement of August 15, 1890; and respondent, Greer, did not purchase on the faith of it. There is no ground for an estoppel whatever.

It is unnecessary to review the third clause of the decree after what we have already said in regard to the other.

The finding of the chancellor in the fourth clause of the decree, that the complainants purchased the warehouse department, as claimed by them, on the 27th of October,

1890, at the price of \$4,614.92, is sustained by the proof, and is affirmed.

It is unnecessary to discuss the balance of the chancellor's decree, founded, as it is, on the errors which we have already discussed. The conclusions, of course, are erroneous; and instead of the conclusions and findings reached either by the special master and the chancellor as to the status of this partnership, and of the accounts of the different individuals towards the firm and each other, we find that the statement made by the expert Robbins is substantially correct, and is the only reliable basis disclosed by the evidence in this record on which the respective rights of the parties can be safely, justly, and equitably settled; and the same is adopted, and from that and the evidence in the record we gather and find the facts and results as stated in Exhibit A, A, to J. S. Robbins' deposition, which we adopt as part of our findings of fact. It will only be necessary to recite some of the conclusions.

All the debts of the firm had been paid except the amount due on settlement to J. F. Horne and brother, members of the firm. On a full settlement of the business, there is due J. F. Horne and brother the sum of \$2,557.04; there is due from N. H. Greer, including the note in suit, the sum of \$1,034.51; there is due from the complainant M. R. Goans the sum of \$1,522.13. The total resources left to pay the amount due J. F. Horne and brother, of \$2,557.04, are the amounts due from N. H. Greer, of \$1,034.51, and from M. R. Goans, of \$1,522.13; error unaccounted for, 40 cents. The result is that the complainant J. F. Horne, as surviving partner, and as representative of his brother's and his own interest, is entitled to a decree, in the name of the partnership, against the defendant, N. H. Greer, on the note sued on, with interest from date of the note and 10 per cent. attorney's fee, as provided for in the note; and a decree will be entered accordingly. The defendant, Greer, will pay all the costs of the cause.

We have not taken up the exceptions of the various parties, nor the assignments of error, *seriatim*; but our findings and the conclusions herein stated dispose of all points made, and we have adopted this as the best method of showing clearly the conclusions which we have reached in the case.

NEIL and WILSON, JJ., concur.

Affirmed orally by supreme court, November 13, 1897.

#### BARTLETT v. BALL.

(Supreme Court of Missouri, Division No. 2.  
Dec. 7, 1897.)

DOWER—VESTED RIGHTS—COVENANTS—BREACH—  
EVICTION—WILLS—LIABILITY OF DEVISEES  
—STATUTES—OPERATION.

1. 1 Rev. Laws 1825, p. 333, providing that the widow shall not "be entitled to dower in

any lands, tenements or hereditaments until all just debts due or to become due by her deceased husband have been paid," has no bearing in favor of any one except a creditor of the estate to whom a debt is owing; and a breach of warranty or of a covenant against incumbrances does not create such a debt as would bar a widow from asserting dower in land conveyed by her husband without her joining.

2. There can be no breach of a covenant against incumbrances that will sustain an action until an eviction has occurred in consequence thereof, or, in case the breach is caused by a dower claim, until an action for dower has been brought, and judgment recovered and satisfied, unless it be a breach occurring at the time of making the covenant, for which only nominal damages are recoverable.

3. At common law a devisee was not bound by the covenant of his ancestor, unless expressly named therein.

4. The wife's right to dower being inchoate and in expectancy, and not becoming vested until the death of her husband, it may be modified or entirely abolished by the legislature without contravening any vested right protected by the organic law.

5. Under Rev. St. 1890, § 8839, providing that "lineal and collateral warranties, with all their incidents, are abolished, but the heirs and devisees of every person who shall have made any contract or agreement shall be answerable upon such covenant or agreement, to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law; and devisees shall be answerable to the same extent as provided by law in case of heirs," so far as a widow's dower is concerned, she may still be a devisee, and her dower right remain unaffected.

6. 1 Rev. Laws 1825, p. 333, in reference to dower, cannot operate beyond the boundaries of the state, so as to affect estates elsewhere.

Appeal from circuit court, Pike county; R. T. Roy, Judge.

Action by Harriet Bartlett against David A. Ball. From a judgment for defendant, plaintiff appeals. Reversed.

J. H. Blair, for appellant. W. H. Morrow & Son and Fagg & Ball, for respondent.

SHERWOOD, J. Action by plaintiff for the assignment of her dower in lot 57, block 6, in Luce & McAllister's addition to the city of Louisiana. The action was brought in September, 1893, and the cause tried at the March term, 1895. In 1822 W. H. O. Bartlett (whose widow and relict brought this action) was a resident of Pike county; and on the 22d of April of that year he acquired the land in litigation from Marshall Mann, his stepfather, who had previously purchased it at sheriff's sale, on the 11th of the same month. The deed to Bartlett was executed by both Mann and the mother of Bartlett, and the consideration mentioned was that of parental love and affection. In 1824 Bartlett left this state, going as a cadet to West Point, and never returned here to live. On the 4th day of February, 1830, plaintiff became the wife of Bartlett, in the city of Newport, R. I.; the marriage resulting in the birth of seven children, who survive him. During all their married life, plaintiff and her husband were nonresidents of this state. Bartlett died on the 11th of

February, 1893, in Yonkers, N. Y., at the age of 88 years. On the 15th day of November, 1830, Marshall Mann, by virtue of a power of attorney derived from Bartlett, conveyed the property in suit to one Charles. This deed, on which this controversy hinges, was based on a consideration of \$300, and contains these covenants: "Have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said Edward Charles, his heirs and assigns [here said land is described]; to have and to hold the said above-described piece or parcel of ground, with all and singular the rights, privileges, ways, and appurtenances thereunto belonging, or in any wise appertaining, as fully and completely as the same now do, or hereafter may, belong to the said Bartlett, to him, the said Edward Charles, his heirs and assigns, in fee simple; and I, the said Bartlett, doth further covenant, warrant, and agree, for himself, by his heirs, executors, and administrators, to warrant and defend said title in the said Edward Charles, free from all claim or claims of or by any person in, through, or by him, the said Bartlett, or in, through, or by any other person or persons whosoever, or by any nature whatever, in the premises, fully and completely." In the deed which contains this covenant, Mrs. Bartlett did not join. This deed embraced a piece of land then known as the "Stoddard Field," and included the land in dispute, valued at the time of the trial at \$3,000. Various mesne conveyances finally vested the title of the litigated land in defendant. The plaintiff at the time of the trial was 81 years old; and the property of her husband, amounting in the aggregate to the value of \$220,000, \$30,000 of which was real estate, was left by his will to her, for and during her natural life. The foregoing facts constitute the basis on which we are to build our judgment in this cause.

At the trial the attempt was made to charge plaintiff as devisee under her husband's will. The law of 1825 (volume 1, Revision of that year, p. 333), when speaking of a widow's seeking enforcement of her dower, declares: "Nor shall she be entitled to dower in any lands, tenements or hereditaments, until all just debts due or to become due by her deceased husband have been paid." The law was repealed in 1835. Touching this law, it has been ruled that it has no bearing in favor of any one except a creditor of the estate, to whom, of course, a debt is owing. As the matter is concisely put in *Thomas v. Hesse*, 34 Mo. 13, "The meaning of the law is that, among claimants of rights against the estate of a deceased husband, creditors claiming payment of their just debts are to be preferred to the widow claiming dower." In the present instance, defendant does not pretend to occupy the attitude of a creditor, and certainly a third person cannot set up those debts as a bar to the widow's dower.

*Id.* In *Walker v. Deaver*, 79 Mo., loc. cit. 677 et seq., Phillips, C., speaking of the husband's liability on his covenant of warranty in circumstances like the present, said, "The covenant created an obligation, but not a debt." See, also, *Nanson v. Jacob*, 98 Mo., loc. cit. 343, 6 S. W. 246, as to the distinction to be taken between a claim for money "due," and one based on unliquidated damages. Besides, in the answer of defendant there are no breaches of the covenant against incumbrances assigned, nor is it alleged that an eviction had occurred in consequence of any such breach, nor that an action had been brought for dower, judgment recovered, and that judgment satisfied. There could be no breach of the covenant against incumbrances until something of the sort aforesaid had occurred, as the basis whereon to assign such breach, unless it were a breach occurring at the time of making the covenant, for which only nominal damages would have been recoverable. *Walker v. Deaver*, 79 Mo., loc. cit. 678.

There are other reasons for doubting whether plaintiff is either estopped or barred from maintaining her action. At common law the heir was not bound by the obligation of his ancestor, only when expressly named, so that, in an action against him as heir, the averment was necessary that he was named in, and bound by, the obligation; and, in addition to that, another requisite to recovery was that he should have assets by descent sufficient to meet the demand. And the same doctrine prevailed as to the necessity of expressly mentioning a devisee in a covenant, in order to bind him. *Rawle, Cov.* (5th Ed.) §§ 309, 311, 312; *Tied.* *Real Prop.* (Enlarged Ed.) § 856. Nor could the land be followed in his hands. He took the land clear of all liabilities. *Id.*, and *Plasket v. Beeby*, 4 East, 485; *Plunket v. Penson*, 2 Atk. 290. Upon this feature the learned author already cited observes: "To prevent the injustice of a devise depriving a specialty creditor of means of satisfaction, the second section of the statute of fraudulent devises (3 W. & M. c. 14), reciting that many persons, after having bound themselves and their heirs, had died seized of lands, and, to the defrauding their creditors, had devised the same, so that the creditors had lost their debts, declared that all wills, etc., should be taken, as against such creditors and their executors, etc., to be void and of no effect; and the third section gave the creditors a right of action upon their specialties against the heir and devisee jointly, and the devisees were made liable in the same manner as heirs, notwithstanding alienation by them." *Rawle, Cov.* § 311. In *Sauer v. Griffin*, 67 Mo. 654, it was held that an action could not be maintained on the bond of the testator against the devisee, nor the land devised followed in the hands of the latter, and that in this regard we were then governed by the provisions of the common law. This was in 1878. At the next revis-



ing session of the legislature the statute law on this subject (Rev. St. 1845, p. 220, § 8; Rev. St. 1855, p. 356, § 8; Gen. St. 1865, p. 442, § 7) was amended by the passage of section 3944, Rev. St. 1879, which is now section 8839, Rev. St. 1889, which is the following: "Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement shall be answerable upon such covenant or agreement, to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law; [and devisees shall be answerable to the same extent as provided by law in case of heirs.]" The words in brackets indicate the amendment. As under our laws of administering estates the obligations of the decedent, whether testate or intestate, bind the assets of the estate in the hands of the heir, no matter what form those obligations may assume, and as the section quoted makes a devisee equally answerable with an heir, it must be held, speaking in a general way, that the defect previously existing in the law was cured by the amended section. But further observations on that section and its application to the facts of this particular case are thought to be pertinent. It is to be noted that the covenant in question, though it mentions "heirs," does not mention "devisees," so that under the common law, then prevalent, it is clear that the devisee was not bound by that covenant at the time of its execution. Under these considerations, the question arises whether the section under comment is applicable in any event to this covenant, and, if so applicable, whether it would not be retrospective in its operation. A law is always construed to be prospective "unless the legislature has so explicitly expressed its intention to make the act retrospective that there is no place for a reasonable doubt on the subject." Black, Const. Law, par. 198, p. 544. See, also, *Lectre v. Bank*, 115 Mo. 184, 21 S. W. 788, and cases cited; *Id.* (decided in banc at this term) 42 S. W. 1074. Nor is it to be forgotten that retrospective laws are forbidden, *eo nomine*, by our state constitution; and, when this is the case, it is immaterial whether or not the act interferes with vested rights. Cooley, Const. Lim. (6th Ed.) pp. 454, 455; Black, Const. Law, par. 197, p. 543. There is nothing, however, in the section which gives indication of other than prospective operation. If it did, it would contravene the constitution. The aspect of the section is altogether towards the future. It lets "the dead past bury its dead." And as the wife's right to dower is inchoate, is in expectancy, and does not become vested until the death of the husband, it follows, of course, that such right may be modified or entirely abolished by the legislature without contravening any vested right protected by the organic law. Black, Const. Law, 430, 431;

43 S.W.—50

Cooley, Const. Lim. 440, 441, and cases cited; *Venable v. Railway Co.*, 112 Mo. 103, 20 S. W. 493. But it is not thought that the section under consideration was intended to affect, obstruct, or defeat the inchoate dower right of a wife, or such right when it becomes absolute in a widow by reason of her husband's death. The legislature of this state over 50 years ago enacted the following section in regard to dower: "No act, deed or conveyance, executed or performed by the husband, without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estates of married women, and no judgment or decree confessed by, or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right and interest of the wife, provided in the foregoing sections of this act." Rev. St. 1835, p. 228, § 7. This section has remained on our statute books ever since. Rev. St. 1845, p. 431, § 8; Rev. St. 1855, p. 670, § 13; Gen. St. 1865, p. 521, § 13; Rev. St. 1879, § 2197; Rev. St. 1889, § 4525. It is inconceivable that the legislature should so sedulously, and for so many years, guard the inchoate and vested dower right of wife or widow by the strong and explicit terms of the above section, and yet in 1879 adopt a section which would absolutely defeat that right, should the wife become a devisee. See the forcible observations of Gantt, P. J., on section 4525, in *Blevins v. Smith*, 104 Mo., loc. cit. 590, 591, 16 S. W. 213. We are therefore of the opinion that a reasonable construction of the two sections requires that in so far as the widow's dower is concerned, but no further, she may still be a devisee, and her mere dower right remain unaffected. This construction, we think, best comports with the legislative intention. Furthermore, the law of 1825, already quoted, relates only to "just debts due or to become due"; and in England, upon a similar statute, it was ruled that, as it only spoke of "debts and actions of debt," an action could not be maintained against a devisee of one who had given "covenants for title." *Wilson v. Knubley*, 7 East, 134. To remedy this an amended law was passed, which included "covenants" as well as "debts." Moreover, it will not be presumed that the legislature intended that the act of 1825 should operate beyond the boundaries of this state, and, had such been the intention, it would have been wholly inoperative. *Wilson v. Railway Co.*, 108 Mo. 588, 18 S. W. 286, and cases cited; *State v. Gritzner*, 134 Mo. 512, 36 S. W. 39. In no point of view, therefore, can the judgment recovered by defendant be permitted to stand.

In conclusion, it is proper to state that the act of the lower court was wholly unwarranted, in taking the case from the jury after the evidence was in, and determining it without their aid. Judgment reversed and cause remanded. All concur.

## CITY OF ST. JOSEPH v. CROWTHER et al.

(Supreme Court of Missouri, Division No. 2.

Dec. 22, 1897.)

## MUNICIPAL CORPORATIONS—TAKING LAND FOR STREETS—CONSTITUTIONALITY OF STATUTE—ASSESSMENTS OF DAMAGES AND BENEFITS—APPEAL—REVIEW.

1. Act March 28, 1893, authorizing condemnation of private property in cities of the second class, requires (section 4) the commissioners to ascertain the actual value of the property without reference to the projected improvement and the actual damages, and to assess against the city, for the payment of such value and damages, the amount of the benefit to the public generally, and the balance of the benefits against the owners of all property within said limits benefited by said improvement. Section 10 provides that when the damages assessed are paid or tendered the improvement may proceed. *Held*, that the word "damages," in section 10, includes the damages to which the owner is entitled for the land taken, and hence such act does not allow the city to appropriate the land taken without paying or tendering to the owner its value, in violation of Const. 1875, art. 2, § 21.

2. Findings of fact by the commissioners and the circuit court on the hearing of exceptions to their report in a condemnation case are no more subject to review by the supreme court than in any other action at law, and, though the award may appear very inequitable, in the absence of some error in law in computing the damages and the compensation due the several owners, appearing in the record, the supreme court cannot interfere.

3. In taking land for a public street it is illegal for the commissioners to pay for it in benefits which they assess to the owner's remaining land, and charge him with benefits to the strip taken.

4. Where the opening of a street to and through an addition will greatly benefit all the property in it, it is illegal to assess only one cent benefit to each lot in it, because the proprietors of the addition, when they laid it out, gave the strip taken.

5. Assessments of damages and benefits, which show that the commissioners find that those whose land is actually taken for a street or other public use are benefited to the exact amount of its value or the damage done to the remainder, while those whose land lies in the same immediate benefit district are only benefited one cent, are illegal.

Appeal from circuit court, Buchanan county; A. M. Woodson, Judge.

Proceedings by the city of St. Joseph for the extension of a street through the land of M. A. Crowther and others. From a judgment overruling exceptions filed by E. C. Zimmerman to the report of the commissioners, he appeals. Reversed and remanded.

This is an appeal from a judgment of the circuit court of Buchanan county in a condemnation proceeding prosecuted by the city of St. Joseph for the extension of Tenth street, in said city, through the lands of E. C. Zimmerman. The ordinance appropriating the property for public use and defining the benefit district, and the petition of the city praying for the appointment of commissioners to assess damages and benefits, are conceded to be sufficient. The appellant, Zimmerman, is the owner of a tract of land fronting 440 feet on Atchison street, with a depth varying from

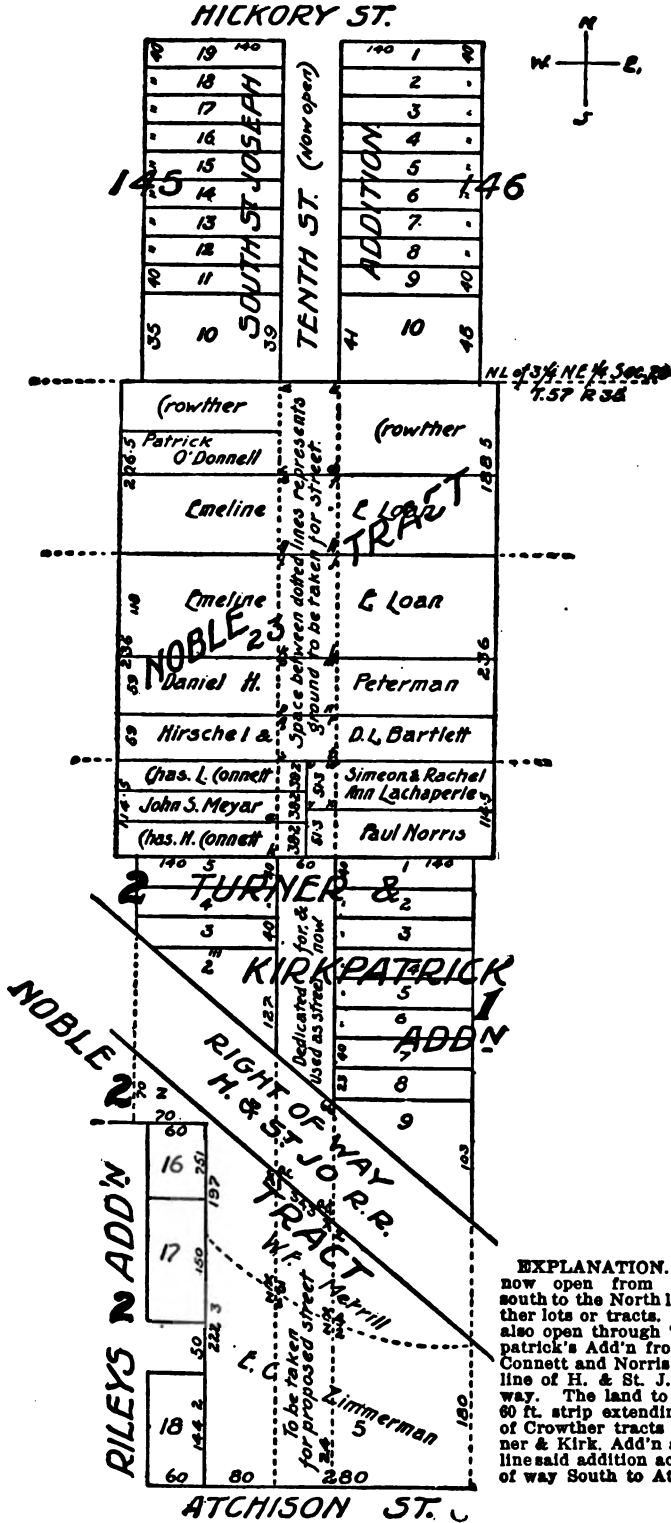
76 feet on Eleventh street to about 228 feet on the west side. As will appear from the accompanying plat, Tenth street is open from the heart of the city of St. Joseph to the south line of city blocks 145 and 146 of South St. Joseph addition. By this proceeding it is proposed to extend Tenth street at a width of 60 feet through a tract known as the "Noble Tract" to the north line of Turner & Kirkpatrick's addition. The street is already dedicated and opened through the last-named addition. Beginning at the south line of said addition, it is proposed to extend it across the Hannibal & St. Joseph Railroad, through appellant's (Zimmerman's) tract, to Atchison street. It will necessitate the condemnation of a strip 60 feet wide and 228 feet 5 inches deep north and south, and will leave a strip of ground west of and fronting on said new extension of the street 228 feet 5 inches long by 80 feet deep.

Appellant filed his exceptions in the circuit court to the report of the commissioners, and the circuit court having overruled the same, he appeals to this court.

Benj. Phillip, for appellant. Casteel & Haynes, for respondent.

GANTT, P. J. (after stating the facts). He challenges the constitutionality of the act of the general assembly of Missouri approved March 28, 1893 (Laws Mo. 1893, p. 62), which provides for the condemnation of private property for public use in cities of the second class, and thus confers appellate jurisdiction upon this court. The errors assigned will be examined in their order.

1. As to the constitutionality of the act. It is insisted that it violates section 21, art. 2. of the constitution of Missouri of 1875, in this: that the said statute provides for the payment of damages which will accrue to the property not taken for public use, and which it is claimed must be assessed separately from the value of the land taken, and authorizes the city, upon the payment of the said damages to the property not taken, to appropriate the land taken without paying or tendering to the landowner the value of the land taken for the street or other public purposes. If this is the true construction of the statute, it must be held to violate the organic law. Section 4 of the act provides that the commissioners shall "ascertain the actual value of the land and premises proposed to be taken without reference to the projected improvement and the actual damage done to the property thereby, and for the payment of such values and damages to assess against the city the amount of the benefit to the public generally, and the balance of the benefits against the owner or owners of all property within said limits which shall be especially benefited by the proposed improvement to the amount that each lot shall be benefited by said improvement." In the tenth section it is further provided "that as soon as the



damages assessed shall have been paid or tendered to the parties entitled thereto respectively, the improvement may be proceeded with." The contention of the learned counsel is that the word "damages," in the tenth section of the act, does not include the compensation or damages suffered by the condemnation for the taking of his land, but the damages to the portion not taken. Upon a careful reading of the whole act, we cannot agree that this is a fair or just interpretation of the act in question. The latter clause of the fifth section controverts the position of the appellant that the law intends three separate verdicts or findings by the commissioners, and that compensation or value of the land taken cannot be included under a general finding of damages for the landowner. It says, "In making such report, the value and damages allowed to each owner and the benefits assessed against each individual shall be separately stated." Obviously two findings only are required,—“value and damages” together constituting one, “benefits assessed” another. But we are unwilling to intimate that this act even inferentially provides for the taking of private property for public use without due compensation. It is evident that, read in the light of the whole context, the word “damages,” in the tenth section, is used in the enlarged sense of covering all damages suffered by the landowner by reason of the condemnation, whether that damage ensued from the taking of his land or the damage to the remainder not condemned to the public use. Every presumption must be indulged in favor of the validity of the act, and this act affords abundant evidence that it was the intention to provide due compensation for all the private property proposed to be taken for public use by cities of the second class. We feel no hesitancy in holding the act constitutional, and the objection untenable.

2. The remaining objections go to the injustice of the award. Findings of fact by the commissioners and by the circuit court on the hearing of exceptions to their report are no more subject to review by this court in a condemnation case than in any other action at law. Consequently, though the award may appear to us at this distance to be very inequitable, yet, in the absence of some error in law in the method resorted to in computing the damages and the compensation due the several owners, we cannot interfere unless such error appears in the record. Such an error does appear upon the face of the report of the commissioners or verdict of the statutory jury. Thus, in this report of benefits, they include the tract of land belonging to the appellant, Zimmerman, in these words: “Against all of E. C. Zimmerman tract shown on map, including that portion thereof taken for street, \$353.00;” said amount being the exact sum awarded Zimmerman both as compensation for the strip 60 by 228 feet 5 inches and damages to the remainder of his

tract. In other words, the commissioners not only took the 60-foot strip through the whole tract, and paid for it in benefits which they assessed to his remaining land, but actually charged him with benefits to the strip which, by this proceeding, was taken from him, and devoted to public use. Certainly, it cannot need argument or authority to demonstrate that this assessment of benefits to the strip condemned for the street could not be charged against Zimmerman, who no longer owned it. The statute of 1893, above quoted, condemns such an assessment of benefits, and, if it did not, the plainest principles of right and justice forbid such a desecration of the constitutional guaranty against the taking of private property. The motion for new trial specifically urged this as one of the reasons why the award should be set aside. The circuit court erred in not setting aside the award on this ground.

3. The commissioners clearly erred in making their estimate of benefits to the lots in Turner & Kirkpatrick's addition. The testimony of one of their number shows that the property in this addition would be greatly benefited by the opening of this extension of the street; that, as now situated, that addition has no outlet; and yet they assessed only one cent benefit to each lot in the addition. When asked to explain how they reached such a conclusion, Mr. Owen testified: “Well, the reason was we considered that Turner and Kirkpatrick, when they laid out their addition, gave the street shown on the map there to the public. They gave that ground there for a street, and we considered that the value of that ground which they gave for a street about equals the benefits which these lots will derive from the opening of the street. We thought one offset the other, and so assessed the benefits at one cent against each of these lots.” That is to say, that, although the commissioners found that these lots would receive great special benefits from the prolongation of Tenth street to Atchison street, yet, inasmuch as the proprietors of that addition, when they laid it out, gave the street in that addition, the commissioners proceeded to assess damages for the laying out of that street in that addition, and offset the benefits with the damages which never, in the very nature of things, could accrue to the owners of these lots. Assuming that the same proprietors still owned all of the lots in that addition, they cannot now recover damages from the public or other citizens for that which they had given to the public. Nor could a purchaser of a lot in said addition recover damages for opening of a street which he received as an easement to his lot when he purchased. When, as here, it is conceded great benefit will result to a certain portion of the property in the benefit district, these benefits can only be offset by damages occasioned by the proposed improvement, and obviously the commissioners in this case offset the benefits by some fanci-

ful notion of public spirit in those who plated the addition, and not by the damages which would result by the extension of Tenth street at that time. There is not the slightest foundation for any claim of damages to these lots by opening the street; on the contrary, it is altogether beneficial. By allowing all this addition to escape assessment for benefits, the commissioners necessarily cast an undue proportion of the whole benefits from the opening of this street upon the property of Zimmerman, and thereby reduced his damages. We have also in this case a peculiar phase of the practice in condemnation cases. Exactly how a commission can arrive at the conclusion that only those persons whose property is actually taken for public use are benefited to the exact amount of its value, or the damage done to the remainder, and those whose property lies in the same immediate benefit district are only benefited one cent, we confess is beyond our ken. Certainly nothing emanating from the courts justifies this method of assessment. Of course, it may often happen that one piece of property is as much benefited by devoting a part of it to a highway as the part taken is worth, but how all the other property can receive such infinitesimal benefit is the annoying problem. We sometimes wonder, if it is really of so little benefit, what public necessity exists for the proposed highway. The tract of Patrick O'Donnell seems to have escaped the attention of the commissioners altogether. As the record discloses the illegality of the method adopted in estimating the damages and benefits, the judgment is reversed, and the cause remanded.

SHERWOOD and BURGESS, JJ., concur.

#### HILL et al. v. CONRAD.

(Supreme Court of Texas. Dec. 20, 1897.)

#### POWER OF ATTORNEY—EXECUTION—CONVEYANCE OF LAND.

1. A donee of a power may execute it by an instrument which does not refer to the power itself; and the execution will be valid when it appears, from the instrument or the attending circumstances, that the act was done by virtue of and with the intention to act under the power conferred.

2. Where it is uncertain whether or not an act done is in execution of the power conferred on the donee to do it, the act will not be construed to be an execution of the power.

3. Where from a deed executed by one having a power giving authority to execute it, or from the attending circumstances, it appears that it was not the intention of the party who executed the deed to exercise the power granted to him, the deed cannot be made sufficient to convey the title of the donor, by referring it to the power which the donee actually had, but failed to exercise.

4. Where one claimed title under a deed from one who had a valid power of attorney from the real owner to sell the land, and the deed by which the conveyance was made contained the following: "Being the same property I bought from" the owner who gave the power of attorney, "as per his deed to me on record, and by

virtue of which purchase I declare myself to be the legal owner of the same, and, as such, I bind myself, my heirs and assigns, to warrant and defend the same against all claims,"—and there was no evidence of a deed to the land in question from the owner to the said grantor,—by the language of the deed the grantor repudiated the power of attorney, and could not be said, in making the conveyance, to have acted for the owner, so as to convey a title to the grantee.

Error to court of civil appeals of First supreme judicial district.

Action by E. P. Hill and others, executors, against Harriet Conrad. From a judgment in favor of defendant, plaintiffs bring error. Reversed.

Geo. H. Breaker, for plaintiffs in error. M. Looscan, for defendant in error.

BROWN, J. Plaintiffs in error, executors of the will of W. R. Baker, deceased, brought this suit to recover of the defendant a tract of land containing 10 acres, known as lot No. 70 in the James Holman survey, and, judgment having been rendered for defendant, prosecute this writ of error to reverse same. Both parties assert title under Mosely Baker. The plaintiffs' title is a conveyance from Mosely Baker to W. R. Baker, plaintiffs' testator, of date November 1, 1847, recorded September 28, 1852, which, for a recited consideration of \$200, conveyed 10-acre lots 33, 54, 49, 59, 70, and 84, in the Holman survey. The defendant's title is as follows: Power of attorney of date July 9, 1845, properly acknowledged, and recorded by W. R. Baker, as clerk, July 12, 1845, from Mosely Baker to John H. Walton, by which the latter, as attorney in fact for the former, was empowered, "for me and in my stead, to ask, demand, and receive from all and every person any sum or sums of money owing or coming to me, and full acquittance to give or take, and to pay any of my debts, and full acquittance to give and take; also, to lease, mortgage, or sell, bargain and convey, in full, fee simple, any real estate that I may own, and full and complete titles, in my name and stead, to make and execute, and generally to do all and everything appertaining to my business that I might or could legally do." Deed from J. H. Walton to A. P. Thompson, of date —, 1846, recorded in Harris county, by W. R. Baker, clerk, November 18, 1846, by which Walton, in his own name, and without any reference to Mosely Baker, or a power from him, in consideration of \$300, acknowledged, conveyed to Thompson 10-acre lots Nos. 49, 70, and 74, "being the same property I bought from Mosely Baker as per his deed to me on record, and by virtue of which purchase I declare myself to be the legal owner of the same, and, as such, I bind myself, my heirs and assigns, to warrant and defend the same against any and all claims." It was shown that Mosely Baker had, on October 7, 1845, conveyed to Walton 10-acre lots 19, 74, 87, 81, 80, and other property in the Holman survey, and had, on October 18, 1845,

also conveyed to Walton 10-acre lot 49 and other property in the Holman survey, which deeds were duly recorded in Harris county by W. R. Baker, clerk, before the conveyance by Walton to Thompson. Defendant regularly deraigned title from Thompson. It was shown that lots 70 and 84 were not mentioned in the inventory of W. R. Baker's estate, nor on his land books or tax lists, so far as known to the executors; and neither of the lots was claimed by the executors until this action was commenced. In this case the trial court held as follows: "Upon the foregoing findings of facts, I conclude that it will be presumed that Walton, in his deed to Thompson, above mentioned, intended to act in regard to 10-acre lot 70 in the capacity of attorney in fact for Mosely Baker, under the power of attorney above mentioned, and that his deed to Thompson conveyed the interest of Mosely Baker in said lot 70. I therefore find for the defendant." The judgment of the court below was affirmed by the court of civil appeals, and in an opinion delivered by Justice Williams, after citing authorities, it is said: "The rule recognized in these decisions is that if the grantor has no estate in the land which can pass by the deed, but has a power to convey the title of another, his act will be referred to his power, because the purchaser will be supposed to have bought in reliance on it. The principle has complete application here."

In *Rogers v. Bracken*, 15 Tex. 564, which is cited by the court of civil appeals, the facts were, in brief, that Bracken made a power of attorney to A. Nell, authorizing the latter to sell a certain tract of land, and A. Nell executed to him a receipt for the power of attorney, in which it was stated in substance that the object of giving the power of attorney was to compromise a certain lawsuit pending between Bracken and others, and afterwards to sell the land so as to reserve to Bracken, clear of all costs, 2,000 acres, at \$1.25 per acre, which Nell was authorized to dispose of, by accounting for that sum. A. Nell executed a bond for title to the land in his own name, under which the plaintiff claimed and sued for the land. Nell made himself a party to the suit, and it was proved by the production of the receipt and other testimony that Nell sold the land under the power of attorney, and for Bracken. This court held under the facts that the deed would be sustained by the power of attorney from Bracken to Nell, but in that case the sale was made under and in pursuance of a power of attorney. In *Huffman v. Cartwright*, 44 Tex. 296, the supreme court, in reviewing the case of *Rogers v. Bracken*, cited above, disclaimed any intention to overrule that case, but laid down what it believed to be the true rule upon the subject, in the following language: "The general rule is believed to be that the intention to bind some one else than the party signing the instrument must appear from the instrument sign-

ed." In *Hough v. Hill*, 47 Tex. 148, the deed in question purported to have been made by virtue of a certain power of attorney, and was silent as to any other authority for making the deed; but there was a second power of attorney between the same parties, and which authorized the sale of the same land. This court held that the deed would be supported by the valid power of attorney, although not the one recited therein, and in that case this court quoted from *Robins v. Bellas*, 4 Watts, 256, as follows: "The court is governed by the intention of the parties, without regard to the form of the instrument, so as to pass the whole interest the grantor has in the premises, whether derived from an appointment or in his own right. A man may therefore execute a power without taking the slightest notice of it." *Link v. Page*, 72 Tex. 592, 10 S. W. 699, was likewise a case in which two powers of attorney existed to sell the same land, and in the execution of the deed the agent referred to the one which proved to be invalid; but the court held that the deed would be supported by that which was valid, although not mentioned. In *Allison v. Kurtz*, 2 Watts, 185, the plaintiff, Richard Allison, who sued as trustee for his sisters, had made conveyance of the land under the following circumstances: Robert Allison, the father, made a will, in which he devised certain lands, embracing that in controversy, to four sons, two of whom (Robert and Richard) were made executors of his will, which empowered them to sell the land for certain purposes expressed therein. The testator had three daughters, who survived him. Before the decease of the father, the son Robert died, leaving no issue. After the death of the father, the three brothers assumed that they took the land as a whole, under the will, and proceeded to partition it among themselves, making deeds to each other in the form of deeds of bargain and sale. The defendant in the suit claimed by regular chain of title from one of these brothers. In making the deeds to his brothers, Richard Allison did not purport to act as executor of his father's will, but it was recited that the three brothers were the owners of the land by devise under the will. Richard Allison, the executor, sued the defendant to recover the land set apart to one of the brothers, being a portion of that which was inherited from the deceased brother, Robert, it being held that the legacy of Robert lapsed, and did not pass by the will, but by inheritance, to his brothers and sisters equally. In disposing of the case, the court said: "The power to sell, vested in Robert as surviving executor, still remained in full force over all the lands. Under these circumstances, the whole estate in land, legal or equitable, passed by the will to the executor. The rights of the children were only in the money to arise from the sale when effected." The court then proceeds to dispose of the case, holding that the

deed of Richard Allison passed the interest that he could have sold under the will, and, in support of the decision, cited authorities to the effect that one having an interest in land, and selling under a void power, will be held to have passed the interest which he owned himself. The case is disposed of as if Richard Allison was the real owner of the property, instead of being executor of the will acting under a power. In confirmation of this view of the case, we quote the following from the opinion, as expressing the final conclusion: "It would, we think, be the extreme of injustice if the grantor himself could, under the pretense of mistake in the form of conveyance adopted, annul his own act, and take back the land after it has been paid for. The daughters are entitled to their shares, but they must look for them to the plaintiff, the executor intrusted by their father to sell, and not to an innocent purchaser from the trustee." An examination of this case will show that the court proceeded upon the theory that the title, legal and equitable, to the land, vested in Richard Allison, who also had the power to sell, and that, therefore, failing to pass the title by his unauthorized act, he was held to have passed it by virtue of that which he could have done.

The rule which we deduce from the American authorities is that a trustee or donee of a power may execute the power conferred upon him by an instrument which does not refer to the power itself; but in such case, to make the execution of the power valid, it must appear from the instrument or from the attending circumstances that the donee or trustee did in fact act under and by virtue of the power conferred upon him to dispose of the property in question, and that it was his intention to dispose of the property in accordance with the power so conferred. If, from the circumstances or the instrument executed, it be doubtful as to whether it was the intention to execute the power possessed by the grantor, then it will not be held that by such act or conveyance that power was in fact executed. 2 Story, Eq. Jur. § 1062a; *Patterson v. Wilson*, 64 Md. 193, 1 Atl. 68; *Yates v. Clark*, 56 Miss. 212; *Andrews v. Brumfield*, 32 Miss. 107; *Willard v. Ware*, 10 Allen, 263; *Amory v. Meredith*, 7 Allen, 397; *Pease v. Iron Co.*, 49 Mo. 124; *Bangs v. Smith*, 98 Mass. 270; *Funk v. Eggleston*, 92 Ill. 515; *South v. South*, 91 Ind. 221; *Jay v. Stein*, 49 Ala. 514; *Matthews v. McDade*, 72 Ala. 378. In section 1062a, 2 Story, Eq. Jur., this language is used: "It is a general rule that, in the execution of a power, the donee of the power must clearly show that he means to execute it, either by a reference to the power or to the subject-matter of it; for, if he leaves it uncertain whether the act is done in execution of the power or not, it will not be construed to be an execution of the power. *Matthews v. McDade*, 72 Ala. 377." If, from the instru-

ment itself or from the circumstances attending it, it appear that it was not the intention of the party who executed the instrument to be construed to execute any power derived from another person, then such instrument, although it will not be effective to convey any title otherwise, cannot be sustained by referring it to the power which the party actually had, but failed to exercise. *Jay v. Stein*, 49 Ala. 514, cited above.

The deed under consideration, in describing the land, contains this extraordinary recital: "Being the same property I bought from Mosely Baker, as per his deed to me on record, and by virtue of which purchase I declare myself to be the legal owner of the same, and, as such, I bind myself, my heirs and assigns, to warrant and defend the same against all claims." By this language Walton repudiated the power which he had from Baker, so far as it might be applied to this land, and distinctly declares that Baker has no title to it, but that he had acquired it from Baker by purchase, by virtue of which he then and there declared himself to be the legal owner, and proceeds in unambiguous language to bind himself, his heirs and assigns, to warrant and defend the title against all claims, which he would not have done if he had been acting for Baker, and not for himself. To give this deed the effect of conveying to Thompson the title of Mosely Baker in the tract of land described is to indulge a presumption that Walton intended to convey the title of Baker, against the positive evidence that he intended to convey his own title, and to deny that Baker had any title to the property. To give it that effect will be to convey to Thompson the title of Baker, when Baker's agent had repudiated his trust, refused to execute it, and claims the property as his own, and would convey to Thompson that which he could not have expected to receive by the deed he accepted with the language quoted embraced therein, whereby he was distinctly notified that he was not buying Baker's title, but the title of Walton. The deed from Walton to Thompson was not the deed of Mosely Baker, and did not have the effect to convey the title of the latter, and the district court and court of civil appeals erred in so holding. From the conclusion of law announced by the judge who tried the case, it appears that the facts in evidence before him were not considered as to their bearing upon the question whether there might not have been a deed actually made by Baker to Walton conveying to him the land; and we do not mean to intimate that the evidence is sufficient to establish such fact, but, in the state of the record, we think it proper to reverse the judgment, and remand the case, rather than to render judgment here, in order that the parties may present it to the court in that light if they should find that the evidence is such as

justify their doing so. It is ordered that the judgments of the district court and court of civil appeals be reversed, and that this cause be remanded to the district court for further trial.

### MCNEAL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

STATUTES—ENACTMENT—CRIMINAL LAW—EVIDENCE—RES GESTÆ—NEW TRIAL—SURPRISE—NEWLY-DISCOVERED EVIDENCE—HOMICIDE—INSTRUCTIONS.

1. Act 25th Leg. p. 118, changing the time of holding court in Ft. Bend and other counties, was enacted in accordance with the constitution.

2. A witness was asked by defendant in a criminal case if he had not been in the penitentiary for a felony. The state objected before answer, on the ground that the witness could only be disqualified by the record of his conviction. The court then stated that the witness might answer, but his answer would only be allowed to go to his credit, and not to his qualification. *Held* not error.

3. On a trial for murder, defendant offered to show that, some time after the killing, witness returned to his house, when he found defendant shut up in his private bedroom; that defendant was very much alarmed, and said he had killed S. in self-defense, and that, at the time he shot, S. and his father were advancing on him, and advanced right up to him, when he fired to save his own life; that this was at witness' house, about 150 yards from the place of the killing; that witness did not know how long it was after the killing, but supposed it was about half an hour; and that he was not at home when defendant came there. *Held* not admissible as part of the res gestæ, even if the statement was made within half an hour after the homicide.

4. Defendant, in his motion for new trial, claimed that he was deceived by the testimony of R. and H. on the trial; that said witnesses had testified at the examining trial that defendant killed deceased in self-defense, when deceased and his father were making an attack on him, etc.; and that on the trial they testified that deceased and his father were not making such attack. Defendant's attorney made an affidavit that, just before testifying, said witnesses made to him the same statement they had made on the preliminary trial; and claimed that he had a subpoena served on the magistrate, and told him to bring all of his books and papers, including his docket, but he failed to bring his docket. *Held* not error to deny the motion, where H. admitted, on cross-examination, that he had testified at the examining trial as claimed by defendant, and R. was impeached by the magistrate, who also showed that he had the examining trial evidence with him.

5. Defendant attached to his motion the affidavits of two women stating that R., shortly before the trial, told them deceased's father had promised him a horse and money to change his testimony, and that they had not informed defendant or his counsel of said testimony until after the conviction. *Held*, that such evidence was not shown to be newly discovered, defendant not showing that he was not aware of it.

6. A new trial will not be granted to enable defendant to obtain impeaching testimony.

7. The court charged that defendant was to be judged by the facts as they reasonably appeared to him at the time of the killing, but he was not to be justified, if he killed deceased, unless the acts and demonstrations of deceased and his father, or one or both of them, as they

reasonably appeared to him, were reasonably calculated to and did produce in defendant's mind the fear that his life was in danger at the hands of deceased and his father or one of them. *Held*, that the charge was not open to the objection that it limited the right of self-defense to an assault by deceased, instead of one by deceased and his father.

Appeal from district court, Ft. Bend county; T. S. Reese, Judge.

Dan McNeal was convicted of murder, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for 25 years; hence this appeal.

Appellant claims that the conviction in this case is void, because the act of the twenty-fifth legislature changing the time of holding court in said county was not enacted in accordance with the constitution. This question was decided adversely to the appellant at a former day of this term. See *Nobles v. State*, 42 S. W. 978.

By the first bill of exceptions appellant questions the action of the court with reference to the witness Virgie Ridley, but, as explained by the court, we see no error in this regard. The witness was asked by defendant if he had not previously been sent to the penitentiary for a felony. The state's counsel interposed an objection, before the question was answered, on the ground that the witness could only be disqualified by the record of his conviction. The court then stated that he would permit the witness to answer the question by parol, but that his answer would only be allowed to go to his credit, and not to his disqualification. As stated above, in this there was no error.

Appellant proposed to prove by the witness Gordon Mays that, some time after the killing, "witness returned to his house. When he returned he found the defendant shut up in his private bedroom. He was very much alarmed, and told witness that he had killed Henry Smart in self-defense; that, at the time he shot, Henry Smart and his father were advancing upon him, and advanced right up to him, when he fired to save his own life. This was at witness' house, about 150 yards from the place of the killing, and was about 12 o'clock of the day of the killing. Witness did not know how long it was after the killing, but supposed it was about half an hour. Witness was not at home when defendant came there." Appellant insisted that this testimony was a part of the res gestæ. It will be noted that it is not shown in the bill how long this statement by defendant occurred after the killing. The witness states he supposes it was about a half hour; but it is not shown how this statement was a part and parcel of the transaction constituting the homicide. The mere fact, if it be conceded



ed that the statement was shown to have been made within a half hour after the homicide, would not make it a part of the *res gestæ*. Other circumstances must be shown to indicate that the statement or expression sprang spontaneously from the transaction and was a part thereof. As shown in the bill, this statement of appellant was a mere isolated statement, and not even the length of time ensuing after the killing is shown. We do not believe this testimony is shown to be a part of the *res gestæ*.

In appellant's motion for a new trial he claims that he was deceived by the testimony of Virgie Ridley and Albert Herndon as to the testimony they would deliver upon the trial of the defendant; that he was taken by surprise at the character of their testimony, he claiming that both of said witnesses had testified at the examining trial to the effect that defendant had killed deceased in self-defense, when deceased and his father, Hiram, were making an attack on him of a character calculated to cause him to apprehend death or serious bodily injury, and that on the trial of this case they testified differently. On the trial each of said witnesses testified that at the time of the homicide deceased and his father were not in the act of making such attack. There is also appended to the motion the affidavit of the attorney to the effect that, shortly preceding the placing of said witnesses on the stand by the state, they had made to him the same statement in regard to the killing which they had made on the preliminary trial; and he claims in this connection that he had a subpoena served on the justice of the peace, and told him to bring all of his books and papers with him, including his docket; but that the justice failed to bring his docket with him. Appellant insists that he ought to have a new trial, in order to procure impeaching testimony. As to the witness Herndon, it is sufficient to state that he admitted on his cross-examination that he had testified differently at the examining trial in regard to the homicide, in the particular inquired about, than as testified to by him on the trial, so that he was not subject to impeachment. As to the witness Ridley, he was impeached by the magistrate, and the magistrate shows that he had the examining trial evidence with him. Why that was not introduced in impeachment of the state's witness Ridley is not shown. And, moreover, it would appear that, if appellant or his counsel were desirous of further impeaching testimony, his counsel might have taken the stand in impeachment of said witness. We would further observe that a new trial will not be granted for impeaching testimony.

Appellant also contends that a new trial should have been granted him because the witness Virgie Ridley, who testified for the prosecution, is a self-confessed bribe taker;

and that the change in his testimony was the result of a bargain between him and Hiram Smart; and he attaches to said application the affidavits of Julia Walker and Jane Robinson. Said affidavits show that the witness Ridley, shortly before the trial, told them that Hiram Smart had promised or had given him a horse and money to procure him to change his testimony in said case. They stated that they had not informed the defendant or his counsel of said testimony until after the conviction. It is proper to observe, however, that appellant, in his motion for a new trial, does not himself show that he was not aware of this testimony, or that it was newly discovered. We would also state that the affidavits of Julia Walker and Jane Robinson are denied in toto by the affidavits of Virgie Ridley and Hiram Smart. The testimony of the two witnesses, Julia Walker and Jane Robinson, is not that they witnessed the alleged act of bribery, but that the witness Virgie Ridley, in effect, stated to them that he had been bribed. The testimony is clearly of an impeaching character, and it is not shown to come within the rule of newly-discovered evidence.

The affidavit of Rosa McNeal as to what defendant said to her when defendant reached her house, shortly after the homicide, is in no sense newly-discovered testimony. If such conversation ever occurred, no one knew it better than the defendant.

Appellant also complains that a new trial should be awarded him on account of the error of the court in the following charge: "The defendant is to be judged by the facts and circumstances as they reasonably appeared to him at the time, when viewed from his own standpoint, in the light of all the circumstances; but he is not to be justified if he killed the deceased, unless the acts, words, or demonstrations of the deceased and Hiram Smart, or one or both of them, as they reasonably appeared to the defendant, were reasonably calculated to produce, and did produce, in the mind of the defendant, the fear or apprehension that his life was in danger, or that he was in danger of serious bodily injury at the hands of said Henry Smart and Hiram Smart, or one of them." He contends that this charge of the court on self-defense is erroneous in limiting the right of self-defense to an assault by deceased, and not an assault by deceased and his father. As we read the excerpt above quoted, we cannot understand on what principle appellant contends that his defense was limited in said charge by an assault made on him by deceased. The charge, as we read it, expressly authorizes the defendant to act on an attack made by either deceased or by his father, Hiram Smart, or by both of them, and it is not subject to the criticism which defendant invokes. There being no errors in the record, the judgment is affirmed.

## SMITH v. STATE.

(Court of Criminal Appeals of Texas. Dec. 22, 1897.)

## THEFT—INSTRUCTIONS—ADMISSIONS OF DEFENDANT.

1. On trial for theft of a horse, where the testimony absolutely excludes any idea of an honest mistake, the refusal to charge that, to constitute theft, there must be a fraudulent taking, with intent to deprive the owner of its value, and if defendant took the horse as his own, believing that it belonged to him, the jury should acquit, is not error.

2. Where defendant was apprehended while taking a horse which did not belong to him, voluntary statements made while in the custody, but before being put under arrest, may be introduced in evidence.

Appeal from district court, McLennan county; Sam. R. Scott, Judge.

Action by the state against James J. Smith, Jr., for stealing a horse. Judgment of conviction. Defendant appeals. Affirmed.

J. E. Yantis and R. L. Johnson, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of the theft of a horse, alleged to be the property of S. P. Whittenburg. The evidence shows that the horse was taken by the defendant from the lot of Whittenburg, between 11 and 12 o'clock at night, and, in bringing the horse from the lot, appellant met the owner about 100 yards therefrom. The evidence shows that he went into the lot, got the horse out, and was bringing it away. At the meeting, the owner accosted the defendant, and asked him what he was doing with his horse. The defendant asked: "When did this horse come here?" Whittenburg replied: "He is my horse. I raised him here." Defendant said: "I think you are mistaken." The owner replied: "I can convince you that he is mine. If you will go around and feel of his left shoulder, you will find a place where I cut off a wart." Upon examination this was found to be true, and defendant said: "He is not my horse, and I don't want him, and I will take him back to the lot." And he took the horse back, and put him in the stable or shed by the side of the crib in the horse lot, the owner accompanying him. The defendant then asked: "What is the damage?" Whittenburg said, "I don't know what to do about it. I don't know how to assess the damage in such a matter. We will go down to my brother-in-law Tom Howard's, and let him decide what to do." Defendant agreed, and voluntarily went with him to Howard's. Howard was aroused from sleep, and informed of the nature of the matter, and he asked defendant his name, and why he took the horse. Defendant said his name was Smith, but did not give his given name. He said he had been on a trip to East Texas, and, as he was going home, he lost a horse, and came back to hunt it, and that this horse at Whittenburg's he thought was his horse. He further said: "Let me go. I can't prove what

I intended to do with the horse. It might send me to the penitentiary." He also stated that he lived 16 miles west of Gatesville; and Whittenburg testified that on Sunday previous to the theft, on Saturday night, defendant came to his (Whittenburg's) lot, in the edge of the pasture, and tried to trade for the horse in question, stating that he had one just like it. Defendant proved by some witnesses that he had a colt some days previous to the alleged theft that was similar in color to the one stolen, and he introduced evidence also to show that he had lost this horse somewhere in that neighborhood. It is also shown by the testimony that the stolen horse ran in the owner's pasture, and was put in his lot or stable on the night he was taken by the defendant. It is further shown by Whittenburg that "defendant acknowledged that he passed Whittenburg's that evening, about sundown, and saw the same horse in the pasture, and said he waited at South Bosque until it was late, and came back, and waited until everything got still." This was the defendant's explanation for the lateness of the hour at which he took the property. After defendant had made these statements, Whittenburg and Howard took him in charge, and kept him until the following morning, and surrendered him to an officer at McGregor.

Appellant's first bill of exceptions was reserved to the action of the court in refusing to give a special instruction requested by him, as follows: "That, in order to constitute the crime of theft, there must be a fraudulent taking,—that is, with intent to deprive the owner of its value, and to appropriate it to the taker's use and benefit; and if, from the evidence, the jury should believe that the defendant took the horse in controversy as his own; believing at the time that the horse belonged to him, the jury should acquit." The jury were fully instructed by the court in his main charge in regard to the question of fraudulent taking and his supposed honest mistake. But, if the court had given no instructions in regard to the matter of mistake, the circumstances of this taking, as detailed above, absolutely exclude any idea of an honest mistake, or any belief on the defendant's part that the horse he took belonged to him. There is not a single indication in this record that this horse was taken under the belief that it belonged to the taker; nor is there any evidence suggesting a voluntary return, as contemplated by the statute. The defendant was caught in the very act, and was compelled by the owner to relinquish the fruits of his crime.

The second bill of exceptions reserved by appellant was to the action of the court permitting statements made by the defendant to Howard and Whittenburg to be introduced in evidence, because he was under arrest, and had not been cautioned that same could be used against him. The evidence shows that, at the time the statements were made, he was not under arrest; that he made those state-

ments voluntarily, in order to settle the matter, and to be relieved of the trouble (probable conviction) incident to the taking; that the conversation was brought about at his own instigation, and it was not until after these transactions that he was taken in charge by Whittenburg and Howard. The judgment is affirmed.

# HOUSTON & T. C. R. CO. v. RED CROSS STOCK FARM.

(Court of Civil Appeals of Texas. Jan. 12, 1898.)

## APPEAL FROM JUSTICE—FILING NEW BOND.

A county court cannot permit one appealing from a judgment rendered in a justice of the peace court to file a new appeal bond after the time for filing a bond had elapsed, where the original bond failed to state a condition required by statute.

Appeal from Travis county court; A. S. Walker, Jr., Judge.

Suit by the Red Cross Stock Farm against the Houston & Texas Central Railroad Company. From a judgment for defendant in the justice court, plaintiff appealed to the county court, which reversed the judgment, and defendant appeals to the court of civil appeals. Reversed.

Waller T. Burns and Oswald S. Parker, for appellant. John Dowell, for appellee.

FISHER, C. J. This suit was brought in a justice's court of Travis county, by the Red Cross Stock Farm, against the railway company, for damages resulting from the negligent killing of certain animals, owned by the plaintiff. The case was tried in the justice's court, and judgment was rendered in favor of the defendant, the railway company, from which the plaintiff appealed to the county court. The appeal bond filed by the plaintiff in the justice's court was defective in matter of substance, wherein it failed to comply with the law, in stating the conditions required. This bond was executed October 19, 1896. At the February term, 1897, of the county court, motion was made by the appellant here, the railway company, to quash the appeal bond, and to dismiss the case; and, in response thereto, the plaintiff, the appellee here, requested permission of the court to file a new bond, correcting the defect, which was granted.

The first assignment of error complains of the ruling of the county court in permitting plaintiff to file his second appeal bond in lieu of the original bond. We have examined the record, and find that the original bond filed in the justice's court was defective, in that it omitted to state one of the conditions required by the statute. The defect in this particular was substantial. The question is: Did the county court, after the time required by law in which the appellee was required to file an appeal bond in the justice's court, have

the authority to permit the appellee to file a new bond in the county court, curing a defect in the original bond, wherein it failed to state the conditions required by the statute? It was held in *Landa v. Heerman*, 85 Tex. 3, 19 S. W. 885, that where the appeal bond from justice's court is defective in being signed by only one surety, or not given for the correct amount, a new bond may be filed when the case is on appeal, correcting the defects in these respects; but we have found no case which has extended the authority of the appellate court to permit a new bond to be filed, curing substantial defects in the original bond in other respects. There is a provision of the law which authorizes the courts of civil appeals to permit new or additional bonds to be filed, correcting defects in the original appeal bond, in matters of substance as well as in matters of form; but there is no statute that authorizes the county court or the district court to exercise the same power with reference to appeal bonds filed in cases appealed from the justice's court. The statute upon the subject of appeals from justice's courts requires the bond to be filed and approved by the justice of the peace within 10 days after final judgment. In *Bremond v. Seeligson*, 1 White & W. Civ. Cas. Ct. App. § 637, the court, in passing upon a case appealed from the justice's court to the county court, says: "The county court should not have allowed the plaintiff to file a second bond, when the first bond was not conditioned as required by law." In *Hollis v. Border*, 10 Tex. 279, the court say: "The only contingency in which parties have been permitted to file a new bond is where the original bond was insufficient in amount, but not vitiated by other defects." In *King v. Hopkins*, 42 Tex. 51, it is said: "The cases in which new appeal bonds have been given have not been extended further than to cure defects for insufficiency in the amount of the bonds, or to permit the addition of another surety,"—and cites *Shelton v. Wade*, 4 Tex. 148; *Hollis v. Border*, 10 Tex. 277; *Smith v. Cheatham*, 12 Tex. 37; and *Berry v. Martin*, 6 Tex. 264. To the same effect are the cases of *Long v. Smith*, 39 Tex. 164; *Martin v. Hartwell*, 1 White & W. Civ. Cas. Ct. App. § 492; *Garratt v. Gay*, Id. 1028; and *Newbauer v. Joseph*, Id. 86.

The same reasons which influenced the legislature in passing the law authorizing courts of civil appeals to permit defects in original appeal bonds to be amended and cured in matters of substance as well as of form, by receiving and having filed new bonds, could evidently be given why the same right should be extended to the county or district courts in cases on appeal from justice's courts; but whatever may be the reason that influenced the legislature to make an exception in this respect in favor of the power of the courts of civil appeals is not a question that we feel called upon to inquire into, as it is sufficient for us to point to the fact that they have not seen fit

to confer such authority upon the county or the district courts, and we have no authority to extend the power of those courts beyond what is conferred upon them by law; and the action of the legislature in this respect may be considered as having considerable bearing upon the construction that should be given to the decisions relating to this question. They evidently construed the decisions to mean that it was not in the power of the courts to permit new appeal bonds to be filed correcting defects in matters of substance, relating to defective statements of the conditions required by the statute; for, if such had not been the case, there would have been no reason for the passage of the act conferring such power upon the courts of civil appeals; and the thought was evidently in the legislative mind that, before such power could be exercised, it was necessary for the legislature to confer it upon those courts, for, if the decisions could have been construed to extend the right to the courts in that respect, legislation would have been unnecessary. We think the county court erred in permitting the new bond to be filed. Therefore we reverse the judgment of the court below, with instructions to the county court to dismiss the appeal from the justice's court.

#### BRUNER v. BRUNER.

(Court of Civil Appeals of Texas. Jan. 5, 1898.)

**DIVORCE—SUBMISSION UPON SPECIAL ISSUES—ESSENTIAL FINDINGS—PLEADING—WAIVER—APPEAL—FAILURE TO REQUEST INSTRUCTIONS.**

1. Where a divorce case is submitted to the jury upon special issues, the questions whether plaintiff was a bona fide inhabitant of the state, and had resided in the county six months prior to the institution of the suit, and had been married to defendant, must be submitted, and a finding made upon them, to support a judgment.

2. In divorce, questions of venue are not waived by a failure to plead in abatement.

3. Where a divorce case is submitted upon special issues, the jury must enumerate the articles of community property, and find the value of each one, to support a judgment settling the property rights of the parties.

4. An appellant cannot complain that certain instructions were not sufficiently explained, where he made no request for special instructions.

Appeal from district court, Bell county; John M. Furman, Judge.

Suit by M. A. Bruner against T. H. Bruner. Judgment for plaintiff, and defendant appeals. Reversed.

Harris & Saunders, for appellant. Moffett & Anderson, for appellee.

**KEY, J.** This is a suit for divorce and to settle the property rights of the parties. Verdict and judgment were rendered for the plaintiff for a divorce and for \$1,065. The plaintiff filed a remittitur of \$180. We sustain the 1st, 2d, 3d, and 4th assignments of

error, and reverse the judgment, and remand the cause for another trial.

The case was submitted to the jury upon special issues; but whether or not the plaintiff was a bona fide inhabitant of the state, and had resided in the county for six months next preceding the institution of the suit, and whether or not the plaintiff and defendant had been lawfully married, as alleged in the plaintiff's petition, were issues that were not submitted to the jury, and the verdict makes no finding upon these issues. Ordinarily, questions of venue, unless raised by a plea in abatement, are regarded as waived, but such is not the rule in divorce cases. The statute requires bona fide inhabitancy of the state, and residence in the county for six months next preceding the filing of the suit, as a prerequisite to obtaining a divorce, and the plaintiff must allege and prove these facts in order to obtain a divorce. *Haymond v. Haymond*, 74 Tex. 414, 12 S. W. 90. The defendant's general denial put in issue the averments of the petition on this subject, as well as all others material to the rights of the parties; but if there had been no such denial, and the defendant had admitted the facts of residence to be as alleged by the plaintiff, as he did admit the fact of marriage, inasmuch as the case was submitted to the jury upon special issues it was necessary that these matters should be submitted also, and a finding made upon them, in order to support a judgment. *Newbolt v. Lancaster*, 83 Tex. 271, 18 S. W. 740; *Silliman v. Gano*, 90 Tex. 687, 39 S. W. 559, and 40 S. W. 391.

The court directed the jury to find whether or not any community property had been used by defendant in improving his separate property, and, if so, to state the amount that had been so used. The pleadings raised this issue, and there was testimony tending to show that such improvements had been made with funds that were community property. Among other things, the jury found \$750 for the plaintiff, as her interest in all improvements on residence, \$42.50, her interest in all fences; and \$16.75, her interest in the cistern; but did not find what amount, if any, of community property was used in making such improvements. The court instructed the jury, if they found there was any community property belonging to the parties, to state specifically in what such property consisted, and also to find the value of each article of such property separately. This the jury failed to do. Therefore, on the subject of community and separate property, the verdict of the jury is not responsive to the charge of the court, and does not make the findings of fact, which are necessary to support a judgment, when the case is submitted to the jury upon special issues.

Some other objections are urged to the charge of the court, but they refer mainly to alleged omissions, which it was the duty of appellant to have attempted to supply by re-

questing special instructions covering the alleged omissions. The objections referred to do not complain of any failure to submit issues to the jury, but charge that the court did not sufficiently amplify and explain certain rules of law laid down for the guidance of the jury.

For the errors pointed out the judgment is reversed and the cause remanded. Reversed and remanded.

### HERRING v. MASON et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

TRESPASS TO TRY TITLE—CANCELLATION OF DEED—VENUE—PLEADING—DEMURRER—DEFENSES—DAMAGES—FRAUD—EVIDENCE—DELIVERY OF DEED.

1. In trespass to try title, the court has jurisdiction to cancel and set aside a deed of land in another county, given by defendant in an exchange for the land in suit, induced by the fraudulent representations of plaintiff.

2. In trespass to try title to land for which defendant has been induced by plaintiff's fraudulent representations to exchange land in another county, an answer setting up such representations, and asking judgment for damages therefor, and for a cancellation of the deed to the latter tract, is not multifarious.

3. In trespass to try title, the allegations of the answer setting up an agreement for an exchange of lands, and specific acts of fraud on the part of plaintiff inducing and relating to the exchange, constitute a valid defense.

4. In trespass to try title to land acquired by defendant under an agreement with plaintiff for an exchange of lands, the former may recover damages for the fraudulent representations of the latter as to the water supply on the land in suit, and for his failure to furnish defendant with stock according to agreement.

5. A demurrer to a pleading whose defects have been cured by amendment will not be sustained.

6. Fraudulent representations inducing the execution of a written contract may be proved by parol evidence.

7. The delivery of a deed to the notary, to be deposited for record with the county clerk from whom the grantee is to get it, constitutes a delivery to the grantee.

8. Where plaintiff in trespass to try title claims a vendor's lien on the land in suit, and judgment is rendered for defendant for more than the amount of the lien, on his claim for damages for fraudulent representations inducing the exchange of lands by which defendant acquired title to the land in suit, a judgment quieting title in defendant is proper.

9. Where a bill of exceptions does not disclose answers to questions to which exception is made, an assignment of error based thereon will not be considered.

10. The erroneous admission of evidence relating to an item of damage not allowed by the court is without prejudice.

Appeal from district court, Comal county; Eugene Archer, Judge.

Action by John Herring against A. B. Mason. Thereafter Charles and Mattie Varney were made parties defendant. Judgment for defendants. Plaintiff appeals. Affirmed.

F. J. Maier, for appellant. Clark, Guinn & Guinn, for appellees.

COLLARD, J. This suit was brought by John Herring against A. B. Mason, May 9,

1896, in form of trespass to try title for 80 acres of land, described in the petition. May 20, 1896, A. B. Mason answered by plea of not guilty, and specially that he in good faith rented the premises from Charles Varney, a resident citizen of Victoria county, on the 1st day of January, 1896, who is the legal and equitable owner, and who has been living on the premises for several years, under purchase from plaintiff, and who was put in possession by plaintiff; that he (defendant) has put the land in cultivation, and has a growing crop on the same, worth \$500, and is entitled to recover over against Varney in case he be dispossessed by plaintiff; that he contracted for the premises for the entire year 1896; and he asks that his landlord be made a party, and, in case he is cast in the suit, that he have judgment over against Varney for the value of the crop, and for the further sum of \$200, for the use of the premises for the remainder of the unexpired term. November 30, 1896, Charles Varney and his wife, Mattie, amended their original answer, and averred: That on the — day of —, 1894, plaintiff and these defendants entered into a contract of sale. That plaintiff was the owner, at the time, of the land sued for, of "the Comal county property," together with several hundred acres adjoining, and a large lot of tools, plows, and farming implements, as well as a number of cows and work stock; and, at the same time, defendants owned lot 11 in block 4 in Englewood addition to the city of San Antonio, "the San Antonio property," also certain household furniture and carpets. That the respective owners agreed to exchange properties upon the following conditions: Defendants were to execute a deed to plaintiff to the San Antonio property, and allow plaintiff the use of the carpets and furniture of the value of \$100, for which plaintiff was to convey, by deed, to them, the Comal county property, and allow them the use for one year of the aforesaid tools, plows, and other implements, together with the milch cows, work stock, pasture for the same in his adjoining pasture, including other feed for the same; and it was also agreed by plaintiff, at the same time and before, that there was a well of never-failing water on the Comal county property, which would thereafter furnish an abundant supply of good water for drinking, household, and stock purposes. That defendants relied upon such representations, and they became a part of the trade, and without which the trade would not have been made by defendants. That, as a further inducement for the exchange of property, plaintiff agreed and represented to defendants that they could have a permanent passageway through his said pasture, which representations were also relied on by them, and without which they would not have made the exchange, and which agreement was to be reduced to writing. That so induced, and for the considerations stated, they made a deed to plaintiff to

<sup>1</sup> Writ of error denied by supreme court.

their San Antonio property, who cunningly procured the delivery of the same to himself without at the same time delivering to defendants his deed to the Comal county property. That he executed the deed, but upon a false pretense withheld the same from defendants, but with the understanding that it should be delivered in a few days. That defendants, relying upon said agreements and representations, at great expense, in a short time after the trade, moved to the Comal county property, and took possession of the same, under the agreements stated, vacating the San Antonio property for plaintiff, who immediately took possession of the same, and has continued to occupy it ever since, and also to use the furniture and carpets, the reasonable value of the use and occupancy of which is \$250 per annum. That, in two weeks after the trade, defendants demanded of plaintiff his deed, but he refused to deliver it, and has ever so refused, although frequently demanded by defendants. It is further alleged that he has violated every other condition of the contract, and, within a month from the delivery of their deed to him, he took away from the Comal county property the work stock, milch cows, tools, and implements, and prohibited defendants the use of the pasture and a right of way through the same; that the well went dry, and so remained for several months at a time, and defendants had no other water, and no means of procuring the same, except at great expense, labor, and loss of time, reasonably worth \$200; that each and all of the plaintiff's said representations were false, and he knew them to be so when he made them, but made them to overreach defendants, whereby they were misled, and the consideration of their deed to him has failed, and plaintiff has thus fraudulently obtained their deed to the San Antonio property. They further allege that they were strangers to Herring,—knew nothing of Comal county and its surroundings; were also ignorant of the character of plaintiff, and of the fact that the well had ever been dry before, and could not ascertain the facts by diligence, and that plaintiff knowingly misrepresented the facts, and misled defendants into the trade; that with such a well the property was not worth one-half as much as with a well as represented by plaintiff to be on the property, to defendants' damage in this respect \$1,000; that by the failure to furnish the stock they were damaged \$100, and by the failure to permit the use of the pasture they were damaged \$100; that their property in San Antonio was a good home, their homestead, and, the consideration for the conveyance of the same having failed, it should be restored to them, and their deed to the same canceled, and, for the same reason, that they are entitled to rent for the same for the time it has been occupied by plaintiff; that the rental of the Comal county property is not only of no value, but an expense, because of defects be-

fore alleged, and it was occupied by defendants at a loss; that they yielded the possession of their San Antonio property upon the promises and representations of plaintiff, and withdrew from a profitable business, paying them a monthly income and wages to the amount of \$75, and in exchange for this he undertook to run the Comal county farm, but, by reason of the withdrawal of the stock, the drying up of the water, and the other deceptions of plaintiff, they have been unable to earn anything, and are now almost reduced to starvation, to their damage, \$1,000. They ask for the further damage of \$100 for expense in moving from San Antonio to the Comal county property. Prayer for all the damages alleged, for cancellation of their deed to the San Antonio property, for possession of the same, costs, etc.

On December 1, 1896, plaintiff filed first supplemental petition, claiming that as he is a resident citizen of Bexar county, and as the lot claimed by the Varneys is situated in Bexar county, it is his privilege to have his title and right thereto litigated in Bexar county. This plea is sworn to by plaintiff's attorney. Plaintiff, Herring, replied to the answer of the Varneys by a number of exceptions: (1) Because the court has no jurisdiction to cancel the deed to the San Antonio property, nor to restore the premises to defendants, the land being situated in Bexar county. (2) Because the averments relating to the San Antonio property and the cancellation of the deed present no defense to the action, and constitute a misjoinder of causes of action. (3) Because the answer is no defense, and shows no reason why defendants should retain the possession of the land sued for. (4) He pleads that the agreements set up for the exchange of property, real estate, right of way, and the failure of the well to supply water are not in writing, and are within the statute of frauds, and are therefore of no effect. (5) Because the alleged agreements as to exchange of land, the deed to the San Antonio property, the carpets, furniture, tools, milch cows, and pasture, right of way, and work stock, are irrelevant, and show no reason why defendants should hold plaintiff's land. (6) Because the averments as to the failure of plaintiff to deliver to defendants a deed are insufficient, as a deed not delivered does not give defendants any title. (7) Because the averments claiming damages set up an improper cause of action, and furnish no grounds for holding plaintiff's land, and because the items of damage are not stated or specified, nor is it shown how defendants were damaged. (8) He excepts to the answer of A. B. Mason, except the general denial and plea of not guilty, because irrelevant and shows no defense. (9) He further excepts to the answer of the Varneys, because it puts in issue matters which constitute no defense for the defendant Mason. He further denies all the answers of defend-

anta. He denies all the averments of fraud and breach of contract on the part of plaintiff, and alleges that the Varneys failed to perform their contract, in that they promised to furnish an abstract of their title to the San Antonio property, which was to show a perfect title in them, and his deed to the Comal county property was not to be delivered to them, nor the title to pass to them, until the abstract was furnished, and pronounced good by plaintiff's attorney, F. J. Maier, but the deed was to be deposited with him as an escrow until such abstract was furnished, and was not to be delivered to them until they had furnished the same; that said abstract was never furnished, and defendants have never exhibited a good title to the San Antonio property; that they have not paid taxes since the alleged exchange of land, as they agreed to do, upon the property in Comal county, nor on that in San Antonio, and he had to pay the taxes thereon to prevent sale of the properties for taxes; that there was a vendor's lien note on the San Antonio property, amounting to \$800, bearing 8 per cent. interest, which the Varneys agreed to pay off and discharge before January 1, 1896, and they have paid nothing on the note, and plaintiff was compelled to pay \$300 of the principal of the note, and promised the holder thereof to assume the payment of the full amount of the note to prevent foreclosure of the lien and sale of the property; that the furniture mentioned was purchased by plaintiff of defendants; that plaintiff is now the owner of the San Antonio property, and holds the same by written deed, duly signed and acknowledged by defendants Varney, which is duly recorded in Bexar county; that the conveyances and agreements as to pasturage, right of way, lease of pasture, and the conveyance of land are not in writing; and he pleads the statute of frauds. He further alleges that he bought of defendants the furniture and carpets, and that he is now, and ever has been, willing to deliver the deed to the defendants to the Comal county property when they comply with their contract to furnish abstract showing good title to the San Antonio property.

Defendants Varney, on December 3, 1896, filed supplemental answer to plaintiff's supplemental petition; demurring to the sufficiency of averment of excuse for not delivering them the deed to the Comal county property, also excepting to the averments of agreement to pay taxes and the failure to do so, because immaterial, and because it is not shown that they were under any obligation to pay the taxes. They except, further, because it is not shown that they were under any obligation to pay the alleged \$800, plaintiff having already breached the contract. They also deny all allegations of the supplemental petition. They specially answer that if they were bound to pay the \$800, which is denied, the failure to pay the

same was because Herring had possession of the property, refused to comply with his contract as set out in their first amended answer, and they were thereby released of any liability to plaintiff on any obligation or contract. They reiterate and enlarge former averments as to the well and water, and claim their damages formerly alleged. They claim that they are entitled to decree vesting in them title to the Comal county property in case they do not procure cancellation of their deed to the San Antonio property. They also pray for damages as claimed. Defendants allege that the deed of plaintiff to them of the Comal county land was delivered to them. Plaintiff filed a trial amendment to his supplemental petition, declaring that the promise to furnish the abstract was a part of the original agreement to exchange lands, and that defendants' promise to pay the \$800 note was also a part of the original contract; that a vendor's lien was retained on the Comal county property to secure the payment of the note for \$800, due on the San Antonio property.

On the 1st day of January, 1896, before defendants' supplemental answer was filed, on December 3, 1896, the court, before trial on the merits, overruled plaintiff's plea to the jurisdiction of the court, and sustained exceptions to that part of the answer as to right of way over plaintiff's pasture, and to that part of the answer claiming \$1,000 damages by reason of the failure of the water in the well. All other exceptions to the answer were overruled. After plaintiff's trial amendment was filed, all defendants' exceptions to his pleadings were overruled. The cause was submitted to the court, a jury being waived; and on the 11th day of December, 1896, judgment was rendered that plaintiff take nothing by his suit for the 80 acres of land in Comal county, the court finding that there was a delivery of the deed to the Varneys to the Comal county land; that plaintiff was liable to the Varneys in the sum of \$900, by reason of the failure of the well, \$100 for failure to furnish milk cows and work horses, this damage to be offset by deducting \$300, principal, and \$100, interest, paid by plaintiff on the vendor's lien note on the San Antonio property, and \$24.95, taxes paid by Herring; and that there is a balance unpaid on the vendor's lien note on the San Antonio property, with 8 per cent. interest per annum thereon from the 2d day of January, 1896, due and owing by the defendants, which, if paid by plaintiff, shall go as a credit on the judgment. Wherefore it was adjudged that plaintiff take nothing by his suit, and that defendants be quieted in their title to the Comal county 80 acres of land. That defendants have and recover of plaintiff \$579.05, less a further credit of the said balance due on the vendor's lien note on the San Antonio property, which was adjudged

to be at date of judgment \$537.77, leaving a balance due the Varneys, after the note is so paid, of \$21.28, with 6 per cent. interest per annum from date, for which execution is awarded. It is further adjudged that, if the Varneys pay off the said balance of \$537.77, then they shall recover of plaintiff such amount of \$537.77, for which execution may issue after the time of such payment. It is further ordered that plaintiff take nothing against defendant Mason, and that defendants recover all costs, for which execution may issue. Plaintiff has appealed.

The trial judge filed conclusions of fact and law, and we find that the evidence sustains his findings of fact. They are as follows: "(1) I find that the defendants Varney and wife and the plaintiff, on or about the 30th of October, 1894, entered into an agreement for the exchange of land, by which the plaintiff was to exchange the Comal property in question, consisting of 80 acres of land, with the improvements thereon, to the defendants Varney and wife, for their San Antonio property, consisting of a house and lot in the city of San Antonio. (2) I find that at the same time, that the parties entered into said agreement with the representation of plaintiff that the said Comal property had thereon a well of good water, that was permanent, and one that had never gone dry, and that the supply of same was abundant for household and stock purposes, and that said plaintiff agreed, as a part of the original exchange of property, that he would furnish work stock and a number of milch cows to defendant, also a sufficiency of farming implements to work the farm on the said 80 acres, provided defendants Varney and wife would consummate the sale and give him a deed to the San Antonio property, with the understanding that the said Varneys were to pay an incumbrance of \$800 on said San Antonio property, and that the Varneys were to let go with their house a lot of furniture and carpets to plaintiff, a list of which was made out and given to plaintiff. (3) I further find that the defendants Varney and wife went into the agreement to exchange with the understanding that said representations mentioned in the 2nd article of these findings were true, and that plaintiff would furnish the said stock and implements, including feed for the stock the first year; and, but for these representations, they would not have made the exchange of places, or given up their San Antonio property, which I find to be valuable property. (4) I further find that there was an agreement at the time that there should be separate papers signed up by the parties to embody the foregoing terms and conditions of exchange in two separate contracts or papers, and that such was the understanding of all the parties at the time the deeds were signed up to the different tracts of land, and that the said other writing, embodying the agreement relating to the stock, implements, furniture, and feed, was not signed, by reason of plaintiff's refusal to do so. (5) I find, further, that when plaintiff received

and accepted the deed from defendants Varney and wife, that the agreement and understanding was that F. J. Maier was to hand the deed to the Comal county property to the clerk of said county court, and that Maier received it for defendants Varney and wife, and that this was in fact and law a delivery of the deed to them. (6) I further find that the retaining of the deed from defendants Varney and wife, and the conduct of plaintiff in this regard, as well as in regard to refusal to carry out the terms of his agreement in regard to the stock and implements, as well as his acts with regard to the holding and having recorded the deed to the San Antonio property, was fraudulent. (7) I further find that the representations of plaintiff in regard to the well were untrue, and that he knew they were untrue, and that to deceive defendants in regard thereto, which was a matter that was such that they would not reasonably have known the defect, and that same was of such a character as to render the 80 acres not worth near as much as if it had been as good or nearly as good, as plaintiff had deceitfully led defendant to believe it was. (8) I find that plaintiff violated his contract first, and that he made false representations to bring about the trade. (9) I find that defendants surrendered the San Antonio property to plaintiff, and the deed to same, and took possession of the Comal tract of land, in good faith, and that plaintiff's actions in every way led them to believe it a complete trade. (10) I further find that plaintiff went into possession of the San Antonio property, and received all the furniture that he contracted for from defendants. (11) I further find that defendants were greatly damaged in the loss of value of the said 80 acres of land by reason of the well thereon not being permanent or valuable, and that the value of the use of the stock was lost to plaintiff. (12) I further find that there was a vendor's lien note of \$800 due on the San Antonio property by defendants Varney and wife, due January 1, 1896, which, according to the terms of the agreement of exchange of property, was to be paid by the defendants Varney and wife; that the same has not been paid, but that plaintiff, to save said San Antonio property from foreclosure under said lien, has paid \$300 on the principal and \$100 interest on said note; also, he has paid \$24.95 taxes on said San Antonio property, chargeable to defendants."

Conclusions of law: "(1) I conclude that the plaintiff is not entitled to recover the land sued for, but that the defendants Varney and wife should be quieted in their title to the same. (2) That by reason of the terms of the original agreement, and the false representations of plaintiff, and his fraudulent conduct, and the great decrease in the value of the Comal county property, by reason of the well being as found in conclusions of fact herein, and the loss by defendants by reason of not having the use of the stock, they were greatly damaged, and are entitled to be recompensed therefor, as shown in the verdict herein rendered by



the court; that the damages accruing to them by reason of the misrepresentation as to the well is \$900, and the damage sustained by them by reason of loss of use of stock and milch cows and work horses is \$104. (3) That defendants should not, under the facts, have a cancellation of the title to the San Antonio property, and that it is equitable and just that if the defendants fall to pay the balance of the money due on the vendor's lien note now incumbering said San Antonio property, and the same be paid by plaintiff, that he deduct the amount so paid from the judgment herein rendered against him."

At request of plaintiff, the court found additional facts as follows: "(1) The court finds that Charles and Mattie Varney did not pay off the incumbrance and give a release, as stated in their deed to plaintiff. (2) They did not pay off any interest on said incumbrance after the execution of the deeds. (3) The court finds that an interest note of \$32 fell due before said defendants knew that the deed to the Comal county property was not deposited with the county clerk, and which they never paid. (4) They never paid any taxes on the Comal county property. (5) There were taxes past due on the San Antonio property when the deeds were executed, which the defendants Varney never paid. (6) Defendants gave a written bill of sale to the furniture after they ceased to use plaintiff's cattle and horses. (7) Plaintiff paid city taxes on the San Antonio property due for 1893 in the sum of \$14.85, for which he received from the city of San Antonio a redemption receipt. (8) Plaintiff paid the taxes on the Comal county property, to keep it from being sold. (9) Defendants never furnished plaintiff with an abstract of the San Antonio property. (10) Defendants never made any demand on plaintiff to give them the deed to the Comal county property, but did demand it from F. J. Maier, who held said deed. (11) The deed to the San Antonio property was actually delivered to the plaintiff, Herring, and defendants never took any steps to revoke it, other than the filing of his cross bill. (12) The deed to the Comal property was never actually delivered to the defendant Varney, but was delivered to F. J. Maier, to be recorded, when said Varney was to get it. (13) Defendants Varney did not turn over to plaintiff any of the butter or milk they received from plaintiff's cows during the time they milked them. (14) Defendant Varney did not attend to plaintiff's stock, or assist in attending to them, the winter after he moved on the Comal county property, because plaintiff turned out all the calves belonging to the milch cows which they were milking, and forbade them to use them."

#### Opinion.

Appellant's first assignment of error objects to the action of the court in overruling his plea to the jurisdiction, and overruling his demurrer to that part of defendants' answer claiming land and damages, and to quiet the

title to the lot in San Antonio, because the court in Comal county had no jurisdiction to determine the same. There was no error as assigned. The issue of the exchange of lands,—the fraud of plaintiff, alleged and proven,—was a proper one as a defense to plaintiff's action to recover the Comal county property; and, the venue and jurisdiction having attached to plaintiff's suit in Comal county, all legitimate defenses thereto could and should have been determined in the county where the suit was brought. It would not have been proper to separate the defenses to the action, and try the plaintiff's suit in one county, and the defenses in another. The plaintiff's suit, properly brought in Comal county, drew to that jurisdiction all matters relevant to the case, either to maintain the action or to defeat it. *Houghton v. Rice* (Tex. Civ. App.) 40 S. W. 349, 1057; and authorities cited; *Stein v. Frieberg*, 64 Tex. 271; *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 213, and authorities cited; *Hill v. Osborne*, 60 Tex. 390. It would be a singular rule to allow the maintenance of a suit in one jurisdiction, and send the defendant to another jurisdiction to make his defenses. The assignment of error is not well taken.

The second assignment of error complains of the court's overruling plaintiff's second, seventh, and ninth exceptions to the answer, upon the ground that it is bad for multifariousness and misjoinder of causes of action. It is the policy of the law to settle in one suit all matters of dispute growing out of the same transaction. *Hill v. Osborne*, supra; *Harris v. Warlick* (decided by this court October 27, 1897) 42 S. W. 356. There was no error as assigned.

The third assignment of error is upon the same grounds, and is disposed of in the foregoing.

The fourth assignment complains of the action of the court in overruling plaintiff's second, third, fifth, seventh, and eighth special exceptions to defendants' answer, because the averments called in question are irrelevant, do not show claim to the land sued for, and show no reason why plaintiff should not recover the land. The fifth assignment is to the effect that, as the answer showed that the deed to the Comal county property was never delivered to Varney, no title passed. Both of these assignments will be treated together. Defendants pleaded special acts of fraud on the part of plaintiff, misrepresentations and bad faith in the exchange of land, and that the Varneys were deceived and damaged thereby. Defendants could recover their damages by reason of such fraud, and base their defense to the suit to recover the land on the alleged fraud. It was finally alleged by defendants that the deed was delivered, and the court correctly found that it was in fact delivered. We will state, in this connection, that the court's judgment eliminated all elements of damages, except the claim for the representations as to the well of water and

its failure, and the claim for damages for failure to furnish milch cows and work horses. The damages adjudged were legitimate, growing out of the transaction for the exchange of lands; and defendants were entitled to their cross suit and recovery for the same, as well as their relief to be quieted in their title and possession of the land sued for; pleaded in the alternative in case their deed to the San Antonio property should not be canceled. The court granted the alternative prayer and a part of the damages claimed. The damages recovered were properly granted, as the result of the wrongs and misrepresentations of the plaintiff. Demurrers to other damages for which there was no recovery need not be considered, as the ruling thereon was harmless. With these remarks, we dismiss assignments of error addressed to the court's ruling on the subject of damages claimed by defendants, except in answer to the seventh assignment of error, which claims that the court erred in overruling plaintiff's seventh exception to the answer, because the damages were not sufficiently itemized and stated in the answer, and on this question we must hold that there was no error as assigned. There was no error in admitting testimony of damages resulting from the failure of water in the well, on which item the court awarded \$900 damages. It is true, the court did sustain plaintiff's demurrer to this item of damages, as alleged in defendants' first amended answer. This was done on the 1st day of December, 1896, but subsequently, on the 3d day of December, 1896, defendants filed a supplemental answer, to cure the defects of former allegations in this respect. The demurrer was not urged against the amended allegations, and there was no adjudication upon them. Consequently, the assignment of error, the evidence sustaining the damages claimed, is not well taken. It is of no consequence that these damages are not based on a breach of contract, as contained in the writings between the parties. They were based on his fraudulent representations, as an inducement to the exchange of properties, that the well was a never-failing well, of sufficient volume of water for all domestic and stock purposes, which representations were relied on by the defendants, and without which the exchange would not have been made, and which representations were false, as found by the trial court, upon testimony that warranted the conclusion. This ground of recovery was based on the fraud in the transaction, and it was not necessary to such recovery that the basis of it should be in writing. The well was a part of the land conveyed to the Varneys, and the fraud was a matter of proof by parol testimony. Parol evidence is admissible to prove fraud by false representations in the sale of land. *Rich v. Ferguson*, 45 Tex. 396; *Association v. Brewster*, 51 Tex. 263; *Routh v. Caron*, 64 Tex. 292, and authorities cited; 1 Greenl. Ev. §§ 931, 932.

The court did not err in rendering judgment for the Varneys for the Comal county property, as assigned in the ninth assignment of errors.

Plaintiff did not show a good title to the property. The court below decided correctly that the deed of plaintiff to the Varneys was delivered to defendants. The evidence was sufficient to establish the fact, as found by the court below, that the deed was delivered. After plaintiff had received the deed of the Varneys to the San Antonio property, the deed of plaintiff to them for the Comal county property was delivered to F. J. Maier, the party who took the acknowledgments to the deeds, with the understanding that Maier was to deposit the deed with the clerk to be recorded, and that defendants might at any time call upon the clerk for the deed. This constituted a delivery, though Maier did not deposit the deed with the clerk, and notwithstanding Maier refused to deliver the deed to Varney and wife, when they subsequently called upon him for it. In equity, the deed should have been delivered, and it will be held that it was delivered. The lands were delivered, and the parties were put into possession, according to the agreement of exchange represented by the deeds. No defect is shown in the title of the Varneys to the San Antonio property, except that it was subject to a vendor's lien note for \$800, which the Varneys agreed to pay off and discharge, at the time of the agreement to exchange lands. This was a part of the original agreement of sale, and, plaintiff knowing the fact, there was no reason for refusing to deliver the deed, and the failure to produce an abstract of title to the San Antonio property was wholly immaterial. The deed of plaintiff and wife to Varney and wife, of date September 5, 1894, to the Comal county property, recites, as consideration, the conveyance of a certain tract of land, the San Antonio property, by Varney and wife to plaintiff, and a collateral note of \$800, secured by lien on the above property in San Antonio, to be paid on or before January 1, 1896, bearing 8 per cent. interest, signed by Varney and wife. The deed to Varney and wife expressly retains a vendor's lien on the Comal county property, "until the above-described notes and all interest thereon are fully paid, according to their face, tenor, and effect, and reading, when this deed shall become absolute." The deeds passing title to both parties were properly acknowledged for record. The deed of Varney and wife to Herring was of the same date (September 5, 1894), and recites as consideration the conveyance to them of the Comal county property, in which they agree to pay the note for \$800, balance due of purchase money on the San Antonio property.

Appellant also, in his ninth assignment of error, complains that the court erred in rendering judgment for the Varneys for the Comal county property, because the deed to the same was not an absolute deed, but show-

ed on its face that the vendor's lien was retained to secure the payment of the \$800 note, after which the deed was to become absolute. The court below correctly found as a fact that, by reason of the fraud and bad faith of plaintiff, defendants had suffered damages to a greater amount than the \$800, and that this debt, represented by the note, was overpaid. We believe that, in so far as defendants were bound to plaintiff to pay the \$800, the obligation was discharged by the damages suffered by defendants. The matter, as between plaintiff and defendants, was equitably adjusted by the judgment of the court; and it should not be held that defendants should not be quieted in their title and possession of the Comal county property upon plaintiff's claim that the vendor's lien still incumbered the land. As to plaintiff, this lien was discharged. Plaintiff first breached the contract of sale.

The judgment of the court for the Varneys is not objectionable, because it adjusted the indebtedness of the parties to each other, and thereby released the vendor's lien on the Comal county property. This action of the court was proper, under the evidence. The assignment challenging the judgment of the court upon the ground that it released the vendor's lien is overruled.

The judgment of the court in favor of defendants for \$104, damages on account of plaintiff's failure to furnish the milch cows and work stock, was proper, under the pleadings, which properly made the issue. It was sustained by the testimony.

Appellant objects to the court's sixth finding of fact, that the plaintiff acted fraudulently in regard to the well, his refusal to deliver the deed to defendants, and refusal to carry out the terms of his agreement in regard to the stock. The evidence was abundant to establish the fraud as found by the court. The objection to the finding that it is not a finding of fact, but of law, is of no importance.

It was not error to find, as was done by the court below, that plaintiff first violated his contract. In a short time after the Varneys took possession of the Comal county property, plaintiff turned out the calves, and refused to allow them to milk the cows. Defendants had not at this time failed in the performance of any part of their agreements. His contract was also violated from the beginning by his false representations as to the well. He represented to defendants, when they went out to inspect the Comal county property prior to the trade, that the well was a never-failing well of water, and would furnish sufficient water for domestic purposes and stock purposes. This was done to induce the trade. Defendants relied upon his representations, and were deceived thereby, and were so induced to make the trade pending. There is evidence showing such facts, and also sufficient evidence to support the finding of the court upon the subject, as

well as to support the finding that he knew his statements were untrue. The well had been dry before, and parties occupying the premises hauled water for family use; and the well went dry while in the possession of defendants, and they had to haul water to the place for the purposes he had represented the well sufficient to supply. There was considerable water in the well when defendants looked at it, pending the trade, and his representations and the subject-matter of them were of a character to deceive, and did deceive, defendants.

The testimony does support the finding of the court that plaintiff was to furnish feed for the stock for the first year of defendants' occupancy of the premises conveyed to them, and that the use of such stock was valuable, as found by the court. The assignment of error addressed to such finding is not sustained.

There was testimony to support the finding of the court of \$900, damages on account of the failure of the well, and we cannot say the amount is excessive. Conrad Pape testified that he lived in Comal county, about two miles from the land in question, and as follows: "I am acquainted with defendants. \* \* \* They hauled water from my place about four months. I have known this well for thirty-one years. I went to look at the well at the request of Mrs. Varney, and I could not [get] as much as a bucketful of water with a cup. It was dry when Theodore Herring lived on the place, for he hauled water one time. He is a brother of plaintiff, and lived there before plaintiff, three-fourths of a mile from plaintiff. Plaintiff lived on the place 10 or 12 years. I was over there quite frequently, while plaintiff lived there, and I never heard him say anything about the well going dry." Cross-examined: "Theodore Herring lived on the place about 1880. I don't know how long he hauled water. The same year he hauled water, I had to haul water also. \* \* \* Others also hauled water that season. It takes a dry season to make the water dry out of this well. I never saw John Herring haul water. My well is 371 feet deep. I don't know of any 15 or 20 foot well that will give lasting water. [The well in question is a shallow well.] I know of two springs that do not go dry." Redirect examination: "A well in that country with abundance of water is very valuable. A well that furnishes an abundance of water is worth \$2,000 at least; makes no difference whether it is a shallow or a deep one. A shallow well is worth more than a deep one, as the expense of machinery to pump it is not required. A shallow well is worth \$1,000 more than a deep one in the course of 30 years' time." Mrs. Varney testified that there was water in the well when they moved there, and it came nine or ten feet from the top. "Herring said the well was eighteen or twenty feet deep. In a short while the water was bad and unfit for use. We cleaned out the well. The same

amount of water never did run in again. The water gave out in a short time. My husband hauled some, but I hauled the most of it." Plaintiff testified that when Varney asked what the hole beside and close to the well was for, when they were out at the place pending negotiations for exchange of places, he answered: "I told him the well did not deliver water enough for my stock and house use in very long and dry seasons, and I got my water from the other place, about one-half mile from the house. The reason for digging the hole near the well was, I thought I could strike the main vein of water. That was all that was said about the water until later." We see there was sufficient evidence to authorize the court in finding that Herring knew the well would not furnish water for household and stock purposes, and that, for the failure of the well, \$900 were not excessive damages. The evidence justifies the finding that plaintiff made the representations as to the well furnishing never-failing water for domestic and stock purposes.

Appellant assigns as error the failure of the court to "find whether or not defendants are intelligent or simple-minded." This assignment need not be considered. As before stated, there was evidence sufficient to authorize a verdict that the deed was delivered to defendants, and the assignment to the contrary is overruled. The objection to the Varneys' testimony that plaintiff was to furnish stock, implements, etc., is not tenable, as we have before seen. The trade between the parties was not all reduced to writing. The consideration of the trade was not fully expressed in the deeds, and it was not improper to prove the same by parol. *McLean v. Ellis*, 79 Tex. 398, 15 S. W. 394, and *Railway Co. v. Jones*, 42 Tex. 161, 17 S. W. 534. The testimony was also admissible on the allegations of fraud. *Railway Co. v. Garrett*, 52 Tex. 187; *Railway Co. v. Jones*, supra. What has been said disposes of the nineteenth assignment of error adversely to appellant.

No satisfactory reason can be given for holding that the court erred in permitting the Varneys to testify as to the value of milch cows and a work horse per year. The value placed upon the same might be unreasonably large, but that would only go to the weight of the testimony. Nor do we see that the Varneys were not qualified, as insisted by appellant, to estimate the rental value of the city property, the value of the same, and the value of the Comal county 80 acres of land.

On cross-examination of defendant Varney, plaintiff's counsel asked him the following questions: "Is it not a fact that you knew the land would be sold for taxes if the taxes were not paid? Did you not know that the vendor's lien would be foreclosed on the San Antonio property if the interest is not paid, and if the principal is not paid?" The court sustained objections of defendants to these questions, that the matter was irrelevant and immaterial, and it had appeared that plaintiff

had broken and violated his agreement. Plaintiff reserved a bill of exceptions, and now assigns the ruling as erroneous. The bill does not show what the answers to the questions would have been. It explains that the object of the testimony was "to prove that defendant had an utter disregard for the safety of either piece of property, did not handle either as a person does his own property, and knew he had no interest in either." The bill and the assignment thereunder cannot be considered, because the answers to the questions are not disclosed. *King v. Gray*, 17 Tex. 71; *Beeman v. Jester*, 62 Tex. 433; *Haney v. Clark*, 65 Tex. 98; *Beeks v. Odom*, 70 Tex. 186, 7 S. W. 702; *McAuley v. Harris*, 71 Tex. 639, 9 S. W. 679; *Railway Co. v. Lockyer*, 78 Tex. 284, 14 S. W. 611; *Cheek v. Herndon*, 82 Tex. 151, 152, 17 S. W. 763.

The court awarded no damages for expense of the Varneys and loss of time in moving from Bexar county, and hence, if the court committed error in admitting evidence to establish the same, it was harmless.

The twenty-sixth and last assignment of error is not well taken. The principles controlling the questions raised have been discussed and disposed of in the foregoing. We have found no reversible error in the trial of the case, or in the judgment of the court, and it is affirmed. Affirmed.

#### BENSON v. PANTHER et al.

(Court of Civil Appeals of Texas. Dec. 18, 1897.)

#### VENDOR'S LIEN—DIFFERENT NOTES—RIGHTS OF HOLDERS—PURCHASER WITH NOTICE.

The payee assigned one of three notes secured by a vendor's lien, and subsequently brought an action on the two remaining notes. The holder of the third note attempted to intervene, but was stricken out at the instance of said payee, who obtained a judgment upon said two notes, foreclosed the lien, and purchased the property at the foreclosure sale. *Held* that, no equity appearing, the judgment would not be set aside at the instance of said payee, and the land resold, in order that the proceeds might be ratably applied on all three notes, but that the payee purchased the land at the foreclosure sale incumbered with a lien in favor of the holder of the third note.

Appeal from district court, Titus county: J. M. Talbot, Judge.

Action by L. D. Panther against J. D. Blackburn and B. A. Benson. From a judgment for plaintiff, defendant Benson appeals. Affirmed.

S. P. Pounders, for appellant. Todd & Glass, for appellees.

#### Conclusions.

STEPHENS, J. Appellant, Benson, sold J. D. Blackburn a tract of land in Titus county, and, to secure the payment of the purchase price, took three promissory notes from Blackburn, and afterwards assigned the one sued on in this case, which was the first to mature, to appellee Panther. In order to in-

duce him to purchase this note, about the time it fell due, Blackburn executed and delivered to him another note, indorsed by one Coker, but only as collateral security to the land note; Panther agreeing not to attempt to collect the former note unless he failed to collect the latter. After the maturity of the three original notes, Benson sued Blackburn upon the remaining two held by him, obtained a judgment foreclosing his lien, and became the purchaser at the foreclosure sale. Panther attempted to intervene in that suit, but his plea of intervention (upon what ground, the record does not disclose) was stricken out at the instance of Benson; and no further notice was taken of the note and lien held by Panther, except that notice was given by him at the foreclosure sale of his rights in the premises. Subsequently this suit was brought, and from a judgment against Blackburn for the amount of the land note purchased by Panther, and against Benson for the foreclosure of the vendor's lien on the land, Benson appeals.

It is first insisted that the judgment is erroneous because it was the right of Benson to have Panther collect the collateral note instead of, or before, foreclosing his lien on the land. This contention is not even plausible, and hence will not be discussed, much less sustained.

The further contention urged is that the court should have ordered the land resold, and the proceeds of sale applied ratably to appellant's judgment and appellee's debt. The principle thus invoked is doubtless what led to appellee's attempted intervention in the original suit; but appellant, the plaintiff in that action, succeeded in having his plea of intervention stricken out, and insisted upon and obtained an exclusive foreclosure in his own behalf. Now that his lien has thus become merged in a judgment, and he has become the owner by purchase of the land, instead of the holder of a lien thereon, and no equity is shown for setting this judgment aside, if, indeed, he seeks to have it set aside, he is not in a position to deny that he voluntarily purchased the land incumbered with a lien in favor of appellee. It was, perhaps, his right (Blackburn not objecting) to have the land sold subject to appellee's lien. For aught that appears, the land was of sufficient value to pay all the notes. Treating appellant, then, as a purchaser, instead of lienholder, we overrule this, the last, contention of his brief, and affirm the judgment.

poena for the general manager of defendant company, commanding him to bring with him the books showing repairs made on the engine setting such fires. Defendant offered to produce such witness and the books if the court would allow him 30 minutes to do so. *Held*, that a refusal to grant such time, and admitting the subpoena, for the purpose of raising presumption that defendant had refused to put the books in evidence, because they would contradict the testimony of defendant as to condition of the engine, was error.

Appeal from Harris county court; W. N. Shaw, Judge.

Consolidated actions by John Farmer, John Blalock, R. M. Blalock, W. L. Sherman, and J. P. Magee, respectively, against the Texas & New Orleans Railroad Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Baker, Botts, Baker & Lovett, for appellant. E. P. Hamblen, for appellees.

PLEASANTS, J. Five separate suits were instituted by the appellees in the county court of Harris county, against the appellant. As all the plaintiffs were represented by the same counsel, and all the suits grew out of the same alleged act of negligence of the defendant, and presented the same issues, it was agreed that they should all be tried together, submitted on the same evidence, to one jury, and under one charge of the court; and it was also agreed that the clerk of the county court should make but one transcript upon appeal from the judgment of that court, and that the five several appeals should be submitted together upon said transcript, and upon one by appellant and one joint brief by appellees. Each plaintiff averred in his petition that he owned in Harris county certain grazing lands, giving the number of acres and a description of the land, and that he was engaged in stock raising and using said lands for that purpose, and that on January, 1895, the grass upon his land was burned off, and that the fire which caused the grass to burn was kindled by sparks escaping through the negligence of the defendant from an engine operated by defendant upon the road, and each plaintiff alleged the several items of damages sustained by him from the fire, as well as the aggregate amount of his damages. The specific acts of negligence which each plaintiff charged the defendant with were that on or about the 11th of January, 1895, the defendant, by the gross carelessness and negligence of its employes, and for want of proper appliances to its engine, and by using defective engines, permitted sparks of fire to escape from its said engines, which set fire to plaintiff's land and other lands adjoining, and thereby the grass on said lands was burned, and the turf injured. The defendant answered each suit by general and special exceptions, and by general denial, and by special plea in confession and avoidance, which plea admitted that the fire was kindled by sparks from its engine, on the day aforesaid, but averred that its engine was equipped with all the appliances and appa-

TEXAS & N. O. R. CO. v. FARMER et al.  
(Court of Civil Appeals of Texas. Dec. 9, 1897.)

#### EVIDENCE—PRESUMPTIONS.

In an action to recover for fire set by locomotive, testimony that the engine was in good condition was not discredited, except by evidence of another fire previously set by the same engine. Plaintiff was permitted to read a sub-

tus designed to prevent fire from escaping from locomotives which practical experience on railroads had demonstrated to be among the best known for this purpose, and that said appliances were at the time the fire was kindled in good condition, and that the engine from which the fire escaped was carefully operated at the time by careful, competent, and experienced employes, and that there is no appliance known to the mechanical world which will absolutely prevent the escape of fire under any and all circumstances from an engine in motion, although said appliances be in good condition, and the engine carefully and skillfully operated, and that the fire complained of by plaintiffs did not originate upon its right of way, but was started upon ground lying out of and beyond its right of way. Each fact alleged in this special plea was proved by the testimony of several witnesses, all of whom, except one, were employes of the defendant,—the engineer and fireman in control of the engine at the time of the fire, and an employe at the roundhouse in the city of Houston, whose special duty was to examine the engines, and the fire apparatus attached to them, which were operated upon defendant's road between Houston and Beaumont. The fourth witness who testified that there was no appliance known to mechanics which would perfectly protect from fire from moving steam engines was a mechanic of large experience, and was not in the employment of the defendant company. Upon trial of the cause, verdict and judgment was rendered for each of the plaintiffs for a definite amount. The defendant moved for a new trial, and, its motion being refused, defendant appealed to this court.

Appellant submits many assignments for our decision, but we shall not discuss many of them. The case must be reversed, and we shall only refer to so many of the assignments as may be necessary to indicate the reasons upon which our decision is based. It is now firmly established by repeated decisions of our supreme court that, when it is shown that a plaintiff has sustained injury from a fire set by sparks from a moving engine operated by the defendant, the law presumes negligence, and the burden rests upon the defendant to rebut and overcome this presumption; otherwise, the plaintiff is entitled to a verdict. And it seems to be equally well settled that the railroad may overcome such presumption by proving by credible testimony that its engine was equipped with appliances for the prevention of the escape of fire, which experience has proved to be of the best for that purpose, and that said appliances were, at the time of the fire, in good condition, and the engine was carefully operated by competent, skillful, and experienced employes. This, as we have said, was shown by the defendant by several witnesses, whose testimony was in no wise discredited, unless it be by the single fact that another fire was previously set by the same engine, operated by the same employes, but

a short distance (a little over a mile) from the fire of which plaintiffs complain, and at an interval of time only necessary for the passage of the train from the place of the first fire to that of the second.

At this stage of the trial, the plaintiffs were permitted, over the objection of the defendant, to read to the jury a subpoena, for the general manager of the defendant company, commanding him to attend the trial of the cause, and to bring with him all books and records pertaining to repairs made on the engine which set out the fire complained of, between the 1st day of January, 1894, and the 1st day of January, 1895, together with the return of the sheriff upon the subpoena, showing its execution; and the reading of this subpoena with the return showing its execution, by reading same to the witness Van Vleck, the general manager of the defendant, by the sheriff of Harris county, is assigned as error. Upon cross-examination of one of defendant's witnesses, it was developed that a record was kept of all the repairs done upon the engines of defendant, and this witness had, on his examination in chief, testified that the spark arrester in the engine, at the time of the fire, was placed in the engine by witness in December, 1894; and it also appeared from the testimony of one of defendant's witnesses that these spark arresters lasted from six to eight months. The witness Van Vleck was summoned to appear on the 20th of November, the day on which it was agreed that all of the cases should be tried together by one jury, and by mistake, it seems, three of the cases were set down for trial on the 20th, and the other two were set for the 24th of November; that the cases set for the 20th were not reached for trial before noon of the 22d, and, under a rule of the court, these cases stood continued for the term, and the witnesses were discharged for the term; and that thereafter it was agreed that all five of the cases, with the consent of the court, should be tried on the 24th of November; and on that day both parties answered "Ready," no motion for continuance being made by either party. When the witness Van Vleck was called, and failed to appear, with the books and the records he had been commanded to bring with him, the counsel for the defendant offered, if the court would allow him 30 minutes to do so, to produce both the witness and the books in court. This offer was made in the afternoon, and the court expressed a willingness to grant the request, and proposed to adjourn the case until morning; and to this proposition the counsel for plaintiffs objected, assigning as his reason for objecting that he was compelled to be absent from the court on the next day. Van Vleck and the books were in the city of Houston. This subpoena could be admitted in evidence only upon a refusal of the defendant to produce the documents called for by the subpoena, and only for the purpose of proving the fact that the defendant had refused to put its records in evidence, that the jury

might determine whether or not its refusal was caused by the knowledge of the defendant that its records would contradict or discredit the testimony of its witnesses. We are of the opinion that the facts do not show a refusal by the defendant to obey the subpoena, or even an unwillingness to do so; and it was therefore error to admit the subpoena in evidence,—an error calculated to influence the jury in reaching their conclusion upon the issue of negligence vel non.

The eighteenth assignment of error, we think, is well made, and should be sustained. The verdict is not warranted by the evidence, and the court should have set the verdict aside, and granted a new trial. For the errors indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

WILDER et al. v. McCONNELL et ux.<sup>1</sup>  
(Court of Civil Appeals of Texas. Nov. 13, 1897.)

RURAL HOMESTEAD—BRINGING WITHIN CITY LIMITS.

Plaintiffs set apart a four-acre block as their rural homestead, under Rev. St. art. 2403. They divided the block into three lots inclosed by fences, and erected a house on each lot, and lived in one of the houses, and rented the others, applying the rentals to their support. Held, that the whole block was exempt to them as a homestead, though it became included within the limits of an adjacent city, where the city extended its boundary lines without their consent.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Injunction by Isaac McConnell and wife against George Wilder & Co. and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

H. S. Moran, for appellants. John W. Squyres and R. L. Stennis, for appellees.

HUNTER, J. This suit was brought by the appellees, Isaac McConnell and wife, on January 27, 1897, to enjoin the sale of a lot, with dwelling house and other improvements thereon, situated in the city of Weatherford, levied on by the constable by virtue of an execution issued on a judgment of a justice of the peace in favor of George Wilder & Co. against Isaac McConnell for \$55.85 and costs. The petition for injunction set forth that the lot was part of McConnell's homestead. The case was tried by the court without a jury, and judgment was rendered in favor of appellees perpetuating the injunction, and from this judgment Wilder & Co. appeal to this court, complaining that the evidence was not sufficient in law to sustain the same. No conclusions of fact were filed by the court, but the following recital appears in the judgment: "And the court, having heard the pleadings of the parties read, and having heard the evidence and argument of counsel, finds and holds that the land in

controversy in this suit is a part of the rural homestead of plaintiffs, and that the temporary injunction heretofore granted in this cause should be perpetuated." A statement of facts is contained in the record, from which we find the following conclusions of fact: The lot in controversy is 75x150 feet, and had at the time of the levy a dwelling house, with four rooms and a front porch, fronting to the west, on a public street of the city of Weatherford, known as "Bois d'Arc Street." It was fenced off to itself, and in the rear thereof was a stable and shed and a privy, and back of the stable lot was a garden spot. In fact, this lot, and one of similar size, arrangement, and improvements adjoining it on the south, were fenced off from each other and from the lot on the north, on which appellees' residence, stables, barns, lots, and other necessary improvements were located, and where they at the time resided, claiming all the lots mentioned as their homestead. Their homestead as claimed was a four-acre block, which, together with a five-acre block adjoining it, was by them, in 1890, designated as their homestead, under the provisions of our Revised Statutes (article 2403); and in the spring of 1893, having sold their five-acre block, appellees built the three houses and the improvements mentioned on this four-acre block, dividing each lot off by partition fences to itself. On the two lots on the north side of the four-acre block, being each 75 feet wide, they placed their dwelling house, barns, lots, well, etc., with the purpose of residing thereon; while on the two lots 75 feet wide each, they placed the dwelling houses and other improvements named, for the purpose of renting them to tenants and applying the rentals to their support. They were old people, the husband being 78 years of age, and had to rely upon the income produced by this property, it seems, for their support and maintenance. These buildings and improvements were all placed on the four-acre block prior to March 1, 1893, and while it was outside the city limits of Weatherford, and while the block constituted their rural homestead. Afterwards, however, on April 6, 1893, the south boundary line of the city was extended, without their request or consent, to the south and east lines of the four-acre block, so as to place this four-acre block exactly in the southeast corner of the city corporation. After the city lines were thus extended, the city proposed to them that if they would set back their fence 20 feet from their west boundary and 6 feet from their south boundary, it would grade and gravel streets on their west and south boundaries, and this they agreed to; and thus Bois d'Arc street, on their west, and Akard avenue, on their south, were opened and established, and graded and graveled.

Since this block was taken within the corporate limits of the city, down to the time of the levy no changes had been made in the lines and fences of the lots, but the appellees

<sup>1</sup> Writ of error granted by supreme court.

continued to rent the two lots on the south of the block whenever they could get tenants, and used them for no other purpose. The tenants who occupied the lot levied upon, however, in many instances paid the rents by manual services in assisting appellees in their household work and work about their garden, lots, and stables. The appellants' judgment and execution were valid and subsisting claims against Isaac McConnell, and were levied on one of the south lots,—the one lying next to appellees' residence lot on the south, being 75x150 feet,—whereby they have fixed a valid lien on said lot, unless it is part of appellees' homestead. Upon these facts, we are of opinion that the judgment of the district court was correct. It is clear that this entire block of four acres was the homestead of appellees at the time the city limits were extended around it. It being their homestead then, and not subject to execution, the extension of the boundary lines of the city, especially without their request or consent, could not, in our judgment, deprive them of the right to continue to use the property afterwards the same as they had done before, without subjecting themselves to the danger of being stripped of it by execution creditors. It did not thus lose its character as a rural homestead. We find no error in the judgment, and it is therefore affirmed.

#### On Rehearing.

(Dec. 31, 1897.)

In the argument of this motion appellants' counsel calls our attention to some errors we made in the findings of fact, which the counsel considers material to appellants' case, and which we take occasion to correct, though we consider the changes which we here make wholly immaterial. Counsel earnestly complains that we place the four-acre lot "exactly in the southeast corner of the city corporation," insisting that the line of the city boundary was extended one-half mile, and that this four-acre block was about midway between the old line and the new one, and was, therefore, about a quarter of a mile from the new boundary line of the city; and we find accordingly.

Again, it is requested as highly material that we find that Zeb Burton bought a lot from appellees out of this homestead block. It does appear from the record that in the spring or summer of 1896 appellees hired Burton to dig a well on the north or residence lot, and paid him therefor by conveying him 78x157 feet off the south side of the block, near the southeast corner thereof. At the time of the trial Zeb Burton lived on the lot appellees conveyed him for digging the well, and at that time Will Clanton and Mrs. Lewis lived east of Burton's, and people lived all around the homestead block; but the record nowhere discloses how near they lived to it, nor does it show when they built their houses. We regard these additional facts

as wholly immaterial to the question decided in this case, as ruled in the original opinion. Unless these houses had been built around appellees' homestead block, so as to make a town or village there before he built his tenement houses, the fact would cut no figure in determining his right to build tenement houses on his rural homestead, and rent them continuously, either for money rent or for services in and about his homestead affairs. The motion for rehearing is overruled.

#### BOWMAN v. TEXAS BREWING CO.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 4, 1897.)

**INJURY TO SERVANT — NEGLIGENCE — EVIDENCE — QUESTION FOR JURY — AGENCY.**

1. Whether a flaw in an iron clip on a wagon is an obvious defect, and such as would render it dangerous for a servant to use, is a question of fact for the jury.

2. Whether a defect in a wagon was such that an ordinarily prudent servant would consider it dangerous to use is a question of fact for the jury.

3. Whether defendant was guilty of negligence in furnishing his servant with certain horses, without warning him of their dangerous character, is a question for the jury.

4. Where there is any evidence to support a cause of action, the issue of fact must be submitted to the jury.

5. A brewing company furnished horses and wagon to deliver beer, and furnished a place to store its beer until it was sold by one claimed to be its agent; and, when so sold, the alleged agent paid the company for it. *Held* to be prima facie sufficient evidence of agency to sustain a finding to that effect.

Error from district court, Grayson county: Don A. Bliss, Judge.

Action by M. H. Bowman against the Texas Brewing Company. Judgment for defendant, and plaintiff brings error. Reversed.

C. B. Randell, for plaintiff in error. W. R. Sawyers and Standifer & Eppstein, for defendant in error.

#### Reasons for Reversal.

HUNTER, J. This suit was brought by appellant on February 7, 1895, to recover damages from appellee for personal injuries alleged to have been received on account of the broken and defective condition of a wagon, and the dangerous character of a pair of horses, which, as an employé of appellee, he was required to use and drive in and about the business of delivering beer in the city of Denison from the storage house of appellee to purchasers and consumers. It was alleged that appellee knew of the defective, broken, and dangerous condition of the wagon, and the dangerous character of the horses, and that appellant did not know thereof. The allegation relating to the horses is as follows: "That both and each of them were then and there easily frightened, excitable, fractious, unsafe, and dangerous to drive for the uses to which they were then and there put," etc. It seems that appellant was employed by Sanford & Son, who, as the evidence tends to

<sup>1</sup> Application for writ of error dismissed for want of jurisdiction.



show, were the agents of the appellee brewing company at Denison, Tex., and that they employed him, not for themselves, but for another. The horses and wagon belonged to appellee, the beer belonged to appellee, and the appellee had a place for storing the beer until sold by Sanford & Son; and, when so sold, Sanford & Son were to pay to appellee \$2 per keg, and \$8 per barrel, for said beer. The court, in making out the statement of facts (for the attorneys disagreed), found the above facts to have been proven. Some of the evidence offered on the subject of agency, and excluded by the court, did not embody conclusions of the witnesses, but the statement of facts,—general in their nature, it is true, but competent, nevertheless, subject to cross-examination for more specific details, both as to the facts, and as to their knowledge thereof. But, as we feel constrained to reverse the judgment on other grounds, the questions can on another trial be put in better form, and the objections thus obviated.

We are of opinion that the court erred in giving the following charge to the jury, which is complained of by appellant: "The testimony introduced before you being insufficient in law to sustain a verdict for the plaintiff, you are instructed to find for defendant." It would be improper in us to discuss the evidence, in view of the fact that another trial before a jury must be had; but we think that there was sufficient evidence on both allegations of negligence to require the court to submit the issues thus raised to the jury.

Mr. Wood, in his work on the Law of Master and Servant, lays down the rule as follows: "In order to excuse the master, it is not enough to show that the servant knew the machinery was defective. It must also be shown that he knew, or ought to have known, that it was dangerous." Wood, *Mast. & S.* (2d Ed.) p. 749, § 365. We think it should have been left to the jury to determine whether the crack or flaw in the iron clip was a real defect or not. The court has no more right to determine that a crack or flaw in an iron clip is an obvious defect, or that it is a defect rendering it dangerous to use the same, than he has to decide any other fact put in issue by the pleadings. It is a question for the jury to decide, and this right to a jury's decision on a controverted question of fact is guaranteed by the organic law of our state government, and is inherent in our system of jurisprudence. If appellant suspected that the crack or flaw was a defect, and that to use it in that condition was dangerous, the jury might have found that his suspicions were removed by the employer, and that he was thus convinced by the employer, either that it was not a real defect, or that it did not render it dangerous to use the wagon. *Lasch v. Stratton* (Ky.) 42 S. W. 756. And it was also a question of fact whether an ordinarily prudent man would have considered the flaw or crack to be such

a defect as would render the wagon dangerous to use, under the circumstances. It also appears that when the defective clip broke, and the singletree fell, the horses, scared at it, became unmanageable and ran away, overturning the wagon and injuring the appellant. Whether it was negligence in the appellee to furnish such horses, without informing appellant of their unsafe character, if he was not so informed (and he alleges that he was not), is a question which the jury ought to be permitted first to pass upon. That they ran away under the circumstances might, of itself, be sufficient evidence to sustain a verdict. *McCray v. Railway Co.* (Tex. Srp.) 34 S. W. 96; *Fitzgerald v. Hart* (Tex. Sup.) 17 S. W. 369; *Stooksbury v. Swan*, 85 Tex. 573, 22 S. W. 967; *Sack. Instruct. Juries* (2d Ed.) §§ 15, 31. At all events, we know of no law which declares that such acts as the appellant's, under the circumstances, constitute negligence per se.

In *Stooksbury v. Swan*, supra, the lamented Chief Justice Stayton said that article 728, Code Cr. Proc. 1879, applies in terms only to criminal procedure, but fairly states the rule applicable to civil cases, and said: "The law provides that 'the jury in all cases are the exclusive judges of the facts proved and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence.'" The evidence in this case does not come within the exceptions named. If the jury are "the exclusive judges of the facts proved," a judge has no legal right to invade their exclusive jurisdiction. Their powers, in our system of jurisprudence, are as high, as sacred from invasion, and as well defined as his; and he has no more right to assume the performance of their exclusive functions than they have to arrogate the performance of his. Of course, he may grant a new trial, if in his judgment the evidence does not sustain the verdict; but, where there is any evidence to support the cause of action or defense pleaded, the issue of fact must be submitted to the jury. The judge can exercise his power over the verdict, except in the absence of evidence, only by granting a new trial, just as the executive may veto an act of the legislature, though he may not defeat or obstruct its passage; and so regardful is our law of the rights of the jury and the sanctity of its verdict that only two new trials can be granted by the judge to each party, except where the jury have been guilty of misconduct, or erred in matter of law. Rev. St. 1895, art. 1372. We think the evidence of agency was, clearly, prima facie sufficient to have sustained a verdict in favor of that alleged fact. For these reasons, we think the judgment in this case ought to be reversed, and the cause remanded for a new trial; and we so order.

**BUCKLER v. TURBEVILLE.<sup>1</sup>**

(Court of Civil Appeals of Texas. Oct. 16, 1897.)

**CONTESTED ELECTION PROCEEDINGS—REVIEW BY WRIT OF ERROR.**

1. Rev. St. 1895, art. 1383 et seq., authorizing an appeal or writ of error to be taken from judgments rendered in "civil cases," do not apply to a contested election proceeding under the statute, as it is not a civil case.

2. Rev. St. 1895, art. 1804h, authorizing an "appeal" from a judgment rendered in a contested election proceeding, does not embrace proceedings by writ of error.

Error from district court, Delta county; Howard Templeton, Judge.

Proceeding by S. B. Turbeville against S. P. Buckler to contest an election. Judgment for plaintiff, and defendant brought error. Dismissed.

Hazlewood & Smith, Sharp & Banister, and Perkins, Gilbert & Perkins, for plaintiff in error. L. L. Wood, Ed. H. Bennett, and Jas. Patteson, for defendant in error.

**FINLEY, C. J.** The motion to dismiss the writ of error sued out in this proceeding is based upon the proposition, in part, that the proceedings of the trial court could only be reviewed in this court by means of an appeal; that the writ of error does not obtain in a trial of this character. This is a contested election proceeding, and the writ of error seeks to have us revise a judgment of the district court of Delta county rendered in such contest. The contest is over the office of sheriff of Delta county, each of the parties to the contest claiming that he was elected to the office by the people on the 3d day of November, 1896. It appears from the record that in November, 1896, S. P. Buckler was awarded the certificate of election by competent authority, and duly qualified as sheriff of Delta county. S. B. Turbeville, who was the opposing candidate at the election, contested the election in the district court of Delta county, under our statute providing for the contest of elections, which was tried by said court, and resulted in a judgment or decree of said court rendered April 3, 1897, declaring the election for sheriff void, and directing the county judge of the county to order a new election to fill said office. No appeal was taken from this decision, and on April 6, 1897, after the adjournment of the court for the term, the county judge ordered the election, in obedience to the judgment, to take place May 1, 1897. The election was held upon said date, both of the contesting parties being candidates at said election; and May 10, 1897, S. B. Turbeville was declared elected, and awarded the certificate of election by the commissioners' court, and he duly qualified as sheriff of the county. On May 11th following, S. P. Buckler sued out this writ of error from said judgment of the district court, declaring the former election void, and direct-

ing the holding of the new one; and the question is, does the law authorize the revision of such judgment by this court under writ of error procedure?

It is quite clear that the general statute (Rev. St. 1895, art. 1883 et seq.) authorizing an appeal or writ of error to be taken to this court from every final judgment of the district court in civil cases cannot be regarded as the source of authority for the prosecution of a writ of error from a judgment rendered in a contested election case. It has been repeatedly held by our supreme court that a contested election proceeding under statute is not a civil case, and is not embraced within the scope of subjects of jurisdiction ordinarily conferred upon judicial tribunals. It has been held to partake of a political nature, not a matter for judicial determination, and that constitutional courts would not be authorized to exercise jurisdiction over such a controversy in the absence of express authority in the constitution. *Williamson v. Lane*, 52 Tex. 335; *Wright v. Fawcett*, 42 Tex. 203; *Rogers v. Johns*, Id. 339; *State v. De Gress*, 53 Tex. 387; *Seay v. Hunt*, 55 Tex. 558; *Ex parte Whitlow*, 59 Tex. 271; *Gibson v. Templeton*, 62 Tex. 555; *State v. Owens*, 63 Tex. 265; *State v. De Gress*, 72 Tex. 246, 11 S. W. 1029. Until September, 1891, when our present constitution was amended, the constitution contained no express provision in relation to the contest of elections. Our amended constitution expressly gives jurisdiction to the district court "of contested elections." Const. art. 5, § 8. In the creation of this court the constitution does not mention contested elections as one of the subjects of its jurisdiction. But, after setting forth subjects of its jurisdiction, it is provided that it "shall have such other jurisdiction, original or appellate, as may be prescribed by law." Under authority of this general jurisdictional clause, the legislature provided for an appeal in contested elections to this court. Rev. St. 1895, art. 1804h, and Id. art. 996, subd. 4. There is no question, therefore, of constitutional jurisdiction,—either as to the trial court or this court. The problem for solution is the construction of said article 1804h, and the determination of the question whether a writ of error can be prosecuted under it.

The principles heretofore considered are valuable and pertinent to this inquiry, for the reason that they lead to the conclusion that the subject of contested elections being a matter of special cognizance and express provision in our constitution and statutes, and not embraced in general provisions relating to civil controversies, we must determine the question before us from the special provisions relating to that subject. The constitution contains no provision relating to the subject of appeal or writ of error in contested election proceedings. The only constitutional provision touching the matter of contested elections is to be found in article 5, § 8, where original jurisdiction is expressly given to the district court. The

<sup>1</sup> Application for writ of error dismissed for want of jurisdiction.

only authority to be found for a revision of the trial proceedings in a contested election is embraced in this provision of our statutes: "Either the contestant or contestee may appeal from the judgment of the district court to the court of civil appeals, under the same rules and regulations as are provided for appeals in civil cases, and such cases shall have precedence in the court of civil appeals over all other cases." Rev. St. 1895, art. 1804h. It will be seen that this provision authorizes an appeal under the same rules as are provided for appeals in civil cases. It is contended by counsel opposing the motion that this language should be construed to embrace proceedings by writ of error. It is insisted that, under our system and practice, the terms "appeal" and "writ of error" are to be treated as meaning the same thing, and therefore, wherever the statute authorizes an appeal, it should be held to give also the right to writ of error. By reference to chapter 19, Rev. St. 1895, under the head of "Appeal and Writ of Error," it will be found that the statute provides that "an appeal or writ of error" may be taken in civil cases. Article 1383. The appeal must be taken during the term of court at which the judgment is rendered. Notice of such appeal must be given in open court, within 2 days after final judgment, or 2 days after the motion for new trial is overruled. The appeal bond is required to be filed within 20 days after the expiration of the term at which the judgment was rendered. If the term may by law continue more than 8 weeks, then the bond must be filed within 20 days after the notice of appeal is given. Rev. St. 1895, art. 1387. The party taking the appeal is called the "appellant." The adverse party is called the "appellee." Id. art. 1384. The writ of error may be sued out at any time within 12 months after the judgment is rendered. Article 1389. The method is by filing petition and bond with the clerk of the court, and having citation issued and served upon the adverse party. Articles 1390-1395. The party suing out the writ is called the "plaintiff in error," and the adverse party is called the "defendant in error." Article 1385. These provisions relate to appeals and writs of error in civil cases generally, and it is clearly manifest that there are provided two separate, distinct, and materially different methods for obtaining the revision by appellate courts of judgments rendered by trial courts of original jurisdiction. It is true that the party desiring that the judgment of the trial court in civil cases shall be revised has the option of adopting the method of appeal or that of writ of error to bring the case into the appellate court. Either means will accomplish the end, but they are separate and distinct, and must not be confounded. The terms "appeal" and "writ of error," as used in the statutes covering appeals in civil cases generally, obviously

mean different proceedings; and it would seem that another article of the statute which relates to a special proceeding, and provides only for an appeal therein, should not be construed as embracing the right to writ of error. We think the language of the statutory provision allowing the appeal requires this construction, and to hold otherwise would overthrow its plain import. But we need not rest our decision wholly upon the language used in the statute. We think it clearly appears that it was the intention of our lawmakers that controversies over elections should be speedily terminated, and for this reason the writ of error was not provided as the means of revising trials in contested elections. Precedence is given such cases over all other business in the trial court. Rev. St. 1895, art. 1802. When an appeal is taken, the clerk is required, without delay, to make up and send the transcript to the court of civil appeals. Id. art. 1804i. The court of civil appeals is required to give the appeal precedence over all other business. Id. art. 1804h. Why make all these provisions to secure a hasty termination of the controversy, and at the same time give 12 months in which to carry the case up by writ of error?

Our supreme court, in discussing the quo warranto statute on motion to file transcript on writ of error proceeding, through Stayton, C. J., said: "The statute regulating proceedings by quo warranto provides 'that in cases of appeal to the supreme court, to which either party shall be entitled, the said court shall give preference to such case, and hear and determine the same at the earliest day practicable, and all such appeals shall be presented to the term of the court in session at either branch, or the first term to be held if not in session, after judgment has been rendered in the district court.' Gen. Laws 1879 (Sp. Sess.) p. 43. The third section of the act evidences an intention on the part of the legislature that this character of action shall be speedily disposed of in the district courts. The fourth, a part of which we have quoted, only provides for an appeal, and requires this to be prosecuted with greater celerity than are other appeals. The reason for this is manifest, and the purpose to be accomplished through such proceeding could be entirely defeated, in some cases, by the delays which might be obtained through a writ of error which may be sued out at any time within two years after the rendition of judgment. The legislature having provided a mode and time within which such cases may be brought before this court for revision, we are of the opinion that it was not intended that they might be raised on writ of error. The judgment of the district court became a finality when, without excuse for the delay, the plaintiff in error failed to prosecute his appeal within proper time. The motion to file the transcript must therefore be refused, and it will be the duty

of the officers charged with execution of the judgment of the district court to see that it is done." *Livingston v. State*, 70 Tex. 393, 11 S. W. 115.

Our attention is also directed to the case of *Hall v. Thode*, 75 Ill. 173. The constitution of Illinois in force when this case arose provided for an appeal and also a writ of error from final determinations of the county courts. The Revised Statutes of said state, under the title of "Elections" (section 123, c. 46), and which governed the case of *Hall v. Thode*, read as follows: "In all cases of contested elections in the circuit courts or county courts appeal may be taken to the supreme court in the same manner and upon the like conditions as is provided by law for taking appeals in cases in chancery from the circuit courts." The case of *Hall v. Thode* was a contest in the county court, under the statute, for the office of clerk of the circuit court. *Hall* sued out a writ of error from the judgment of the county court to the supreme court, as in ordinary cases. On motion to dismiss, the supreme court said: "Here is a specific remedy provided in a specific case; not one arising in the usual course of legislation, but exceptional. It is a familiar principle in such cases where the organic or statute law has given a specific remedy that remedy must be pursued. In contested elections before the county court, the remedy, and the only one, to correct a supposed error in the judgment, is by appeal. In our opinion, this special provision has taken away, by reasonable implication, the remedy by writ of error. These proceedings are purely statutory, having no vigor outside of the statute. And it is an unvarying principle that the requirement of the statute must govern and control them. We are clear, on reason and authority, that a writ of error does not lie in this case, and accordingly is dismissed." *Hall v. Thode*, 75 Ill. 173.

We think it clear that it was not intended by our legislature to give the right to prosecute the writ of error in contested election cases, and the motion to dismiss in this cause is therefore sustained.

#### OLIVER et al. v. MOORE et al.

(Court of Civil Appeals of Texas. Nov. 20, 1897.)

#### PARTNERSHIP—INSTRUCTIONS—ISSUES—INCOMING PARTNERS—LIABILITIES.

In an action against three parties for a debt contracted in the name of one, but alleged to have been a partnership debt, the other two denied the partnership, and in a special answer set out that they had no interest in the profits or losses of the alleged partnership work, and had no connection with the other party until long after the debt sued on had been contracted, and that they then became merely indorsers for him. The court gave a general charge as to what would constitute a partnership between the parties, and instructed that they were liable as partners if, at any time prior

to the time at which the debt was contracted, they were partners in said work. *Held*, that the two defendants were entitled to an instruction that they were not liable as partners, if, after the debt had been contracted, they became partners in said work, unless they assumed or agreed to pay said indebtedness.

Appeal from district court, Dallas county: Edward Gray, Judge.

Action by J. W. Moore against W. J. Williams, T. J. Oliver, and R. C. Storie. From a judgment for plaintiff, and from an order overruling their motion for a new trial, defendants Oliver and Storie appeal. *Reversed*.

Geo. H. Flowman for appellants.

**BOOKHOUT, J.** This is a suit instituted February 17, 1894, by J. W. Moore against W. J. Williams, T. J. Oliver, and R. C. Storie. In an amended petition, filed November 13, 1893, plaintiff alleged that on January 1, 1892, defendants were partners in the construction of a system of water works at Denton, in Denton county, Tex., under the firm name of W. J. Williams, and under said firm name had constructed said water works, and that said partnership continued until January 1, 1893; that on February 13, 1892, the defendants, under the firm name of W. J. Williams, entered into certain contracts with plaintiff to make excavations, erect the necessary buildings, and lay foundations and pipes necessary in the construction of said waterworks, and that plaintiff performed all of said work in accordance with his contract: that on July 16, 1892, in part payment for said work and services performed by plaintiff under said contract, the defendants, under their firm name of W. J. Williams, executed and delivered to petitioner their two certain promissory notes, for \$500 each, payable to the order of plaintiff,—the first on the 15th day of August, 1892, and the second on the 31st day of August, 1892,—with 10 per cent. interest per annum after maturity, and 10 per cent. attorney's fees if placed in the hands of an attorney for collection. There was no answer filed by defendant W. J. Williams. The defendants Oliver and Storie answered by general denial, and a denial of the partnership with Williams under the name of W. J. Williams; and further answered that on February 11, 1892, Williams, for himself, and before these defendants had any knowledge or notice of the same, entered into a contract with the Denton Water, Light & Power Company for the construction of a system of waterworks in the city of Denton, Tex.; and on said date, and prior to defendants' having any knowledge of the same, contracted with plaintiff, Moore, to do certain work in the construction of said waterworks; and thereafter plaintiff, Moore, without any knowledge upon the part of these defendants, entered upon the performance of said work for said Williams, and did certain work under said contract in the construction of said waterworks. That defendants Oliver and Storie, on March 19, 1892, agreed to lend

said Williams money, and indorsed paper for him, for material to erect said waterworks, for which said Williams agreed to pay them 10 per cent. interest on the same by the 1st day of July, 1893, and as security for said loan said Williams assigned to them certain bonds and stock to be issued to him by said Denton Water, Light & Power Company, and further agreed to give them, as a bonus for said loan, a certain amount of bonds of said Denton Water, Light & Power Company. That they never were partners with said Williams in the construction of said waterworks, had no interest in its profits, nor did they share any of its losses, and that plaintiff did the work for Williams under contracts made by him long before defendants Oliver and Storie had any connection with said Williams, and that whatever work was done by plaintiff upon said waterworks was done for said Williams and at his request, and not at the instance or request of these defendants. That plaintiff, Moore, accepted the notes of said Williams, and had never made any demand on these defendants for the payment of same until in February, 1894, just previous to the filing of this suit. The answer was duly sworn to by both defendants. There was a trial, which resulted in a verdict by a jury in favor of plaintiff, Moore, for the amount of the notes sued on, with interest and attorney's fees, upon which judgment was duly entered. Oliver and Storie filed their motion for new trial, which was overruled, to which ruling they excepted, and have appealed to this court.

There are numerous assignments of error by appellants, and nearly all of them are directed at the charge of the court, and the refusal by the court to give special charges requested by the defendants Oliver and Storie. The court in its general charge instructed the jury, generally, what in law would constitute a partnership on the part of Williams, Oliver, and Storie; and further told them that, if they believed that at any time previous to the 16th day of July, 1892, the defendants were partners in the construction of the waterworks at Denton, then they should find for plaintiff the amount of the notes, principal, interest, and attorney's fees. The defendants Oliver and Storie requested special charges upon the issue embraced in their special answer, to the effect that if W. J. Williams, individually, entered into a contract with the Denton Water, Light & Power Company, on February 11, 1892, for the construction and erection of its system of waterworks at Denton, Tex., and thereafter, on February 13, 1892, he individually entered into a contract with the plaintiff whereby the plaintiff was to perform certain parts of that work in the laying of pipes, etc., and thereafter the defendants Oliver and Storie became interested in said work, they would not be liable or bound on the contract made between plaintiff and W. J. Williams, unless they assumed or agreed to pay the indebted-

ness created by said contract. The several special charges requested by defendants Oliver and Storie invoked the law governing the liability of an incoming partner. See *T. Pars. Partn.* (4th Ed.) §§ 336, 337, and notes. There was evidence tending to prove the matters set forth in the special pleadings of the defendants Oliver and Storie. The court in its general charge entirely ignored the issues raised by the pleadings of said defendants. These defendants were entitled to have the issues raised in their pleadings, and to support which evidence had been introduced tending to establish the truth of the same, submitted to the jury; and the failure of the court to submit the same to the jury, after its attention had been called to the matter by the several special charges requested by said defendants, was error. We do not feel called upon to pass upon the other assignments of error raised by appellants. Because of the court's refusal to submit to the jury the matters of defense set up by the defendants Oliver and Storie, the judgment is reversed, and the cause remanded.

#### SOUTHWESTERN MFG. CO. v. SWAN.

(Court of Civil Appeals of Texas. Nov. 20, 1897.)

#### DIVORCE—COMMUNITY PROPERTY—TRESPASS TO TRY TITLE—HOMESTEAD.

1. When a decree of divorce is entered, and no order is made concerning community property, the husband and wife become tenants in common of land in which they had a community interest.

2. Where a man and his divorced wife are tenants in common of land, she is entitled to a homestead in her share of the property, if she lives there, and raises and supports her children. A divorced husband is not entitled to claim the exemption of homestead in his share of the community property by the fact that he worked on the property a short time in the capacity of an employe, and contributed a small amount to the support and education of the minor children, who were living with his divorced wife.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Trespass to try title by the Southwestern Manufacturing Company against Louisa C. Swan. From a judgment for defendant, and from an order overruling plaintiff's motion for a new trial, plaintiff appeals. Reversed.

On November 30, 1890, J. T. Swan and L. C. Swan were husband and wife, and had a family consisting of three minor children; and on that date they purchased 100 acres of land in Kaufman county, Tex., from Sarah E. Roberts and her husband, A. L. Roberts. The deed was made to Louisa C. Swan, and recited a consideration of \$875 cash in hand paid by Louisa C. Swan out of her separate estate, and the further consideration that she was to pay off a balance due on certain notes held against said property, executed by A. L. Roberts, payable to G. B. Davis; said

balance being \$350. J. T. Swan moved with his family upon said land, built a house and barn thereon, dug a well and cistern, and made other improvements, and lived thereon as his homestead. On February 9, 1894, the North Texas National Bank of Dallas recovered a judgment in the district court of Kaufman county, Tex., against J. T. Swan for the sum of \$1,605.95. An abstract of this judgment was duly filed, recorded, and indexed in Kaufman county on March 6, 1894. This judgment was transferred by the North Texas National Bank to plaintiff, the Southwestern Manufacturing Company, on December 25, 1894. On August 21, 1894, L. C. Swan filed suit in the district court of Kaufman county against J. T. Swan for divorce; and on September 13, 1894, a decree was entered granting a divorce, and awarding the sole care and custody of their children, Josia, Claude, and Edna, to Mrs. L. C. Swan. There was no disposition whatever made of any property by the decree. Mrs. L. C. Swan and the children remained in possession of the homestead, cultivating and using it as their own. J. T. Swan moved to Houston in March, 1894, and lived there until August, 1896. He claimed an interest in the property by reason of its having been purchased with community funds, and improved by the community estate. On November 2, 1896, it was agreed between J. T. Swan and Mrs. L. C. Swan that, for the purpose of settling whatever interest J. T. Swan had in the property, she (Mrs. L. C. Swan) would execute a deed to him for 45 acres, reciting a cash consideration of \$1,250, and that J. T. Swan was to immediately deed it back, for the recited consideration of \$750 cash, and a note for \$500 to be executed by Mrs. L. C. Swan (J. T. Swan retaining a vendor's lien on the 45 acres of land), which note was to be accepted by J. T. Swan for his interest in the 100 acres. This agreement was carried out. The deed was made by Mrs. L. C. Swan to J. T. Swan on November 2, 1896, for 45 acres of land, and at the same time the deed was made by J. T. Swan, conveying the same property back to L. C. Swan; the deed reciting a cash consideration of \$750, and the promissory note of Mrs. Swan for \$500. These deeds were acknowledged and delivered on the same day. No cash was paid in this transaction. On December 11, 1896, plaintiff below (appellant here) caused an execution to be issued on its judgment (the same having been kept alive by the issuing of an execution within a year), and caused the same to be levied upon the 45 acres of land described in the deed from Mrs. Swan to J. T. Swan of November 2, 1896. The land was duly advertised and sold by the sheriff on the first Tuesday in January, 1897, and bid in by the appellant. The amount of the bid, less the costs, was credited upon its judgment.

Huffmaster & Huffmaster, for appellant. J. S. Woods, for appellee.

BOOKHOUT, J. (after stating the facts). This is an action of trespass to try title, instituted by appellant against Mrs. L. C. Swan to recover the 45 acres of land. The defendant pleaded a general denial, not guilty, and that the same was the homestead of herself and her divorced husband, and not subject to levy, and alleged that the land was paid for out of community funds of herself and her divorced husband, and that the recitation contained in the deed from Roberts and wife, that the same was paid for out of her separate property, is not true. And she further alleged that J. T. Swan never abandoned his homestead interest in said property, either before or since the divorce, and since the decree he has worked upon and aided in improving said tract of land, and contributed to it by the use of his means and labor, and that she and her divorced husband had the right to partition and divide their homestead rights and equities in said land free from any liability arising therefrom. Plaintiff filed a supplemental petition, alleging that the property was purchased with the separate means of Mrs. Swan, and that, if J. T. Swan ever had any homestead interest in the same, he abandoned the same long prior to the time that plaintiff acquired its rights therein. It also set up the divorce proceedings, and alleged that after the granting of the divorce J. T. Swan abandoned his family and his said home. There was a trial with the aid of a jury, and a verdict for the defendant, upon which judgment was duly entered. Plaintiff filed its motion for new trial, which being overruled, it excepted, and prosecutes its appeal to this court. The facts above set out were proven upon the trial.

Under our view of the law of this case, we deem it necessary to pass upon but one assignment of error presented by appellant. Appellant's fourteenth assignment of error is as follows: "The court erred in instructing the jury as follows: 'The jury are further instructed that if they believe from a preponderance of the evidence that the land in question was occupied and improved by Mrs. L. C. Swan and her husband, John T. Swan, and formed a part of their homestead, prior to the time they were divorced, September 13, 1894; and if the jury further believe from the evidence that after said divorce was granted it was agreed by and between defendant, L. C. Swan, and her husband, John T. Swan, that she (defendant) should continue to use and occupy said land as a part of their homestead, and support their minor children, and that she continued to use said land as a part of said homestead until November 2, 1896; and if the jury further believe from the evidence that on November 2, 1896, when she conveyed said land to John T. Swan, it was understood and agreed between said parties that he should immediately reconvey same to her, and that said arrangement was made for the purpose of adjusting the equity rights of John T. Swan in said homestead, and to make

defendant, L. C. Swan, the sole owner of the same, for the purpose of supporting and maintaining their minor children,—then and in that event the jury are instructed that the judgment lien claimed by plaintiff did not attach to said land when it was conveyed to John T. Swan by defendant; and, if such is the case, the deed of John T. Swan, dated November 2, 1896, placed the title in him to said land, and you should find for defendant." The principle announced in the foregoing charge of the court is in direct conflict with the decision of our supreme court in the case of *Kirkwood v. Domnau*, 80 Tex. 647, 16 S. W. 428. That was a suit brought by the purchaser from a divorced husband of his interest in the community homestead of himself and divorced wife, against the divorced wife and her husband; she having married again after the divorce. In the divorce proceedings in that case between G. W. Allen and Bettie Allen there was no disposition made of their property. There were minor children, and they remained with their mother upon the community homestead. She supported them without the assistance of her divorced husband. Allen, the divorced husband, executed a deed of trust to secure a debt he owed. The debt not being paid, the deed of trust was foreclosed, and the property bought in by appellee. In that case, Associate Justice Henry, speaking for the court, said: "Allen and wife, while their marriage subsisted, each owned an undivided one-half interest in the property in controversy. It was in the power of the court that decreed the divorce, under the statute, not only to make such a decree with regard to the use of the homestead as would properly protect the wife in its use, but it might also have provided for its protection and use by the minor children of the marriage, subject only to the prohibition clause that the decree should not have the effect, in form or in substance, of divesting the husband of his title to one-half. We think, however, that the husband's interest in the property can be so charged only in the divorce suit, and as a part of the decree of divorce. It not having been then done, the former husband and wife stood towards each other, after the decree of divorce, as if they had never borne that relation to each other. They then owned the property as tenants in common, and subject to all the rules and regulations of strangers; bearing to each other that relation." We think the law announced in the above case is applicable to the facts in the case before us. It is true that J. T. Swan, after the divorce, contributed small amounts towards the education of the minor children. He returned to the property and worked thereon a short time in 1896, but in the capacity of an employé of one of the tenants. Under the law as announced above, the decree for divorce not having made any disposition of the property, J. T. Swan and L. C. Swan after the divorce were tenants in common in their community property. The

decree of divorce having awarded the custody of the minor children to Mrs. L. C. Swan, and they having resided with her upon the property, she had a homestead therein to the extent of her community interest. 80 Tex. 648, 16 S. W. 429. The appellant's judgment lien attached upon the interest of J. T. Swan in the property, and it was entitled to enforce its lien by levy of execution and sale. As there may be a question about the partition of the property, and equities to adjust, which the appellee would be entitled to have submitted to a jury, we think the cause should be sent back for another trial. For the reasons above stated, the judgment is reversed and the cause remanded.

GULF, C. & S. F. RY. CO. v. ROYALL.  
(Court of Civil Appeals of Texas. Jan. 12, 1898.)

INJURY TO EMPLOYE—DEFECTIVE APPLIANCES—  
KNOWLEDGE OF DEFECTS—DAMAGES.

1. The only evidence that deceased knew of a defective fastening on the end gate of the car at which the accident happened was the testimony of one witness that, about 20 minutes before the accident, he and deceased set the gate up, but no remarks were made concerning the defect. Subsequently he testified that at the time he and deceased set up the gate a remark was made about the defect. *Held* that, by reason of the contradictory statements on a point so material, the jury were justified in finding that deceased had no notice of the defect.

2. The burden is upon the defendant to show that deceased had knowledge of a defect in the appliance that caused the death.

3. A verdict of \$2,000 is not excessive when awarded a mother for the death of her son, who, at the time of his death, had a life expectancy of 36 years, and was earning from \$60 to \$70 per month, while she was a healthy woman, with a life expectancy of from 6 to 9 years, and had been receiving \$20 or more per month from her son for support.

Appeal from district court, Brown county; J. O. Woodward, Judge.

Action by Fannie E. Royall against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This suit was instituted by appellee, F. E. Royall, the mother of N. H. Royall, deceased, to recover damages for his negligent killing by the Gulf, Colorado & Santa Fé Railway Company, the alleged negligence consisting of defective fastenings of an end gate to a coal car, which fell upon N. H. Royall while he was attempting to couple the car to another car, and so caused his immediate death; he at the time acting carefully, without knowledge of the defect, which defect was, at and before the time of the killing, well known to defendant. Defendant answered by general demurrer, general denial, and plea of not guilty. There was a trial by jury, resulting in a verdict and judgment for plaintiff for \$2,000 damages, from which the railway company has appealed.

We find the facts proven on the trial as follows: Plaintiff is the surviving mother of Nathaniel H. Royall. He was killed while attempting to couple a coal car to the caboose by the falling or swinging out of the end gate of the car, which struck him, and caused his death in a few minutes. He was working at the time in his employment for defendant as a brakeman, the car being used at the time by defendant at San Angelo, Tex. He was assisting in making up a freight train of defendant running between San Angelo and Goldthwaite. The coal car belonged to the Missouri, Kansas & Texas Railway Company. C. A. Collins was in charge of the train, and it was by his order that the coal car was attempted to be coupled to the caboose, under directions of M. J. Dooly, defendant's station agent. The defect in the end gate of the coal car was that there was no hinge on one side, and no fastenings at either end or top. This defect caused the injury. The jury were authorized to find that it had not been shown that Royall knew of the defect in the end gate before or at the time of his injury, and, in deference to the verdict, we cannot say the fact was proved. The witness Lamon, upon whose depositions, taken twice by defendant, defendant relies to prove the fact, did testify that Royall knew of the defect some 20 minutes before the accident; but his different depositions, taken at different times, are contradictory on a material fact tending to show such knowledge on the part of Royall. In the first depositions he testified that they set the end gate up, but that they had no conversation about it. In later depositions of the same witness, taken two years after, he said that when they set the gate up they noticed it had nothing to secure it, and some remark was made about it at the time, but he could not remember what was said. The accident occurred, he says, some 20 minutes afterwards. If nothing was said about the defect at the time it was set up, there would be no evidence that Royall knew of the defect, except the fact that it was lying down when they saw it, and they set it up; but to fix knowledge of the defect upon Royall, and that he noticed it, the remark made about it was important and conclusive, if true. The jury evidently declined to credit Lamon's evidence upon this subject. No other witness testified to the very question. Giving to the verdict the effect it should have, we find that it was not shown that Royall, at the time or before he was hurt, had notice of the defect mentioned. Defendant's negligence was proved. At the time of his death he was a young man, and had a life expectancy of 36 years and over. He was receiving as wages from \$60 to \$70 per month, not as regular salary, but for the number of miles he traveled. He was contributing to his mother's support and maintenance \$20 to \$35 per month. His regular contribution was \$20 per month, but on two occasions he gave her \$35 per month, and on two \$50 per month. His mother was a healthy

woman at the time of his death, and her life expectancy was 6 to 9 years. She was 69 years of age.

J. W. Terry and Chas. K. Lee, for appellant. D. W. & D. H. Doom, for appellee.

COLLARD, J. (after stating the facts). It was the province of the jury to decide the issues of fact, and pass upon the credibility of the witness and the weight of the testimony. It was in their legitimate power to reject the testimony of the witness Lamon as to Royall's knowledge of the defect in the gate of the coal car. He was the only witness that testified upon the subject. We do not believe we should hold that the jury abused their power, in view of the fact that the witness' testimony was self-contradictory on the very fact in issue, especially after the trial judge refused the motion for a new trial on that ground. The plaintiff was not required to show the negative, that Royall did not know of the defect in the car at the time he attempted to make the coupling. It was matter of defense, not developed by plaintiff's case in evidence. The negligence of defendant in using the defective car was sufficiently shown to entitle plaintiff to a recovery, and, if deceased was chargeable with knowledge of the defect in the car, it devolved upon the defense to prove it, as in cases of contributory negligence. *Railway Co. v. Johnson*, 89 Tex. 519, 35 S. W. 1042; *Railway Co. v. Myers*, 55 Tex. 116; *Railway Co. v. Silliphant*, 70 Tex. 629, 8 S. W. 673; *Railway Co. v. Dunham*, 49 Tex. 181; *Railway Co. v. Richards*, 59 Tex. 373; *Railway Co. v. Crenshaw*, 71 Tex. 346, 347, 9 S. W. 262; *Denham v. Lumber Co.*, 73 Tex. 88, 11 S. W. 151. The assignment of error that the verdict is excessive cannot be sustained. The testimony warranted a verdict for a greater amount than was awarded by the jury. We find no reversible error in the case, and the judgment of the lower court is affirmed. Affirmed.

#### HAWKINS v. WELLS et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 6, 1897.)

REAL ESTATE—TITLE—WARRANTY—MISREPRESENTATIONS—RELIANCE—INSTRUCTIONS—IMPLIED WARRANTY—SPECIAL WARRANTY—EVIDENCE.

1. Where a vendee possessed all the information as to title that was possessed by the vendors, and expressed himself satisfied therewith, and his means of knowledge was equal to theirs, and he availed himself of it, he cannot have relief for failure of title, although he may have relied on the vendors' representations.

2. Where the question was whether plaintiff had any right to recover by reason of defendants' representations, an erroneous instruction that defendants must have honestly believed that their representations were true was not prejudicial to the plaintiff.

<sup>1</sup> Writ of error denied by supreme court.



3. Where a vendor, with no intent to deceive, merely expresses an opinion that the title is good, the vendee has no right to rely thereon.

4. Where a deed containing a special warranty expresses the contract between the parties, the presumption is that the vendee acted upon his own knowledge of the title; and he cannot afterwards complain, unless some misrepresentation was made, upon which he rightfully relied.

5. Where there are no covenants as to title, none will be implied, under Rev. St. 1895, arts. 633, 634, except as to prior conveyances by the grantor, and that the estate is free from incumbrances.

6. A vendor refused to execute anything but a special warranty deed, and the vendee was duly apprised of the effect of such a deed, and the evidence was contradictory as to whether the vendor made positive assertions that the title was good, and the party who sold the land to the vendor informed vendee that he knew nothing about the title, except what he had been told, and thought it was good. *Held*, that the vendee was not entitled to recover on failure of title.

Appeal from district court, Fannin county; E. D. McClellan, Judge.

Suit by C. M. Hawkins against C. C. Wells and others. Judgment for defendants, and plaintiff appeals. Affirmed.

R. B. Semple and T. P. Steger, for appellant. Lusk & Thurmond and Taylor & McGrady, for appellees.

RAINEY, J. This suit was brought by appellant to rescind a contract of sale of land, and cancel a deed by which he conveyed to C. C. Wells 56 acres of land in Fannin county, Tex. The consideration for said conveyance was a tract of land of 640 acres in Tom Green county, Tex., which was deeded to appellant by one A. J. Campbell, and the sum of \$100 paid by said Wells to appellant. The effect of the allegations in plaintiff's petition is that said Wells and said Campbell entered into a conspiracy to defraud plaintiff out of his land; that they represented the title to the 640 acres of land to be good, which was not true; that Wells said he would guaranty the title to same, etc.; that he relied on said statements as to the condition of the title, and was induced thereby to execute the deed to Wells,—he being ignorant of the want of title in Campbell to the 640 acres of land. After the trade, Wells took possession of the 56-acre tract, and made improvements thereon. Plaintiff asked for rent of said premises, and that the \$100 paid him be deducted from said rents, etc. Wells answered by general denial, special demurrers, and plea of not guilty, and, specially, that he traded with Campbell for the 640-acre tract at the request of plaintiff; that Campbell owed on said land \$340, which he (Wells) paid, and he also paid to plaintiff \$100 in cash, the understanding with plaintiff being that he was to trade with Campbell for the 640-acre tract, and plaintiff was to deed him the 56 acres for same; that he knew nothing of the title to the 640 acres, except from hearsay, and had never seen it, which was known to plaintiff; that he had acted in good faith, and made valuable improvements on the land, etc. On the trial,

judgment was rendered for the defendants, and plaintiff appeals.

The evidence shows that Hawkins and Campbell were negotiating for the exchange of land, when Wells came upon the scene. A trade was agreed upon, by which Campbell was to deed Hawkins the 640-acre tract, and Wells was to pay \$340, the amount due on the land by Campbell, and also to pay Campbell \$30 and Hawkins \$100, and Hawkins was to deed Wells the 56-acre tract. This trade was subsequently consummated. As to the representations made by Wells and Campbell as to the title to the 640-acre tract, there is a conflict in the evidence; the evidence of plaintiff showing that Wells and Campbell made positive assertions that the title to the 640-acre tract was good, and that Wells proposed to "guaranty" the title. On the other hand, the evidence of defendants was to the effect that they stated to plaintiff that they knew nothing about the title, but thought that it was good. On the day plaintiff executed his deed to Wells, the parties went to the office of Agnew & Duncan, attorneys, to have the papers drawn up. While there, the question of title to the 640-acre tract was raised. Wells said Arledge knew more about the title, as he had owned the land, and Agnew proposed that he be seen about it. Wells and Hawkins went to see Arledge, who was merchandising there. Arledge testified on this point, which testimony was not contradicted: "I told them the sheriff of Tom Green county sold it to somebody on a debt against the railroad company, and it had been transferred down to me, and properly conveyed, and I thought the title good. I knew nothing about the title, except what had been told me, and what I had noticed from a number of deeds in my chain of title which I had when I sold to Campbell. I gave them the information truthfully, as I then believed it to be, but stated to Hawkins and Wells that I thought it was good. I gave Campbell a special warranty deed to this land." Wells and Hawkins returned to the office of Agnew & Duncan, and instructed them to draw the deed, as matters were satisfactory. Campbell refused to execute any but a special warranty deed, and Duncan explained to Hawkins what a special warranty deed was, and told him that he would get such title as Campbell and Arledge had. Wells paid the money as he contracted. Hawkins accepted the deed with special warranty from Campbell, and executed the deed to Wells conveying the 56 acres. Wells took possession, and made valuable improvements thereon. Campbell's title to the land was not good. We conclude that Hawkins accepted the deed to himself, having the same knowledge of the title that Wells had, and knowing the legal effect of a special warranty deed.

The first assignment of error is: "The court erred in charge No. 3, in charging the jury that, if Campbell had no title to the 640 acres, and if defendants did not know of his want of title, but honestly believed that

he had a good title, and so represented to plaintiff, and if they stated to plaintiff that their knowledge or information as to the title of Campbell was acquired solely from George Arledge, Campbell's vendor, and if plaintiff consulted said Arledge in regard to such title before delivering his deed to Wells for the 56 acres, then the plaintiff cannot recover, no matter upon whose representation he relied, because there is no evidence showing the supposed case represented by said charge. Said charge is not the law. Said charge is upon the weight of the evidence." Wells testified that he knew nothing about the title to the 640-acre tract, and that he never made any representations about the title to Hawkins or any one else; that, when the deed from Campbell to Hawkins was being prepared, Hawkins raised the question about the title to said tract, and stated that he was afraid of it; that Campbell then said that he knew nothing of the title, only what he had been told, and that George Arledge, from whom he bought, said that the title was good. Hawkins and Wells then left, to interview Arledge, and, when returning, Hawkins expressed himself as satisfied with the title, from what Arledge had told them. We think that this evidence warranted the charge as to the effect of the representations, if any, as to title. If this was true, Hawkins had procured from Arledge all the information about the title that was possessed by the defendants, and expressed himself satisfied therewith. His means of knowledge being equal to that of defendants, and having availed himself thereof by making inquiry, he will not be entitled to relief, although he may have relied on the representations of the defendants. "Misrepresentation entitling to relief must be in reference to some material thing unknown to the purchaser, either from not having examined, or from want of opportunity to be informed, or from entire confidence reposed in the vendor; that a concealment of material facts known to the vendor, and unknown to the vendee, which are calculated to influence the action, or operate to the prejudice, of the vendee, is fraudulent, but that where the facts lie equally open to both vendor and vendee, with equal opportunities of examination, and the vendee undertakes to examine for himself, without relying on the statements of the vendor, it is no evidence of fraud in such case that the vendor knows facts not known to the vendee, and conceals them from him." *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771; *Cresap v. Manor*, 63 Tex. 485; *Jackson v. Stockbridge*, 29 Tex. 394; *Mitchell v. Zimmerman*, 4 Tex. 75; *Clark v. Reeder*, 158 U. S. 505, 15 Sup. Ct. 849. The court did err, however, in charging in this connection on the good faith of defendants in making representations as to title. It was not a question of good faith on the part of defendants, but whether or not plaintiff was entitled to relief by reason of the representations, if any, made by de-

fendants. But this error was not calculated to influence the jury to the prejudice of plaintiff.

The following paragraph of the court's charge is assigned as error, to wit: "The mere expression of an opinion or belief by Campbell or Wells to plaintiff that Campbell's title was good, if the one making the expression honestly believed the title to be good, could not constitute such fraud as to entitle plaintiff to recover, no matter how erroneous such opinion or belief may have been. If defendants honestly believed Campbell's title to be good, the statements made to plaintiff in regard to such title, in order to amount to a fraud such as would entitle plaintiff to recover, must have amounted to the positive assertion, as a fact, that Campbell had a good title; the statement must have been false; the plaintiff must have relied on it, and must have been induced thereby to make the deed conveying his 56 acres to Wells." We see no reversible error in this charge. Where one, in making a trade, expresses a mere opinion, with no intent to deceive, the party to whom it is made has no right to rely thereon. It is otherwise where a party intentionally expresses an opinion that is calculated to deceive by reason of the circumstances that surround the parties or transaction, or if he makes a positive affirmation that is false, and on which a party is, from the surroundings, authorized to rely, and does rely, the party injured thereby is entitled to relief, and it is immaterial whether or not the statement was made in good faith. The rule is clearly expressed by Mr. Pomeroy, in his excellent work on *Equity Jurisprudence* (volume 2, §§ 877, 878), as follows: "A misrepresentation must be an affirmative statement or affirmation of some fact, in contradistinction to a concealment or failure to disclose, and to a mere expression of opinion. \* \* \* Since the very corner stone of the doctrine is that the statement must be an affirmation of a fact, it has sometimes been said (but very incorrectly) that a misrepresentation cannot be made of a matter of opinion. The true rule is that a fraudulent misrepresentation cannot itself be the mere expression of an opinion held by the party making it. The reason is very simple: While the person addressed has a right to rely on any assertion of a fact, he has no right to rely upon the mere expression of an opinion held by the party addressing him, in whatever language such expression be made. He is presumed to be equally able to form his own opinion, and to come to a correct judgment in respect to the matter, as the party with whom he is dealing, and cannot justly claim, therefore, to have been misled by the opinion, however erroneous it may have been." *Mitchell v. Zimmerman*, *supra*; *Newton v. Ganss* (Tex. Civ. App.) 26 S. W. 81. In the first five paragraphs of the court's charge, a clear exposition of the law applicable to the facts of plaintiff's case, as made by his plead-

ings and proof, was given to the jury. In the succeeding paragraphs of the charge, the law applicable to the facts from defendants' standpoint was given. Taking the charge as a whole, we are of opinion that the case as made by both sides was fairly presented.

The deed executed by Campbell to Hawkins, conveying the 640 acres of land, contained a covenant of special warranty. The deed expressed the contract between the parties; and the presumption of law is that Hawkins acted upon his own knowledge of the title, and he will not be heard to complain that he did not receive a perfect title, unless some misrepresentation was made, upon which he was authorized to, and did, rely, in making the contract, that will entitle him to relief. *McIntyre v. De Long*, 71 Tex. 86, 8 S. W. 622; *Rhode v. Alley*, 27 Tex. 445. Even where there are no covenants as to title, none will be implied in this state, except as to a prior conveyance by the grantor, and that such estate is free from incumbrances, "which includes taxes, assessments and all liens upon real property." Rev. St. 1895, arts. 633, 634. In 2 Devl. Deeds, § 957, we find this language: "Where there has been no fraud, mistake, or accident, a purchaser who has taken a deed without covenants has no right, for a defect in his title, \* \* \* to detain the purchase money, or to recover it in case of payment." The uncontradicted evidence shows that Campbell refused to execute a deed with covenants of title, other than a special warranty. Hawkins was duly apprised of the effect thereof, and the evidence is sufficient to warrant the conclusion that he did not act on the faith of any representation of Wells that would entitle him to relief. The judgment of the court below is affirmed.

**SMITH et ux. v. COVENANT MUT. BEN. ASS'N OF ILLINOIS.**

(Court of Civil Appeals of Texas. June 12, 1897.)

**MUTUAL BENEFIT INSURANCE—MEMBERSHIP FEE—BIMONTHLY CALLS—ORDER—CANCELLATION—CONDITIONS OF POLICY—MORTUARY CALLS.**

1. The consideration for insurance as expressed in the policy was "the receipt of the advance premium, the payment of all bimonthly premiums," etc. The policy and regulations provided for payment of bimonthly premiums, graded according to age of applicant. The policy and application provided that no liability should be incurred until payment of the advance premium, the approval of the application, and the delivery of the policy. The regulations provided that an "advance premium" of the same amount for all ages should be collected with each application, and that no bimonthly call should be made on any member until after the expiration of at least 105 days from date of policy. *Held*, that the "advance premium" is of the nature of a membership fee, and not a payment in advance to meet the bimonthly calls made after expiration of 105 days.

2. Where it clearly appears that the words "advance premium," as used in a policy, relate to the membership fee, and not to an advance payment of bimonthly premiums, and the insured was requested by the company to read the policy, and had been notified that his first payment had been applied as such advance premium, and not on the bimonthly premiums to become due, the refusal to give an instruction based on the theory that the insured was misled by the company into the belief that the advance premium had been remitted, and his first payment applied as an advance on the bimonthly calls, and that the company ought to have known that he so understood it, is not error.

3. Where the policy and by-laws of a mutual insurance company provide for payment of an advance premium as membership fee, which was given to the soliciting agent as his commission, an order given on the company by an applicant for membership for the payment of such premium to the agent out of money due the applicant from the company cannot be countermanded without withdrawing the application.

4. Where a member of a mutual insurance company, with knowledge that his first payment was applied on the advance premium or membership fee, and not as an advance payment of the first bimonthly call, retains his certificate, without objection, until after forfeiture for nonpayment of such call, he cannot be heard to complain that such application was wrongful.

5. Where a letter does not, in express terms, countermand payment of an order, the question of the intention of the writer is one for the jury to determine from all the facts and circumstances.

6. Where the court states the legal effect of a contract of insurance by a mutual insurance company, and submits to the jury only issues of fact, a charge that the contract is contained in the policy and application, no mention being made of the rules and by-laws, is harmless error.

7. A policy provided that, if it shall come to the knowledge of said association that the insured made false statements in his application, on the good faith of which this certificate was issued, or if the insured shall be guilty of any criminal act, or shall injure his health by the use of alcoholic or other stimulants, or shall become an habitual user of toxicants, "or shall violate any of the conditions or agreements contained in the application or this certificate," etc. *Held*, that the clause, "or shall violate any of the conditions," etc., refers to the conditions and agreements of the nature particularly enumerated, and not to the condition contained in another section providing for the payment of bimonthly premiums, and for forfeiture for nonpayment thereof.

8. Under a policy providing that, for the payment, among other obligations, of all death claims, a bimonthly premium shall be payable on the first of certain months, a mortuary call, made at one of the bimonthly periods, is not invalid by reason of the fact that the death claims enumerated in the call had already been paid out of funds on hand,—a practice adopted by the company and sanctioned by its by-laws.

9. A mortuary call for payment of a bimonthly premium is not void for including in its list of death claims a number that might have been included in the preceding call.

10. A call on a member of a mutual insurance company for payment of a greater premium rate than that required of others is not, on that account, void, where the amount required to be paid by each is in accordance with the by-laws in force at the time of issuing their respective policies.

11. Under Act III. June 16, 1887, § 4, prescribing the form of assessment notice, a notice stating that it is a mortuary call for payment of death claims according to an annexed list showing the number and amount of each poli-

1 Writ of error denied by supreme court.

cy, the name and residence of the deceased, and the name of, and the amount and date of payment to, each beneficiary, is sufficient.

12. When there is no evidence of defendant's knowledge of or participation in a fraud perpetrated by another, the refusal to instruct on that issue is not error.

Appeal from district court, Fannin county; E. D. McClellan, Judge.

Action by Gilbert L. Smith and Malinda F. Smith against the Covenant Mutual Benefit Association of Illinois. Judgment for defendant. Plaintiffs appeal. Affirmed.

This is a suit brought by Gilbert L. Smith and wife, Malinda F. Smith, against the Covenant Mutual Benefit Association of Illinois, based upon a certificate of insurance for \$5,000, issued by the defendant to Dr. Tolbert C. Smith, payable upon his death to his mother, Malinda F. Smith. The defense to the action relied upon by the defendant was a failure to pay a mortuary call or assessment, whereby the certificate of insurance lapsed and became forfeited under the provisions of the contract of insurance. The case was tried by a jury, and resulted in a verdict and judgment in favor of the defendant. From this judgment an appeal has been perfected to this court by plaintiffs.

The issuance of the certificate of insurance, the death of the assured, and that plaintiff Malinda F. Smith is the beneficiary, are all unquestioned facts. The only question to be determined by the trial, upon which there was a contest, was whether the certificate had lapsed and become void by reason of failure to pay a mortuary call or assessment. Upon this issue arose several minor issues of fact, and quite a number of questions of law. The defendant, as indicated by its name, is a mutual benefit association. Its certificate holders are its members. It has a constitution, by-laws, rules, and regulations for its government, and it pays its liabilities created by death of persons holding its certificates of insurance through assessments or mortuary calls upon its members. Only one assessment was levied against deceased's policy, and that was call 120. The certificate consists of a printed form furnished by defendant, filled out as is usual in insurance policies. The essential parts of the certificate are as follows: "In consideration of the receipt of the advance premium, the payment of all bimonthly premiums hereafter required, and the representations, agreements, and warranties made in the application for membership, \* \* \* a copy of which is hereto annexed, and the agreement upon his [deceased's] part to accept and comply with all the provisions hereinafter stated, the Covenant Mutual Benefit Association of Illinois does hereby issue this policy, and constitute the above-named applicant [deceased], hereafter termed the 'insured,' a member of the said association, and agrees to pay from any

funds received or to be collected for mortuary purposes as a benefit to his mother, Malinda F. Smith, \* \* \* within ninety days from the receipt by said association of full and satisfactory proofs of a valid claim under this contract, conditioned upon the death of the insured, the sum of five thousand dollars, together with such part of the emergency fund as shall be due under the terms of the contract, any unpaid premiums or other indebtedness being first deducted therefrom: provided, further, that in the event the insured shall become totally and permanently disabled \* \* \* upon the determination of the medical director and executive board, this policy, if then in force, may, at the option of said executive board, be surrendered properly receipted at one-half its face value: \* \* \* provided, especially, that this policy of insurance, and the provisions, requirements, conditions, agreements, representations, and warranties set forth in the succeeding pages [of said policy], or contained in the said application [for said policy], shall be taken together, and in such entirety shall constitute the contract of insurance between the association and the insured. And this certificate or policy of insurance is issued solely upon the statements, representations, and warranties made in the aforesaid application, and shall not go into effect, or remain in force, or be binding upon the association, unless such statements, representations, and warranties are true, and the insured shall fully comply with all the conditions, requirements, and agreements contained in this contract. In witness whereof, the said Covenant Mutual Benefit Association of Illinois has, this 19th day of December, 1892, by its president and secretary, signed, sealed, and delivered this contract at its office in the city of Galesburg, Illinois. [Seal.] [Signed] A. W. Berggren, President. W. H. Smollinger, Secretary."

The following conditions, among others, appear on the back of the certificate, the others being immaterial on this appeal: "(1) To provide for the payment of all death claims, or other current expenses, and to maintain an adequate emergency or reserve fund to guaranty the prompt payment in full of all future obligations, there shall be due, according to the mortality experience and emergency fund requirements of the association, and payable at its general office in Galesburg, Ill., on the first business days of January, March, May, July, September, and November, respectively, of each and every year during the continuance of this contract, a bimonthly premium or assessment based upon the annexed tables of rates, according to age, and graded according to the mortality experience of the association, and amount of benefits named herein: provided, however, that at such time or times as the insured shall be entitled to the advantages of the emergency fund, as hereinafter stated, the board of managing directors may readjust the

grading or basis of the bimonthly assessments or premiums due thereafter in accordance with the amount of such emergency fund then available, the current age of the members, and the mortality of the association. (2) No personal liability of the insured is incurred by becoming a policy holder in this association; but this certificate of insurance is issued and accepted subject to the express conditions that, if any of the payments stipulated in this contract shall not be paid to the association on or before the day of the date as provided in this contract, at its home office in Galesburg, Ill., this contract shall terminate, and all rights be forfeited to the association. (3) The amount received from bimonthly premiums or calls, less the amount hereinafter provided for the general and emergency funds, shall constitute the mortuary fund, and shall only be used for the payment of death claims, and the protection of the mortuary fund. (4) Twenty-five cents on each five hundred dollars of insurance, to be collected bimonthly (which is included in the above [following] table of rates), shall be carried to the general fund to provide for the expenses. (5) Twenty per cent. of the mortuary premium received under this certificate or policy of insurance may be converted into the emergency fund, and held in trust, as provided in the by-laws, for the exclusive benefit of the policy holders, to be used only for the purpose of paying the actual increase of cost by reason of the advancing age of members and payment of death losses in excess of the actuary's mortality tables, as provided in section 6. (6) After the certificate or policy has been in force for six years from the first day of January following its date, and annually thereafter, there shall be an equitable distribution, for use in paying future mortuary premiums, of so much of the then unappropriated emergency fund and its accumulations as are derivable from the contributions made thereto the sixth respective preceding year and part of year; and upon the death of the insured, after this certificate or policy has been in continuous force six years from the first day of January following its date, there shall be due the beneficiaries hereunder, payable in like manner and under same conditions as the benefits named herein, such part of the then total emergency fund and its interest accumulations as the association's actuary shall determine legally due, in proportion to the contributions made by the insured thereto. (7) A printed notice, directed to the address of the insured as it appears at the time on the books of the association, and deposited in the post office, or printed in a newspaper published by the association, and forwarded as aforesaid, shall be legal notice of any required payment, and the testimony of the secretary, supported by the affidavit of the person or persons who performed such service of mailing said notice so addressed, shall be taken and admitted as conclusive evidence of such mailing, and as absolute proof of due notice to the insured. (8) In case of change of residence, post-office ad-

dress, occupation, or name of the insured, he or she must immediately notify the secretary of such change, and upon the failure of the association to receive such notice it shall proceed for all purposes as if no such change had been made. (9) No liability shall be incurred by the association until the payment of the advance premium, the receipt and approval of a written application, and this certificate or policy of insurance has been issued and delivered during the life and good health of the insured; and no agent or other person, except the president or secretary, has power to change, modify, or alter this contract, or to waive forfeiture, extend credit, or grant permits." "(11) If the insured shall personally engage in blasting, submarine operations, underground mining, selling intoxicating liquors, glassblowing, manufacturing poisonous, explosive, or inflammable substances, trading or residing among savage tribes or nations, or be employed as an indoor stone or marble cutter, quartz-mill operator, as a fireman, as a railroad switchman, engineer, fireman, brakeman, or freight conductor, or shall be engaged in military service (except in time of peace), or in naval or marine service, without having first obtained the written consent of the association, or shall die in consequence of engaging in duelling, fighting, keeping unlawful or disreputable resorts, the violation or attempted violation of the laws of any nation, state, or province, by the hands of justice, or be convicted of a felony, then, in each and every such case, this certificate or policy shall be null and void, and all payments made thereunder shall be forfeited. (12) If the insured shall use stimulants or narcotics to such an extent as to impair his or her health, or produce delirium, tremors, or cause death; or shall die while intoxicated, or from the effects of drunkenness; or if there has been any false or untrue statement made in the application or examiner's certificate,—then, and in each and every such case, this certificate shall be null and void, and all payments made thereon shall be forfeited to the association." "(14) If at any time during the first five years of this contract, reliable information and evidence shall come to the knowledge of said association that the insured did make false and untrue statements in his or her application, on the good faith of which this certificate is issued, or if the insured shall be guilty of any criminal act, or shall injure his or her health by the use of alcoholic, narcotic, or other stimulants, or shall become an habitual or excessive user of toxicants, have delirium tremors, or shall violate any one of the conditions or agreements contained in the application or this certificate, the association may, by written or printed notice, signed by its president and secretary, notify the insured of his or her violation of the conditions and agreements thereto contained, and that the question of the cancellation of the same will come before the board of managing directors at the time named in said notice (which shall not be less than 30 days from date thereof) for

hearing and investigation, and the finding of said board, and their action thereon, shall be final and conclusive. (15) This contract shall be governed by, subject to, and construed only according to, the laws of the state of Illinois, the place of this contract. (16) If this contract shall have been in continuous force until five years from its date, it shall thereafter be incontestable for error or misstatements in the application, and for all causes named in sections 12 and 14 of this contract; provided, the conditions as to occupation and payment of mortuary calls have been complied with; and provided, further, that where an understatement of age is made, in which case the benefits recoverable herein shall be such proportionable part only of the whole benefit named herein as the total amount of the mortuary premiums paid bears to the total amount required at the true age, and except, further, that, if the true age at the date of the application was beyond the limit of age then taken by the association, then there shall be recoverable only the total amount of bimonthly premiums paid thereon."

On the back of the policy is a table of rates, showing rate per \$1,000 insurance, bimonthly, at the ages given,—the age at joining,—running from 21 up to 60:

Age	Amount	Age	Amount	Age	Amount	Age	Amount
21	\$1.78	25	\$1.86	29	\$1.97	33	\$2.10
22	1.80	26	1.88	30	2.01	34	2.15
23	1.82	27	1.91	31	2.04	35	2.18
24	1.83	28	1.94	32	2.07	36	2.23

The application made by deceased for the policy contained the questions usually found in printed applications for life insurance, and also contained the further printed provisions: "Advance payment must in all cases accompany the application." "I, the undersigned applicant, do hereby declare that I have made full and correct answers to all questions in forms A and B, and, whether said answers, together with the foregoing explanations, are in my own handwriting or not, I adopt them as my own, admit them to be material, and warrant them to be full, complete, and true in all respects; and further agree that said answers and this declaration shall form the exclusive and only basis of the contract between myself and the Covenant Mutual Benefit Association; said contract not to be in force or binding upon the association until after the payment of the advance premium, and the approval of the application by the medical board, during my life and good health, which contract, when completed by the granting of a policy, shall be subject only to the conditions and stipulations contained in said policy and this application, which are hereby accepted and made the complete terms of the contract, and for myself and my beneficiaries I hereby authorize any physician possessing knowledge or information, acquired professionally or otherwise, touch-

ing matters herein referred to, or any disease I may hereafter have, to disclose the same fully at the instance of said association. \* \* \* And I further agree that, if any fraudulent or untrue answers have been made, and if death shall result from suicide before five years' continuous membership, and if I shall use intoxicants, opium, or other stimulants to an extent liable to injure my health or shorten life, or shall omit, neglect, or refuse to pay any of the mortuary calls on or before the day on which they shall fall due, then, and in either event, this contract shall be null and void, whether so declared by the association or not, and all moneys which have been paid shall be forfeited to said association." Said application has printed upon its back the following: "All applications must be mailed so as to reach the principal office within one week from date of examination. No application will be acted upon, or policy issued thereon, until it has been fully completed in accordance with the rules of the association and instructions herein contained. W. H. Smollinger, Sec'y." Also the following: "This blank to be used only by medical director. Medical director's memoranda. Approved Dec. 19, 1892. A. D. Wing." This application has stamped upon it: "Rec'd Dec. 16, 1892." The application was received at the home office of defendant December 16, 1892.

At the time of the issuance of the certificate the appellee had in force certain by-laws, the beginning of which read as follows: "Constitution and by-laws and rules and regulations of the Covenant Mutual Benefit Association of Illinois. Principal Office, Galesburg, Ill. Incorporated Jan'y 9th, 1877. Revised 1892." The following portions are presented as pertinent in the consideration of this case: Article 2, § 1, By-Laws: That the object of the association shall be to furnish financial aid to the heirs, devisees, etc., of deceased members, or to totally disabled members. Article 6, § 1, By-Laws, provides that all moneys received by the association shall be placed in one of the following funds: Mortuary, reserve, emergency, advance, or general fund; such funds to be held in trust for the membership as provided in the by-laws. Article 4, § 1, Rules and Regulations, provides that "neither of the several funds, or any part of them, shall be divided among the officers or members of the association, as profits or otherwise, except to equitably distribute any surplus belonging to the reserve fund, as provided in section 3 of this article, which has served the purposes for which it was collected, and is no longer required for the proper maintenance of that fund, or in the event of a final dissolution of the association." Section 2 provides that: "All moneys realized or received by the association from assessments or bimonthly calls made and collected for mortuary or total disability purposes shall belong to, and be placed in, the mortuary fund, and no part or portion of this fund shall

be used in any manner or appropriated for any purpose other than the payment of death and total disability claims, and the protection of the mortuary fund, except that the managing directors may set aside and transfer to the reserve emergency fund twenty per cent., or less, of the total amount collected from time to time for mortuary and total disability purposes, which amount, when so set aside and transferred, shall be appropriated and used only as provided in section 3 of this article." Section 3: "To provide for the purposes hereinafter stated, and when so ordered by the managing directors, twenty per cent., or less, of the total amount collected from time to time for mortuary and total disability purposes, may be placed in the reserve emergency fund, securely invested as provided in section 6 of this article, and held in trust for the exclusive benefit of members of this association, to be used only for the following purposes, viz.: First, for the payment of death losses or total disability claims that may occur in any one year in excess of the rate stated in the actuaries' tables of mortality; second, to provide for and pay the actual increase of cost by reason of the advancing age of members; third, annually after January 1, 1897, provided, in the judgment of the management, it can be safely done, to equitably distribute, for use in paying mortuary premiums, any unappropriated surplus derivable from the contributions made thereto during the sixth respective preceding year; fourth, on the death of a member who shall have contributed to the reserve emergency fund for six years, to return to his beneficiary the unused or unappropriated portion of such reserve emergency fund which may have been contributed by said deceased member in his lifetime." Section 4: "All moneys realized from membership fees, monthly or annual dues, expense premiums or assessments, or received by the association from any other source, and not properly belonging to either the mortuary, reserve emergency, or advance funds, shall be placed in a separate fund, to be known as the 'General Fund,' and each member shall pay 12½ cents per month on each \$500 insurance carried, which shall be collected with each bimonthly call. All agency and general expenses of the association shall be paid from this fund, and when it shall be in excess of the current and emergency requirements of the association, the managing directors may transfer such excess into the mortuary fund." Section 5: "All moneys received by the association as advance premiums, or deposited with it to provide for the payment of future bimonthly calls or assessments, shall be placed in the advance fund, and shall be withdrawn from it and used only when necessary to meet the payments for which they are deposited, except that upon the death of the insured for whose benefit the advance or deposit was made any unused portion thereof shall be withdrawn, and paid with the certificate at its

maturity, in addition thereto." Article 5, § 2, Rules and Regulations: "An advance premium of \$8 per \$1,000 insurance must be collected with each application for membership, and on applications for a less amount than \$1,000 the advance premium shall be \$8. The assessment rates of the association shall be based upon the following tables for each \$1,000 indemnity, and shall be such percentage thereof as the mortality experience of the association shall require." Then follows the table, which is same as on back of the policy, and given herein. The rates given in the table provide for the accumulation of the mortuary, reserve emergency, and general funds. Article 5, § 3, Rules and Regulations: "In case the insured shall become totally and permanently disabled, the executive board, upon the recommendation of the medical director, may, if all the conditions of the contract have been complied with, upon the surrender and cancellation of the policy, pay one-half its face value in cash." Section 7: "For the purpose of preventing unintentional lapsing, and for the accommodation of members, the managing directors shall, from time to time, in accordance with the mortality experience, adopt rules of advance deposit, which shall render certificates nonforfeiting for the nonpayment of assessments for the time agreed upon, not exceeding one year. The secretary shall at all times accept advance deposits from members, which shall be placed to their credit, and stand chargeable with any assessment that may be due as they occur, and the notice of such assessment shall bear on its face a memorandum of the credit balance due such member after deducting the amount of such assessment." Section 10: "The managing directors shall order six regular mortuary calls each year, on which all members having held membership for at least 105 days prior to the date thereof shall be liable. They shall be issued on the first business days of January, March, May, July, September, and November, respectively, and shall close 30 days from date, but the managing directors may, at their discretion, by affixing a penalty of not less than ten cents, extend the time to all who cannot pay within the 30 days. The mortuary calls shall be in such form, and contain such facts, as the laws of Illinois may require, shall state when it will close, and what extension of time, if any, is given." Section 11 provides that "any member may withdraw from the association by notifying the secretary, in writing, returning his or her certificate, and paying whatever may be due the association, but shall thereby forfeit all claims to the funds of the association, as well as any amount he or she may have contributed thereto."

The Illinois statute on the subject of notice was introduced by the appellee, and was as follows: "Assessment Notices—Application of Fund. Assessment notices sent to members by any association or corporation

doing business in this state, shall state the object or objects for which the money to be collected is intended; the names, last address and amount of certificate of deceased members, the amount to which the beneficiary of each is entitled or the amount which would be realized for the beneficiaries of each if all the members who are assessed would pay their assessments, and no part of the funds collected for the payment of death benefits shall be applied for any other purposes."

The assured was 22 years old when the certificate was issued to him, December 19, 1892, and his bimonthly assessment under the contract was \$9. The certificate was declared lapsed by the association on June 16, 1893, for the alleged nonpayment of call No. 120 for \$9. The call bore date of May 1, 1893, though it was ordered on the 4th day of April, 1893. The resolution of the board of managing directors by which it was ordered was: "That the following proofs of death, having been reported complete and sufficient by the medical director, attorney, and actuary, and reviewed and approved by the executive, be approved, and assessed upon as mortuary call No. 120. The call on all policies issued subsequent to March, 1890, to be the maximum given in the table of rates on the back of the policy." Then follows, as a part of the resolution, a list of 72 death claims, aggregating \$193,500, with the name and residence of each deceased member. As a matter of fact, however, every one of these claims had been paid before the resolution was passed, out of funds on hand arising from previous assessments. The following notice of assessment was mailed to the deceased on the 28th day of April, 1893, dated May 1, 1893: "You are hereby notified that, in consequence of death of members of the association whose names appear on the accompanying sheet, satisfactory proofs of death having been filed and approved, a call for \$9.00 has been ordered in accordance with the conditions of your certificate, by the terms of which it is now due, and must, under penalty of forfeiture, be received at this office on or before May 31st, or within 30 days from the date of this notice. Assn't closes May 31st, 1893. Next call issued July 1st, 1893. Mortuary call including — cents. Expense \$——. W. H. Smollinger, Sec'y." The sheet which accompanied the notice contained the following clause: "The following death claims having been approved and paid, mortuary call No. 120, issued May 1st, 1893, is ordered by the board of managing directors." Then follows a tabulated list of claims, giving the number of each policy, amount of policy, amount paid to the association, what same amount of insurance would have cost in old-line companies, what the amount paid on each to the association would have bought in old-line companies, name and residence of the deceased, name

of beneficiary, when proofs were completed, when the claims were each paid, and the amount paid to each. Nothing else is stated in regard to the claims. The claims are the same as given in the resolution above. Twelve of these claims, amounting to \$21,375, are stated in this sheet to have been paid on February 15, 1893; three, amounting to \$6,000, on February 17th; four, amounting to \$13,500, on February 18th; nine, amounting to \$25,750, February 20th; five, aggregating \$17,250, February 21st; nine, aggregating \$22,000, February 24th; one of \$2,500, February 25th; two, aggregating \$7,500, February 28th. The proofs of thirty-four of these claims were completed on January 10, 1893, thirty-four on February 13th, two on February 28, 1893, one on March 21, 1893, and one—that of C. W. Breed, of Chicago, for \$1,000—on September 7, 1892.

It was conclusively shown, and not controverted, that said mortuary call No. 120 was not paid. Appellants try to meet this issue—First, by showing that under the contract of insurance he was not subject to any charges or assessments until about six months after his certificate was issued, and that the company had funds belonging to him which it should have applied to the payment of this assessment; second, that the call was not legally binding upon him, for reasons which will be hereafter considered. The evidence was conflicting upon the questions whether the assured was to be charged anything for the first six months after the issuance of the certificate, and whether the company held funds of the assured which it should have applied to payment of mortuary call 120. The defendant's testimony tended to show, and was a sufficient predicate for the finding of the jury, that defendant's soliciting agents, Carden & Wilkerson, employed the assured as medical examiner for the company, agreeing that the company should pay him \$2.50 for each person examined by him. The assured agreed that he would invest half the sum realized by him from this source, upon the basis of \$8 per \$1,000 advance premium to be paid by him. Under arrangement with the company, this advance premium went as compensation to the soliciting agents, and, in addition, the general agent of the company, under whom they were employed, paid them a bonus of \$1 per \$1,000 insurance secured by them. The soliciting agents were authorized to remit to the assured this advance premium whenever they desired so to do, and they took that course to a large extent, receiving as compensation only the \$1 per \$1,000 bonus offered by the general agent. These agents procured at Honey Grove 27 applications for insurance, outside of the application of Dr. Smith, and to each of them they remitted the advance premium of \$8 per \$1,000 which the policy and laws provided should be paid. The as



sured, Dr. Tolbert C. Smith, examined each of the applicants, and his agreed compensation amounted in the aggregate to \$67.50. The payment of the advance premium carried the policy, under section 10 of the by-laws, heretofore quoted, for at least 105 days, free of further charges. These bi-monthly mortuary calls were required to be made on the first business days of January, March, May, July, September, and November; and when the certificates were issued between November 16th and 1st of January the payment of the advance premium carried the insurance free of further charge for 45 days in excess of the 105 days,—150 days, or about 5 months. The policy in this case was issued December 19, 1892, and the advance premium therefore carried it 150 days; that is, it was not subject to mortuary call until May 1, 1893. The company paid the assured \$30, by draft, on the amount due him for examination of applicants, and on his written order it paid the balance due him—\$37.50—to its agent George A. Carden. The evidence shows conclusively that before the giving of this order upon the company for \$37.50 to the agent Carden, a controversy arose between said agents and assured as to whether the assured should pay them anything. The assured contended that the advance premium was to be remitted to him by the agents, as had been done with the other applicants; while the agents contended that he was to pay them the advance premium. This controversy terminated in the giving of the order upon the company for \$37.50 to the agent Carden; this sum being \$2.50 less than the advance premium provided for by the laws of the company. After this the application of the assured was sent in to the home office of the company, and the certificate was issued to him.

The order given by deceased was as follows: "Honey Grove, Texas, Dec. 3, 1892. Pay to the order of Geo. A. Carden, \$37.50, and charge to my account. T. C. Smith, M. D. To Covenant Mutual Benefit Association, Galesburg, Ill." The order has marked on it in pencil: "O. K. 12—28—92." On the same day that this order was given, deceased wrote a letter to appellee in regard to it. Demand was made in open court upon appellee to produce this letter, but it failed to do so. It was admitted that notice to produce it was given in due time. Appellee's attorneys claim that the letter could not be found. Its contents are unknown, except as may be inferred from the reply to it, introduced by appellants, which is as follows: "Office of Cov. Mut. Ben. Ass'n, Galesburg, Ill., Dec. 9, 1892. T. C. Smith, M. D., Honey Grove, Texas—Dear Sir: I have your esteemed favor of Dec. 3, and in reply to the same would say that I am certainly surprised at the facts recited in your letter. I wish that you would write me, and advise me what the circumstances were under which you gave this order

to Mr. Carden, and for what you were owing him. Is it in payment of advance premium on an application which you expect to make, or what? Certainly he is not entitled to any of the medical examination fee, and the only way that I can see in which he would have a right to ask you for an order for money that was due you on account of work done for this association would be if you were indebted to him. Should be pleased to have you write me fully in relation to this matter. Very truly yrs., W. H. Smollinger, Sec'y." This letter was replied to by deceased as follows: "Honey Grove, Dec. 11, 1892. Mr. W. H. Smollinger, Galesburg, Ill.—Dear Sir: Your letter of 9th to hand. Will say in reply that I was not under any indebtedness to Mr. Carden whatever. I examined 27 applicants, and was to receive \$2.50 each, but on settlement was forced to discount my account \$37.50, or receive nothing; so I thought it better to take \$30 than nothing, as Mr. Carden, after I had done the work, claimed that all collections came through him, and before he would send in my account I would have to give him an order for \$37.50. I thought it a strange way of doing business is the reason I have written you. From your letter I see Mr. Carden has done me a wrong, and if it is in the power of the association to have justice done me, and pay me the full amount (\$37.50), I would be under many obligations to you. Mr. Carden has no right to extort this money from me, and I am willing to leave this matter with you gentlemen. Please answer as soon as convenient, as I will leave for the Polyclinics at New York soon. Very respectfully, T. C. Smith." The letter has the following indorsements stamped thereon: "Rec'd Dec. 14, 1892." "Dec. 21, 1892." "Answered Dec. 22, 1892. Cov. Mut. Ben. Ass'n." "Answered Dec. 15, 1892. Cov. Mut. Ben. Ass'n." Appellants introduced the following reply to the foregoing letter: "Galesburg, Ill., Dec. 15th, 1892. Dr. T. C. Smith, M. D., Honey Grove, Texas—Dear Sir: I have your esteemed favor of recent date, and in reply to same would say that I will take the matter referred to in your letter in hand, and will fully investigate the same. Very truly yours, W. H. Smollinger, Sec'y." Accompanying the policy was the following letter to deceased: "Office of the Cov. Mut. Ben. Ass'n, Galesburg, Ill., Dec. 19th, 1892. T. C. Smith, Esq.—Dear Sir: With this please find your certificate of membership, No. 75,142, for \$5,000, which, upon examination, we trust will be satisfactory. Please read the certificate, and copy of application attached, carefully, and, should error be discovered, notify us at once. You will expect to receive your first mortuary call for \$9.00 from the first of next May; the same to be paid at this office within 30 days from its date. Fraternally yours, W. H. Smollinger, Sec'y." The next letter, sent out about December 28th, was as follows: "Galesburg, Ill., Dec. 20, 1892. Dr. T. C. Smith, Honey Grove, Texas: Below find

statement of your account from Nov. 15th, 1892, to Dec. 15th, 1892. Trusting that you will find everything correct and satisfactory, I am, fraternally, W. H. Smollinger, Sec'y." "Dr. 1892, Dec. 20, to advance premium, \$37.50; Dec. 20, to Csh. Dft. No. 5,124, \$30.00, —\$67.50. Cr. 1892, Dec. 15, by examinations, \$67.50,—\$67.50." There was also an itemized list of examinations made by deceased in the statement. On December 22d appellee wrote deceased as follows: "Galesburg, Dec. 22nd, 1892. T. C. Smith, Esq., Honey Grove, Texas—Dear Sir: With reference to the matter of \$37.50 which you state you paid to Mr. Carden under misrepresentation, under protest, etc., would say we have endeavored to make a thorough investigation of the same, and are informed that you agreed to make application for a policy of \$5,000 insurance, on which the advance premium is \$40, and that Mr. Carden rebated the advance premium of \$2.50, and that you gave an order for the balance of \$37.50. If there was such an arrangement, he certainly was entitled to the money, and you should complete the application at once. Very truly yours, W. H. Smollinger, Sec'y." On December 6, 1893, deceased wrote appellee, asking when he would be required to make another payment on his policy; to which the appellee replied that the policy had lapsed through nonpayment of call No. 120; to which last letter deceased replied on December 30, 1893: "You are undoubtedly mistaken when you say my policy has lapsed, for I have your written receipt for payment of advance premium for one year, and my policy bears date of December 19, 1892. If you will examine the matter closely, you will find that a portion of my fees for making medical examinations for the company went to pay this advance premium. It has been my intention all the while to keep my policy in good standing." The letter inclosed \$15, which was returned by appellee.

W. C. Calkins, appellee's general counsel, testified in its behalf as follows: "I am one of the directors of defendant. This call (120) was made on all of defendant's members,—on those holding certificates dated prior to 1890, as well as on those dated subsequent thereto; but the call made on members whose certificates bore date prior to 1890 was made on a separate plan, and according to the provisions of their respective contracts, but were all included in the call as mortuary call No. 120. What I mean by separate plan is a plan separate from the plan named in the policy involved in this suit, and described in the by-laws in force at the time the contracts were made. The call made as above stated on certificates dated prior to 1890 was made under defendant's original by-laws as revised January 26, 1886, and in 1888, and under the other by-laws preceding that. But the call was made at the same time, under the same resolution, as call 120, and made at the usual time, place, and in the usual and customary manner. Each policy holder is assessed ac-

cording to the provisions of his contract and the by-laws in force at the time his contract was made. The calls prior to 1890 were upon policies that were, to use one expression, 'kind o' pass around the hat policies.' They contained no promise to pay money. They did contain a promise to pay whatever might be realized from the assessment, realized from membership, and from ready comparison show calls there and by-laws different from those as shown by these by-laws (Revised By-Laws 1892). Those policies were made with reference to paying current death claims,—death claims as they occurred without reference to the future. They contained no provision with reference to paying back dividends, or on total disability. The second class, which includes the policy in this suit, as a fact contains all those clauses, total disability,—which means payment of half in case a man is totally disabled,—and makes the premiums to declare dividends at the end of six years; also provides for protecting future obligations. We pay, and had for some time been paying, our claims in advance, paying them just as soon as they were presented to the company, borrowing from the fund then on hand to be replaced by future assessments; and this assessment (No. 120) is one of them. This levy was made in the usual manner. The death claims contained in the notice of mortuary call No. 120 had been paid out of the mortuary fund, and said call was made to replenish that fund. The experience of the society is that the death rate of the old policy holders averages precisely the same as it does under the new under the same conditions. And the excess collected from the new policy goes to their credit under their contract in the way of dividends at the dividend period. Members whose policies antedate the year 1890 are paid in full, same as those coming in since 1890, and the increased rates charged to those whose policies are dated since 1890 are accounted for in the total disability clause, and other extra privileges under policy since 1890; and, according to our idea, the mortality experience makes them pay about the same rate. The same form of notice is used in the one class as is used in the other, except as to grade and number of particular policy and amount to be paid by that particular holder, which was governed by the contract and by-laws at the time it was insured."

Appellee introduced in evidence its various by-laws antedating the "Revised By-Laws of 1892." The by-laws of 1877 provided for the following maximum rates of assessments for each \$625 of insurance, according to the age at joining, and the membership of the association:

Age.	Am't.	Age.	Am't.	Age.	Am't.	Age.	Am't.	Age.	Am't.
21-26	\$ .75	27-33	\$1.00	41-50	\$1.20	51-55	\$1.50	56-60	\$2.00

An additional sum of 10 cents on each assessment was added to pay expense of collection. An annual assessment was also provided for at the following rates: Upon certificates limited to \$1,250, \$1.50; limited to \$2,500, \$2.25; limited to \$5,000, \$3.

The by-laws of 1880 provided for the following maximum assessment rates, to pay death claims, according to age at joining and membership of the association, for each \$625 of insurance:

Age	Am't	Age	Am't	Age	Am't	Age	Am't	Age	Am't
21-26	\$ .75	27-38	\$1.00	39-47	\$1.20	48-52	\$1.50	53-56	\$2.00

-To which assessment, when necessary for the payment of general expenses and collection costs, the board of directors might add a sum not exceeding the following amounts per month: On certificates limited to \$625, 15 cents; \$1,250, 18 cents; \$2,500, 24 cents; \$5,000, 30 cents.

The by-laws of 1886 provided for assessments to pay death claims and current expenses and collection costs at precisely the same rates as in the by-laws of 1880, given above; mortuary and expense assessment, however, to be collected at same time. It is expressly provided by these by-laws that there shall be six mortuary calls, and only six, each year, to be levied on same days as provided in revised by-laws of 1892, and in policy in suit.

The assessment rates provided in the by-laws of 1890 were such a percentage of the following as the mortality experience and the maintenance of the emergency fund might require, the rate being for each \$625 of insurance, payable bimonthly, same as in by-laws of 1892, and according to age at joining:

Age	Am't	Age	Am't	Age	Am't	Age	Am't	Age	Am't
21	\$ .80	23	\$ .82	25	\$ .84	27	\$ .88	29	\$ .92
22	.81	24	.83	26	.85	28	.90	30	.94

To provide for agency and general expenses each member could be charged 12½ cents per month on each \$625 of insurance, to be collected with each bimonthly call. The same provision for the accumulation, use, and distribution of the emergency fund is found in these by-laws as in those of 1892. The revised by-laws of 1892 contain no reference to or mention of the former by-laws.

This is believed to be a sufficient statement of the material facts shown upon the trial to serve as a basis for the disposition of the questions presented upon this appeal. Such additional facts as may be deemed necessary to consider may be stated in connection with the discussion of the questions presented for decision.

Taylor, Galloway & McGrady and Pruitt & Smith, for appellants. W. C. Calkins and Harris, Etheridge & Knight, for appellee.

FINLEY, J. (after stating the facts). The first and eighth assignments of error complain, respectively, of the general charge and the refusal of the court to give in charge to the jury a special instruction requested. The portion of the general charge attacked is as follows: "If said Carden agreed with Dr. Smith to remit the advance premium or membership fee, and if afterwards, and before the delivery of the certificate, he claimed such fee from Dr. Smith, and if Dr. Smith, in compliance with such demand, gave Carden an order on defendant for \$37.50, and afterwards accepted from defendant the certificate the application for which was procured by said Carden, and if the defendant paid said Carden said sum on said order, then the defendant had the right to pay such order, notwithstanding the fact (if it was a fact) that Dr. Smith requested the defendant, after having given the order, to pay the money to him instead of Carden; and, if you find such to be the facts in the case, you will find for the defendant." This is the special charge asked: "That if you believe from the evidence that Carden had authority from the defendant to rebate the membership fee, and that he entered into a contract with the deceased for the deceased to take a policy of insurance for \$5,000 in the defendant association, and that as a part of said contract said Carden agreed to relinquish, and did relinquish, to the deceased, said membership fee, and in pursuance thereof deceased made application for said policy, and that defendant delivered said policy to deceased, and that afterward defendant applied \$37.50 of the debt which it then owed deceased for medical examinations to the payment of advance premium on said policy, and notified deceased of such application, and that, if deceased, in exercise of ordinary care, was thereby led to believe and understand, and did so believe and understand, that such application of said \$37.50 by defendant was for the purpose of paying premiums on said policy to accrue after the time said policy would be carried by said relinquishment, and by reason of such belief and understanding deceased acquiesced in such application of said \$37.50 by defendant; and if the defendant knew, or in the exercise of ordinary care ought to have known, that such was the belief and understanding upon the part of deceased, and that this was why he was acquiescing in the application of said \$37.50, then you will find for plaintiff, unless you find against her on account of the other instructions given you." The proposition urged against the charge of the court is that the term "advance premium" should be held to mean money paid by the assured in advance for the purpose of meeting mortuary calls made after the expiration of the 105 days. It is insisted that under the terms

of the certificate and laws and regulations of the association the term "advance premium" is of doubtful meaning, and that courts should give it that meaning which would be most beneficial to the assured, and prevent a forfeiture. In support of this position authorities are cited to the effect that, where the terms of an insurance contract are of doubtful import, and will admit of different constructions, one of which will sustain the contract and prevent its forfeiture, while the other will result in forfeiture, courts should adopt the construction which will uphold the contract; citing 1 Bac. Ben. Soc. § 203; Anson, Cont. § 331; Goodwin v. Society (Iowa) 66 N. W. 157; First Nat. Bank v. Hartford Fire Ins. Co., 95 U. S. 673. The proposition of law announced is sustained by the authorities, and is well established, but the application here attempted to be made cannot be admitted. We think it clearly appears that the "advance premium" provided for by the laws of the association is in the nature of a membership fee. Eight dollars per \$1,000 insurance is charged against all applicants, regardless of their ages, while the amount of the assessments to be subsequently paid are rated, and differ according to ages. The "advance premium" carries the policy free of other charge for at least 105 days,—that is, mortuary calls can only be made against the holder of a certificate after it has been in force 105 days; and these calls can only be made on the first business days of January, March, May, July, September, and November. The payment of the advance premium by the assured would have carried his insurance, without further payment, to the mortuary call of May 1, 1893, to which his policy was subject. The special charge asked is based upon the idea that the assured may have been misled into the belief that the advance premium was remitted, and that the company had applied his \$37.50 to the payment of assessments to be made after the period had passed through which the advance premium would carry the policy, and that the company knew, or ought to have known, that he so understood the matter, and therefore should be held responsible. The evidence did not warrant any such charge. What was meant by the advance premium was clearly manifest from the contract. The assured had explicit notice that his \$37.50 had been paid to Carden as the advance premium due from the assured, and was further notified, at the time the policy was delivered to him, that the first mortuary call which would be made upon him would occur on May 1st, and would be for the sum of nine dollars; and he was requested to carefully read the certificate and copy of application attached. The mortuary call was made May 1st, in accordance with this notice, and forwarded to and received by the assured. Under such a state of facts there was no occasion for any such mistake as that contended for by appellants.

The tenth and twelfth assignments are di-

rected, respectively, at the refusal of a special charge asked and the charge given. The special charge is in this language: "That the written order given by Dr. Smith to Carden was subject to countermand, and, if the payment of it was countermanded by deceased before defendant became liable thereon, then defendant had no right to pay the same to Carden without deceased's consent, or unless, deceased knowing that the same had been so paid by defendant, it was afterwards ratified by deceased." The part of the general charge complained of is the seventh paragraph, as follows: "If Carden agreed with Dr. Smith to remit the advance premium or membership fee, and if afterwards, and before the delivery of the certificate, he claimed such fee from Dr. Smith, and if Dr. Smith, in compliance with such demand, gave Carden an order on defendant for \$37.50, and afterwards accepted from defendant the certificate the application for which was procured by said Carden, and if defendant paid said sum to Carden on said order, then the defendant had the right to pay such order, notwithstanding the fact (if it was a fact) that Dr. Smith requested the defendant, after having given the order, to pay the money to him instead of Carden; and, if you find such to be the facts, you will find for the defendant." As has been heretofore shown, the advance premium or membership fee was expressly provided for by the laws of the association, and by the terms of a private contract between the soliciting agents and the association it was to go as compensation to said agents. The agents had authority to relieve applicants of payment of this advance premium if they desired to do so, but they were under no obligation to do it. It was simply a matter between the soliciting agents and the assured whether the payment should be made. The company got the benefit of the advance premium in either event, for this constituted compensation to the agents; and, if they remitted it to applicants for insurance, the company was not affected thereby. Under these conditions, after Carden demanded of the assured payment of the advance premium, and the assured gave him an order on the company for \$37.50 out of the amount due him by the company in payment of such advance premium, he had no right to countermand this order without countermanding his application for insurance at the same time. He had no right to demand the certificate of insurance without payment of the advance premium. It was a matter of grace on the part of the agent to relieve him of its payment; and, if the agent withdrew his promise, claimed to have been made, to that effect, before the sending in of the application for insurance, and in response to his demand for its payment assured gave the order for \$37.50, he had no right afterwards to countermand the order, and claim the benefit of the certificate of insurance, without payment of the ad-

vance premium. We think the charge of the court correctly presented this phase of the case to the jury, and it did not err in refusing the special charge.

Under the thirteenth and fourteenth assignments of error appellants assail these two sections of the charge: "If you find that Carden claimed or demanded \$37.50 of Dr. Smith on the ground that he was entitled to a part of the medical examiner's fees, and if, in fact, Smith had contracted with Carden to divide his examination fees with him, and if Smith gave him the order in compliance with such claim, and afterwards countermanded the order, and notified defendant not to pay it, then defendant had no right to pay it to Carden; and, if you so find, then, unless you find that Dr. Smith had notice that the money had been so applied, and acquiesced in the same, you will find for plaintiff. On the other hand, if you find that Dr. Smith and Carden had a controversy as to the \$37.50, and Smith gave him the order, and afterwards submitted the question as to Carden's right to the \$37.50 to the defendant to decide, and if the defendant decided against Dr. Smith, and paid it to Carden, and Smith had notice of such decision, and acquiesced therein, until defendant had declared his certificate forfeited, then Dr. Smith had no right to have said money applied to payment of said mortuary call No. 120, although you may believe that originally he had a right to the money; and, if you so find, you will return a verdict for the defendant. You are at liberty to determine from the letter from Dr. Smith to defendant, dated December 11, 1892 and from all other evidence before you which may bear upon the question, as to whether said letter was meant as a submission of the matter in dispute between Smith and Carden to the defendant for decision; and, even if you find that Smith intended it as a positive countermand of the order, if the defendant mistook the meaning, and believed in good faith that it was intended to submit the matter to it to investigate and decide, and paid the money to Carden under such mistaken belief, and if Dr. Smith knew or had notice of such decision, and acquiesced in the same until after his certificate had been declared forfeited, then you must find for defendant." Based upon these assignments, appellants urge two propositions:

First. They assert that, unless the assured knew of the mistake in the interpretation of his letter by the association, his rights should not be prejudiced thereby. We do not think the court erred in the particular complained of. If the association in good faith applied the \$37.50 due and owing by it to Dr. Smith upon the advance premium on his policy, and notified him of such application, and he acquiesced in it, receiving and retaining his policy, the assured could not, if his policy had become forfeited for nonpayment of the mortuary call levied subsequent to this appropriation and notification to him, repudiate the application of the money, and insist that it be applied in

discharge of mortuary calls, and thereby impose a liability of \$5,000 in favor of beneficiaries of his certificate. That is to say, even though the application of this \$37.50 by the association to the payment of the advance premium upon the policy, the same going into the hands of Geo. A. Carden, should be determined as not strictly equitable as between the assured and the soliciting agent, Geo. A. Carden, yet, if the assured knew of the application, received and retained the policy with such knowledge, he should not have allowed the policy to become forfeited by nonpayment of subsequent assessments, and cannot have this transaction opened up, the rights between him and Carden adjusted, and by such adjustment impose a heavy liability upon the association. If he intended to insist upon his claim, asserted in this case, that this \$37.50 should be paid to him, or applied to future assessments made against his certificate, he should have asserted and maintained this claim before the forfeiture, and declined to accept the benefits of the certificate under the conditions of its delivery to him by the company. 2 Pom. Eq. Jur. § 817; Bigelow, Estop. 683; Hansen v. Supreme Lodge (Ill. Sup.) 29 N. E. 1121; Eaton v. Supreme Lodge, 22 Cent. Law J. 560; Hopkins v. Insurance Co., 43 N. W. 197, 78 Iowa, 244; Insurance Co. v. Hagerty (Sup.) 36 N. Y. Supp. 558-562; 2 Whart. Ev. §§ 1140, 1154; 1 Greenl. § 197 et seq; 62 Am. Dec. p. 91, note.

Second. It is insisted that the evidence did not justify this issue being submitted to the jury. This contention is not borne out by the record. The issue had a legitimate basis in the evidence; and, besides, appellants requested a charge based on ratification of the application by Dr. Smith, and, having invited the court to charge upon this issue, they cannot now complain that the court did so. The contention that it was error in the court to leave to the jury the determination of the question whether the assured intended by the letter of December 11, 1892, to countermand the order given by him to Carden upon the company for \$37.50, is not well taken. The letter did not, in express terms, countermand the payment of this order, and the court very properly left the jury to determine, under all the facts and circumstances of the case, whether the writer intended the letter to be a countermand of the order previously given to Carden. Taylor v. McNutt, 58 Tex. 71; Moss v. Helsley, 60 Tex. 438; Tallaferra v. Cumdiff, 33 Tex. 416; 28 Am. & Eng. Enc. Law, p. 535.

The eighteenth assignment of error: "The court erred in charging the jury that the contract between deceased and defendant was contained in the certificate and written application therefor, when they should have been instructed to construe the same in connection with defendant's rule and by-laws." The court, in its charge, stated to the jury the legal effect of the contract between the parties, and gave to the jury for determination only issues of facts arising in the evidence. While it is true

that the rules and by-laws of the association constituted part of the contract of insurance, the court having fully stated the legal effect of the contract to the jury, no harm was done to the appellants by the court's parenthetical statement that the certificate and application showed the contract between the parties.

Seventh assignment of error: "The court erred in charging the jury that the failure of Dr. Smith to pay or cause to be paid, or to advance money or means to defendant to pay, said call No. 120, caused a forfeiture of said certificate, because it was not shown by the evidence that the deceased was ever notified by defendant that the question of the cancellation of his certificate for failure to pay mortuary call 120 would come up for hearing and investigation before the board of managing directors of defendant, giving the time when same would come up as is provided in said certificate." This assignment of error is based upon section 14 of the certificate, which reads: "If at any time during the first five years of this contract reliable information and evidence shall come to the knowledge of said association that the insured did make false and untrue statements in his or her application, on the good faith of which this certificate is issued, or if the insured shall be guilty of any criminal act, or shall injure his or her health by the use of alcoholic, narcotic, or other stimulants, or shall become an habitual or excessive user of toxicants, have delirium tremens, or shall violate any one of the conditions or agreements contained in the application or this certificate, the association may, by written or printed notice, signed by its president and secretary, notify the insured of his or her violation of the conditions and agreements therein contained, and that the question of cancellation of the same will come before the board of managing directors at the time named in said notice (which shall not be less than thirty days from date thereof) for hearing and investigation, and the finding of the said board, and their action thereon, shall be final and conclusive, and an absolute bar to the prosecution and recovery on this certificate after the death of the insured." Section 2 of the certificate provides: "No personal liability of the insured is incurred by becoming a policy holder in this association, but this certificate of insurance is issued and accepted subject to the express conditions that, if any of the payments stipulated in this contract shall not be paid to the association on or before the day of the dates as provided in this contract, at its home office in Galesburg, Ill., this contract shall terminate, and all rights be forfeited to this association." The general language in section 14, above quoted, "or shall violate any agreements of this certificate," must be construed so as to refer to conditions and agreements of the nature and kind particularly enumerated in the preceding part of this section. This is in accordance with the general rules of construction that the particular controls the general. *Railway Co. v. Rambolt*, 67 Tex. 656, 4 S. W. 356;

*Perez v. Perez*, 50 Tex. 322-324. That this construction reaches the true meaning and intent is rendered manifest and certain by the language of section 2, above quoted, which makes the failure to meet payments stipulated for in the contract work an absolute forfeiture of the policy.

In the second and sixth assignments of error it is urged, first, that, there being no unpaid claims against the association at the time call No. 120 was levied, no mortuary assessments could be made. There is a provision in the policy to this effect: "To provide for the payment of all death claims, or other current expenses, and to maintain an adequate emergency or reserve fund to guaranty the prompt payment in full of all future obligations, there shall be due, according to the mortality experience and emergency fund requirements of the association, and payable at its general office in Galesburg, Ill., on the first business days of January, March, May, July, September, and November, respectively, of each and every year during the continuance of this contract, a bimonthly premium or assessment based upon the annexed tables of rates, according to age, and graded according to the mortality experience of the association and amounts of benefits named herein." It was shown that mortuary call No. 120 was paid out of funds on hand raised by previous assessments under mortuary calls, and that call No. 120 was made to replenish this fund. It was shown that this was a practice and method of business adopted and carried on by this association. A fair construction of the provisions of the contract, including the by-laws, rules, and the regulations of the association, leads to the conclusion that this method of business was authorized. *Nibl. Ben. Soc. & Acc. Ins. p. 481*; *McGowan v. Association* (Sup.) 28 N. Y. Supp. 177; *Wolf v. Association* (Mich.) 66 N. W. 576; 3 Am. & Eng. Enc. Law (2d Ed.) 1063, etc.

It was further urged that this call was void, because it was based upon a large number of claims which should have been included in the call issued on March 1st preceding. It is sufficient to say, in answer to this proposition, that no greater sum was demanded of the assured than he had contracted to pay as his bimonthly assessment. He was liable, under the terms of his policy, for the assessment made on May 1, 1893, and, as the company had authority to make this assessment with a view of replenishing the mortuary fund, exhausted by the death claims which were the basis of this mortuary call, there is nothing that he can justly complain of.

The appellants further urge that call No. 120 was void, because a greater sum was demanded of the assured than was due according to his contract as set forth in the by-laws. The contention is that there were members of the association who became

such before March, 1890, and that they were assessed at a less rate than was the assured. The association has had several sets of by-laws, with policies issued under each, and, while all policy holders were assessed by call No. 120, each policy holder was assessed at the rates provided in the by-laws under which his policy was issued. The assured made application and received his certificate under the by-laws of 1892. These laws fixed his rate of assessment definitely, and by his contract he obligated himself to pay bi-monthly the sum of \$9. His policy or certificate possessed benefits that the old certificate holders were not entitled to. He voluntarily went into the organization under these by-laws, with the positive obligation to pay this amount of assessment bi-monthly. He is in no attitude to complain that old policy holders, whose certificates were issued under different by-laws and under different rates, are charged less than himself. *Nibl. Ben. Soc. & Acc. Ins.* 273-475; *Cohen v. Order of Iron Hall (Mich.)* 63 N. W. 304; *Leffingwell v. Grand Lodge (Iowa)* 53 N. W. 243; *Weller v. Aid Union (Sup.)* 36 N. Y. Supp. 734.

Under the fourth and fifth assignments of error this proposition is presented: Mortuary call No. 120 is claimed to be illegal and void, because the object or objects for which the money was to be collected were not legal objects, and were not sufficiently stated. These mortuary calls are required by the terms of the policy to comply with the statutes of Illinois. The Illinois statute on the subject of notice is as follows: "Assessment Notices—Application of Funds.—Assessment notices sent to members by any association or corporation doing business in this state, shall state the object or objects for which the money to be collected is intended; the names, last address and amount of certificates of deceased members, the amount to which the beneficiary of each is entitled or the amount which would be realized for the beneficiaries of each if all the members who are assessed would pay their assessments, and no part of the funds collected for the payment of death benefits shall be applied for any other purpose." The notice under consideration states that it is made in consequence of death of 72 members of the association, whose names, addresses, and the numbers of whose claims are carefully stated in the notices. The notice states it is mortuary call No. 120. The contract and by-laws of the association defines what is a mortuary call, and what it includes. We think the notice was a full and fair compliance with the statute. *Nibl. Ben. Soc. & Acc. Ins.* p. 481; *McGowan v. Association (Sup.)* 28 N. Y. Supp. 177.

The eleventh assignment of error complains of the refusal of this special charge: "If, after Dr. Smith had earned the \$37.50 in services rendered defendant, and had also contracted in good faith with an authorized

agent (Carden) to take a policy, the membership fee to be rebated, and then Carden undertook to defraud Dr. Smith out of said \$37.50, and if the defendant, knowing of such fraud on Carden's part, joined therein, and became a party thereto, for the purpose of preventing Dr. Smith from collecting said debt, and to enable Carden to collect same, where he had no right to do so, and then paid same to Carden, but withheld from deceased the knowledge that he had done so, and led him to believe that the same had been applied to the payment of premiums which were to accrue and mature on his policy in the future by use of the unexplained term 'advance premium,' then the forfeiture of policy for nonpayment of mortuary call No. 120 was void." The court did not err in refusing this special charge, for the reason that the evidence did not warrant the presentation of such an issue to the jury.

We find no error in the judgment. It is therefore affirmed.

#### MUTUAL BEN. LIFE INS. CO. v. COLLIN COUNTY NAT. BANK et al.

(Court of Civil Appeals of Texas. Dec. 18, 1897.)

#### PRINCIPAL AND AGENT—PLEADING—ESTOPPEL—RATIFICATION.

1. As a defense to a note, the maker alleged that it was given to one who held himself out as the agent of an insurance company, and was to be canceled unless the maker received the policy contracted for; that, after it had been given, he corresponded with the company, and it sent an agent to see him, had him examined by a physician, and then refused to issue the policy, and denied all knowledge of the note. *Held* that, as the company's actions with reference to the transaction did not begin until after the note had been given, and since facts constituting an estoppel must be pleaded, it was error to instruct that the company was estopped from denying the agency, provided it had done such acts as were reasonably calculated to produce the belief upon the part of the maker of the note that said person was its agent.

2. As such acts might constitute a ratification, and since it is not necessary to plead acts of ratification, an instruction on that theory could be properly given.

Appeal from Collin county court; J. M. Pearson, Special Judge.

Action by the Collin County National Bank against Jonathan Woodall and the Mutual Benefit Life Insurance Company on a note. A judgment was rendered in favor of plaintiff against Woodall and in favor of Woodall against the insurance company. The insurance company appeals. Reversed in part.

G. R. Smith and J. R. Evans, for appellant. G. E. Carpenter and Garnett, Jones & Merritt, for appellee.

#### Reasons for Reversal.

TARLTON, C. J. On December 1, 1893, Jonathan Woodall executed a promissory note, payable to the order of C. Q. Foote, in

the principal sum of \$267.82, due September 1, 1894. Before maturity, Foote indorsed this note to the Collin County National Bank, which, on December 15, 1894, brought this suit against the maker and indorser to recover the amount of the note. Woodall pleaded a failure of consideration, in this: that the note was executed to C. C. Foote, as agent of the Mutual Benefit Life Insurance Company, for the first premium of a policy in that company for \$5,000, alleging that the policy was never delivered. He alleged that Foote was, at the date of the execution of the note, the agent of the insurance company, with full authority to bind it; that as such agent Foote solicited the defendant to take out a policy in the sum of \$5,000; that to this end an application was at the time written out; that Foote, as the agent of the company, executed to the defendant a receipt for the note, showing it to be in consideration of the insurance policy referred to; that when the transaction occurred the parties were in the country about 12 miles from McKinney; that it was agreed between them that Woodall was to execute and deliver to Foote, as such agent, the note in question; that Foote would execute the receipt above mentioned; that thereafter Woodall would go to McKinney, and be examined by the company's physician at McKinney, and, if such examination was satisfactory, that the insurance company was to execute and deliver to the defendant the policy for \$5,000, when the note would become a binding obligation; that, if the examination was not satisfactory, the note should be canceled; that within the time agreed upon the defendant made several trips from his home to McKinney for examination by the physician; that he was unable to find Foote; that he thereafter wrote a letter to the insurance company, proposing to stand such examination, and to carry out his part of the contract; that the company in reply notified defendant that it would send its state agent, H. A. Craycroft, to attend to the matter; that Craycroft subsequently caused another agent to go to the home of the defendant, and that this agent, whose name is unknown, directed the defendant to go for examination to Dr. W. T. Willey, a physician at McKinney, and that upon satisfactory report the policy for \$5,000 should be at once issued to the defendant; that, in accordance with this direction, the defendant secured an examination, which was forwarded to the company, which proceeded to repudiate its contract; that Foote and the company, with intent to swindle the defendant, fraudulently represented to him that the company would issue the insurance policy in consideration of the note in question; and that, if the plaintiff ever paid any valuable consideration for the note, it was obtained from him by fraud. The insurance company was made a defendant on the prayer of Woodall, who sought recovery against it, should he be required to pay the note. It denied the alle-

gations of this answer, alleging that at the time of the execution of the note Foote was not its agent; that he was without authority to represent it in any way; and that no agent of the company had authority to accept notes in settlement of its premiums, and that Foote had none. The suit having been dismissed as to Foote, the trial resulted in a verdict and judgment for the bank against Woodall, and for the latter against the insurance company, which appeals.

We fail to find error upon the issue between the bank and Woodall. Upon the issue between Woodall and the insurance company the court instructed the jury that, if they should believe from the evidence that Foote was not the agent of the insurance company at the time of the execution of the note, and that if Woodall at that time believed that Foote was such agent, and that said belief was founded upon any acts done by the insurance company, reasonably calculated, under all the facts and circumstances, to produce the belief upon the part of Woodall that Foote was the agent of the company, then, under such circumstances, the insurance company would be estopped from denying that Foote was its agent. Upon this instruction an assignment of error is predicated, on the ground that estoppel was not pleaded by Woodall. The answer, as we read it, contains no allegation of such acts on the part of the company as are referred to in this charge. No act of the company is alleged inducing the belief referred to, and contemporaneous with or prior to the execution of the note. The course of conduct by the company with reference to this transaction is alleged to have begun with the sending by the company of an agent in response to a letter written by Woodall after the transaction with Foote. This conduct, and the acts therein involved, might constitute ratification, but would not, for manifest reasons, constitute acts prior to or contemporaneous with the transaction with Foote, and could not constitute the estoppel referred to in the charge. It is not necessary to plead acts of ratification, which is equivalent to antecedent authority. *Railroad Co. v. Chandler*, 51 Tex. 420; *Insurance Co. v. Shrader*, 11 Tex. Civ. App. 261, 81 S. W. 1100, and 32 S. W. 344; *Rail v. Bank*, 3 Tex. Civ. App. 558, 22 S. W. 865. But a different rule prevails with reference to estoppel. The facts constituting such estoppel must be pleaded. *Banking Co. v. Stone*, 49 Tex. 4; *Banking Co. v. Hutchins*, 53 Tex. 68; *Rail v. Bank*, 3 Tex. Civ. App. 559, 22 S. W. 865. If at the time that Foote took this note from Woodall the company had placed itself in an attitude such as to justify an inference that, while no real relation of agency existed between it and Foote, yet, as to third persons, this agency should be implied, on account of its holding out to persons dealing with Foote that the latter was its agent, the acts and conduct which constituted such holding out should be



alleged with reasonable certainty. These acts and this conduct are not averred by Woodall, and hence there was error in the charge complained of. After careful examination of the testimony, we are unable to say that a verdict against the company would necessarily have ensued had not this erroneous charge been given. Hence the judgment is affirmed as to the appellee bank, but it is reversed, and the cause remanded, as to the appellee Woodall, who is adjudged to pay the costs of this appeal. It is so ordered.

**BRYANT v. GALBRAITH et al.**

(Court of Civil Appeals of Texas. Nov. 27, 1897.)

**ASSIGNMENTS OF ERROR—CORPORATIONS—ACCOUNTING.**

1. An assignment of error that "the court erred in rendering judgment for defendants" is too general.

2. An assignment of error that "the court erred in deciding that plaintiff was entitled to nothing, and in refusing to render a judgment for the plaintiff for the amount the proof showed he was entitled to recover under the evidence adduced by him on the trial," is too general.

**On Rehearing.**

1. An assignment of error, which is practically concealed in the brief, and is not followed by a proposition, with statement from the record, showing the contents of a letter the exclusion of which is assigned as error, will be ignored.

2. Unless it is made to appear that a person owned some substantial interest in the assets of a company, the fact that he is excluded from participation in its business by those who furnished all the money and practically owned all the assets, will not entitle him to an accounting.

Appeal from district court, Bowie county; James M. Talbot, Judge.

Suit for accounting by Robert H. Bryant against T. A. Galbraith and another. Judgment for defendants, and plaintiff appeals. Affirmed, and motion for rehearing overruled.

Henry & Henry, for appellant. Sam H. Smelser, for appellees.

**STEPHENS, J.** This appeal, which is from a judgment upon conclusions of law and fact denying appellant (plaintiff below) any recovery, is prosecuted upon two assignments of error only, reading: "(1) The court erred in rendering judgment for the defendants. (2) The court erred in deciding that the plaintiff was entitled to nothing, and in refusing to render a judgment for the plaintiff for the amount the proof showed he was entitled to recover under the evidence adduced by him on the trial." Under repeated decisions, these assignments are too general, and the exception of appellees thereto is sustained. No error is apparent from the face of the record, and the judgment is affirmed.

**Motion for Rehearing and for Further Conclusions.**

(Dec. 31, 1897.)

After stating the nature and result of the suit, appellant's brief thus submits the two  
43 S.W.—53

assignments of error quoted in our opinion on original hearing: "Appellant assigns the following errors, to wit," (here copying), and thus numbering the assignments: "1st" and "2nd." Then, under the head of "Propositions," follows the rest of the brief, which is a continuous statement, without discrimination, of various propositions, matters of evidence, the court's conclusions of law and fact, arguments and authorities, and of what is now claimed to be the third assignment of error, reading: "The court erred in excluding the letter of defendant T. A. Galbraith, when offered in evidence by the plaintiff, as per bill of exceptions No. 1." If submitted as such, and followed by an appropriate proposition, with statement from the record showing the contents of the letter,—which it is not,—this would be a sufficient assignment. But as presented in the brief, it was practically concealed, and, like the appellees, we did not suspect that the statement above quoted was presented or relied on as an assignment of error. We are therefore of opinion that it, too, should be ignored, though it does not seem that the evidence would have added anything of value had it been admitted. We are asked to file conclusions of law and fact, but, as appellant has not specifically assigned errors to the conclusions already filed by the district judge, we do not perceive the necessity of complying with this demand. However, since appellant requests it, we adopt the conclusions so found, and therefrom, as well as from the statement of facts, deduce the further conclusion that appellant failed to show that he had ever paid or tendered to appellees the consideration (which was the transfer of stock in another concern) upon which his equitable claim as an alleged shareholder in the Texarkana Furniture Company rested; that is, he failed to prove the essential allegation made in the seventh paragraph of his petition. Our conclusion of law is that, unless it was made to appear that he owned some substantial interest in the assets of this company, the exclusion of which he complains from participation therein by the appellees, who, as appears from the sixth paragraph of appellant's petition, had furnished all the purchase money, and practically owned the assets of the corporation, did not entitle him to the equitable relief sought.

**WARD v. WILSON et al.**

(Court of Civil Appeals of Texas. Oct. 3, 1897.)

**AGREEMENT OF ATTORNEYS—BINDING EFFECT—CONSTRUCTION.**

1. Plaintiff sued on certain notes, which were a lien upon land sold to defendant by plaintiff's grantees. Defendant answered, denying that he had assumed any part of the debt represented by the notes. Pending the action an agreement was entered into between the attorneys of the parties respectively, by which the defendant, in consideration of certain conditions

<sup>1</sup> Writ of error granted by supreme court.

agreed to pay so much of said notes as were equitably a lien on that portion of the land purchased by him. *Held*, that defendant was bound by the agreement made by his attorney in his behalf.

2. Under such agreement, a personal judgment could be obtained against defendant for such equitable proportion.

Error from district court, Clay county; George E. Miller, Judge.

Action by M. A. Wilson and others against J. C. Ward on promissory notes, and to subject certain lands to the judgment. Judgment for plaintiff. Reversed and reformed.

J. H. Cobb and Flood, Hughes & Foster, for plaintiff in error. J. A. Templeton and H. A. Allen, for defendants in error.

TARLTON, C. J. M. A. Boone, under her former name of M. A. Wilson, conveyed to one M. J. Tompkins five quarter sections of land lying in Clay county, Tex., for which on September 21, 1891, he executed his five promissory notes, each in the sum of \$960, payable to Mrs. M. A. Wilson, and numbered 3, 7, 9, 11, and 14. The notes were payable on the 21st of September, 1901; but it was provided that each should bear interest at 8 per cent. per annum, payable on the 21st day of September of each year, and that, if the interest should remain unpaid for 10 days after maturity thereof, the legal holder could at once declare the entire obligation due and payable. A default having been made in the payment of interest as thus stipulated, plaintiff exercised the option provided for, and brought suit on February 22, 1896, against divers parties claiming interests in the sections, including J. C. Ward, the plaintiff in error. The latter was duly cited, and from his answer filed at the succeeding March term, 1896, it appears that he claimed an interest of 60 acres out of the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 53, and also an interest of 80 acres out of the N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 58; his claim in each instance being by purchase from J. J. and Emma Pond, to whom M. Brooks, the vendee of Tompkins, had sold 60 acres out of the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 53, and all of the N. E.  $\frac{1}{4}$  of section 58. It was alleged that J. J. and Emma Pond, in consideration of this conveyance, had assumed to pay \$360 of note 11, and interest, and all of note 14, and that Ward did not assume to pay any part of the indebtedness. Of note 11 the sum of \$640 was alleged to have been assumed by one T. B. Gill, a purchaser of 100 acres off the north end of the N. W.  $\frac{1}{4}$  of section 53. At the same term of the court the following agreement as to the matters in controversy between the plaintiff and J. C. Ward was signed by the attorneys for the parties, respectively: "M. A. Wilson vs. E. B. Gill et al. In District Court of Clay County, Texas. March Term, 1896. In the above-entitled cause, it is agreed that whereas, J. C. Ward claims a part of the land in controversy herein, which he purchased from

J. J. and Emma Pond, viz. 60 acres off the south end of the N. W.  $\frac{1}{4}$  of Sec. 53, and 80 acres off of the north end of the N. E.  $\frac{1}{4}$  of Sec. 58, which land is more particularly described in said J. C. Ward's pleading; and whereas, said land is subject to plaintiff's lien to secure notes Nos. 11 and 14, given by M. J. Tompkins for said quarter sections of land, respectively, which notes are sued on herein; and whereas, said J. C. Ward has paid a part of the interest due on said notes, and desires to continue to pay his pro rata part of said notes, for which the land held by him is equitably bound according to the terms of the original contract between plaintiff and said Tompkins: Now, therefore, it is hereby agreed by and between the plaintiff herein and said J. C. Ward that said J. C. Ward shall have the right to continue to carry out said original contract, in so far as the incumbrance equitably chargeable against the land so held by him is concerned; and said plaintiff hereby agrees to permit said defendant to make the payment of the amounts, principal and interest, of said indebtedness, which is equitably chargeable against said land so held by J. C. Ward according to the terms of the original contract of sale. And said J. C. Ward hereby agrees and binds himself to make the remaining portion of the said quarter sections of land sell for enough to pay off and satisfy all that part of the indebtedness above mentioned which is properly chargeable against the same, or, upon his failure to make said land bring said amount so properly chargeable against same, the said J. C. Ward agrees to pay such balance, and upon so doing he shall be entitled to and may have an assignment to him of a pro rata part of the judgment which he may have to pay in order to protect his interest herein,—that is to say, all of such indebtedness other than the indebtedness properly chargeable against the land so held by said J. C. Ward; and it is agreed that the remaining portion of said quarter sections may be first sold to satisfy the said indebtedness against same, and that the lands so held by Ward shall only be liable for the balance due after such sale. And as to such balance, payment thereof shall be made as above specified. But it is expressly understood that this agreement shall not have the effect to waive, or in any manner impair, the plaintiff's lien against said quarter section of land for the full amount of said note, until same is fully paid. It is also understood and agreed that this agreement shall not be taken or construed as in any manner affecting the plaintiff's rights against any of the remaining defendants herein, or against lands held by them, respectively, and the court, in the decree to be rendered in this cause, shall have full power to adjust all of the equities of the various parties, to the same extent as he could do were no such agreement made; but, in so far as this agreement can be enforced and carried out by the court without affecting the interest of the plaintiff as against the remain-

ing defendants, same shall be done. M. A. Boone (née M. A. Wilson), Plaintiff, by J. A. Templeton, Attorney for Plaintiff. J. C. Ward, by J. H. Cobb, His Attorney." Thereafter, at the same term, the cause was continued. At the succeeding September term, the plaintiff filed a second supplemental petition, purporting to be in reply to the answer of the defendant Ward, in which she declared upon the written agreement already referred to; alleging the maturity of notes 11 and 14, on account of the failure to pay interest as therein stipulated, and praying a personal judgment against Ward in accordance with the terms of the agreement. On October 14, 1896, the court entered judgment rectifying the appearance of "both parties"; that they announced, "Ready for trial," waiving a jury, and submitting the matters of fact as well as of law to the court; and further rectifying that the court heard the pleadings, evidence, and argument of the counsel. The court, among other matters, rendered a personal judgment, by virtue of the agreement referred to, in the sum of \$2,376, against Ward. This judgment we are asked to revise.

1. We are of opinion that the supplemental petition was a pleading alleging a cause of action against Ward, and justifying a personal judgment. It contained matters in reply to the answer previously filed by him, denying the assumption of indebtedness. Ward having been served with citation, and having answered, the agreement signed by his attorney cannot be regarded as unauthorized. Nor was it necessary that there should be an affidavit as to the justness of the plaintiff's claim. The recitals in the judgment do not permit us to concur with the plaintiff in error that he was not in court when the second supplemental petition was filed. If it be true that it was filed without leave of the court,—a matter on which the record does not enlighten us,—it cannot be said that the defendant was injured by an omission to obtain such leave, in view of the fact that it was a declaration upon an agreement presumed to have been signed by his authority, and of which he necessarily had knowledge.

2. We are of opinion, however, that the agreement did not authorize a personal judgment against the defendant in the sum of \$2,376, the aggregate amount of the two notes secured by lien upon the two quarter sections, in each of which the defendant claimed but a partial interest. It is only by the terms of the agreement that any obligation rests upon Ward. We find nothing therein justifying the conclusion that he intended thereby to charge himself with the burden resting upon the entire land securing the two notes. The agreement accorded Ward the privilege of making payment of the amount equitably chargeable against the land held by him, in consideration of which, in the event that he failed to cause the remain-

der to sell for enough to discharge that portion of the indebtedness properly chargeable against it, he undertook to pay such balance. This balance, as shown by the plaintiff in error, is represented by the sum of \$1,080, with 10 per cent. as attorney's fees thereon, drawing interest at the rate of 8 per cent. from the date of the judgment below. For this amount, and no more, personal judgment should have been rendered against Ward.

3. Other questions raised by the plaintiff in error are without merit. However, on account of the excessiveness of the recovery against him, we order that the judgment, affirmed as to parties not complaining, be otherwise reversed, and here reformed and rendered in accordance with the foregoing conclusion.

#### Motion for Rehearing by Plaintiff in Error.

(Jan. 8, 1898.)

This motion is overruled, with the remark that it is believed that the averments of the plaintiff's supplemental petition, read in the light of the recitals of the agreement made a part thereof, were sufficient to justify a personal judgment against Ward, in the absence of any exception, general or special, addressed to the pleading. *Burks v. Watson*, 48 Tex. 112. It is also believed that, under the judgment rendered by this court, and as indicated in its opinion, the rights of the plaintiff in error under the agreement signed by him are fully protected. No execution is awarded against him, unless he fail at the foreclosure sale directed in the judgment to make the land, the amount due on which he has assumed to pay, bring the amount thus assumed. If the land shall bring such amount at the foreclosure sale, no judgment whatever will rest against him. So, if he comply with his obligation, he will obtain title to the land sold under foreclosure. So, also, on such compliance, the judgment for which the land should be sold would be canceled, and no judgment would hence remain against any party to be transferred to him. Motion overruled.

#### Motion for Rehearing of Defendants in Error.

It is made to appear by this motion that the record indicates that the true amount assumed by Ward, and for which judgment should be rendered against him, is \$1,377.98, with 8 per cent. interest from the date of the judgment below, instead of \$1,080, with 10 per cent. as attorney's fees thereon, as set forth in our original opinion. The judgment heretofore entered will therefore be reformed so that the judgment rendered against Ward will be in the sum of \$1,377.98, with 8 per cent interest from the date of the judgment below. To this extent the motion is granted, but in all other respects it is overruled. So ordered.

**PURCELL v. TEXAS & P. RY. CO. et al.**  
(Court of Civil Appeals of Texas. Nov. 20, 1897.)

**ESTOPPEL BY PLEADING.**

Plaintiff is not bound by an allegation in his pleadings as to the time when the quarantine established by the live-stock commission went into effect under the law, where the material inquiry is whether defendant carrier had time before it did take effect to transport certain cattle, which the establishment of such quarantine would excuse it from doing.

Appeal from district court, Nolan county; R. A. Ragland, Special Judge.

Action by W. L. Purcell against the Texas & Pacific Railway Company and the Texas Central Railway Company. From a judgment for defendants, plaintiff appeals. Reversed as to the Texas & Pacific Railway Company, and affirmed as to the Texas Central Railway Company.

Woodruff & McCauley, for appellant. L. W. Campbell and Bidwell & Stennis, for appellees.

**STEPHENS, J.** Appellant sued the Texas & Pacific and the Texas Central Railway Companies to recover damages for an alleged joint refusal to transport 223 head of cattle from Hico to Midland, Tex., before the quarantine line established between those places took effect, in February, 1897, alleging that it went into effect at the beginning of the 15th day of said month. The case was tried without a jury, and, failing to recover, appellant brings it here, upon conclusions of law and fact, without any statement of facts. From the conclusions of fact it appears that the cattle were delivered to the Texas Central Company at Hico, and promptly carried and delivered by it to the Texas & Pacific Company, at Cisco, on the 14th day of February, in time for the latter company to have carried them across the quarantine line, and to Midland, during the 15th, though not during the 14th, day. Judgment went against appellant, upon the ground, as stated in the court's fifth conclusion of law, "that it would have been unlawful for the defendants, or either of them, to have transported the cattle across the said quarantine line, at any time during the said 15th day of February, 1897," on account of what was stated in the next preceding conclusion of law, reading: "The live-stock sanitary commission of Texas, acting within the scope of their authority, had prescribed, with proper penalties, that no cattle should be transported across the quarantine lines established by it from the 15th day of February, 1897, to the 15th day of November, 1897; and the governor of the state of Texas, by his proclamation, had duly put the said rules and regulations so made by the said commission in full force and effect from and after the 15th day of February, 1897."

The conclusion last quoted accurately states the action of the live-stock sanitary commis-

sion of the state of Texas and the governor's proclamation, of which we take judicial cognizance, as to the time when the quarantine went into effect, to wit, "from and after February 15, 1897." That this language excluded the 15th day from the quarantine period is too well settled in this state to require the citation of authority. But see *Hollis v. Francois*, 1 Tex. 118; *Hill v. Kerr*, 78 Tex. 217, 14 S. W. 566; *Burr v. Lewis*, 6 Tex. 81; *Gainer v. Cotton*, 49 Tex. 101; *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049; *Railway Co. v. Moore* (recently decided by this court) 43 S. W. 67, and cases cited. Indeed, the appellees do not seem to controvert this. They insist, however, that appellant is bound by his allegations that the quarantine went into effect at the beginning of the 15th day. While he did so allege, the substance of his allegations was that the railway companies had refused to carry the cattle before the quarantine went into effect, and the pleader is only required to prove the substance of the issue. Time is not usually of the essence of a plea, any more than of a contract. It mattered not whether the quarantine took effect with the 15th or the day following. The material inquiry was whether the companies had time before it did take effect to do what, as common carriers, the existence of the quarantine only would excuse them from doing, which was properly matter of defense. It was only important for the plaintiff below to allege this feature of the case as bearing upon the measure of his damages, there being a difference, as set forth in the findings of fact, of \$4 per head (or \$892 in the aggregate) in favor of the (Midland) market north of the quarantine line. Besides, the law fixed the period of quarantine, and of this appellees were bound to take notice, and could not rely on the mistaken allegations of appellant. Matters of law need not be pleaded, and mistakes of law do not excuse. For this additional reason the counter propositions of appellees are unavailing. We consequently adopt the conclusions of law and fact, except the fifth conclusion of law, which we overrule, and reverse the judgment as to the Texas & Pacific Railway Company, and here render judgment against it, in favor of appellant, in the sum of \$892, with lawful interest from February 15, 1897, and costs of suit; but as to the other appellee, it having performed its duty in carrying the cattle to Cisco, the judgment is affirmed.

**WAGGONER et al. v. WISE COUNTY.**  
(Court of Civil Appeals of Texas. Nov. 27, 1897.)

**ORDER OF COMMISSIONERS' COURT—FAILURE TO RECORD—SALE OF SCHOOL LANDS—CHARGE OF NEGLECT.**

1. An order of the commissioners' court, officially passed at a regular term, and which has been acted upon by the parties for several years, is not void because of a failure to enter it upon the minutes in accordance with Rev. St. 1895,

<sup>1</sup> Writ of error granted by supreme court.

<sup>1</sup> Writ of error denied by supreme court.

art. 1554, which provides that all proceedings of such court shall be recorded.

2. The commissioners' court of a county having sold certain school lands to W. and H., taking their note for the price, and reserving a lien upon the land to secure its payment, has power to release their liability on the note after default, and take in lieu thereof the note of another party for the amount due, secured by trust deed on the land, to whom W. and H.'s interest had been conveyed, and who assumed the payment of their note, under Const. art. 7, § 6, and Rev. St. art. 4271, providing that each county, through its commissioners' court, may dispose of its school lands in such manner as may be provided by them.

Appeal from district court, Wise county; A. J. Booty, Special Judge.

Suit by Wise county against W. T. Waggoner and others on a promissory note. From a judgment for plaintiff, defendants appeal. Reversed.

R. E. Carswell and Spencer & Basham, for appellants. Bullock & Tankersley and Buckaloo & Clendenen, for appellee.

HUNTER, J. This suit was brought by plaintiff, Wise county, January 11, 1897, against W. T. Waggoner, Mrs. Julia Francis Halsell and her husband, H. H. Halsell, Maud Mitchell and her husband, James Mitchell, Annie E. Simmons and her husband, W. T. Simmons, Furd Halsell, Mary Joe Halsell, Glen Halsell, and David Jamison. The above-named Julia Francis Halsell is the surviving wife of J. G. Halsell, hereinafter mentioned, but now deceased. Mrs. Maud Mitchell and Mrs. Annie Simmons, above named, are Furd, Mary Joe, and Glen Halsell, are the children and heirs at law of the aforesaid J. G. Halsell, deceased. The suit is founded on a promissory note made and executed by defendant W. T. Waggoner and the said J. G. Halsell, deceased, dated the 23d day of January, 1883, payable to the order of Wise county, for the sum of \$32,300.60, due and payable 10 years from date thereof, with interest thereon from date until paid at the rate of 6 per cent. per annum, said interest to be paid annually on the 1st day of July of each year. The consideration of said note is 17,712 acres of the Wise county school lands, situated in Haskell county, which was, at the time of the execution of the note aforesaid, conveyed by the county aforesaid to defendant W. T. Waggoner and said J. G. Halsell, and to secure the payment of said note a vendor's lien was retained in the deed of conveyance aforesaid. The plaintiff seeks to recover on this note, and to enforce the vendor's lien against said land. The defendants, as a defense, set forth and relied upon the following substantial grounds and facts, to wit: That after the purchase of the lands aforesaid, to wit, on the 2d day of January, 1886, defendant W. T. Waggoner purchased from J. G. Halsell, deceased, his (Halsell's) one-half interest in said land, and took from him a quitclaim deed; that on the 1st day of January, 1886, defendant Waggoner sold

and conveyed all of said lands to M. O. Lynn, providing in the deed that Lynn therein assumed the payment of the note sued on; that on the 22d day of April, 1887, said Lynn, by deed with covenants of general warranty, conveyed said lands to defendant David Jamison, the deed providing that Jamison, as part consideration, assumed the payment of the note sued on; that the plaintiff's commissioners' court, with full knowledge of the transaction above stated, and without the knowledge or consent of defendants, took from defendant Jamison, on the 23d day of January, 1898, in lieu of the note sued on, and in discharge and satisfaction of same, the said Jamison's note for a like sum, due and payable five years after date thereof; and that to secure the payment of the note aforesaid, executed by defendant Jamison, the said commissioners' court accepted from said Jamison a deed of trust that day executed to J. T. Johnson, the then acting county judge of Wise county.

The district court found the following conclusions of fact, which we adopt as undisputed: "(1) On the 23d day of January, 1883, the plaintiff county, through the commissioners' court, sold to J. G. Halsell and W. T. Waggoner the four leagues of land described in plaintiff's petition, and on which plaintiff prays a foreclosure. Plaintiff conveyed said land to said Waggoner and Halsell by a deed in which a vendor's lien was retained to secure the payment of the note sued on. Said vendees executed and delivered to plaintiff their promissory note for said land, which note is as follows, to wit: '\$32,300.60. Decatur, January 23, 1883. Ten years from date we or either of us promise to pay to the order of Wise county, Texas, the sum of thirty-two thousand three hundred and nine dollars and sixty cents, with interest thereon from date till paid at the rate of six per cent. per annum, said interest to be paid annually on the 1st day of July of each year; and it is agreed that, if any installment of interest is not paid when due, then the whole sum, principal and interest, shall be considered as due, and said Wise county may recover the same. This note is given as a part payment for the Wise county school lands, situated in Haskell county, and this day conveyed to us by the agent of said county. J. G. Halsell. W. T. Waggoner.' (2) On the 2d day of January, 1886, J. G. Halsell, by a quitclaim deed, conveyed his undivided one-half interest in said land, being that described in plaintiff's petition, to W. T. Waggoner. Said deed also conveyed other lands. (3) On the 1st day of January, 1886, W. T. Waggoner conveyed said lands, together with other lands, to M. O. Lynn. In the deed to Lynn it was provided that Lynn should assume the payment of the note sued on as part consideration for said lands. (4) On the 22d day of April, 1887, M. O. Lynn, by a deed with covenants of general warranty, conveyed said lands to David Jamison."

together with other lands, in which deed Jamison assumed the payment of the note sued on as part of the consideration for said lands. (5) The annual installments of interest provided for in the note sued on were paid to the 1st of July, 1895, and were paid by Jamison after his purchase of said land. The last installment was paid on August 15, 1895, but included interest only till 1st of July. The last installment is indorsed on a note given by said Jamison to the county treasurer of Wise county, as shown in the sixth finding of fact. (6) That the note sued on matured on January 23, 1893. That in November of 1892 negotiations began between David Jamison and the commissioners' court of plaintiff for the release of the makers of the note sued on, by taking Jamison's note in lieu of it. That these negotiations continued till July 1, 1893, when said Jamison executed to plaintiff's treasurer his note for a like sum as that contained in the note sued on, together with a mortgage on the lands sold by plaintiff to Halsell and Waggoner, said note due five years from date, and bearing interest at six per cent., payable annually, a copy of which is given in the eighteenth finding of fact herein. Said mortgage was given to J. T. Johnson, county judge of Wise county, and was to secure the note given by Jamison. That the note sued on was then and there in the possession of the treasurer of plaintiff, and has ever since been in his possession, till by him delivered to the counsel of plaintiff to bring this suit. (7) That, while said note herein sued upon was retained by said treasurer, the commissioners' court of plaintiff regarded said note as settled by the note of Jamison, and the makers released, and no longer liable thereon, and looked to the note and mortgage of said Jamison as the source and security from which plaintiff was to realize payment for its lands sold to Halsell and Waggoner. (8) That the note sued on is unpaid, together with interest thereon from July 1, 1895. (9) That, at the time plaintiff took the note of Jamison in lieu of the note sued on, said land was worth the amount due on said note, and that Jamison would have paid said note if it had been demanded by plaintiff. That the commissioners' court thought it best to keep the money due the plaintiff secured by said lands, and for that reason took the note of Jamison. That said lands have since said time shrunken in value, and are not now worth the amount due on said note. (10) That J. G. Halsell died about April, 1886, leaving an estate worth not far from \$500,000. That his surviving wife, Julia Halsell, has since intermarried with H. H. Halsell. That J. G. Halsell left a will, which has been probated. That in said will his wife, Julia Francis, was made executrix. That no action was to be taken in the probate court, other than the probate of the will and the return of an inventory, etc. That the executrix was an independent

one, and she was to so continue to manage said estate till her marriage, and at her marriage she was to cease to be such executrix, and Hon. J. W. Patterson was to assume her place of executrix. That the estate has been partitioned, five-tenths thereof going to the said surviving wife, and one-tenth to each of the five children of said deceased, whose names are Annie E. Simmons, wife of W. T. Simmons, Maud Mitchell, wife of James Mitchell, Furd Halsell, an adult son, and Mary Joe, and Glen Halsell, the last two named being minors, without any guardians of their estates, their estates being in the hands of Hon. J. W. Patterson, as trustee, by the terms of the will of J. G. Halsell, deceased. Mrs. Julia Francis Halsell married H. H. Halsell, June, 1894. (11) That defendant Waggoner and the estate of J. G. Halsell, deceased, are and have always been solvent since the making of the note sued on. (12) That neither W. T. Waggoner nor the estate of said Halsell was in any way concerned with the transaction by which the note and mortgage of Jamison were taken in lieu of the note sued on. That in November, 1892, Jamison told said Waggoner that he (Jamison) had made an arrangement with plaintiff by which said Waggoner was no longer liable on the note sued on. He (Waggoner) was anxious that the arrangement should be effected. Neither did Julia Francis Halsell nor any of her children know anything of said transaction until after consummation of same, nor assent to same. Waggoner's only knowledge of said transaction was what was told him by Jamison, and he supposed that Jamison had in fact then procured his release. (13) That at the present time Jamison is insolvent, and the lands described in plaintiff's petition have depreciated in value since January 23, 1893. (14) That no improvements have ever been made upon the lands described in plaintiff's petition. (15) That the transaction between plaintiff and Jamison, set out in the sixth finding, was had without the knowledge or assent of defendants or either of them, save Jamison. (16) That the treasurer of plaintiff made annual reports to the commissioners' court of the condition of the school fund of plaintiff, and in said report the annual interest payments made by said Jamison on said note were reported as having been collected from said Jamison as interest on said note, which said reports were approved by formal orders of said court. (17) That the sale and conveyance from Lynn to Jamison was procured by defendant Waggoner, the said Lynn having become insolvent and unable to pay the note sued on, which he had assumed in the deed from Waggoner to him. (18) I find that the following is a correct copy of the note given by David Jamison, intended by the commissioners' court to be in lieu of W. T. Waggoner's note: 'No. 287. Vendor's Lien Secured by Deed of Trust \$32,309.60. No. 1. Decatur, Texas, July 1,

1893. Five years after date I promise to pay to Jno. M. Gibbs, county treasurer of Wise Co., and his successors in office, the sum of thirty-two thousand three hundred and nine dollars and sixty cents, with interest thereon from date till paid at the rate of six per cent. per annum, the interest payable annually, as it accrues, at Decatur, Texas; one-half the same being in payment for a certain lot or parcel of land, of four leagues, 17,712 acres, situated in Haskell county, Texas, known as Wise county school lands. This note is given in lieu of a certain note of \$32,309.60 executed on Jan. 23, 1883, by J. G. Halsell and W. T. Waggoner; to secure the payment of which a vendor's lien is reserved in said conveyance, and as additional security to this note I have this day executed a deed of trust on said land above referred to. It is understood and agreed that failure to pay this note, or any installment of interest thereon, when due, shall, at the election of the holder of them or any of them, mature all notes given by David Jamison to said John M. Gibbs, Co. treasurer, in payment for said property; and it is hereby especially agreed that, if this note is placed in the hands of an attorney for collection by suit, I agree to pay 5 per cent. additional on the principal and interest then due as attorney's fee. David Jamison.' (19) That no record of the transaction by which the note and mortgage of Jamison were taken in lieu of the note sued on was ever entered on the minutes of the commissioners' court of plaintiff. That said arrangement was consummated orally, but with said court in actual, open, and regular session, all the members of said court voting in favor of said settlement save and except one of the commissioners, who gave a negative vote. The commissioners' court of plaintiff, at and prior to the acceptance of the note and mortgage of Jamison, in lieu of the note sued on, knew that Jamison had assumed the payment of the note sued on in his purchase of said land from Lynn."

The learned special judge who tried the cause below upon these facts concluded that the commissioners' court had no power to accept the Jamison note and deed of trust in lieu of the Waggoner and Halsell note and vendor's lien, and whether it had such power seems to be the principal question involved in this appeal, as indicated by the assignments of error and briefs. In argument, however, it was contended by appellee's counsel that, as the commissioners' court made no entry in the minute book of the court of its order releasing appellants from their note, and accepting Jamison's note and deed of trust in lieu thereof, the action of the court was, for this reason, a nullity; and we will briefly notice this point first.

Article 1853 of our Revised Statutes of 1895, which relates to the records of the county court in probate proceedings, requires that "all decisions, orders, decrees, and judgments

shall be entered on the records of the court," and expressly declares that any not so entered shall be a nullity. Article 1554, Rev. St. 1895, relates to the minutes of the commissioners' court, and provides: "The court shall cause to be procured and kept in the clerk's office suitable books in which shall be recorded the proceedings of each term of the court, which record shall be read over and signed by the county judge, or the member of the court presiding, at the end of each term and attested by the clerk." Our supreme court noticed the difference in these two articles, and held in *Ewing v. Duncan*, 81 Tex. 235, 16 S. W. 1000, that, if the court actually passed the order, it would not be void under this article merely because the same was not entered of record. Here the facts are undisputed that the court officially passed the order by a vote of four to one, and that all parties had for several years acted on it, probably overlooking the fact that the clerk had failed to enter it in the minutes. We are of opinion that it was not for this reason void, but that the fact that it was an order made by the court sitting in term time, as a court, is sufficient to release and discharge appellants, if the court had the power to make such an order. As to this power, our constitution provides in substance: (1) That the lands granted to each county are of right the property of the counties respectively; (2) that the title thereto is vested in the counties; (3) that each county, through its commissioners' court, may sell or dispose of them in such manner as they may provide; and (4) that the lands and proceeds thereof, when sold, shall be held by such counties alone in trust for the benefit of the public schools therein, and shall be invested in United States bonds, state or county bonds, or such other securities, and under such restrictions, as may be prescribed by law, the counties to be responsible for all investments, and the interest and revenue only to be used as available fund. Const. art. 7, § 6. Our Revised Statutes (article 4271) provide: "Each county may sell or dispose of the lands granted to it for educational purposes, in such manner as may be provided by the commissioners' court of such county; and the proceeds of any such sale shall be invested in bonds of the state of Texas, or of the United States, and held by such county alone as a trust for the benefit of public free schools therein, only the interest thereon to be used and expended annually."

Neither the constitution nor this article attempts to provide for the manner or terms of sale. All these are left to the commissioners' court, and this court, it seems, is made, in effect, the general trustee for selling or otherwise disposing of the lands, upon such contracts, terms, and conditions as it may deem proper to adopt or provide; the county, of course, being always responsible for the corpus of the fund. It has been held by our supreme court that it may lease the land for a long or a short term, and if the terms of

the lease are violated, or default is made in the payment of the rent as provided for in the lease, the commissioners' court may declare or consider the rights of the lessee as forfeited, and re-lease the same to another party. *Falls Co. v. De Laney*, 73 Tex. 463, 11 S. W. 492. The commissioners' court cannot give the land away, nor can it dispose of it, or the proceeds of the sale thereof, for any other than the use and benefit of the public schools of the county. *Pulliam v. Runnels Co.*, 79 Tex. 363, 15 S. W. 277. And in *Boydston v. Rockwall Co.*, 86 Tex. 238, 24 S. W. 273, Justice Gaines, in delivering the opinion of our supreme court touching the construction of article 986m, Sayles' Civ. St., as to the powers therein given the commissioners' court to invest the proceeds of the sale of such lands, says: "The statute does not restrict the general power of the court over the investment of the school fund." And he then declares that the court may exchange an existing investment of the fund, or a part of it, for another investment which, in the opinion of the court, should be deemed more desirable. It has always been held in this state, where land is conveyed, and in the deed of conveyance a vendor's lien is expressly retained to secure the unpaid purchase money, that, as between the parties, the vendee takes only an equitable and conditional title, and that the superior legal title remains in the vendor until the purchase money is paid, upon the happening of which event his deed becomes absolute and the vendee's title perfect. Until the purchase money is fully paid, however, the contract of sale remains in its nature executory, and the vendor has his right, upon default of the vendee in the payment of the purchase money, to elect either to sue upon the debt, and have foreclosure of the lien and sale of the land in satisfaction thereof, or to recover back the land in trespass to try title; the equities, of course, being in this case adjusted in the same suit. The deed in this case being of the character of an executory contract of sale, we can see no reason why the commissioners' court of Wise county, whose general power over this fund is incontrovertible, should be deprived of this valuable right of election which is clearly vested in every other vendor, and is often exercised with most beneficial results. The action of the commissioners' court in this case was simply the exercise of this right and power. The transaction was not a reinvestment of the proceeds of the sale of the lands, for these proceeds had never been realized, default having been made in the payment on account of the release; but it was, in effect, an election on the part of the vendor trustees to reclaim the land, and sell it to another party upon apparently more advantageous terms, as the security could be more easily, quickly, and cheaply foreclosed. It is probable that Waggoner and the Halsells could have resisted this action, had they not conveyed their interests, through Lynn, to Jamison;

but having done this, and the commissioners' court having consented thereto, and ratified the transaction, by accepting the note and deed of trust of Jamison, giving to him a five-years extension of the time of payment. In lieu of the past-due note of Waggoner and Halsell, there was no one to oppose the court's action in making the new sale, as it were, to Jamison. The constitution and the statute have placed this power and this discretion in the hands of the commissioners' courts, and we think wisely. If they abuse them, and the fund is lost or impaired, the county, under the provisions both of the constitution and of the statute, is responsible, and bound to make the fund whole. We are therefore of opinion that the judgment in this case against appellants ought to be reversed and rendered in their favor, but in all other respects affirmed: and we make the order accordingly.

#### FITZWILLIAMS v. DAVIE et al.

(Court of Civil Appeals of Texas. Jan. 12, 1898.)

INSANE PERSONS—SALE OF LAND—POWER OF GUARDIAN—REGULARITY OF SALE—CERTIORARI—HARMLESS ERROR.

1. Where a right exists in favor of a party non compos mentis to set aside a sale made by the probate court solely because of inadequacy of price, such person's guardian may utilize this equity for her benefit, so as to relinquish the right to have such sale set aside for such a sum of money as, taken with what had previously been paid, would make a fair price for the land.

2. The failure of a notice of a sale of land belonging to a person non compos mentis to properly describe the property was a mere irregularity, and did not deprive the probate court of jurisdiction to make the sale.

3. A writ of certiorari to set aside an order of sale of an insane person's land, made by a probate court, is not a matter of right, and, if the testimony shows that the ward has received benefits equal to the value of the property, the probate order will not be disturbed.

4. It is harmless error to exclude testimony tending to show that the property of the ward, which sold for \$400, was worth more than \$600, when the testimony shows, and the court found, that the ward received the benefit of more than \$1,000 as the result of the sale.

Appeal from district court, Travis county: F. G. Morris, Judge.

Certiorari proceedings by Ida F. Fitzwilliams against Margaret B. Davie and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is a certiorari proceeding, brought by appellant against appellees to set aside and vacate a guardian's sale made in the estate of Minerva J. Fannin, non compos mentis, in the probate court of Travis county, in 1857. There was a nonjury trial, which resulted in a judgment for the defendants, from which the plaintiff has appealed.

Each side presented a number of exceptions to the pleadings filed by the other, and the case appears to have been submitted to the court below upon all questions, and the



court, at a subsequent day, filed conclusions of law and fact, which include conclusions upon the exceptions to pleadings. The conclusions of fact are supported by testimony, and are adopted by this court, and made the basis of its decision. Said conclusions are as follows:

"(1) That the plaintiff is one of the heirs of Minerva Fannin, deceased.

"(2) That there was a necessity for the sale in question, in that the ward had no income, and no personal property or other means of support, without a resort to the sale of real estate for her support.

"(3) That the notice set out in plaintiff's petition is the only notice or citation issued after said application was filed, and that it described other property than that described in the application for an order of sale, and was published for four successive weeks prior to the making of the order of sale, but not for four weeks prior to the commencement of the term of court at which the order of sale was made.

"(4) I find that the lot in controversy was of the value of \$600 at the time of the sale for \$400, and that it could not have been made to appear to the county court at that time that a refusal to confirm the sale, and the ordering of a resale of the lot, would have resulted in obtaining any better price for the land. The contract which Davie subsequently made to pay \$1,000 absolutely in yearly payments for five years, and \$250 per year during the life of Minerva Fannin, which might and did amount to the payment of thousands of dollars for this lot, certainly was out of all proportion to the value of the lot, according to all the testimony. That he had a reason for paying something more than the value of the lot is shown by the witness Selling, but just all that actuated him in making this extraordinary contract cannot now be proved. Suffice it to say that the contract throws no light on the value of the lot, or what it would bring at public outcry among bidders generally having no special reasons for paying more than its value. The court, in passing on the sale, could only consider what the property would bring if again exposed to a fair sale, and could not be supposed to know of some particular person, who was not a bidder at the sale, having a reason for paying largely more than the value of the property. If I could consider the contemporaneous sales which the witness Franklin was told was made of property in the immediate locality of the lot in question as indicating the value of this lot, not more than \$1,000 would appear to be its value, if it was as good a lot as those near by, which Franklin speaks of, and he throws no light on the subject of what it would probably have brought at public sale. But I cannot consider the sales testified about by him, because he only testified of these particular sales from hearsay. The appraisers resided in Travis county, and cannot be presumed to

have acted on their own knowledge as to the value of this lot. They probably acted upon report from others, whose means of knowledge are unknown to the court. Against this we have the testimony of the witness Selling, who shows himself to have done business on the opposite side of the street from the lot in question, near by it, about the time of the sale; that he was well acquainted with the values of lots in that locality, and knew the particular physical condition of this lot, which rendered it less valuable than others on a different side of the street and higher than this lot; that it was quite low, and had quite a large basin or sink on it, covering a considerable portion of the lot, and that water stood there nearly all the time during the years 1857 and 1858, and prior thereto; that it was not on the side of the street on which the business was done; and that, in his opinion, it was, at that time, of the value of \$500 or \$600. There is no testimony in opposition to this statement of the condition of the lot; and, even if lots in the immediate neighborhood of this lot, not affected by these objections, were of the value of \$1,000, it is not made to appear that this lot was not depreciated in value by the special conditions existing on it, so as not to be worth over \$600. The testimony is not satisfactory on this question of value, but I do not think it has been made to appear that the sale was for a sum so much below the value of the property, as to shew that the county court abused its discretion, or committed error, for which its orders ought to be set aside, in confirming the sale.

"(5) That on the 20th day of January, 1858, S. M. Swenson, the purchaser at the guardian sale, made a special warranty deed to John P. Davie, conveying to him the lot in controversy, in consideration of \$200 per annum for five years, and \$250 per annum thereafter during the natural life of Minerva J. Fannin, to be paid to her legally appointed guardian, in which deed a vendor's lien was retained to secure the payment of said purchase money.

"(6) That on January 14, 1862, the legislature of Texas passed a special act, of which the following is a copy:

"An act to authorize the superintendent to receive Minerva J. Fannin into the lunatic asylum, and to contract with her guardian for her support and maintenance.

"Section 1.—Be it enacted by the legislature of the state of Texas, that the superintendent of the lunatic asylum be, and he is hereby authorized and required to contract with Thomas F. McKinney, as guardian of Minerva J. Fannin, to receive and care for her in said asylum, during the term of her natural life, provided that said McKinney shall provide and secure to said asylum an annuity fully sufficient, in the judgment of the superintendent, to support and maintain said Minerva in said asylum during her life, free from charge to the state.

"Sec. 2.—That said McKinney be authorized to transfer to said asylum, any part of the estate of said Minerva, descended to her from her parents, which may be necessary to secure such sum as is requisite to her support and maintenance in said asylum.

"Sec. 3.—That this act take effect and be in force, from and after its passage.

"Approved January 14th, 1862."

"(7) That on the 8th day of December, 1862, the said Thos. F. McKinney, guardian of Minerva Fannin, entered into a contract with the superintendent of said asylum for the support and care of said Minerva J. Fannin, during her natural life, in which he assigned to said superintendent the debt of said Davie for the purchase money of the lot in controversy, together with several tracts of land, claimed to be the property of Minerva Fannin, for the support of said ward.

"(8) That the lot in question was inherited by Minerva J. Fannin one-half from her mother and the other half from her sister, who inherited said one-half from their mother, and died after the death of their mother.

"(9) That Jno. P. Davie paid said \$200 per annum to the guardian of said Minerva J. Fannin for five years, and thereafter to her guardian, or under his direction, to the superintendent of the state lunatic asylum, where she was maintained and cared for, to pay in part for her support and maintenance under the contract made under said act of the legislature, during the natural life of said Minerva J. Fannin, who died June 27, 1893.

"(10) That Jno. P. Davie died testate before the institution of this suit, and that the defendants are the executors and devisees of said Davie."

Among others, the trial court filed the following conclusion of law:

"(4) I am of the opinion, as indicated on the rulings on plaintiff's exceptions, that if a right to set aside the sale in question existed in favor of Minerva J. Fannin, after the sale to Swenson, solely because of the inadequacy of price paid by Swenson, her guardian could utilize this equity or right of action for her benefit, so as to relinquish the right to have said sale set aside for such a sum of money as, taken together with what Swenson paid, would make a fair price for the land. In the case of Clayton v. McKinnon, 54 Tex. 206, it appeared that Clayton, guardian, used money belonging to his ward to purchase land, the title to which was taken in his own name, and sold to vendees who had knowledge of this fact. The court held that such vendees held the legal title in trust for the ward. But a subsequently appointed guardian prosecuted a money demand for the means of the ward thus used, instead of suing to recover the land, as he might have done. The supreme court held the ward bound by the election of his guardian, made in good faith, and there was no evidence that the probate court authorized the guardian to thus relinquish the right to recover the land. There, as here, the title

was not in the ward, and it was not a question of selling real estate without an order of the probate court, but it was a question of suing to set aside or obtain a title. In such cases the guardian can accept a money consideration for the equitable right to sue to recover property, the title to which has been erroneously passed to another. If any order of the probate court to give effect to such a transaction is required, the probate court, on motion to set aside the sale at the same term of court at which it was confirmed, might have adopted and approved the acts of the guardian, after the transaction was made, if it could have authorized the settlement before it was made. And what the probate court could have done under such circumstances, this court, sitting in its stead, can now do. If the contract, making provision for future support of the ward, and turning over this claim against Davie, to be applied from year to year to the support of the ward, was improper, yet, after the money has been paid, and applied to her necessary support, by the guardian directly, or by others under the direction of the guardian, the transaction may be approved as a like expenditure of the guardian from year to year would have been approved. This view of the question renders it unnecessary to pass on the effect of the legislative act, the constitutionality of which has been assailed."

R. C. Walker, for appellant. Austin & Rose, for appellees.

KEY, J. (after stating the facts). At the probate sale, which appellant seeks to have set aside, S. M. Swenson became the purchaser, and thereafter he conveyed the property to J. P. Davie. Appellees' counsel verbally objected to the jurisdiction of the trial court, because S. M. Swenson was not made a party to this proceeding. The trial court sustained this contention, and for that reason, and because no equitable ground for setting aside the orders of the probate court complained of had been shown, the case was dismissed, and judgment rendered against appellant and the sureties on her bond for the costs. It is insisted in this court, that the original purchaser, Swenson, having now no interest in the subject-matter of the litigation, is not a necessary party to this proceeding. We find it unnecessary to decide this question, because, in our opinion, the court was correct in the second ground upon which the judgment is based, and in this connection we refer to and approve the fourth conclusion of law filed by the trial judge, and set out above. The failure of the notice of sale to properly describe the property was a mere irregularity, and did not deprive the probate court of jurisdiction to make the sale. Davis v. Touchstone, 45 Tex. 497; Robertson v. Johnson, 57 Tex. 64. We also agree with the trial court in holding that a writ of certiorari to set aside orders made by a probate court is not a matter of right, and if the testimony shows, as in this

case, that, as a result of the sale, the ward has received benefits equal to the value of the property, the probate orders should not be disturbed.

Appellant complains of the action of the court in excluding certain evidence, which it is claimed tended to show that the property was worth more than \$600 at the time of the sale. A sufficient answer to this is the fact that the court's findings and the testimony show that, as a result of the sale, the ward received the benefit of sums of money aggregating much more than \$1,000, the amount alleged by appellant to be the value of the property. Therefore, if it had been shown by uncontroverted proof that the property was worth \$1,000, appellant would not have been entitled to the relief sought. After due consideration of all the questions involved in this appeal, our conclusion is that the judgment should be affirmed, and it is so ordered. Affirmed.

#### MOORE et al. v. TEMPLE GROCER CO.

(Court of Civil Appeals of Texas. Jan. 12, 1898.)

#### FRAUDULENT CONVEYANCES—EVIDENCE OF VALUE—ADMISSIBILITY—APPEAL—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Estimated value of book accounts is admissible in evidence on an action to set aside an alleged fraudulent conveyance thereof.

2. Evidence of the price a fraudulent purchaser obtained after the pretended sale to him of a stock of goods and fixtures is not admissible to show their value when he received them.

3. Where the trial court found that a conveyance by a debtor to one creditor was fraudulent as to other creditors, on the grounds that it was merely a pretended transaction, and that the value of the property greatly exceeded the debt, it was not error to exclude evidence as to what was said between the parties when the conveyance was executed, as it would not affect the latter ground.

4. A new trial for newly-discovered evidence of an impeaching character will not be granted.

Appeal from district court, Bell county; John M. Furman, Judge.

Attachment by the Temple Grocer Company against C. C. Harris and another, partners. Moore, McKinney & Co. claimed the attached property under the statute for the trial of the right of property. Judgment for plaintiff, and Moore, McKinney & Co. appeal. Affirmed.

Statement of the nature and result of the suit:

"On the 2nd day of April, 1896, the Temple Grocer Co. brought suit in the county court of Bell county, Texas, against C. C. Harris and J. E. Harris, partners, under the firm name of Harris Brothers, for the sum of \$592.60, alleged by it to be due for goods, wares, and merchandise sold them in the regular course of business, and on same day caused a writ of attachment to be issued out of said cause, and levied on the property in controversy, as the property of Harris Brothers, to satisfy said alleged in-

debtedness of \$592.60, which plaintiff alleged was afterwards, on the 31st day of December, 1896, reduced to judgment, with foreclosure of said attachment lien and sale, subject to the judgment to be rendered in this cause. Plaintiff alleged that, at the time said writ of attachment was levied on said property, it was the property of Harris Bros., and was subject to be levied upon to satisfy the debts of said Harris Bros., and that defendants, Moore, McKinney & Co., had no right, title, interest, or claim in or to said property; that defendants James Moore, L. S. McKinney, and Max Mass, partners, under the firm name of Moore, McKinney & Co., acting by their agent, R. E. Burt, and the said C. C. Harris and J. E. Harris, entered into a combination and conspiracy by which they fraudulently undertook, agreed, and conspired to convert said property to their own use, and to place the same beyond the reach of the creditors of Harris Brothers; that they conspired and did enter into a pretended transfer and sale of said property from Harris Bros. to defendants, in payment of a pretended indebtedness, as owing to them from Harris Bros., but said Harris Brothers were to remain in the control and ownership and management of said property, and to continue the business, but under the pretended ownership of defendants; that, besides the stock and fixtures in controversy, there was included in said pretended transfer all notes and accounts and claims of Harris Bros. to the amount of about \$600, worth at least \$500; that the property in controversy was worth the sum of \$700, and largely exceeded in value the indebtedness owing from Harris Bros. to Moore, McKinney & Co.; and that the said Harris Bros., at the time of said pretended transfer, were wholly and notoriously insolvent. Defendants first presented general exception to plaintiff's issue, and entered a general denial, and specially alleged that the said Harris Bros., on April 1st, 1896, were due them the sum of \$503.70, besides interest, for goods sold and delivered them by defendants, prior to April 1st, 1896, in their regular course of business, and that on or about April 1st, 1896, they presented their claim to Harris Brothers for payment, and that on same day said Harris Brothers sold, conveyed, and delivered to defendants the property in controversy, together with the book accounts and claims due and owing said Harris Brothers, the consideration being the cancellation and settlement of said \$503.70 indebtedness due by Harris Bros. to defendants; and it was so understood, agreed, and accepted by all of said parties thereto at the time, and made for the purpose of collecting their said debt; that defendants did not conspire, collude, or confederate with said Harris Brothers, nor with any one else, to swindle, cheat, or defraud plaintiff or any one else; that said stock, property, accounts, and fixtures were great-

ly depreciated in value, and worth a great deal less than their cost or invoice price, and all of said property received by defendants was not of the reasonable market value of said indebtedness of \$508.70; that said stock was not reasonably worth more than 50 per cent. on the dollar—fixtures not more than 40 per cent. on the dollar—of cost or invoice price; and that said book accounts were worth less than 25 per cent. on the dollar; and that said defendants, by judicious management, have not realized the sum paid for said property. Defendants alleged that they purchased said property in good faith, and were in the quiet, peaceable, and exclusive possession of said property when plaintiff wrongfully and illegally levied upon same, and that Harris Brothers had no right, title, claim, or interest in same, and that their claim to said property was made in good faith, etc. A trial was had before the court, a jury having been waived, and a judgment for plaintiff, Temple Grocer Co., for \$574.68."

The following are the conclusions of fact and law, as found by the trial court:

"First. I find that on the 1st day of April, 1896, and for several months prior thereto, C. O. Harris and J. E. Harris, as partners, under the firm name and style of Harris Brothers, were engaged as merchants in the retail grocery business in Temple, Bell county, Texas; and upon said 1st day of April, 1896, said firm was justly indebted to the defendants, Moore, McKinney & Company, in the sum of \$508.70, and to the plaintiff, Temple Grocer Company, in the sum of \$592.60, for goods sold to said firm in the course of their business as merchants. Second. That on said 1st day of April, 1896, the said Harris Brothers executed to the said Moore, McKinney & Company a bill of sale to all their goods, wares, and merchandise then on hand and owned by them in said business, and included in said bill of sale their furniture, fixtures, show cases, shelving, and all book accounts belonging to said firm, which instrument was acknowledged on the same day, and filed for record in the office of the county clerk of Bell county at five o'clock p. m. on same day. Third. That on the 2nd day of April, 1896, the Temple Grocer Company instituted a suit in the county court of Bell county, Texas, against said firm of Harris Bros., upon its debt, as above stated, and upon the 31st day of December, 1896, obtained a judgment against the said Harris Brothers for the sum of \$592.60; and on the 2nd day of April, 1896, the said Temple Grocer Company sued out an attachment in said suit against said Harris Brothers, and caused the same to be levied upon the goods, wares, and merchandise, and fixtures included in said bill of sale, from said Harris Brothers to Moore, McKinney & Company, which property is the property in controversy in this case, and in said judgment, on the 31st day of December, 1896, foreclosed their lien upon said property, subject to the judgment to be rendered in this

cause. Fourth. That on the 8rd day of April, 1896, Moore, McKinney & Company filed their claimants' oath and bond with F. F. Downs and P. L. Downs, as sureties, claiming the property under the statute for the trial of the right of property. Fifth. That Robert E. Burt was the agent and traveling salesman of Moore, McKinney & Company on the 1st day of April, 1896, and had been for some time prior thereto, and, as such agent, represented the firm of Moore, McKinney & Company in all matters connected with the negotiating for the sale to them by Harris Brothers. Sixth. That on the 1st day of April, 1896, and at the time the bill of sale above mentioned was made by Harris Brothers to Moore, McKinney & Company, said firm of Harris Brothers and the members of said firm were insolvent, and had no property subject to execution other than that mentioned in their bill of sale to Moore, McKinney & Company, all of which was known to Burt, the agent of Moore, McKinney & Company; that the property mentioned in the bill of sale was worth the sum of \$712.66, and was largely in excess of what was reasonably necessary to pay the debt of Moore, McKinney & Company. Seventh. That the bill of sale of Harris Brothers to Moore, McKinney & Company did not evidence the real understanding and agreement between the parties; but that the real contract and agreement between Burt, the agent of Moore, McKinney & Company, and Harris Brothers, was that this transfer should be made to this firm, so as ostensibly to show a sale of all the interest of Harris Brothers in the property to Moore, McKinney & Company, in payment of their debt; but there was to be no real sale of the property. The business was to continue, as it had been, the property of Harris Brothers. Moore, McKinney & Company were to supply the business with goods necessary in the conduct of it. The business was to be managed and controlled, and the goods sold, by Harris Brothers in the name of Moore, McKinney & Company; and this arrangement was entered into for the purpose and with the intent, on the part of both Harris Brothers and Burt, the agent of Moore, McKinney & Company, not alone to collect the debt of Moore, McKinney & Company, but to prevent the other creditors of Harris Brothers from pursuing the property with legal process, and to hinder and delay them in the collection of their debts, until Harris Brothers should be enabled, by the conduct of the business in this way, to pay them, if it ever were possible for them to do so. Eighth. That the value of the goods and fixtures levied upon by Temple Grocer Company was \$502.06."

Conclusions of law: "From the above findings of fact, I conclude that the agreement and contract entered into on the 1st day of April, 1896, as above mentioned, between Burt, the agent of Moore, McKinney & Co., and Harris Brothers, was, as against the Temple Grocer Company and all other creditors of said

Harris Brothers, null and void; and the property mentioned in the bill of sale, and which was levied upon by the Temple Grocer Company, was subject to the attachment levied thereon, for the purpose of paying its debt; and the Temple Grocer Company is entitled, under the law, to 10 per cent. damages on the value of said property so levied upon, to wit, the sum of \$50.20, the value of the property being less than the amount of plaintiff's claim and interest on said sum of \$502.06 (the value of said property) from April 3rd, 1896 (the date of said bond), at the rate of six per cent. per annum."

Moffett & Anderson, for appellants. Banks & Cochran, for appellee.

FISHER, C. J. (after stating the facts). There is evidence in the record upon which the conclusions of the trial court may be based; and, in view of the facts, we will not disturb the judgment, but are content with the conclusions reached by the trial court as to both grounds for holding the sale to the appellants by Harris Bros. invalid.

There was no error in permitting C. C. Harris and M. Harris to testify as to the estimated value of the book accounts at the time that the pretended purchase was made by Moore, McKinney & Co. Proof of such fact is more or less based upon the opinion of the witnesses who testify thereto. The value of outstanding and uncollected accounts is more or less a matter of estimate, and is not always susceptible of an accurate valuation.

There was no error in refusing to permit the witnesses Burt and Buchanan to testify as to what the goods and fixtures were sold for, after the sale to Moore, McKinney & Co. The question was, what was the value of this property at the time the pretended sale was made? and what the property sold for thereafter could have little, if any, bearing upon the value at the time the fraudulent sale was made. This question was passed upon in the case of *Oppenheimer v. Halff*, 68 Tex. 418, 4 S. W. 562, and it was there held that this character of testimony was inadmissible. Looking to the testimony of Buchanan as stated in the record, we find that he did testify as to efforts made to collect the accounts, and did, in effect, testify that he did not know the financial condition of the parties owing these accounts, and did not know what the accounts were worth in Temple, at the time that the sale was made to the appellants.

There was no error in the refusal of the court to permit witnesses Burt and Anderson to testify as to what was said and done between R. E. Burt and C. C. Harris regarding the sale and the execution of the bill of sale of the property in controversy to Moore, McKinney & Co. If we could hold this testimony admissible on that branch of the case which questioned the legality of the sale on

the ground that it was pretended and simulated, and not in fact a bona fide transaction, in view of the other issue in the case, which was found by the court against the validity of the sale, it is apparent that this testimony could not change the result.

There were two grounds upon which the court found the sale from Harris Bros. to appellants illegal. One was that it was a pretended and simulated transaction, and in fraud of creditors; and the other was that the sale was fraudulent, on the ground that more property was transferred by Harris Bros., the insolvent debtors, to the appellants, than was necessary to pay off and discharge their debt. The facts on this last issue show that there was such a disproportion between the value of the property transferred to appellants and the amount of their debt as to render that transaction, in view of the insolvency of Harris Bros., illegal as to the appellee and other creditors. The excluded testimony would only affect the first issue, and if it could be conceded that it was of sufficient force to have overcome the testimony introduced by the appellee, showing the fraudulent purpose and intent of the parties in the sale of the property, still the judgment of the court below could be maintained on the finding as to this last issue.

There was no error in the ruling complained of in the tenth, eleventh, and twelfth assignments of error. The relevancy of this proposed testimony is not apparent; that is, so much of it as relates to the appellee promising to pay the \$100 note to the Temple National Bank in the event it was successful in this suit. Such testimony, if it had any bearing at all, could only affect the credibility of the witnesses C. H. B. Harris and C. C. Harris; and such effect could only be given to the testimony of what was said by C. C. Harris, as stated in the twelfth assignment of error. Neither C. C. Harris nor his father, C. H. B. Harris, were parties to this suit. They were simply used as witnesses by the appellee, in order to establish some of the material facts upon which the court based its conclusions. It is claimed by these assignments that the court erred in failing to grant a new trial, because this testimony was only discovered since the trial; and the motion for a new trial is based, in part, upon the ground that it should be granted in order to let in this newly-discovered testimony. As said before, if this evidence could have been considered for any purpose, it could only be upon the ground of impeaching the testimony of these witnesses, or as having some effect upon their credibility. The general rule is that new trials will not be granted in order to let in newly-discovered evidence of this character. Of course, there may be exceptional cases, in which this general rule should yield; but we do not believe that the rule should be relaxed in this particular case.

Our agreement with the trial court, as to the facts found by it and the conclusion

there reached, is sufficient answer to appellants' fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth assignments of error. In opposition to the statement of facts approved by the judge below, we cannot consider the affidavits of the appellants on file. If, as a fact, the trial court agreed with the statement prepared by the attorneys for appellee, and, in the opinion of the court, that was a correct statement of the facts, the court was at liberty to approve it. We find no error in the record, and the judgment is affirmed. Affirmed.

### PEOPLES v. TERRY et al.

(Court of Civil Appeals of Texas. Jan. 12, 1898.)

**VERDICT — CONSTRUCTION — EXCEPTIONS — STATEMENT OF FACTS — FINDINGS OF FACT — NEW TRIAL — FAILURE TO CONSIDER EVIDENCE.**

1. Defendant pleaded that the land in question was purchased under execution against her husband, and the vendee, of whom plaintiff purchased with notice, agreed that she was to have the land upon payment of a certain sum, which she tendered. In a separate count she claimed title in her own right, and alleged that the property was not subject to execution for her husband's debts. The verdict was general in her favor. *Held*, that plaintiff was not entitled to the sum defendant had tendered.

2. After final judgment, the court's failure to consider certain evidence offered on the trial can only be raised in a motion for new trial.

3. A party cannot complain that a motion for new trial was continued where he took no exception.

4. A statement of facts cannot be made and filed at the term of court subsequent to the trial.

5. On a jury trial a court is not required to make findings of fact and law.

Error from district court, Milam county; W. G. Tallafarro, Judge.

Suit by Tom Peoples against J. M. Terry and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. W. Chambers and T. S. Henderson, for plaintiff in error. Moore & McBride, for defendants in error.

FISHER, C. J. Plaintiff in error, Peoples, sued defendants in error, J. M. Terry and his wife, M. F. Terry, and one Davis, in trespass to try title for a certain tract of land, situated in Milam county. Defendants pleaded not guilty, and the defendant in error Mrs. Terry pleaded that the plaintiff held the land under purchase at execution sale, on a judgment against her husband, and that the land in controversy was her separate property, and not subject to sale for the debts of her husband. She further pleaded in a separate count, in effect, that one C. T. Leverett, who purchased the land at the execution sale, and under whom the plaintiff holds, purchased the land for her use and benefit, under an agreement between her and the said Leverett that he would advance the money to purchase said land, and would hold the same in trust for her, which amount she alleged to be the sum of \$229.65; and she further charges that

the plaintiff, Peoples, purchased the land from Leverett, with full notice of said agreement; and she asks that the trust be enforced, and that she recover the land; and she further offers and tenders to pay, if so required, the amount of money advanced by the said Leverett, by virtue of the agreement. There are some other issues pleaded, but these are all that it is necessary to notice. The case below was tried before a jury, who returned a verdict in favor of M. F. Terry for the land sued for, and also damages in her favor for \$9, and also in favor of Davis for \$15. Upon that verdict, judgment was rendered for defendant in error Mrs. Terry for the land.

There is no statement of facts in the record. It is claimed by the plaintiff in error that there was error in the judgment, because it did not award to him the amount defendant in error Mrs. Terry had offered and tendered in her pleadings in the event she should recover the land. This offer and tender were made under that count of the answer which set up the trust agreement between her and Leverett, and, if it had appeared from the verdict of the jury that recovery in her favor was had solely upon that ground, there would possibly be some merit in the contention of plaintiff in error; but the verdict is general, and we cannot tell but what it may have been based upon that count in the answer in which the defendant in error set up title to the property in her separate right. There is no statement of facts in the record, and we are in the dark upon what facts the jury really based their verdict.

In reply to those propositions which urge that the court erred in refusing to amend and reform the judgment rendered, we call attention to that provision of the statute which requires that all motions for new trials in arrest of judgments or to set aside judgments shall be determined at the term of court at which the motion shall be made.

The motion which the plaintiff in error terms a "request to amend the judgment" was, in effect, a motion for a new trial, or a motion to set aside the judgment. The motion was made and filed at the term at which the final judgment was rendered, but was not called up and disposed of until the next succeeding term. From the bill of exceptions raising this question it appears that it was the desire of the plaintiff in error to have the court review and consider, at this subsequent term, certain facts, which the plaintiff in error contends were offered in evidence on the trial of the case, and which the court should again consider, in order to establish the fact that plaintiff in error was entitled to judgment in his favor for the amount proffered and tendered by Mrs. Terry, under that count in her answer in which she sets up the contract and agreement between her and Leverett. The court could not consider these facts, which in no wise appeared as a matter of record, in order to reform or correct any mistake in the entry of the judgment; but if any

right was based upon the existence of these facts, or any relief was claimed therefrom, and if they were not considered or given effect by the verdict of the jury and in the judgment of the court, the failure in this respect could only be raised in a motion for a new trial; and, if such was the case, it should have been heard and disposed of at the term at which the motion was filed.

What we have said virtually disposes of the third assignment of error, for if the court had permitted the pleadings of the plaintiff in error to have been amended, claiming the amount tendered, it would not have changed our ruling upon the question just discussed; but we are not inclined to extend the right of the trial court to permit pleadings to be amended after verdict.

What we have said disposes of the fourth assignment of error. There is no bill of exceptions complaining of the refusal of the court to consider the motion for a new trial at the term at which it was made. The court, on the 6th of June, at the term at which the judgment was rendered, continued the motion for a new trial, or what the plaintiff in error terms the "motion to reform the judgment," until the next term of the court, when it was finally disposed of. There was no exception taken to the ruling of the court in this respect.

There was no error in the refusal of the court to permit a statement of facts to be made and filed at the term of the court subsequent to the trial. The time had passed in which the statement of facts could be filed.

The seventh assignment of error complains of the refusal of the court to file findings of fact and conclusions of law, at the request of plaintiff in error. This was a trial before a jury, and it was not a case in which the court was required to make any findings of fact and law.

The eighth assignment of error is disposed of by stating that the question is not presented in compliance with the rules for briefing causes in this court; and, further, in the absence of a statement of facts, we cannot determine whether there was any error committed by the charge there complained of.

We find no error in the record, and the judgment is affirmed. Affirmed.

STINNETT v. CITY OF SHERMAN et al.  
(Court of Civil Appeals of Texas. Dec. 24,  
1897.)

MUNICIPAL CORPORATIONS—CHIEF OF POLICE—  
POLICEMEN—NEGLIGENCE—SPECIAL VERDICT—  
CONCLUSION OF ISSUE—SAFETY OF PRISONERS—  
CAUSE OF ACTION.

1. A city is not answerable in damages for the negligence of its officers while exercising its police power.

2. One who was placed in a city prison, and was stabbed by a crazy inmate, brought an action against the chief of police on his official bond. The court submitted the general question, "Who, if any one, was guilty of negli-

gence?" The jury found that the policeman who had imprisoned the crazy man was guilty of negligence, in not properly searching him. This policeman was not a party to the action, and there was no finding as to the defendant, whose negligence alone was involved. *Held*, that under Rev. St. 1895, arts. 1331, 1333, providing that the findings of a special verdict must be such that nothing remains for the court but to draw from such facts the conclusion of law, said finding did not conclude the issues raised by the pleadings.

3. A private citizen cannot maintain an action for damages against the chief of police for failure to perform the duties imposed upon him by a city ordinance which provides that he shall safely keep all prisoners confined in the city prison until they are legally discharged.

4. A prisoner who was incarcerated in the city prison was stabbed by another prisoner, who had not been properly searched by the policeman who had placed him in confinement. By city ordinance, one of the duties of the chief of police was to safely keep all prisoners until legally discharged. The chief of police had no personal knowledge of the incarceration of the prisoner injured, or of the prisoner committing the injury. *Held*, that the only cause of action against him arose from his failure to be at the prison in person or by deputy for the purpose of preventing prisoners from being confined with improper persons; and action against him for damages for such personal injuries would not lie.

Appeal from district court, Grayson county; D. A. Bliss, Judge.

Action by Louis Stinnett against the city of Sherman, J. M. Blain, and others, for damages. From an order sustaining a demurrer interposed by the city, and from a judgment in favor of the remaining defendants, entered on a special verdict, the plaintiff appeals. Affirmed as to the city. Reversed as to the remaining defendants.

This suit was filed in the district court of Grayson county on August 27, 1896, by appellant, Louis Stinnett, against appellees, the city of Sherman, a municipal corporation, J. M. Blain, its chief of police, and C. H. Smith, R. R. Hazlewood, J. D. Woods, Joseph Bledsoe, and Charles Crenshaw, as sureties on the official bond of J. M. Blain. Appellant averred that he was arrested on May 24, 1896, for an alleged violation of an ordinance of the city of Sherman, and incarcerated in the city prison in a cell, with a dangerous-demented person named Northcutt, who had in his possession a knife, which was a deadly weapon, with which he attacked appellant, and inflicted painful and serious bodily wounds. Appellant claims that his injuries were due and attributable to the negligence of appellees the city of Sherman and J. M. Blain, the chief of police, and their deputies, assistants, and agents, and their failure to use proper care for his safety, and laid his damages at \$5,000. A general demurrer interposed by the city was sustained, to which appellant excepted. The cause was tried on special issues submitted to the jury as between appellant and J. M. Blain and his bondsmen, and resulted in a judgment that plaintiff take nothing, from which this appeal is prosecuted.

There was no material conflict in the testimony, and the facts may be stated as undisputed, and as follows:

On the night of May 24, 1896, at about 11 o'clock, appellant was in an intoxicated condition in the city of Sherman, and was arrested by two policemen, named Etter and Patterson, who conducted him to the city prison, or calaboose, and there confined him on a charge of being drunk in a public place. As soon as the cell door was locked, a man sprang upon appellant from the opposite side of the cell, and with a pocketknife stabbed him in the abdomen. The wounds penetrated the walls of the abdomen, and through one intestine, causing the intestines to protrude through the wound to the extent of about 15 inches. In response to the screams of appellant, the policemen reopened the cell door, and took him out, and then sent for a surgeon. The man in the cell who stabbed appellant proved to be a crazy person, known by the name of Northcutt, whom a policeman named Andrews had arrested on the preceding day, and placed in the city prison. This was done because Northcutt was known to be of unsound mind, and his family had requested the police force to imprison him, and notify them whenever he came to town, and also because certain residents of East Sherman had that day complained to the police that a man was out there acting strangely, and had alarmed the women in the neighborhood. The policeman Andrews, thinking that it was probably a drunken man, went out in the patrol wagon, and brought Northcutt in. On the route he made an effort to escape, but was overtaken by the policeman, who at that time made a slight search of his person, to ascertain if he had a pistol. In the language of the policeman: "As I overtook him, he showed some resistance, and, fearing he might have a pistol, I kinder felt around him, but found nothing." No search whatever was made through the pockets of his garments, and he was placed in the cell with the knife with which he subsequently inflicted the injury upon appellant. There were but three cells in the city prison, one of which was for female prisoners, one for the "chain gang," or convicts who were working out their fines, and the third was the one in which Northcutt and appellant were confined. Appellee J. M. Blain, the chief of police, had not been about the city prison since about 9 or 10 o'clock on the preceding morning, and had no deputy or other person in charge of the prison. It was an unusually busy day for the police force, on account of a circus being in town. The chief of police did not know that Northcutt had been placed in the prison, and was at his home in bed and asleep when the accident occurred. Northcutt was arrested and placed in the cell of the city prison at 12 o'clock m. of the day on which appellant was arrested and placed in the cell. Patterson and Etter, when they put appel-

lant in the cell, did not know that Northcutt was in the cell. They knew that he had been placed in the prison that day, but did not know he was in the cell at the time they put appellant in there. Appellant suffered great agony and pain, and was confined to his bed about eight weeks. He was earning at least 75 cents per day, and his time was reasonably worth that much. There was testimony tending to show that he was permanently disabled. It was shown that the city of Sherman is incorporated under a special charter granted by the legislature, and that J. M. Blain had been duly elected and had qualified as chief of police prior to the injuries complained of. His bond, which had been duly accepted and approved by the city council, was as follows: "The State of Texas, County of Grayson. Know all men by these presents, that I, John M. Blain, as principal, and ——— and ———, as sureties, do hereby acknowledge ourselves to owe and to be indebted to the city of Sherman in the penal sum of five thousand dollars, for the payment of which to be well and truly made we hereby bind ourselves, heirs, executors, and administrators. Conditioned, however, that whereas, the said John M. Blain was elected on the 7th day of April, 1896, to the office of chief of police of the city of Sherman, Grayson county, Texas, now, therefore, if the said John M. Blain shall truly and faithfully discharge the duties of said office in accordance with the laws and constitution of the state of Texas and the ordinances of the city of Sherman, then the above shall be null and void; otherwise, to remain in full force and effect." This bond was signed by appellee Blain as principal, and appellees Smith, Hazlewood, Bledsoe, and Crenshaw as sureties.

The following ordinances of the city of Sherman were introduced:

**"Chap. VII. Powers and Duties of Chief of Police.**

**"Sec. 3.** It shall be the duty of the chief of police to execute all process or orders issued to him by the mayor or other officers of the city having authority to issue the same, and to make returns thereof according to law. He shall supervise, control and direct the police force of the city, and see that they promptly and faithfully perform their duties. He shall so apportion the police force into different watches that the entire city will be diligently protected at all times, and shall assign each policeman his rounds or duty.

**"Sec. 4.** He shall be keeper of the city prison, or calaboose, and shall keep the same in a cleanly and wholesome condition, and shall safely keep all prisoners confined therein until legally discharged."

**"Sec. 12.** The chief of police is authorized to appoint one or more deputies for whose official acts he shall be responsible. He may also employ as many deputies as he may deem proper to assist in preserving order at



celebrations or unusually large gatherings of people, with consent of the city council."

"Chap. XXII. Duties of City Police.

"Sec. 4. The chief of police, under direction of the mayor and city council, shall have control and supervision over the police force of the city. He shall assign each policeman his rounds or duty, and, if he deem it necessary, may use the whole force in any one place in the city, in the prevention or suppression of crime or the preservation of the peace. The chief of police shall see that each policeman is properly armed and equipped, as the emergency may require, and that he faithfully perform the duties required of him. It shall be the duty of the chief of police to report to the city council at the first regular meeting in each month, the time served by each policeman, during the preceding month, the time absent, and such other information concerning the police as he deems proper."

"Sec. 13. Whenever any arrest shall have been made, and the person arrested shall have on or about his person any deadly weapon, money or property, it shall be the duty of the officer making the arrest to take charge of the same, and report and turn the same over to the chief of police."

"Section 1. The police force of the city shall consist of the chief of police, and such number of regular policemen as the city council may from time to time authorize by resolution and by resolution appoint.

"Sec. 2. All policemen shall be elected or appointed by the city council in the manner prescribed by law for the election of officers by the city council, at the first regular meeting of the new council after the annual election of city officers, and shall hold their offices for the term of one year: provided that no policeman shall be elected to fill any vacancy or otherwise for a longer term than till such first regular meeting of the new council after the annual election.

"Sec. 3. Upon the election or appointment of any person as a member of the police force, it shall be the duty of the city secretary to issue to him a certificate of appointment, signed by the mayor and attested by the secretary, and upon receiving the same such person shall before entering upon the duties of his office take and submit to the oath prescribed in the constitution of the state, which oath shall be endorsed upon the certificate of appointment and filed in the office of the secretary."

"Sec. 12. In all cases for the arrest of any person without warrant for the violation of any law or ordinance of the city, the officer making the arrest shall take forthwith such person before the city judge, for trial, if within the hours for holding city court. If said court be not in session, such officer shall commit the person so offending to the city prison, or calaboose, there to be securely kept until said court shall be in session; then he shall be forthwith taken before the court for trial: provided that the chief of police or policeman

making the arrest may take good and sufficient bail for the appearance of such offender before said court."

"Sec. 17. The city council shall have power at any time to remove any member of the police force in the manner prescribed by charter, for wilful or habitual neglect of duty, misconduct in office, cruelty to persons, intoxication, gaming or conviction of crime or for the violation of the lawful orders of the mayor, the chief of police, or other adequate cause."

It was agreed that there was an ordinance of the city making drunkenness in a public place an offense.

Beaty & Culver, for appellant. E. O. McLean, Galloway & Dunlap, and Hazlewood & Smith, for appellees Blain and sureties. G. P. Webb, for appellee city of Sherman.

FINLEY, O. J. (after stating the facts). 1. The first objection to the proceedings below here urged by appellant relates to the action of the court in sustaining a general demurrer to the cause of action against the city, as stated in the petition. In this the court did not err. A city is not answerable in damages for the negligence of its officers while exercising its police power. *Givens v. City of Paris*, 5 Tex. Civ. App. 705, 24 S. W. 974; *Whitfield v. City of Paris*, 84 Tex. 431, 19 S. W. 566.

2. It is insisted that the findings of the jury upon the issue of negligence were not sufficient to form the basis of the judgment. The court submitted the general question: Who, if any one, was guilty of negligence? The jury found that Andrews, the policeman who placed the crazy man in the cell, was guilty of negligence in not properly searching him. Andrews was not a party to the suit, and there was no finding on the issue of negligence as to the defendant Blain, whose negligence alone was involved. We think the contention that the findings do not conclude the issues raised by the pleadings is well founded, and will require a reversal of the judgment as to Blain and his sureties. *Rev. St. 1895, arts. 1331, 1333; Moore v. Moore*, 67 Tex. 296, 8 S. W. 284; *Smith v. Warren*, 60 Tex. 462; *Silliman v. Gano* (Tex. Sup.) 30 S. W. 559. For the guidance of the court upon another trial, inasmuch as the case is fully developed by the evidence, and there is practically no contest over the facts, we will consider the material question involved in the case.

After the city was dismissed from the case, which we hold was proper, J. M. Blain, the chief of police, and his sureties, were the only defendants. The facts unequivocally showed that plaintiff was placed in the prison cell by Policemen Patterson and Etter, without any knowledge of the fact by Blain. Immediately after being placed in the cell, plaintiff was assaulted by a crazy man in the cell, who had been placed there by Policeman Andrews without the knowledge of Blain. The policemen were elected by the city council, and were not appointed by Blain. They were not his depu-

ties. The ordinances of the city provided, as to the chief of police, that "he shall be keeper of the city prison, or calaboose, and shall keep the same in a cleanly and wholesome condition, and shall safely keep all prisoners confined therein until legally discharged." The obligations imposed by this ordinance are due to the public, and not to citizens in their distributive and individual character. The city, in the exercise of its sovereignty, has the power to imprison persons for the violation of its laws, and this ordinance is only a part of the plan provided by the city for the exercise of its sovereignty. For a failure to perform the duties imposed by the ordinance the chief of police is responsible to the city,—the public; but for such nonfeasance he cannot be held responsible in damages to the individual citizen. 2 Thomp. Neg. pp. 815-825, notes, §§ 1, 6, 7, 12. If the chief of police was guilty of negligence it consisted in his failure to be at the prison in person or by deputy, and prevent the policemen from placing appellant in the cell with the crazy man. It cannot be legitimately contended that he was guilty of any act of misfeasance. The only legitimate complaint which could reasonably be made against him would be the neglect of a public duty. We do not wish to be understood as announcing the doctrine that the keeper of a prison may negligently allow a prisoner actually in his custody to be unnecessarily injured, without incurring personal liability for damages sustained by such person. That proposition is not necessarily involved in this case. The chief of police did not have actual custody of appellant, in person or by deputy, and did not know that either of the parties was in the calaboose at the time the injury was inflicted. There was no such actual relation between appellant and appellees as would create an affirmative obligation on the part of appellees towards appellant as an individual to protect him from assault by other prisoners. Murfree, Off. Bonds, § 213; South v. Maryland, 18 How. 396-403. Upon this state of facts, the court should have instructed a verdict for defendants. As to the city of Sherman the judgment dismissing the case is affirmed. As to the other defendants the judgment is reversed, and the cause remanded.

#### WILLIAMS v. VAUGHAN et al.

(Court of Civil Appeals of Texas. Dec. 11, 1897.)

##### APPEAL BY INTERVENER—BOND.

1. The liability of an intervener, who has been denied a judgment for the fund sued for in a garnishee's hands, is only for costs; and he may appeal by giving a bond for double the costs, conditioned under Rev. St. 1895, art. 1670, providing for a bond on appeal for twice the amount of the judgment, and his liability is not increased by giving a bond for a sum greater than required by law.

2. Neither an intervener, nor his sureties on his appeal bond, filed under Rev. St. 1895, art. 1670, providing for a bond on appeal for twice

the amount of the judgment, are liable, on appeal, for the amount of money in a garnishee's hands which the intervener seeks to recover.

Appeal from Hill county court; W. C. Morrow, Judge.

Action by Joe Williams against J. M. Chandler, garnishee, and B. H. Vaughan and others, interveners. Judgment was entered against interveners, who, in an action consolidated with the original suit to enjoin collection of judgment, had a judgment, from which the plaintiff, Joe Williams, appeals. Affirmed.

The appellant, Joe Williams, having a judgment against W. S. Jarrett, sued out a writ of garnishment against J. M. Chandler. Chandler, in answer to the writ, admitted that he owed Jarrett certain money. B. H. Vaughan, J. G. H. Buck, R. J. Ware, and E. M. Turner intervened in said cause, claiming the money that Chandler had answered that he owed Jarrett. Issue was joined between Williams and these parties as to who was entitled to the money, and the trial resulted in a verdict and judgment for Williams. The interveners appealed the case to the county court of Hill county, Tex., the sureties on their appeal bond being C. G. Hughes and J. H. Rice. On another trial had in the county court of Hill county, Williams was again successful. By an oversight, judgment was not entered at the term that judgment was procured, but was entered *nunc pro tunc* at the following term. The judgment was against the garnishee, and also against the interveners and the sureties on their appeal bond, for the amount of money that the garnishee had answered was in his hands. Execution was issued on this judgment, and placed in the hands of the sheriff of Hill county, Tex. The interveners and the sureties on their appeal bond enjoined the levy of the execution, and on a trial of this cause the injunction was perpetuated, the injunction suit having been consolidated with the original suit. From this judgment Joe Williams appeals.

There is no issue of fact in this case, and, inasmuch as the conclusions of fact filed by the court below present the whole case, they will be herein copied, and are as follows: "(1) The court finds that on November 25, 1895, in the justice's court of precinct No. 1, Hill county, Tex., Joe Williams recovered of W. S. Jarrett a judgment for \$122.37, with interest thereon from said November 25, 1895, at the rate of 10 per cent. per annum, and all costs of suit; that the amount in controversy in said suit, exclusive of interest and costs, was more than \$100; and that said judgment has never been paid. (2) That on December 6, 1895, the said Joe Williams procured the issuance of a writ of garnishment upon said above-named judgment against J. M. Chandler, said writ of garnishment being in due and proper form, and having been issued in due form, and in all things a compliance with the statute, and that said writ of garnishment was duly served on the said Chandler. (3) That on December 30, 1895, the said J. M. Chandler

filed his answer in the said justice's court in said cause, in which he stated that he was indebted to the said W. S. Jarrett in the sum of \$60.10. On January 29, 1896, B. H. Vaughan, J. G. H. Buck, R. J. Ware, and E. M. Turner intervened in said cause in said justice's court, and by their plea of intervention claimed the said fund, to wit, \$60.10, which was then in the hands of said garnishee, Chandler, and asking that they have judgment for the same against said garnishee, Chandler. (4) By proper pleading in said justice's court issue was joined between the said Joe Williams and the said interveners as to who was entitled to said fund of \$60.10 so in the hands of said garnishee. (5) On February 1, 1896, said cause came on for trial in said justice's court, and that upon a trial before a jury, upon said issue so joined, the following verdict was returned, to wit: 'We, the jury, find for the plaintiff \$60.10, amount garnished.' Upon this verdict a judgment was rendered by the court on said date that said interveners take nothing, and that the said Joe Williams recover of the said Chandler the said amount of \$60.10. (6) That the said interveners gave notice of appeal, and on February 10, 1896, filed in the said justice's court their appeal bond, with C. G. Hughes and J. H. Rico as sureties, said bond being in all respects a compliance with the statutes providing for appeals from the justice's court to the county court, the conditions thereof being that the appellants should prosecute their appeal to effect, and should pay off and satisfy the judgment which might be rendered against them on such appeal; that the said appeal bond so filed by said interveners was approved by the said justice of the peace, and by virtue thereof a proper transcript was made, and the said transcript, and all the papers of the case, and the said appeal bond, were duly filed in the county court of Hill county, Tex., the said appeal to the county court thus being perfected in accordance with law. (7) That at the February term, 1896, of the said county court, the cause again came on for trial, and that, upon issue joined between the said plaintiff and interveners as to who was entitled to the said money in the hands of the garnishee, a verdict of the jury was rendered, which is as follows: 'We, the jury, find for the plaintiff the sum of \$60.10, the amount in the hands of the garnishee.' That the cause was tried in said county court upon the same pleadings upon which it was tried in said justice's court, the said verdict of said jury being on file among the papers of the case. (8) That no judgment was entered upon said verdict at said February term; that at the May term of the county court, 1896, the judgment, which is copied in plaintiff's petition in cause No. 1,512, was entered in said county court, the same having been done in open court, at a regular term of said court,—the judgment, as copied in said petition, being a verbatim copy of the judgment which was entered, \* \* \* the same having been entered at said May term, 1896,

upon the verbal motion of plaintiff's counsel. (9) That the said plaintiff in said cause No. 1,512 (injunction suit) had no actual notice of the motion of plaintiff, Williams, to have said judgment entered, and no actual knowledge that judgment was to be entered at said May term. (10) The court finds that attorney J. T. Williams represented the plaintiff, Joe Williams, upon the trial of the said cause in the justice and county courts, and that attorney Jas. K. Parr, of the firm of Winfrey & Parr, represented the said interveners in the trial of the case in the county court, the written pleadings on file in said cause No. 1,431 showing that the said Parr was the attorney for said interveners and represented them in the trial of said cause, both in the justice's court and in the county court; that the said attorney J. K. Parr had notice of the plaintiff's motion to have a judgment entered at said May term of the court, 1896; that the said Parr and J. T. Williams, in a conference had before the said judgment was formally entered, had an agreement that the judgment should be entered at that term of the court; that it was the said Parr's understanding that a judgment should be entered in favor of the plaintiff and against the garnishee, Chandler, only, and that it was the said J. T. Williams' understanding that the judgment that was entered was to be entered; that, under these conditions and circumstances, the judgment sought to be enjoined in this case was entered at the said regular May term of the county court, 1896. (11) The court finds that upon the trial of the said cause No. 1,431, at the February term of the county court, no additional pleadings were filed, and that no issue was made as to the liability of the interveners and their sureties on their appeal bond to pay the said \$60.10, except in so far as the bond by its terms may have bound them. (12) The court finds that the said J. M. Chandler was insolvent at the time the garnishment was served upon him, and has so remained ever since; but the court further finds that he had the said money in his hands, and would have paid the same when judgment was rendered against him in the justice's court, had said cause not been appealed, and he would have paid the same in case judgment had been properly entered at the February term of the county court. Said Chandler, up to March, 1897, lived in Hill county, but has since removed therefrom. (13) That execution was issued on said judgment entered May, 1896, and the same was enjoined, as will fully appear by the pleadings."

McKinnon & Carlton, for appellant. Smith & Phillips, for appellees.

FINLEY, C. J. (after stating the facts.) Appellant contends that the interveners and their sureties on appeal bond became liable by reason of the appeal bond, not only for court costs, but for the amount of money for which the garnishee was shown to be liable.

There is no claim or pretense that the interveners were originally liable to appellant upon his judgment debt, nor that they became liable by receiving any of the funds garnished. They had intervened in the garnishment suit, claiming that the money in the hands of the garnishee belonged to them, and asking that they have judgment against the said garnishee for the same. Upon the trial in the justice's court the plaintiff in garnishment recovered judgment against the garnishee, and it was adjudged that the interveners take nothing by their intervention, and that they pay costs. Under the issue made upon the trial, the judgment could not have legally gone further against interveners. From this judgment, that the interveners take nothing by their intervention, and that they pay costs of suit, the interveners appealed to the county court, and executed an appeal bond conditioned as provided by article 1670, Rev. St. 1895. The cause was tried *de novo* in the county court upon the same issue that was made in the justice's court, and again the plaintiff in garnishment was successful, and appellant urges that it was proper to enter judgment in his favor against the interveners and their sureties upon their appeal bond for the amount of money shown to have been in the possession of the garnishee. Is this position tenable?

Aside from the proceeding of certiorari, there are but two methods of perfecting an appeal from a judgment rendered in a justice's court. These methods are pointed out by articles 1670, 1671, Rev. St. 1895, respectively. The former provides for the giving of an appeal bond in double the amount of the judgment, while the latter provides for appeal upon affidavit of inability to pay costs or give security therefor. There is no provision made for appeal by giving a cost bond, as is made by article 1400, Rev. St. 1895, relating to appeals from county and district courts. *Pace v. Webb*, 79 Tex. 316, 15 S. W. 269. It will therefore be seen that the interveners must have perfected their appeal in one of the two methods mentioned, and they did perfect their appeal under article 1670. The condition of the bond, as prescribed by the statute, is "that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal." In *Cotulla v. Goggan*, 77 Tex. 32, 13 S. W. 742, it is held that the condition to prosecute the appeal to effect, and the condition to pay off and satisfy the judgment which may be rendered against the appellant, must both be met, or the appellant and his sureties will be held liable upon the appeal bond. In *Ross v. Williams*, 78 Tex. 371, 14 S. W. 796, it is held that where the proper judgment to be rendered in the justice court is that the party take nothing by his suit, and that he pay costs, this judgment may be appealed from by giving bond in double the amount of the costs. To the same effect is *Moore v. Als-*

ton, 4 Willson, Civ. Cas. Ct. App. § 191. It seems to us that the necessary deduction from these authorities is that the interveners could have perfected their appeal by giving bond in double the amount of the costs, conditioned as required by article 1670, Rev. St. 1895. If this be correct, then the fact that they gave bond in a greater sum cannot increase their liability nor that of their sureties; or, to speak with more accuracy, the character of their liability would not be changed by the fact that they gave a bond in a greater sum than was required by statute. We are of the opinion that the court below properly held that the interveners and their sureties were only liable to the extent of the costs. The other positions assumed by appellant, attacking the judgment of the trial court, are not sound, and we see no particular reason for discussing them in this opinion. Judgment affirmed.

#### WATSON v. WINSTON et al.

(Court of Civil Appeals of Texas. Dec. 11, 1897.)

**SALES—ACTION FOR PRICE—EVIDENCE—DEPOSITIONS—INSTRUCTIONS—HARMLESS ERROR.**

1. An unsigned order sheet, containing a description of certain goods to be used in constructing defendant's house, which was made out by plaintiff's agent at the time the verbal transaction regarding the delivery of the goods took place between the agent, defendant, and the contractor building the house, is admissible, as part of the *res gestæ*, to show what actually did take place.

2. Where the transaction between plaintiff's agent and defendant regarding the delivery of certain goods by plaintiff, to be used in the construction of defendant's house, was verbal, conditions and stipulations amounting to a contract, contained in a written order sheet made out at the time by the agent, but not signed by defendant, are inadmissible, to prove a promise by defendant to pay for the goods.

3. A party wishing a special instruction that the jury are not to consider part of a written order, properly admitted in evidence, should so request the court.

4. A bill of lading, the execution of which is not proven, is inadmissible in an action for the price of the goods described therein.

5. In an action for the price of goods shipped to defendant to be used in constructing his house, evidence that the contractor building the house took the goods from the depot is admissible.

6. In an action against the owner for the price of goods used in the construction of his house, parol evidence was introduced of the terms of a written contract between the owner and the contractor who built the house, by which the latter agreed to furnish a certain amount of that class of goods. *Held* that, although defendant was entitled to have the contract admitted, a refusal to admit it was not prejudicial error.

7. Evidence that plaintiff had never given credit, but had always required cash payments for goods sold to a contractor, who had agreed to furnish certain goods to be used in constructing defendant's house, is incompetent to show a purchase by defendant of such goods.

8. Where a contractor agreed to furnish mantels and tiling to be used in building defendant's house, in an action against the latter for the price of the materials so used evidence that de-

defendant was warming himself day and night by them is inadmissible, as tending to prejudice his case before the jury.

9. A party may read any admission of the adverse party contained in a deposition taken ex parte, without being compelled to read the whole deposition.

Appeal from Ellis county court; J. C. Smith, Judge.

Action by William Winston and another against S. H. Watson. From a judgment entered on a verdict for plaintiffs, defendant appeals. Reversed.

This was a suit brought in the county court of Ellis county, Tex., by appellees, William Winston and G. B. Higginson, composing the firm of Winston & Higginson, against appellant, S. H. Watson, for the price of certain goods, wares, and merchandise, consisting of certain mantles, grates, and tiling, alleged in appellees' first amended original petition (on which the case was tried, to have been sold to appellant, at his instance and request, on or about June 9, 1896, for which it was alleged appellant verbally agreed to pay appellees, on demand, \$266.95; and to this petition a sworn itemized account, containing a description of the goods, was attached, marked "Exhibit A," and made a part of the petition. Appellees alleged that said goods had never been paid for, and prayed judgment against appellant for \$266.95, and costs of suit. Appellant answered by first original answer filed January 4, 1897, and pleaded to said petition a general demurrer, special demurrers Nos. 1, 2, and 3, and a general denial; and for further answer, by special sworn plea, denied, under oath, the justness of each and every item of the verified account marked "Exhibit A," and made a part of appellees' first amended original petition, and alleged that each item was wholly unjust; that he never bought any such goods, or authorized any one for him to do so; and further pleaded, under oath, that appellees claimed to have an order for such goods alleged to have been signed by appellant, but that he never signed such order, or authorized any one for him to sign it, and if he did sign such an order it was signed by the fraud of appellees and its agent, Burgess, in concealing from appellant the contents of same. The case went to trial on these pleadings. There was a trial, with the aid of a jury, which resulted in a verdict for plaintiffs for \$266.95, upon which judgment was duly entered. Defendant filed his motion for new trial, which being overruled he excepted, gave notice of appeal, and has prosecuted an appeal to this court.

C. M. Supple, for appellant. Sherrod & Singleton, for appellees.

BOOKHOUT, J. (after stating the facts). Appellant assigns as error: "The court erred in admitting in evidence what purported to be a written order, which is set forth in defendant's bill of exceptions No. 3, embracing terms and conditions of sale of goods, because the

same was not signed by any one, and because it was not shown that defendant ever accepted or agreed to terms thereof, or that he knew of same, and because it was setting up a cause of action predicated upon a written order and sale of goods, when plaintiffs' first amended original petition, on which they went to trial, declared on a verbal order and sale." In June, 1896, one Boze had a contract with the defendant, S. H. Watson, to remodel the residence of defendant. The contract stipulated that Boze was to furnish \$200 worth of mantels as a part of said work. One Burgess was agent of plaintiffs, who are manufacturers of mantels at Louisville, Ky. About June 9, 1896, Boze met up with Burgess in Waxahachie, Tex., and told him he had an order for him for mantels and tiling for defendant's house. Burgess accompanied Boze to the house of defendant, and introduced him to the defendant and other members of the family. There was a sharp conflict of testimony as to what was said and took place in reference to the order for the tiling and mantels. Burgess testified that he told defendant that he had called to sell him mantels and tiling for his house; that defendant asked witness the prices, and stated that Mr. Boze was to furnish \$200 worth of mantels and tiling at factory prices, delivered at Waxahachie, and goods selected in excess of that amount were to be paid for by defendant. Defendant explained the reason he asked about factory prices was that he wished to get any commission to which Boze was entitled. Witness says he told defendant that plaintiffs had nothing to do with the contract between defendant and Boze, but that plaintiffs would look to defendant, and not to Boze, and that defendant and Boze could settle their own affairs. The mantels and tiling were selected, amounting to \$266.95, and witness Burgess says he wrote a description of same in an order form of plaintiffs, and handed defendant a copy of this order. On the trial plaintiffs offered this order in evidence, to which defendant objected for the reasons above stated in the first assignment of error. The court overruled the objection, and admitted the order sheet in evidence. We do not think the court erred in admitting this order sheet. It was a memorandum made at the time of the transaction, and is admissible as a part of the transaction, as tending to show what did take place, and is *res gestæ*. *Goldman v. Blum*, 58 Tex. 641.

But appellant insists that there were printed conditions and stipulations amounting to a contract contained in the order sheet, and, the order sheet not having been signed by the defendant, it was error to admit the contract in evidence. As already stated, the order sheet was properly admitted. This is the only point raised under appellant's first assignment of error properly before us; but in view of our disposition of the case, and in view of another trial, we will say that, upon a proper objection being made, that portion of the paper which contains the printed cor

ditions and stipulations should be excluded from the jury.

Appellant further contends that the court in its general charge should have told the jury how far they could consider the written order as evidence. If appellant wished a charge to the effect that the jury should not consider the printed conditions and stipulations contained in the order sheet, and the main charge omitted such an instruction, appellant should have asked a special instruction to cover this omission. *Ballard v. Perry's Adm'r*, 28 Tex. 364; *Southern Cotton Press & Mfg. Co. v. Galveston Wharf Co.*, 3 Willson, Civ. Cas. Ct. App. § 258.

Appellant's third assignment of error complains of the ruling of the trial court in admitting in evidence two bills of lading, one purporting to be issued by the Missouri, Kansas & Texas Railway Company, and the other issued by the Louisville & Nashville Railway Company, at Louisville, Ky. There was no proof of the execution of these bills of lading. Burgess testified that he did not know who signed them, nor did he know that the persons who signed them were agents or employes of the respective railroad companies. Witness did not deliver the goods to the railroad companies in person, nor does he know that the railroads received the goods. The court erred in admitting the bills of lading in evidence.

We do not think the court erred in permitting the introduction of the evidence of Boze, to the effect that he took the mantels and tiling from the railroad depot at Waxahachie, and the circumstances under which he took them. We therefore overrule appellant's fourth assignment of error.

We think the defendant was entitled to have the contract between himself and Boze introduced in evidence. But as there was evidence introduced as to its terms in reference to the amount of mantels, etc., he was to furnish, appellant has not been injured by this ruling.

Appellant's sixth assignment of error complains of the ruling of the court in permitting plaintiffs' agent Burgess to testify "that plaintiffs had frequently sold goods to E. S. Boze prior to June 9, 1896,—for instance, for Dr. J. C. Fears' house,—but required Boze to pay cash." The testimony was that plaintiffs had never in any instance credited said Boze for any goods, but always required Boze to pay cash for goods purchased. This evidence was objected to as immaterial and irrelevant, and calculated to prejudice defendant's case before the jury, and does not bear upon any issue in the case. The exceptions were overruled, and the ruling made the ground of a bill of exceptions. The sharp contest in this case was whether the goods were purchased by the defendant, Watson, at the time they were selected. In June, 1896, or whether they were purchased by Boze, the contractor engaged in remodeling defendant's house. There was much evidence introduced

by each party to support their respective contentions. It was the duty of the jury to settle this contest, but they should settle it on legal evidence. Whether the plaintiffs had or had not ever had previous dealings with Boze; whether they had or had not ever credited him, but made him pay cash for goods,—was not competent evidence to show that plaintiffs and defendant entered into a contract on June 9, 1896, by which plaintiffs sold to defendant, and defendant purchased from plaintiffs, the mantels and tiling made the subject-matter of this suit. The court erred in admitting this evidence.

The court erred, as set out in appellant's eighth assignment of error; in admitting testimony, over defendant's objection, that defendant was getting the benefit of the mantels; that he was warming himself by them day and night. It was shown that the mantels and tiling had been put in place in defendant's house. This was as far as it was proper to go. The testimony that defendant was warming himself by them day and night was well calculated to prejudice defendant's case with the jury.

Appellant's ninth assignment of error complains of the ruling of the court in refusing to allow defendant to read to the jury certain answers of one of the plaintiffs contained in his deposition, taken *ex parte*, as an admission of said witness, without reading all of the deposition. The defendant had propounded interrogatories and taken the depositions of one of the plaintiffs *ex parte*, as prescribed by statute. *Sayles' Civ. St. art. 2239*. The defendant offered to read certain answers of the witness. The plaintiffs objected that defendant could not read a portion of said answers without reading the entire deposition. The court sustained the objection, and required defendant to read the entire deposition if he read any. This was error. The defendant was entitled to read any admission contained in the deposition without being compelled to read the whole deposition. *Parker v. Chancellor*, 78 Tex. 526, 15 S. W. 157; *Lacoste v. Bexar Co.*, 28 Tex. 420. The other assignments of error presented raise questions not necessary to be considered, in view of another trial of this cause. For the reasons above pointed out the judgment of the court below is reversed, and the cause remanded.

JONES et al. v. CUMMINS.

(Court of Civil Appeals of Texas. Dec. 24, 1897.)

GARNISHMENT—CHANGE OF VENUE—PRODUCTION OF WRIT—EVIDENCE—ADMISSIONS.

1. In transferring garnishment proceedings from the county where the action is brought to a county where a garnishee resides, *Rev. St. 1895, art. 248*, provides that plaintiff may file in the latter court a certified copy of "the proceedings in garnishment, including the plaintiff's application for the writ, and the answer of the garnishee, and the affidavit controverting the same." *Held*, that the failure of the statute to enumerate the writ of garnishment ex-

cluded it from its requirements, and it need not be filed.

2. On the trial of an issue between plaintiff and garnishee, the production of the writ of garnishment is not essential to plaintiff's recovery, the garnishee having answered.

3. Since the court of a county where a garnishee resides acquires no jurisdiction of an action begun against him in another county until all the proceedings required by Rev. St. 1895, art. 248, to be transferred, have been produced, failure to produce the same at the trial works a dismissal of the action against the garnishee, and not a judgment in his favor.

4. Original assessment lists are admissible in evidence against the parties making them.

Appeal from Grayson county court; J. H. Wood, Judge.

Action by Jones, McDuffie & Stratton against Mrs. J. B. Cummins, garnishee. From a judgment in favor of the garnishee, plaintiffs appeal. Reversed.

Wolfe & Hare and Leslie & McReynolds, for appellants. Head, Dillard & Muse and Crawford & Crawford, for appellee.

RAINEY, J. The appellants in February, 1891, instituted a suit in the district court of Dallas county, Tex., against W. W. Walker on an action of debt. An attachment was sued out against Walker's property, and a writ of garnishment was sued out against appellee, Mrs. J. B. Cummins, who resided in Grayson county, Tex. Mrs. Cummins answered, denying being indebted to Walker, or having in her possession any effects belonging to him. This answer was duly controverted by appellants. On February 28, 1892, appellants recovered a judgment for their debt against Walker, and on motion of appellants the garnishment proceedings were transferred to Grayson county. On a trial of the issues in garnishment judgment was rendered for appellee. The trial judge ruled that appellants would not be entitled to recover unless they would produce or offer in evidence the writ of garnishment. Appellants failing to produce or offer in evidence the writ of garnishment, the court instructed a verdict for appellee. Appellants' first assignment of error is based upon this action of the court. The record shows that no copy of the writ of garnishment was among the papers of the case. Garnishee's answer under oath contained a statement that the writ of garnishment was served upon her, and there was a prayer for reasonable attorney's fees for preparing the answer to said writ of garnishment. Copies of the original judgment, application for writ of garnishment, garnishee's answer, and appellants' controverting affidavit, were on file in the district court of Grayson county, and are contained in the record on appeal. The issue here raised is whether or not, in transferring the proceedings in this character of case, it is necessary to embrace a copy of the writ of garnishment; and, if so, is it essential that same be introduced in evidence on the trial? Article 248, Rev. St. 1895, reads as follows: "If the garnishee whose answer is so con-

troverted be a resident of some county other than that in which the proceeding is pending, the plaintiff may file in any court of the county where the garnishee may reside, having jurisdiction of the amount of the judgment in the original suit, a duly certified copy of such original judgment and of the proceedings in garnishment, including the plaintiff's application for the writ and the answer of the garnishee and the affidavit controverting the same." Why the lawmakers used this language, "and of the proceedings in garnishment, including the plaintiff's application for the writ and the answer of the garnishee and the affidavit controverting the same," is not altogether clear. The term "proceeding in garnishment," standing alone, would include the documents enumerated, without their being named. So there must have been some reason why they were especially mentioned. The most reasonable solution, to our minds, is that those mentioned were all that would serve any useful purpose, and the legislators deemed it unnecessary, as well as a useless expense, to require the bond and writ of garnishment to be transferred. The transfer of the application for the writ of garnishment was deemed essential to show that the court had jurisdiction of the garnishment proceedings, and the answer of the garnishee and controverting affidavit were necessary pleadings to be before the trial court to try the issues made therein. No good purpose could be subserved by the transfer of the writ of garnishment. The office of the writ is to notify the garnishee that the debt due by him to the defendant, or property of the defendant in his hands, must be held by him subject to the payment of plaintiff's demand, if so determined by the court. 8 Am. & Eng. Enc. Law, p. 1118. And, if the garnishee has answered, the writ has served its purpose, and to introduce it in evidence is a useless proceeding. *Curtis v. Ford*, 78 Tex. 262, 14 S. W. 614. We are of the opinion that the rule, "The expression of one thing is the exclusion of another," applies in construing the article under consideration; that the mention of the application, answer, and controverting affidavit excluded any other document that would ordinarily be included in the term "proceedings in garnishment"; and that it was not necessary, in transferring the proceeding to Grayson county, to include a copy of the writ of garnishment. Therefore the court below erred in holding its production on the trial essential to plaintiffs' recovery. Under no phase of the case can the instructions of the court be justified. The application for the writ of garnishment gave the court jurisdiction of the matter, and appellee, having answered the writ of garnishment, was in no position to demand the production of the writ. Could it be held that the production of the writ was essential to plaintiffs' recovery, the failure to produce would not justify a judgment for the defendant. In such a case the proceeding should have been dismissed

inasmuch as the transfer of the proceedings required by statute constitute the basis of jurisdiction. Nor was it incumbent upon plaintiffs to introduce the writ in evidence, as before stated.

The court erred in not permitting plaintiffs to introduce in evidence the original assessment lists showing the property rendered by Mrs. J. B. Cummins for the years 1882 to 1890, inclusive. The renditions were made by her in person, and sworn to. The statements of parties to the suit, when pertinent, are always admissible against them; and we see no difference between assessment lists, when signed by the parties, and other statements. It has been held that tax rolls are not admissible as declarations against a party (*Greer v. Drug Co.*, 1 Tex. Civ. App. 634, 20 S. W. 1127), and properly so, because such rolls are made by the assessor or by his direction, are but copies of the original list, and are not binding upon the party. The contents of the assessment lists were material in support of appellants' contention, and should have been admitted in evidence. The judgment is reversed, and the cause remanded.

#### WILLIAMS v. LOVE.

(Court of Appeals of Indian Territory. Jan. 14, 1898.)

##### TRIAL—SPECIAL VERDICTS—SUFFICIENCY.

1. Mansf. Dig. Ark. § 5141, provides: "A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the court but to draw from them conclusions of law." *Held*, that when neither party has requested a special verdict, and the jury unequivocally disagree on a general verdict, the court may afterwards submit questions to the jury calling for a special verdict alone, by which the jury finds the facts only.

2. If the jury's findings of fact are sufficiently numerous and explicit, and leave nothing for the court to do but to determine questions of law, they constitute a special verdict.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Kilgore, April 29, 1896.

Action by Simon Love against S. L. Williams and others. From a judgment in favor of plaintiff against defendant Williams, the latter appeals. Affirmed.

On the 14th day of September, 1895, before the United States commissioner at Purcell, Ind. Ter., Simon Love, the appellee, hereinafter called the plaintiff, brought his action against S. L. Williams, the appellant, called hereinafter defendant, and William Douglass, Sr., and William Douglass, Jr., for labor performed and money expended for them from October, 1892, to April, 1893. On the 27th day of September, 1895, defendant Williams filed his separate answer, specifically denying his indebtedness to said Love in any sum of money whatever, denied ever employing said Love at any time to pur-

chase and feed cattle, or authorized any one to so employ him; that he had no interest in such cattle. Trial was had on September 27th, and judgment was rendered in favor of defendant Williams for his costs. In due time plaintiff, Love, perfected his appeal to the United States court of the Indian Territory at Purcell. Trial of the cause was had at the April, 1896, term, before a jury. The record, on page 6, states that the jury, having retired to deliberate, and the hour of adjournment having arrived, returned into open court, stating that they wanted further time, and the court (by agreement of counsel) permitted them to separate over night, and the case was continued until next day. At a subsequent part of the record (page 14) it is stated that, after they had long considered their verdict, said jury returned into court, and announced their inability to agree on a verdict, and asked to be discharged from the further consideration of the case, and that thereupon counsel for Love prepared certain questions for the jury to answer, and asked the court to submit them to be answered, and the court, over the objection of counsel for defendant Williams, submitted the questions to the jury. It is immaterial which of these statements is correct, as it is conceded that the instructions were asked and given. The court gave the following instruction, as requested: "The jury are instructed that they are authorized to make a finding on each of the foregoing special issues submitted herein in the nature of questions, by responding to each separately. You will write your answers under each question. C. B. Kilgore, Judge." To which instruction defendant excepted. After consideration thereof, the jury returned the following as their findings of fact upon each of the questions submitted, as follows: "(1) Did the defendant Williams know of and agree to the employment of the plaintiff, St Love? Ans. Yes. (2) Was the defendant Williams acting for himself, or was he acting as agent for Glasier? Ans. For Glasier. (3) If Williams was acting as agent for Glasier, did he, or any one for him, inform the plaintiff, Love, that he was acting only as agent? Ans. No. (4) How much, if anything, is due the plaintiff Love? Ans. \$146." All said answers being signed "J. S. Ewing, Foreman." And upon said answers, the court "ordered, adjudged, and decreed that the plaintiff, Simon Love, do have and recover from the defendant S. L. Williams the sum of \$146, together with all costs in this behalf expended; for which let execution issue." In due time defendant Williams filed his motion to set aside and vacate the judgment and to grant a new trial, which motion was overruled, and exception thereto allowed. On the 9th day of May, 1896, said defendant filed his motion for an appeal, which was granted, and defendant Williams was allowed 90 days to prepare and file his bill of exceptions, and he



brings said cause to this court for review of errors stated in the record.

Geo. M. Miller and C. L. Herbert, for appellant. D. B. Davidson, W. B. Johnson, and A. C. & Lee Cruce, for appellee.

SPRINGER, C. J. (after stating the facts). The counsel for appellant in this case contend that the court below erred in submitting the questions set forth in the statement of this case to the jury, for the reasons, as alleged, that neither party had requested a special verdict, and the jury unequivocally disagreed on a general verdict, so that any questions submitted to them at such time and in such manner could only call for a special finding; that a jury can be required by the court to return a special finding only in a case in which they render a general verdict. To support this contention, counsel for appellant cite sections 5142, 5143, of Mansfield's Digest, and certain cases reported in volumes 40, 50, and 52, of the reports of the supreme court of the state of Arkansas (see volumes 7 and 13 S. W.); also *Thomp. Trials*, § 2677. In order to understand fully the law in regard to special and general verdicts, it will be necessary to consider sections 5140-5143 of Mansfield's Digest. These sections are as follows:

"Sec. 5140. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant.

"Sec. 5141. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.

"Sec. 5142. In all actions the jury, in their discretion, may render a general or special verdict, but may be required by the court, in any case in which they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. This special finding is to be recorded with the verdict.

"Sec. 5143. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly."

From these sections it will appear that the verdict of a jury may be either general or special. A general verdict is defined by the statute to be that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is defined to be that by which the jury finds the facts only, and the statute points out in section 5141 how this special verdict of finding the facts only must be presented. It will be observed from reference to this section that the facts must be so presented as that nothing remains to the

court but to draw from them conclusions of law. Then follows section 5142, in which it is provided that a jury, in their discretion, may render a general or special verdict, but they may be required by the court, in any case in which they render a general verdict, to find specially upon particular facts. This special finding should be recorded with the verdict. The reason for recording this special finding is explained in the next section—5143—of Mansfield's Digest. When the special finding of fact is inconsistent with the general verdict, the special finding controls. Counsel for appellant ignore the authority given in section 5141 to the jury to return a special verdict by which the jury finds the facts only. In the closing paragraph of appellant's brief, reference is made to section 1316 of Mansfield's Digest, which section is as follows: "Sec. 1316. When the facts in a special verdict are insufficiently found, the supreme court may remand the cause, and order another trial to ascertain the facts." The converse of this proposition is that, when the facts in a special verdict are sufficiently found, the appellate court would have no occasion to remand the cause for another trial. The section of *Thompson on Trials*, cited by counsel for appellant, is as follows: "Sec. 2677. Answers Without General Verdict.—If the jury, either under instructions or not, should return answers to the interrogatories without returning a general verdict, they cannot be considered, and are a nullity, requiring a new trial to be granted, unless the findings of facts are numerous and explicit enough to constitute a special verdict." From this section it is apparent that if the findings of fact are numerous and explicit enough to constitute a special verdict they will be sufficient. Mansfield's Digest has specially provided that the special verdict may be returned by the jury, and in a special verdict the jury finds the facts only. If such findings of fact by the jury leave nothing for the court but to determine questions of law, the verdict of the jury has accomplished everything that could be accomplished by a jury trial.

Counsel for appellant have cited in support of their position certain decisions of the supreme court of the state of Arkansas. The first case cited is that of *Railway Co. v. Miles*, 40 Ark. 208. In that case special issues were submitted to the jury, and, in addition to the general verdict for the plaintiff, findings upon these issues were returned into court. There was, therefore, in that case, a general verdict, and special findings of fact, and, it appearing to the court that the special findings of fact were inconsistent with the general verdict, they displaced the general verdict. That was all that was decided in the case, and it is founded upon the express letter of the statute, as will be seen by reference to section 5143 of Mansfield's Digest. The next case cited to support appellant's contention is that of *Dyer v. Taylor*, 50 Ark. 314, 7 S. W. 253. In that case the jury failed to agree upon the

questions of fact submitted to them, and returned a general verdict in favor of the defendant. The court did not regard this as error, and the judgment was affirmed. The next case cited is that of *Railway v. Canman*, 52 Ark. 517, 13 S. W. 280. In that case the jury failed to agree upon the special interrogatories submitted to them, but found a general verdict. Neither of these Arkansas cases is in point, nor controls. The court is of the opinion that the questions of fact submitted to the jury in the case at bar, on the request of the appellee, submitted to the jury all the issues of fact upon which it was the province of the jury to pass. When these facts were found by the jury, nothing remained for the trial court but to enter a judgment based upon the findings of fact by the jury. The judgment of the court below is therefore affirmed.

CLAYTON, THOMAS, and TOWNSEND, JJ.,  
concur.

#### PARKER et al. v. UNITED STATES.

(Court of Appeals of Indian Territory. Jan. 14, 1898.)

LARCENY—EVIDENCE OF OTHER CRIMES—HEARSAY  
—OBJECTIONS—TRIAL—EXCLUDING WIT-  
NESSES—REMARKS OF COUNSEL.

1. To identify two cattle sold by defendants with the cattle charged to have been stolen by them, evidence that two other cattle sold by them at the same time were stolen property taken from persons other than the prosecutor, and at or about the same time as the others, but which evidence did not show that they were taken at or about the same place, was inadmissible.

2. In a prosecution for the larceny of cattle, a witness, in describing a cow, said that the owner had told him what kind it was, and, as he remembered, it was a light-red one. Another witness testified that he knew a certain person had lost a cow, because the owner had told him; and, in answer to the question whether he knew that the cow had been recovered, witness said the owner told him that he got it back. The testimony was objected to, not specifically as hearsay, but merely as "incompetent, irrelevant, and immaterial." *Held*, that it should nevertheless have been stricken out.

3. A remark of counsel in the conduct of a case will not be noticed on appeal unless an objection thereto has been made, a ruling obtained, and an exception saved.

4. After the court, at the request of the prosecution in a larceny case, had ordered witnesses excluded from the court room, a witness remaining therein during the trial was permitted to testify. The jury were not instructed that they might consider the fact of his so remaining as affecting the credibility of his testimony, no request having been made for such a charge. *Held* no abuse of discretion.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Kilgore, April 8, 1897.

Wilson Parker and Dan Shipman were convicted of larceny, and they appeal. Reversed.

On the 20th day of October, 1896, an indictment was returned into the United States court for the Southern district of the Indian

Territory against the appellants, Wilson Parker and Dan Shipman, charging them jointly with the larceny of two head of cattle, the property of one W. B. Henson. On April 8, 1897, the case was tried, resulting in a verdict of guilty against both defendants. A motion for a new trial was filed, overruled, and exceptions saved. The defendants were then duly sentenced. No objections were made to the form of the indictment, or to the charge of the court. There are 18 assignments of error. The first to the tenth, inclusive, and the twelfth and thirteenth, present objections to the admissibility of evidence, and assign errors upon two grounds: First, that the statements of certain witnesses were hearsay; and, second, because of the incompetency, irrelevancy, and immateriality of certain other evidence. The eleventh assignment is that the court erred in allowing a certain witness to testify who had not been placed under the rule, but had remained within the hearing of the other witnesses while testifying. The fifteenth to the eighteenth, inclusive, are that the court erred in overruling defendants' motion for a new trial. The second assignment, besides setting up the admission of certain incompetent evidence, is that the court erred in not sustaining the defendants' objection to a certain side-bar remark made by the United States attorney during the trial. Upon the trial the prosecution proved by competent evidence that Henson, the prosecuting witness, had two head of cattle stolen from him,—one a deep-red cow, branded U, and the other a black heifer, unmarked and unbranded; that these cattle, when taken, were running in the field or pasture of one Misner; that the cow had never been recovered, but that the black heifer was afterwards found in the possession of one Arthur James, and from him was recovered by the owner. There was no competent testimony showing how James became possessed of her. It was proven that shortly after the larceny of the cattle the defendants drove and sold to Pollard four head of cattle, two of them resembling the stolen ones. The other two were white cows. Pollard butchered the red cow, and one of the white ones. The other white one strayed away, and has never been recovered by him. He sold the black heifer to one Crim. Crim testified that he bought the heifer from Pollard, and sold her to one Daube. Neither Daube nor James were placed upon the stand. The only evidence of the identification of this heifer as being the one which the defendants sold to Pollard is the description given of her by Henson, the owner, and by Pollard, together with the statement of Henson that shortly after he missed his cattle from the range, having learned that Pollard had bought cattle answering the description of his, he went to him, and got from him such information as led him to go to James for the animal, and there found her. The identification of

the red cow depended entirely upon the description given of her by the owner and Pollard. Henson, of course, gave an exact description of his stolen cattle, but he had never seen them in the possession of defendants; but Pollard was unable to accurately describe them. He knew that he had bought of the defendants, shortly after the larceny, together with two others, cattle of the general description of the stolen ones. The heifer had no marks or brands upon her, and he did not remember those of the cow. The defendants had never been seen with the cattle, except at the butcher's pen. The prosecution, to secure a conviction, relied mainly upon the fact that these stolen cattle were, recently after the theft, found in the possession of the defendants; and, inasmuch as they (the defendants) were claiming that the cattle which they had sold to Pollard were different from the stolen ones, the question of identification became the most important one in the case. It was the contested point. If the cattle in the defendants' possession recently after the larceny were the stolen ones, then there was no explanation of their possession. The defendants introduced a number of witnesses who testified to facts tending to show that the heifer had been raised, from a calf, by them, and that they had purchased the cow from a man by the name of Joy, and that she had never been owned by the prosecuting witness, and therefore the cattle which they admitted to have sold to Pollard were not the stolen ones. The case was a close one. The identification of the stolen property was not perfect. It is obvious that under these circumstances it was important for the district attorney, if he had any evidence upon the question of the identification of the stolen cattle, by which he could rebut the evidence of the defense, to introduce it before the jury. For this purpose (that is, for the purpose of more clearly identifying the cattle sold to Pollard as being the stolen ones), and to rebut the testimony of the defendants that they had bought one and had raised the other, he was permitted, over the objection of the defendants, to introduce evidence of the fact that two white cows belonging to other owners, found in the possession of the defendants, with the alleged stolen ones, and sold by them to Pollard, were also stolen property, taken from a range at or about the same time that the others were taken from the Miner field. The evidence failed to show that the two sets of cattle were taken from or about the same place. The competency of this testimony is the principal question raised by the assignments of error. Conceding that the proof was sufficient to show that the two white cattle were found in the possession of the defendants, that they were stolen property, and that they were taken at or about the same time with those alleged to have been stolen, without any evidence that they were taken from or

about the same place, was it admissible in this case for any purpose?

O. B. Kendrick, J. C. Graham, Henry M. Furman, C. L. Herbert, and Jesse H. Hill, for appellants. A. C. Cruce and G. G. Calmes, for the United States.

CLAYTON, J. (after stating the facts). It is unquestionably the law that, while proof of other independent crimes is not admissible to establish the guilt of the defendant of the offense on trial, yet, under certain circumstances, other crimes may be proven. In cases of larceny, if properly connected, the proof that other stolen property was found in the possession of the defendant, with the property charged to have been stolen, is admissible for either of four purposes: (1) To prove felonious intent; (2) to prove that the alleged theft was a part of a continuous transaction or scheme of larceny; (3) to identify the defendant; (4) to identify the stolen property. In all of these cases, however, it must not only be shown that the defendant was found in possession of the property, and that it was stolen; but, in addition thereto, it must appear from the proof that there was some connection between it and the property charged in the indictment to have been stolen. If nothing be shown but that it was in the defendant's possession, then it is inadmissible in every case, because it tends to prove nothing but another, and a separate and independent, larceny. If, in addition to the fact that the stolen property was found in possession of the defendant recently after the alleged larceny, it be shown that it had been stolen at or about the same time and place as that charged to have been stolen, then it is admissible in all of the cases, because, under the circumstances of each case, it tends to prove the matter in controversy. Cases arising under the first proposition are usually those where the taking by the accused of the alleged stolen property is admitted or clearly established, and the defense is interposed that it was taken under some claim of right, or color of title, or through some mistake or misapprehension. In such case, for the purpose of proving the intent, the prosecution, in rebuttal, may show that, at the time defendant was found with the property in question, he was in possession of other property stolen about the same time and place. Under the second proposition, it may be shown that the alleged stolen property was found in the possession of the defendant, together with a number of other stolen articles, taken at different times and places, not too remote from the time and place of the alleged larceny, not for the purpose of showing that the defendant is a common thief, or of proving an independent crime against him, but as tending to show that the alleged taking was a part of a continuous transaction or scheme of larceny, and thus shedding light on the transaction in controversy. Cases arising under the third proposition are gen-

ally those where the larceny is admitted or established, and the defendant has been seen with the alleged stolen property," but under such circumstances as that he was not recognized by the witness, as, if he were a stranger to him, or was in disguise, or seen in the nighttime; or, it may occur in cases where no one has seen the defendant in possession of the property alleged to have been stolen, but the circumstances point to his guilt, without clearly identifying him. In such case, proof of other stolen property having been found in his possession shortly after the theft, taken about the same time and place, is admissible for the purpose of identifying him. The case of *Long v. State*, 11 Tex. App. 387, is a good illustration of cases of this kind. In that case the court say: "The court, over the objections of defendant, permitted proof that other stolen cattle were in the bunch with which the cow charged to have been stolen was driven to Seguin. In this there was no error, in view of the peculiar facts of this case. The most difficult thing on the part of the prosecution was to connect defendant with the possession of the cow charged to have been stolen. To do this, it was necessary to describe and identify the herd with which she was when taken to Seguin. To do this, evidence that other cattle from the same range were taken at the same time was proper. Some of the state's witnesses were able to identify the herd, but not the cow in question; others, the herd, and stated the fact that the cow charged to have been stolen was with it. The herd being thus identified, the state attempted to connect the defendant with it (the herd); thus showing his connection with, or possession of, the animal charged to have been stolen. We are of the opinion that, under the circumstances of this case, these facts were admissible; but, most evidently, it was the duty of the court to have informed the jury of the purpose for which this evidence was admitted." If the larceny of the alleged stolen property be proven, but the identity of the defendant is in doubt, then, if the fact that other property which had been taken was stolen at the same time and place, and was found in the possession of defendant shortly after the larceny, be established, inferentially he is the man who took it all. In the case of *Long v. State*, supra, the fact that the defendant, shortly after the larceny, was found in possession of other cattle, whether stolen or not, which the unrecognized man was seen driving with the cattle alleged to have been stolen, would have been competent proof for the purpose of identifying him as the man who was seen driving the stolen cattle; but it would not have been competent to have proved that these other cattle were stolen, but for the fact that they were taken from the same range, and at the same time, with those in controversy. Cases arising under the fourth proposition usually occur when the alleged stolen property found in the possession of the defendant is similar to others of

that class, but without marks of identification whereby it may be distinguished, or the brands and marks may have been destroyed, or the property so mutilated as to leave it without means of identification. In such cases, proof that the defendant, recently after the larceny, was in possession of other stolen property, taken about the same time and place, is admissible for the purpose of identifying that which is in controversy, and found in his possession. If the property named in the indictment be shown to have been stolen, but the identity of that found in possession of the defendant, claimed to be the stolen property, is in doubt, then the fact that he was found with other stolen property, which had been taken from or about the same place, and at the same time, would so connect the two articles as that the identification of one would tend to identify the other; but if not taken from or about the same place, although it may have been taken at the same time, and found in the possession of the defendant, it would have no such tendency, and therefore for that purpose the proof of it would be inadmissible. In the case before us the proof tends to show that the two white cows of Adams and Smith were stolen; that they were taken about the same time as those of the prosecuting witness; that they were found in the possession of the defendants, with the cattle charged to have been stolen. But there is no evidence that they were taken from or about the same place. In this the case of the government is fatally defective. As has been shown, the whole purpose of the United States attorney in offering this proof was to identify the Henson cattle. It is not possible that it could have been offered for any other purpose, and therefore, under the circumstances of this case, it was inadmissible.

The next exception raised by the assignments of error which we will notice is: "That the court erred in overruling the objection of the defendants to the admissibility of the testimony of D. B. Henson and S. S. Henson relating to the larceny of the aforesaid white cows." Their testimony in this connection was as follows: "D. B. Henson. Q. Do you know whether or not there were other cattle stolen out there from other parties about that time? (Objected to as incompetent, irrelevant, and immaterial. Objection overruled; to which the defendant excepts.) A. Yes, sir; there was a great deal of taking of cattle by some one at that time. By Mr. Cruce: Unless these men have all lied to me, I can show that these two men drove other cattle out there at this time. (The defendant objects to the remarks of the U. S. attorney.) Q. What other cattle were lost at that time? (Objected to as incompetent, irrelevant, and immaterial. Overruled; to which the defendant excepts.) A. Mr. Tobe Smith lost a cow, and Mr. Adams lost a cow at the same time. Q. Do you know whether or not they recovered them? (Objected to as incompetent, irrelevant, and immaterial. Overruled; to which the defend-

ant excepts.) A. Mr. Adams got his. Mr. Tobe Smith never got his back, though. Q. What kind of a cow was Adams' cow? (Objected to as incompetent, irrelevant, and immaterial. Overruled; to which the defendant excepts.) A. I suppose it was a white cow. Q. What kind of a cow was the other one,—Tobe Smith's? (Objected to as incompetent, irrelevant, and immaterial. Overruled; to which the defendant excepts.) A. Tobe Smith told me what kind of a cow his was; but I think, as well as I can remember, she was a light-red cow. He did tell me what her brand was, and all about it. (The defendant objects to the answer. Overruled.) "S. B. Henson. Q. Do you know whether or not any one else lost any cattle there at the same time? (Objected to as incompetent, irrelevant, and immaterial. Objection overruled; to which the defendant excepts.) Q. Who was it lost any? A. That gentleman there lost one,—Mr. Adams. (Pointing to a gentleman in the court room.) Q. What kind of a cow did he lose? A. I could not tell you. Q. Did you ever see it? A. No, sir. Q. Who else lost any? (Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.) A. Tobe Smith. Q. What kind of a cow was it? A. I don't know. Q. Do you know whether they got their cows back? A. Mr. Adams got his back, he told me, yesterday. (Objected to,—what Mr. Adams told him. Overruled. Exception.) \* \* \* Q. How do you know, Mr. Henson, that Mr. Adams lost a cow at the same time? A. He told me. Q. You don't know, as a matter of fact, that he lost it? A. No, sir; only what Mr. Pollard told me. Mr. Pollard told me he lost a cow at the same time; she got out of the pen, and he couldn't find her." The above testimony was objected to as being "incompetent, irrelevant, and immaterial," and we are here asked to declare its admission to have been error, for two reasons: (1) Because, under the circumstances of this case, it was an attempt to prove a separate and independent larceny. For the reasons heretofore stated, we hold that this objection should have been sustained. It is not sufficiently shown that the two sets of cattle were taken from about the same place. (2) Because it is hearsay. Upon this point the United States attorney contends that, as this objection was not specifically made at the trial, the court was not bound to notice it. While it is true that all hearsay evidence is incompetent evidence, yet it is the rule that the specific, and not the general, objection should be plainly stated to the court, so that the court's judgment may be fairly obtained in relation to it. But in this case the evidence objected to as being incompetent was so obviously and certainly hearsay that the court, we think, even on its own motion, should have stricken it out.

In the second assignment of error the sidebar remark of the United States attorney is assigned as error. While counsel, in their conduct of a case and in argument, are allowed

some considerable latitude, yet if it can be shown that the remark was improper, and was prejudicial to the defendants' case, and proper objection was made, and overruled by the court, and exceptions were duly saved, this court would not hesitate to reverse because of such an error. In this case, while the defendants objected to the remark, no ruling of the court upon the objection was pressed or had, and no exceptions were saved, and therefore we are not called upon to notice this assignment.

The eleventh assignment of error is as follows: "Eleventh. The court erred in allowing John Howell to be introduced as a witness and to testify in this case, over objection of defendants, after he had testified that he had been in the court room during the trial after the rule had been placed upon the witnesses at the request of counsel for the government; the proof showing that said witness was not, under the law, privileged from the rules." Section 2906, *Manuf. Dig.*, provides that, "if either party require it, the judge may exclude from the court room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of the other witnesses." The exclusion of witnesses from the court room during the trial of a case is left, by this section, in the sound discretion of the court. *Randolph v. McCain*, 34 Ark. 696. When, however, a witness, by inadvertence, has remained within the hearing of the other witnesses during the trial, and is afterwards permitted to testify, the court should, we think, if so requested, instruct the jury that this fact might be taken into consideration by them as affecting the credibility of the witness' testimony; but, as this was not asked, we do not find that the trial court abused its discretion in this matter. For the errors aforesaid this case is reversed and remanded for a new trial.

SPRINGER, C. J., and THOMAS, J., concur. TOWNSEND, J., did not participate in the case.

#### SIMON v. THOMPSON et al.

(Court of Appeals of Indian Territory. Jan. 14, 1898.)

#### EQUITY PRACTICE—REFERENCE—TRIAL ON MERITS—JUDGMENT—FINALITY.

1. Plaintiff alleged that the pledgee of his goods assigned them to a defendant for the benefit of creditors; and he prayed for an order restraining the assignee from selling the property, for the appointment of a receiver, and that an accounting be had of the amount due from plaintiff, and that he be allowed to redeem the goods. On application to the master in chancery for a temporary restraining order, and an order appointing a receiver, the master took testimony, and reported, not only against allowing the interlocutory orders, but also on the facts of the case, and concluded, as a matter of law, that plaintiff was not entitled to the relief prayed for. *Held*, that an order of court confirming such report was a final judgment on the merits, which could not be entered in vacation.

2. The next day after the hearing the judge, in chambers, without notice to plaintiff, confirmed the report. Several months afterwards, plaintiff moved to vacate that judgment, and filed exceptions to the report. On the hearing of this motion the testimony taken before the master was produced, and the court again confirmed the master's report, and entered judgment for defendants. *Held*, that the judgment was erroneous, since there had been no lawful trial on the merits.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Kilgore, May 9, 1896.

Action by Harris Simon against J. B. Thompson and others. From a judgment for defendants, plaintiff appeals. Reversed.

The complaint in this case, filed in the United States court at Purcell December 23, 1895, alleged that about the 15th day of August, 1895, the plaintiff borrowed from the firm of Turk Bros. & Co., of Purcell, Ind. T., the sum of \$2,000, to buy a certain stock of goods and fixtures; that to secure the debt thereby contracted, the plaintiff pledged the stock of goods and fixtures to Turk Bros. & Co., and permitted Turk Bros. & Co. to hold and insure the same in their name; that said stock of goods was replenished from time to time by the plaintiff; that on the 19th day of November, 1895, Turk Bros. & Co. executed an assignment of their property to J. B. Thompson, for the benefit of their creditors, and transferred to him, as a part of their estate, the stock of goods and fixtures mentioned, together with the insurance policies held by them as security for the debt; that at that time, and at the time the complaint was filed, a part of the debt remained unpaid; that defendant J. B. Thompson, as assignee of Turk Bros. & Co., had taken possession of the stock of goods and insurance policies, claiming to own the same as a part of the property of Turk Bros. & Co. conveyed to him in the assignment; that the plaintiff had demanded possession of the goods and insurance policies from J. B. Thompson, who refused to deliver them. The plaintiff prayed that J. B. Thompson be restrained from selling the goods under the deed of assignment, that a receiver be appointed to take charge of the property and manage the business pending the litigation, that an accounting be had of the amount due by plaintiff to defendant, and that the plaintiff be allowed to pay the amount due on the debt owing to Turk Bros. & Co., and to redeem the stock of goods and fixtures, and for such other relief as he may be entitled to. None of the defendants, except J. B. Thompson, as assignee for said Turk Bros. & Co., answered in the case. In his answer, J. B. Thompson, as assignee, denied that Harris Simon ever had any interest or title to the property sued for, or that he ever had possession of any part of it, except as the agent of Turk Bros. & Co., and alleged that Turk Bros. & Co. were the exclusive owners of the property, and conveyed to him the title to the property in the

deed of assignment, and set up title to the same as their assignee. The plaintiff gave the defendants notice that he would apply to the master in chancery for a temporary restraining order, and for the appointment of a receiver. At the hearing in response to this notice the issues between the plaintiff and the defendant were investigated before the master in chancery. The master in chancery filed his report in court, denying the relief prayed for. When this report was filed it was brought up before Judge Kilgore at his chambers in Ardmore, and he made an order confirming the same, and denying the application for the appointment of a receiver, and for the injunction restraining the sale of the goods sued for under the assignment. He further ordered that the costs of the proceedings be taxed against the plaintiff, Harris Simon. At the April term of court, at Purcell, where the case was pending, plaintiff filed exceptions to the master's report, and in connection therewith a motion to require the master in chancery to return into court the testimony taken before him. In response to this motion the master in chancery filed in court the testimony taken before him at the hearing. When the case was called for trial the exceptions to the report of the master in chancery were overruled, and the court proceeded, on defendant's motion, to enter up judgment according to the recommendations in the master's report. To this action of the court the plaintiff duly excepted, and his exception was allowed. A motion for a new trial by the plaintiff was duly overruled, and he has appealed to this court.

J. W. Hocker and Zol. J. Woods, for appellant. W. A. Ledbetter and S. T. Bledsoe, for appellees.

SPRINGER, C. J. (after stating the facts). Counsel for appellant assign the following errors in this case: (1) The court erred in overruling the motion to vacate the judgment, because said judgment was entered in vacation, and not in term time; the hearing of the cause was in chambers, and not in open court; was ex parte; not had at a time and place of which the plaintiff had any notice to appear, or knowledge of the proceedings; because the judgment was rendered without any hearing as to the merits. (2) The court erred in not sustaining the plaintiff's exceptions to the master's report, and in sustaining the motion of defendants to confirm the report of the master, because there was no testimony before the court to support the finding of the master, and the court simply followed the opinion of the master, without inquiring into the testimony upon which such opinion was based; thereby, in effect, delegating the power and authority of a judge to hear and finally determine, to the master. (3) The court erred in overruling plaintiff's motion for a new trial, because a full hearing of the merits of

the case had been denied the plaintiff, and because the judgment of the court was not sustained by any testimony produced before the court. (4) Because the manner of proceeding in this case is wholly unknown to the law and our system of jurisprudence. We will consider these assignments of error in their order.

It seems that the master in chancery, to whom this case was referred by the court, at the hearing of the petition of appellant for a restraining order and for the appointment of a receiver, took certain testimony, and reported, not only on the question of allowing the interlocutory orders, but upon the facts, and accompanied his conclusions of fact with his conclusions upon the law of the case. This hearing was at Purcell, and in vacation. The master stated at the conclusion of his findings of fact as follows: "I conclude, as a matter of law, from the foregoing findings, that the complainant is not entitled to the relief prayed for, and so report." On the following day, at Ardmore, without notice to the plaintiff, the judge, in chambers, passed upon the master's report, confirmed the same, and ordered that the plaintiff forthwith pay all the costs, including a fee of \$50 for Mr. Hobby, the master. The master did not submit to the judge, in chambers, at this time, the testimony upon which he found the facts in the case. When the court assembled at Purcell, the appellant moved the court to vacate the judgment entered in vacation at Ardmore, because the same was entered in vacation, as stated in his first assignment of error above set forth. It is conceded by counsel for the appellees that, if the order in question be considered a final judgment on the merits of the case, it is void, for the reason that it appears to have been entered in vacation. But counsel for appellees further insist that the court's refusal to vacate this order is immaterial, for the reason that the whole matter came up again in open court at Purcell, and a final judgment was there entered in the case. The judgment of the court in vacation at Ardmore confirmed the master's report in all respects; and, the master having reported that the complainant was not entitled to the relief prayed for, this was a final judgment upon the merits, and, having been made in vacation, it was void. Whether this error was cured by the subsequent action of the court at Purcell will appear upon consideration of the second assignment of error.

In the court at Purcell the appellant filed a motion to require the master to return the testimony taken by him, and upon which he had based his report and recommendations, into court; and he also filed exceptions to the master's report, and a motion to vacate the judgment of the court entered in vacation at Ardmore. The master undertook to comply with the motion to require him to supply the testimony, and filed in court what he

testimony produced before him. The appellant then submitted affidavits of the witnesses who testified before the master, and filed them in support of his exceptions to the master's report, which affidavits contradicted the testimony as furnished by the master. The court overruled the motion to set aside the judgment rendered in vacation at Ardmore. The appellees then filed a motion that the master's report be confirmed, which motion was sustained. To this action of the court the appellant excepted. The appellees also moved that they have judgment in the case, and filed the evidence taken before the master in support of their motion. The transcript contains this statement: "Which said motion was opposed by the plaintiff by reason of the affidavits of J. W. Hocker, Harris Simon, and I. Spitzer, and introducing in evidence the notice attached to the original summons herein, all of which are fully set forth in bill of exceptions No. 2; which said motion is sustained by the court, and judgment given for the defendants; to which action of the court the plaintiff excepted, and exception was in open court allowed." The affidavit of J. W. Hocker, to which reference is made, was to the effect that the only matter tried at the hearing before the master was the question as to whether the plaintiff was entitled to the temporary relief sought; that the testimony of the witnesses was not written down at the examination, but that the evidence returned into court by the master was written out by the master over four months after the taking of the same, from his memory, and without talking to the witnesses, or all of them; that the statement of what the testimony was, as shown by the testimony returned, is not as affiant understood the same to be; that affiant understood that the hearing before the master was not on the issues in the case, but only in the matter of granting the temporary order of injunction and appointing the receiver; that the hearing was not a final trial; that affiant did not at the time intend, as counsel for appellant, to enter into a final trial, but simply to ascertain whether or not the temporary relief should be granted. The affidavit of Harris Simon, referred to above, was to the effect that he was one of the witnesses who testified at the hearing on the application for an injunction before the master in chancery, and that the testimony returned into court by the said master as having been given by him was not correct, and that he did not testify in substance as set forth in said report. Notwithstanding the affidavits submitted to the court by the appellant in resisting the motion to enter judgment for the defendants, the motion was allowed, and final judgment entered for the defendants below (the appellees in this case). It is evident from all the facts in the case that the court erred in entering final judgment in this case; that the testimony upon which the same was based had been taken

in a proceeding for temporary injunction, and for the appointment of a receiver; that the real merits of the case had never been investigated; and that the case was not in a condition in which final judgment could be entered. The appellant was entitled to a hearing upon his complaint in equity. He had prayed, in addition to his application for a restraining order and for a receiver, "that an accounting be had of the amount due from plaintiff to defendant; that plaintiff be allowed to pay said amount, and redeem said stock of goods, fixtures, and stores, and such general and special relief as in equity and good conscience, in the premises, the court may deem fit and proper." No opportunity was offered the appellant in the court below to introduce evidence and obtain the judgment of the court upon this prayer. The judgment for defendants on the merits of the case was an error which entitles the appellant to a reversal of the judgment and a new trial.

The third assignment, that the court erred in overruling plaintiff's motion for a new trial, and the fourth assignment, that the proceeding in the case is wholly unknown to the law and our system of jurisprudence, do not require any further consideration, in view of the opinion of the court sustaining the second assignment of error. The judgment of the court below is reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

CLAYTON and THOMAS, JJ., concur.  
TOWNSEND, J., did not participate in the case.

MOFFETT-WEST DRUG CO. v. BYRD.  
(Court of Appeals of Indian Territory. Jan. 14, 1898.)

SALES—FAILURE TO DELIVER—PLEADING—AMENDMENT—EVIDENCE—DAMAGES—DEPOSITIONS—APPEAL—REVIEW.

1. Error in the admission of testimony will not be considered on appeal where no exception was reserved.

2. If exception to the admission of testimony is taken, and nothing is proven upon its admission, the party excepting cannot complain, as he is not prejudiced.

3. In an action for breach of contract to sell and deliver drugs, an allegation in the complaint of special damages for "loss of time occasioned by the defendant's failure to comply with the said agreement" is sufficiently specific to allow plaintiff to prove time spent by him in preparing for, and awaiting the arrival of, the goods, including the expenses of hiring a certain doctor in preparation therefor.

4. For failure to deliver to the buyer drugs shipped to a certain place, there to be delivered to him, damages in loss of time spent by the buyer in preparing for, and awaiting the arrival of, the goods, including the expense of hiring a certain doctor in preparation therefor, the loss being limited to the time elapsing between the arrival of the goods at the place for their delivery and the beginning of an action to recover therefor, are not too remote.

5. The admission in evidence of exhibits to a

deposition taken by defendant, by allowing plaintiff to read the same to the jury, is wholly in the court's discretion.

6. In an action for breach of contract of sale of goods on which \$100 had been paid by the plaintiff buyer, defendant offered to confess judgment for the \$100. The offer was rejected, and the court stated that the records would show that plaintiff had made a claim for the \$100, and, if he should sue for it thereafter, the suit on trial would be a bar to the other suit. *Held*, that such action of the court, which was authorized by the statute or amendments, amounted to an amendment of the complaint, so that plaintiff might recover the \$100.

7. In an action for breach of contract of sale of goods, it appeared that the seller's agent wrote the seller from the place where the goods were to be shipped and delivered to the buyer as follows: "If you think that you want this order on these terms, I think it would be advisable for you to have mortgage made out and forwarded to me, and I will go there, and get it signed and fixed up;" and in the same letter wrote further as follows: "I did not ask him, but presume that if you think that stock and building is not sufficient security, that he would not object to giving us a mortgage on live stock." And the seller, on receipt of this letter, shipped the goods, and then objected to the security. *Held* sufficient to show that the seller's agent and the buyer had agreed on the terms of purchase, and that after the seller acted on the order by shipping the goods, and then objected to the security agreed upon, the buyer had a right to infer an intended breach.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, February 10, 1896.

Action by L. A. Byrd against the Moffett-West Drug Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This was an action instituted on the 2d day of July, A. D. 1895, before Robert L. McClure, United States commissioner for the Northern district of the Indian Territory, at Vinita, by the appellee (plaintiff below), against the appellant (defendant below), alleging that the plaintiff purchased from the defendant a stock of drugs of the value of \$555.85, the terms of payment being \$100 cash when the order was given and purchase made, \$100 payable on the delivery of the goods, balance in two equal payments; notes to be given for 60 and 90 days, one-half each secured by a mortgage on the stock of goods purchased and the store building at Chelsea, Ind. Ter., in which the goods were to be placed, or mortgage on live stock and other property. Plaintiff alleges that he paid the \$100 cash, and upon the arrival of the goods at Chelsea, Ind. Ter., tendered the additional cash amount of \$100; but the defendant refused to deliver said goods to the plaintiff, or any part thereof. Plaintiff further alleges that he further offered to comply with the contract of purchase by executing notes and mortgage as above set forth. Therefore he claims damages for breach of contract, for loss and injury which his credit has sustained by defendant's refusal to comply with its agreement, by loss of time which had been occasioned by said breach, by the dif



ference in the contract price of said goods and carriage to Chelsea, Ind. Ter., and the retail price of said goods less expense of marketing same at Chelsea, Ind. Ter., and demands judgment and damages for the sum of \$300 and costs. On the same day he filed an affidavit and bond for attachment. On the 11th day of July, defendant filed an answer to the complaint, denying that the plaintiff has a just and lawful claim founded upon a breach of contract to deliver goods, denies that the plaintiff is damaged in the sum of \$300 or any other sum, and asks that defendant be discharged with reasonable costs and \$150 damages against plaintiff for his improperly securing the issuance of said attachment. On the same day, the case was tried before the commissioner and a jury, who returned a verdict for \$176.40, and found the issue of attachment for the plaintiff; whereupon judgment was rendered upon the verdict, and for costs, amounting to \$50.95. Defendant appealed. On August 6, 1895, defendant filed his affidavit and bond. Appeal granted, and bond approved. On the 25th day of February, 1896, the defendant moved that Exhibits C, D, E, and F-1 to the deposition of W. G. Sludder, taken on the part of the defendant, be suppressed, which motion, on March 5, 1896, was sustained as to Exhibit D, and overruled as to the balance of the exhibits. On the 10th day of March, 1896, the plaintiff filed an amendment to his complaint, praying for judgment for \$100 paid to defendant, damages for loss of credit by reason of the defendant's refusing to comply with its contract in the sum of \$100, also loss of time occasioned by the defendant's failure to comply with the said agreement in the sum of \$25, also the difference in the contract price of said goods and the value of said goods at Chelsea in the sum of \$75, and for costs of suit. On the same day, the case was tried before the Honorable William M. Springer and a jury, who returned a verdict for \$100, with interest at the rate of 6 per cent. per annum from May 21, 1895, and damages, \$75, and costs, and attachment sustained. On the 12th day of March, motion for a new trial was made and overruled by the court, and judgment rendered upon the verdict. Defendant excepted, and prayed an appeal to the next term of the court of appeals of the Indian Territory, and 30 days was given defendant to file its bill of exceptions. On April 8th, by agreement between counsel, 30 days additional was granted to file a bill of exceptions; and on the 5th day of May the bill of exceptions was signed and sealed, and made a part of the record, and filed. Bond for appeal was filed on March 31, 1896. The bill of exceptions preserves the evidence taken on the trial, and the instructions requested by the defendant to be given to the jury which the court declined to give, but gives the second instruction requested in a modified form. From the evidence it appears that

the plaintiff telegraphed the defendant that he wanted to purchase a stock of drugs from them, and defendant answered that they would send their traveling salesman, Mr. Mittong, to Chelsea, Ind. Ter., to see plaintiff; and they did so, on or about April 16, 1895. The plaintiff and Mr. Mittong agreed upon the goods to be purchased, and how they were to be paid for. The prices were to be fixed in St. Louis, and the plaintiff was to pay \$100 cash,—\$100 when the goods should arrive in Chelsea, and the balance in two equal payments, at 60 and 90 days after date, for which notes were to be executed, to be secured by mortgage on the stock of goods thus purchased and the store building in which the same were to be placed. Plaintiff paid \$100 cash on account to Mr. Mittong, and took his receipt, and on the same day Mr. Mittong sent to defendant the order for the goods. In the letter accompanying the order, Mr. Mittong writes defendant as follows: "If you think that you want this order on these terms, I think it would be advisable for you to have mortgage made out and forwarded to me, and I will go there, and get it signed and fixed up;" and in the same letter writes further as follows: "I did not ask him, but presume if you think that stock and building is not sufficient security, that he would not object to giving us a mortgage on live stock."

John B. Turner and James B. Burckhalter, for appellant. W. H. Tibbils and Denison & Maxey, for appellee.

TOWNSEND, J. (after stating the facts). The appellant has filed eight specifications of error, which are as follows, to wit: "(1) The court erred in permitting Byrd to prove special damages by testifying that he had made special preparation to receive this bill of goods, and go into the drug business by erecting a building at Chelsea. (2) In permitting Byrd to prove special damages by testifying that a part of his especial preparation to receive these goods consisted of hiring Dr. Mathews, and what he paid him. (3) In permitting Byrd to prove special damages by testifying that part of his special damages consisted in nine days' loss of individual time, preparing for and awaiting the arrival of these goods. (4) In admitting certain testimony. (5) In permitting plaintiff to read to the jury Exhibits C, E, and F-1 to W. G. Sludder's deposition, and overruling defendant's motion to suppress the same. (6) In refusing to instruct peremptorily for defendant on the evidence. (7) In refusing to give defendant's instruction (No. 2), which is as follows: 'If you find that there existed between plaintiff and defendant a contract, then the burden of proof is upon the plaintiff to show by a fair preponderance of the evidence a breach of said contract by defendant refusing or neglecting to comply with the terms thereof, and to show what damage, if any,

he sustained by reason of said breach; and, until plaintiff has shown the contract and its breach, he is not entitled to recover the \$100 paid on the contract or any other amount.' (8) In modifying instruction No. 2 so as to read: 'If you find that there existed between plaintiff and defendant a contract, then the burden of proof is upon the plaintiff to show by a fair preponderance of the evidence a breach of said contract by defendant refusing or neglecting to comply with the terms thereof, and to show what damage, if any, he sustained by reason of said breach; and, until plaintiff has shown a contract and its breach, he is only entitled to recover the \$100 paid on the contract; but, if the contract and a breach are shown, the plaintiff is entitled to recover, in addition thereto, such other amount of damages as you may find from the evidence he has sustained.'"

So far as the first specification of error is concerned, it is sufficient answer to say that no exception was reserved to the admission of the testimony, but, if there had been, no sum whatever was proven as an item of damages in that respect.

It is contended by appellant that no allegation of special damage in his complaint covered the items mentioned in specifications of error 2 and 4; but he concedes that the loss of the individual time of plaintiff is alleged as special damages in specification No. 3. The allegation in the complaint is "loss of time occasioned by the defendant's failure to comply with the said agreement." This allegation could cover the time of Dr. Mathews, as well as plaintiff's individual time, and also plaintiff's time on his trip to Vinita, to which specifications of error Nos. 2, 3, and 4 refer. But appellant argues that all such damages are too remote even had they been specially alleged. We cannot concur in this view. The court was particularly careful to limit the time to a period between the 6th day of May and the 20th day of May, it being the time that elapsed between the arrival of the goods at Chelsea and the instituting of this action. These items of damage, though small in amount, were the natural and proximate result of the shipment of the goods under the contract of purchase, and their arrival at destination, where plaintiff was to receive them.

Specification of error No. 5 goes to the refusal of the court to suppress Exhibits C, E, and F-1 to W. G. Sludder's deposition. This was a deposition taken by appellant itself of a trusted employé, known as its "credit man," to be used on the trial of this cause. This was wholly in the discretion of the court, and if, in the opinion of the court, these exhibits threw light upon this transaction, it was not only in his discretion, but eminently proper that he should admit them.

Specification of error No. 6 need not be considered. That there was evidence of damage that properly went to the jury there can be no question. There was evidence

that was properly admitted showing the difference between the contract price in St. Louis and the market value at Chelsea, Ind. Ter., at time of delivery, which would account for almost all the damage found by the jury in their verdict; and the question whether there was a contract existing between the parties and a breach of the same was fully and fairly submitted to the jury by the court.

The seventh and eighth specifications of error can very properly be considered together. They relate to the refusal of the court to give instruction No. 2 as requested by appellant, and the giving of the same in a modified form. The court gave the following, as requested by appellant's request No. 2: "If you find that there existed between plaintiff and defendant a contract, then the burden of proof is upon the plaintiff to show by a fair preponderance of the evidence a breach of said contract by defendant refusing or neglecting to comply with the terms thereof, and to show what damage, if any, he sustained by reason of said breach; and, until plaintiff has shown a contract and its breach, he is"—and refused to give the following words at the close of appellant's request No. 2, to wit, "not entitled to recover the \$100 paid on the contract or any other amount," and in place of them substituted the following words, to wit, "only entitled to recover the \$100 paid on the contract, but, if the contract and a breach are shown, the plaintiff is entitled to recover, in addition thereto, such other amount of damages as you may find from the evidence he has sustained." On page 39 of the transcript, during the examination of the appellee, appears the following: "Counsel for the defendants offer to confess judgment for the one hundred dollars, which offer plaintiff, by his counsel, refused to accept. The Court: The records will show that the plaintiff has made a claim for this \$100, and, if they should sue for it hereafter, this suit will be a bar to the other suit." This action of the court, which is fully authorized by the liberal statute of amendments of Arkansas, and now in force in this territory, amounted to an amendment to plaintiff's complaint, and justifies the charge of the court as made in giving plaintiff's request No. 2 as modified. It is perfectly evident from an examination of the letter of Mr. Mittong to the appellant when the order for these goods was sent in to it that both he and the appellee had come to a full understanding in regard to the purchase of these goods and terms of payment; and, had appellant fully advised its counsel of that correspondence, it is very questionable if this suit would ever have been necessitated; but when they acted upon the order, and shipped the goods, and then commenced their objections to the security agreed upon, we think the appellee was justified in the conclusion that appellant did not intend to carry out the contract. The terms of the contract should have been settled before the goods

were shipped, if appellant did not propose to accept it. We are of the opinion from an examination of all the evidence that substantial justice has been done, and therefore the judgment below is affirmed.

CLAYTON and THOMAS, JJ., concur.

STATE ex rel. ATTORNEY GENERAL v.  
HARRISON.

(Supreme Court of Missouri, Division No. 1.  
Jan. 21, 1898.)

Concurring opinion.

For majority opinion, see 41 S. W. 971.

BARCLAY, C. J., concurs in the result, for these reasons:

The record of the county court does not show that the appointment of the members of the county institute board was made without the advice of the school commissioner. We therefore should assume that it was made with said advice, and according to law, as all public officers are presumed to have acted rightly, till the contrary appears. On certiorari to review an appointment of this sort, the record is the only matter to be considered; and where it shows that the court had power to make the appointment, and certainly where it also falls to show any deviation from the course marked out by law for making the appointment, the latter cannot be quashed for any matter outside the record under review. Whether or not the power exercised in such an appointment is judicial or administrative seems to me immaterial; for, even assuming it to be judicial (as the moving parties here claim), the certiorari should nevertheless be quashed, for the reasons above given.

CITY OF LOUISVILLE v. MULDOON et al.

(Court of Appeals of Kentucky. Dec. 4, 1897.)

APPEAL—TIME FOR ALLOWING—COMPUTATION—  
SUPRESEDEAS—VALIDITY.

1. The trial court has no power to grant an appeal after the expiration of the term during which the judgment was rendered.

2. A supersedeas bond executed to stay proceedings under a judgment, the right to appeal from which does not at the time exist, is ineffectual, and not binding upon the party executing it.

3. There is no judgment in fact upon a verdict until the motion for a new trial is decided.

4. The 60 days during which, by virtue of Civ. Code, § 968, a court having continuous session has power to grant an appeal, do not begin to run until the order upon a motion for a new trial is made.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Action between the city of Louisville and M. Muldoon and others. From a judgment for the latter, the former appealed. The ap-

peal was dismissed, without opinion, and appellant petitions for a rehearing. Petition overruled.

Henry L. Stone, for appellant. T. L. Burnett and Barnett, Miller & Barnett, for appellees.

LEWIS, C. J. The appeal in this case was, October 29, 1897, on motion of appellees, and because the transcript of the record had not been filed within the time required by Civ. Code, § 738, dismissed, with damages. November 30, 1897, appellant filed a petition for rehearing of, and overruling, the motion to dismiss, upon the ground that the order of the lower court granting the appeal was null and void, and consequently the supersedeas bond is unenforceable. It has, as argued by counsel, been definitely determined by this court that the trial court is without power, after expiration of the term during which a judgment was rendered, to make an order granting an appeal therefrom to this court. And, if so, it would seem to follow a supersedeas bond executed to stay proceedings under a judgment, the right to appeal from which does not at the time exist, is superfluous and ineffectual, and, being so, should not be treated as binding upon, or enforceable against, the party executing it. Indeed, it has been more than once so held by this court. Civ. Code, § 734, provides: "The mode of bringing the judgment of an inferior court to the court of appeals for reversal or modification shall be by an appeal which shall be granted as a matter of right to a party or privy against a party or privy, by the court rendering the judgment on motion made during the term at which it is rendered, or thereafter by the clerk of the court of appeals on the application of either party or his privy." And by section 968 it is provided that a "court having continuous session shall have control of its judgment for sixty days as circuit courts have over their judgments during the term in which they are rendered." The Jefferson circuit court, where the present action was pending, being one of continuous session, it had no power to grant the appeal in question 60 days after the judgment was rendered. Said judgment was in one sense actually rendered January 14, 1897, while the order granting the appeal was not made until April 7, 1897,—after more than 60 days. But it was distinctly held in Louisville Chemical Works v. Com., 8 Bush, 179, when the precise question before us was considered, that "there is no judgment in fact upon the verdict of a jury until the motion for a new trial, if made in proper time." Fixing the date of the order or judgment overruling the motion for new trial of this case as the time when the limitation of 60 days began to run, which was February 27, 1897, as, according to the ruling in the case cited, should be done, that period had not ended when

the order granting the appeal was made, and the lower court had power to make it. The petition for rehearing is overruled.

### WILLIAMS v. SAX.

(Court of Chancery Appeals of Tennessee.  
July 7, 1897.)

VENDOR'S LIEN — CROSS BILL — DISCRETION OF TRIAL COURT.

1. In a suit to enforce a vendor's lien, and to recover a balance of the price, the action of the chancellor in refusing to allow a cross bill to be filed by the defendant, several years after he had answered in the case, setting up facts which defendant had known for 12 months, is discretionary, and will not be reviewed.

2. Failure of title is no defense to a bill to enforce a vendor's lien.

Appeal from chancery court, Sequatchie county; T. M. McConnell, Chancellor.

Action by Isaac Williams against Max Sax to enforce a vendor's lien on a tract of land. Decree for plaintiff. Defendant appeals. Affirmed.

W. D. Spears, for appellant. Byron Pope, for appellee.

BARTON, J. This bill was filed on February 28, 1891, to enforce a vendor's lien on a tract of land in Sequatchie county, and to recover a balance of the purchase money of \$114.28, with interest from March 1, 1887. To this bill the defendant, Max Sax, filed an answer, in which he stated that, as trustee for E. F. Colyar and others, he had bought the lands in question from the complainant, for which the complainant had executed his deed, with general warranties; that the land was originally the property of the father of the complainant, who had died intestate, leaving seven heirs; that the complainant claimed one-seventh by inheritance, and four-sevenths as purchased from a brother and sisters; that for two of the shares complainant had title, viz. the share bought from his brother and his own share; that the three shares he claimed to own by purchase from his sisters he had no title to; that, at the time of the execution of the deed by the complainant to the respondent, it was agreed between them that complainant would procure and perfect his title to the three-sevenths claimed to have been purchased from his sisters, to which his title was not perfected, and, when so perfected, the balance of the money was to be paid, and it was averred that he had not yet complied with this agreement, and that title to these three-sevenths was outstanding; that the respondent would not have made the purchase but for this promise and agreement to perfect the title. After the filing of this answer, the cause was continued from term to term by consent. On the 10th of September, 1896, Max Sax, by his solicitor, in open court, presented to the chancellor a cross bill, and an original

bill in the nature of a cross bill, and moved the court to be allowed to file the same; which motion the chancellor overruled, and refused to allow the bill to be filed, giving as his reasons that the court was of opinion that too much time had elapsed since the filing of the original bill, and too much time had elapsed since the older and superior title referred to in the cross bill had been discovered. To this action the defendant excepted. Thereupon a decree was entered which recites that the cause came on to be heard on the 10th of September, 1896, before the chancellor on the record; and it was decreed that the complainant recover of the respondent the sum of \$114.28, with interest from March 1, 1887, amounting in all to \$189.58, which amount was decreed to be a lien on the land, which was directed to be sold. The land was sold by the master as decreed, and brought amount of debt and costs; the sale reported; and at the March term, 1897, the sale was confirmed, and the title divested and vested. From this decree the defendant, Max Sax, prayed an appeal and assigns errors; the first error assigned being the action of the chancellor in refusing to allow the cross bill presented to be filed.

The allegations of this cross bill, in substance, are as follows: It first sets out the filing of the original bill, and the answer in this case, and, among other things, the allegation of the answer that, when Williams perfected his title to the three-sevenths interest by getting proper and legal deeds from his sisters, Sax was to pay him the balance due on the land, and not before. This balance was the amount sued for by Williams in the bill. The bill further alleges that Williams was insolvent; that the complainant Sax was only acting as trustee for others, and had no personal interest in the matter; that since the bill was filed by Williams the title to the land had been divested out of him, the complainant, and vested in the complainant who joined in this cross bill, the Sequatchie Valley Land Company; that the case had been continued along from time to time, pending negotiations for a compromise, until very recently. — a little over 12 months ago, — when it was unexpectedly developed, by surveys made by one M. E. Deacons, that the complainant not only did not get a title to the three-sevenths interest in this land by reason of the defective deeds from Williams' sisters, but complainants got absolutely no title to any part of the land, the same being entirely covered up and embraced in grants known as the "Barrel Grants," which were older titles; that these facts had been discovered since the filing of the answer in the above case, and very recently, except as to the lap of 100 acres on what was known as the "School Field Grant," by grant known as the "Riddle Grant"; that after the discovery

had been made the case was continued over, and no preparation had been made to try the case, because it was expected that the suit would be compromised without incurring cost; that at the time of the purchase the complainants in this cross bill had no knowledge whatever of the conflict with the Barrel grants; that the complainant Sax paid to the original complainant Williams \$285.72, retaining \$114.28; that Williams made to Sax a warranty deed to the land, with full covenants of seisin and against incumbrance; and that he had breached each of these covenants. The prayer of the bill was that the complainants be allowed to file the bill as a cross bill, and an original bill in the nature of a cross bill, and that the complainants have a decree against Williams for the full amount of the money paid, with interest, and that this be decreed a lien on any part of said land, if it should be found that Williams could make title to or had an interest in any part of it, and that the land be decreed to be sold for its payment.

We are of the opinion that there was no reversible error in the decree of the chancellor in refusing to allow this bill to be injected in this suit and filed as a cross bill. Matters of this kind are in the discretion of the chancellor, and his action will not be reversed by us, except for an obvious abuse of that discretion, which does not appear in this case. On the allegations of this cross bill, as presented, it would appear that the matters complained of had been known for more than 12 months before this cross bill was prepared and presented. There are vague allegations as to the compromise propositions, it being said that it was expected that the case would be compromised and costs saved. Who expected it, or why, is not stated. These allegations were entirely insufficient to excuse the long delay. The original bill was simply a bill to enforce a vendor's lien on the lands in question, and the matters of defense set up in this cross bill are simply that there was a failure of title. But these do not constitute a valid defense to enforce a vendor's lien. While the facts stated in the cross bill offered might be a good ground for rescission on an independent bill, still they are not a defense to the bill to enforce a vendor's lien, so far as subjecting the land for sale is concerned. It was not an effort to abate purchase price, but to resist whole recovery, and to recover back amount paid. This can be reached by independent action on covenants of deeds, and, as the land has been sold for enough to pay balance sought to be recovered, no harm has resulted. At least, it is a case where it was within the chancellor's discretion whether he would allow the case to be further delayed by the interposition of this cross bill, and we think the discretion was properly exercised.

In *Clark v. Carlton*, 4 Lea, 458, a similar case, our supreme court said, through Judge

Cooper: "The chancellor was undoubtedly right in all these rulings. It was in his discretion, even if the application disclosed a proper case for a cross bill, to refuse to stay the trial of the original cause. *Brown v. Bell*, 4 Hayw. 287. The grounds of the proposed bill were that there were defects not specified in the complainant's title, and an incumbrance on the land which is specified. A mere averment that there are defects of title, without stating facts from which the court can see that defects do exist, is, of course, mere sound, signifying nothing. But the authorities are uniform that a defect of title is no defense to a bill to enforce the vendor's lien. *Hurley v. Coleman*, 3 Head, 205; *Curd v. Davis*, 1 Helsk. 574; *Jones v. Fulghum*, 3 Tenn. Ch. 200. It may be a defense to a money decree for the surplus after exhausting the property, under some circumstances, but the chancellor expressly reserved the rendition of a formal decree until after a sale of the property. Ordinarily, the vendee in possession under a deed must rely upon the covenants of his deed. *Topp v. White*, 12 Helsk. 175. The existence of an incumbrance would be matter for an original, not a cross, bill, and could be of no avail, except as a set-off to a money decree. *Cohen v. Woollard*, 2 Tenn. Ch. 686." See, also, *Jones v. Fulghum*, 3 Tenn. Ch. 200.

There is nothing in the second objection that there was no proof to show amount due. The statements of the bill on this subject are, in effect, admitted in the answer. There is no error in the decree of the chancellor, and it will be affirmed, with costs.

Affirmed orally by supreme court, November 16, 1897.

## HARRIS v. LEMMING-HARRIS AGRICULTURAL WORKS.

### LEMMING v. SAME.

(Court of Chancery Appeals of Tennessee.  
Oct. 10, 1896.)

#### CORPORATIONS — SALARIES OF DIRECTORS — WORK AND LABOR.

1. A director of a corporation cannot, by his own, or the votes of those representing his interest in the directorate, vote and secure to himself an exorbitant salary; but he will be required to act in the utmost good faith, and in the interest of the stockholders whom he represents.

2. In a suit for services rendered by plaintiff as superintendent of defendant's works, where the weight of the proof shows that the services were necessary, that he served during the time for which he charged, and that his services were reasonably worth the amount claimed, the decree of the chancellor in his favor will be affirmed.

Appeal from chancery court, Roane county; H. B. Lindsay, Chancellor.

Suits by C. W. Harris and Florence D. Lemming against the Lemming-Harris Agricultural Works for services rendered. The suits were consolidated. From a decree for plaintiffs, defendant appeals. Affirmed.

Otto Fischer, for appellant. McKinzie & Carr and R. B. Cassell, for appellee.

BARTON, J. These two consolidated causes involve suits brought by the complainant and Florence Lemming, as the assignee and representative of J. J. Lemming, deceased, against the defendant, a manufacturing corporation located at Harriman, in Roane county, for charges alleged to be due them by account; the charges in the account being mainly for services rendered by Lemming and Harris to the defendant. By agreement of parties the causes were consolidated in the court below, and heard together; the evidence taken in each case being used interchangeably in the other. Proof was taken, and the cause heard, and a decree rendered by the chancellor in favor of the complainants, from which the defendant company appealed to the supreme court. Since the appeal the Florence Lemming cause has been settled, and the cause is now pending before us only as to the claim of the complainant Harris.

Charles W. Harris filed his bill on July 3, 1895, against the defendant company; exhibiting his account, and claiming a balance due him from the defendant of \$608.18. Most of the items of charges consisted of wages or salary alleged to be due him for services rendered by him, under contract of employment with the defendant, from the 8th day of October, 1894, to June 24, 1895, during which time, he alleges, he was in the service of the defendant company, under employment by contract at a salary of \$125 per month, as president and general manager of the company, which he alleges was also reasonable and fair, and that the amount was justly due, owing, and unpaid. The defendant, in its answer, denies the justice of the account; basing its denial principally upon the ground that the complainant, who is a director, fraudulently and unlawfully voted himself, by the assistance of J. J. Lemming, another director, who was also interested in the resolution passed, an exorbitant salary of \$125 per month. The right of such directors to vote themselves salaries is questioned and denied, and it is alleged that the amount voted was exorbitant and unreasonable; that a salary of \$60 per month would have been sufficient. It is denied that there is anything due him, legally or justly. As before stated, the decree was in favor of complainants, and the defendant appeals, and assigns errors here. There are two different sets of assignments of errors filed by different counsel for defendant, but both presenting the same points, and composed of two assignments which are objections to the decree of the chancellor. The first is that the chancellor erred in sustaining the action of the board of directors in voting salaries to C. W. Harris, as president, and to J. J. Lemming, as general manager, of \$125 per month each; and the second, that the chancellor erred in allowing the complainant \$125 per month as salary, which amount

was excessive and unreasonable compensation for the work done, on a quantum meruit.

The facts are: That the defendant company is a successor or reorganization of a previous partnership, in which most of the present stockholders of the defendant company were interested. The assets of the previous concern were purchased, and the present defendant company organized, in September, 1894. At that time the stock of the company was represented about as follows: J. J. Lemming, \$5,500; L. D. Lilly, in trust for J. J. Lemming, \$100; W. A. Rockwell, \$4,500; C. W. Harris, \$2,600; W. H. Canard, \$100. Afterwards, on February 8, 1895, other stock was subscribed for as follows: L. W. Kelly, \$5,000; C. W. Harris, \$900; J. J. Lemming, \$900. At an adjourned meeting of the board of directors held on October 15, 1894, at which all of the directors of the corporation were present, except D. Gibson, a resolution was passed unanimously employing J. J. Lemming as general manager at a salary of \$125 per month, and C. W. Harris was employed as superintendent at the same salary of \$125 per month, to begin October 1, 1894; and they were authorized to act in their respective capacities (having been elected at a previous meeting), on said salaries, until the next annual meeting, which was set for June 24, 1895. As stated, there were present at this meeting all of the directors, except Gibson, to wit: J. J. Lemming, C. W. Harris, L. D. Lilly. (who held a share as trustee for Lemming), and W. A. Rockwell. The salary of \$125 per month was voted to Lemming, the weight of the evidence tends to show, without objection. The resolution fixing the salaries was a joint one, but, before adoption, the amount to be paid each was separately discussed and settled. Rockwell, who is one of the present stockholders, and one of the present management instigating the defense to the present suit, first made an objection to the amount proposed to be paid to the complainant Harris; but, upon Mr. Harris stating that he would not serve for less, Rockwell withdrew the objection, and the resolution was unanimously passed. Harris continued in the employment of the company as superintendent without serious objection, and with the notice and knowledge of all the stockholders and directors, until June 24, 1895, when the management was changed and he was ousted, when the company refused to pay the amount of his claim, and this suit was brought.

It is earnestly insisted on behalf of the defendant that the vote by these interested directors and by Mr. Lilly, who represented the interest of Mr. Lemming, was a fraud upon the stockholders, and illegal and void, and that the salaries voted and charged were unreasonable and exorbitant; and we are furnished with an elaborate discussion and citation of the law and authorities upon this point. But we do not consider it necessary to pass upon this, as we are satisfied that the cause can be more properly settled on another

point; stating, however, that we understand and hold the law to be that a director of a corporation cannot, by his own, or the votes of those representing his interest in the directorate, vote and secure to himself an exorbitant salary; but he will be required to act in the utmost good faith, and in the interest of the stockholders whom he represents.

On the other point it is insisted (on the question of quantum meruit) that the amounts charged by Harris were grossly exorbitant and unreasonable, and that his services were only worth \$60 per month. It is not questioned that he was in the employment of the company during the time for which he has charged. On this point the decided weight of the proof is that the services rendered by Harris as superintendent were proper and necessary, that he served the company during the time for which he has charged, and that his services were reasonably and fairly worth \$125 per month,—the amount charged. And this we find as a fact, without going into a long discussion of the details of the evidence. It is apparent that in this suit there has been a contest between stockholders for the mastery and control of this corporation, and a great deal of bitterness and bad feeling have resulted. There is evidence going to show that, during a part of the time for which Harris has charged, the plant was not in operation, and that the services rendered were not needed; and it is a point contested with much bitterness, and a large expense of time, energy, and paper, as to whether or not the corporation, during his administration, was run at a loss or a profit. How this is, we deem it unnecessary to settle; but we do find that it was both necessary and proper for the management of such a concern as the defendant company to have had a superintendent, and it was a necessary result that such superintendent, outside of any question of employment, would not properly have been discharged for reason of temporary stoppage; and we find that he gave his time, energy, and attention to the business of the company, and, as stated, that his services were reasonably worth the amount charged, of \$125 per month. This finding is conclusive of this lawsuit, without regard to the other questions raised and discussed with so much learning and energy. The decree of the chancellor will therefore be affirmed, with costs.

NEIL and WILSON, JJ., concur.

#### Opinion on Petition to Rehear.

BARTON, J. This is before us on a petition to rehear, and we are asked to reverse our findings on the principal issues of fact heretofore passed on. Counsel for petitioner are under the impression that we overlooked much of the evidence for defendant, and gave undue weight to that for the complainant. The case was argued orally before us

on these very questions at much length, and in detail, and with great earnestness and ability; voluminous and able briefs and arguments were filed, and have been read by us with care and attention; and it is a mistaken impression that counsel have, that any part of the testimony escaped our observation and consideration. That we may have given undue weight to some testimony is a possibility incident to all human testimonials, but we carefully read all this immense record, of about 800 pages, as well as all the arguments; and the opinion announced is the result of our deliberate judgment, after the best consideration we could give to a case ably presented by both sides. It is, of necessity, a question that is not capable of ascertainment with scientific exactness, but must, to a certain extent, always be one of estimate. We endeavored to weigh the statements of all the witnesses, considering their interests, prejudices, means of knowledge, capability of judging, etc., in connection with what was proven as to the character of complainant, his qualifications, etc., the nature and necessities of the position he occupied, etc., the conduct of all the parties interested, etc., and in fact all competent evidence bearing legitimately on the question, and came to the conclusions previously announced. After a careful reading of the petition to rehear, and consideration of the reasons then presented, we are not able to change our conclusion. It is true that our opinion, in length, is not proportioned to the record before us; but the issue presented was brief and simple, and it would have served no good purpose, nor will it now, to go into a detailed discussion of the testimony and character of the different witnesses. The able discussion presented in the briefs of opposing counsel rendered this entirely unnecessary. We clearly announced our conclusions, which remain unchanged, and the petition to rehear will be dismissed.

WILSON and NEIL, JJ., concur.

Affirmed orally by supreme court, November 13, 1897.

#### COOPER v. YOAKUM.

(Supreme Court of Texas. Jan. 13, 1898.)

WRIT OF ERROR—TIME OF TAKING—STATUTES—CONSTRUCTION.

1. Under Rev. St. 1895, art. 1389, providing that a writ of error may be sued out at any time within 12 months after the final judgment is rendered, and not thereafter, the 12 months begin to run from the rendition of the main judgment, and not from the order overruling a motion for a new trial.

2. Where words in a legislative enactment have been construed by the court, the legislature, in using the same words in a subsequent statute on the same subject-matter, must be presumed to have intended to employ them in the same sense.

Certified questions from court of civil appeals of Fourth supreme judicial district.

Action by A. G. Cooper against B. F. Yoakum. From a judgment for defendant, plaintiff sued out a writ of error to the court of civil appeals, which certified questions to this court. Opinion certified.

H. E. Vernor, Clark & Fuller, and C. S. Robinson, for plaintiff in error. Houston Bros. and Franklin & Cobbs, for defendant in error.

GAINES, C. J. The following questions have been certified for our determination by the court of civil appeals for the Fourth supreme judicial district: "The petition for writ of error was filed on April 24, 1897. The judgment was rendered on March 9, 1896. The order overruling plaintiff in error's motion for new trial appears in the minutes of the district court, of the date April 24, 1896, and reads: 'In this cause, this day, came on to be heard defendant's motion for a new trial, which motion, after being duly considered by the court, was by the court overruled, to which ruling of the court defendant in open court excepted, and gives due notice of appeal.' A motion is filed on behalf of defendant in error, in this court, to dismiss the writ of error because not sued out in time. In connection with this motion it is shown that the order was in fact made on April 22, 1896, by a certified copy of the entry of the district judge on his motion docket as follows: 'Motion overruled, to which plaintiff excepts, and ten days' leave given to file statement of facts. 4/22/96.' This court finds from the evidence before it that the 22d of April, 1896, was in fact the date upon which the judge overruled the motion. (1) Should the writ of error have been sued out within twelve months from the rendition of the main judgment? (2) If not, then is the date upon which the minutes show the judgment overruling the motion for new trial to have been rendered conclusive of the date from which the twelve months allowed within which to sue out a writ of error, are to be computed?"

We are of the opinion that the first question certified should be answered in the affirmative. Section 142 of the act of May 13, 1846, "to regulate proceedings in the district court," provided that "no writ of error shall be granted after the expiration of two years from the rendition of the judgment. \* \* \*" Pasch. Dig. art 1496. In *Waterhouse v. Love*, 23 Tex. 560, this statute was construed, and it was there held that under it the writ of error should have been sued out within two years from the time at which the main judgment was rendered. In this opinion, speaking of the provision quoted above, the court say: "The language is too plain to be mistaken. It bars the remedy at the expiration of two years from the 'rendition of the judgment.' The rendition of the judgment is an independent

fact, distinct from the adjournment of the court, from other proceedings at the term, and in the same case; and it is from the happening of this fact that the two years are to be computed. This is the plain meaning of the language of the statute. A previous section of the same act provides, in case of appeal, that the appeal bond shall be given 'within twenty days after the term of the court at which the judgment or decree was rendered,' showing that the legislature had in mind the distinction between the date of the judgment and of the adjournment of the court." The language of the present statute, in so far as it affects the point before us, is not different in substance. It reads as follows: "The writ of error may, in cases where the same is allowed, be sued out at any time within twelve months after the final judgment is rendered, and not thereafter." Rev. St. 1895, art. 1389. That the final judgment which is meant is the judgment proper in the case, and not the order overruling a motion for a new trial, is made manifest by the second preceding article of the Revised Statutes in relation to appeals. That article reads, in part, as follows: "An appeal may, in cases where an appeal is allowed, be taken during the term of the court at which the final judgment in the cause is rendered, by the appellants giving notice of appeal in open court within two days after final judgment, or two days after judgment overruling a motion for a new trial," etc. Id. art. 1387. It is quite clear that the legislature did not intend to use the words "final judgment" in one sense in article 1387, which fixes the time within which notice of appeal is to be given, and in a different sense in article 1389, which defines the date from which the 12 months are to be computed within which the writ of error is to be allowed. Besides, those words, as used in the act of May 13, 1846, having been construed by this court, the legislature, in using the same words, as applicable to the same subject-matter in article 1389, must be presumed to have intended to employ them in the same sense. Our opinion will be so certified.

DENMAN, J., did not sit in this case.

#### BOWEN et al. v. LANSING WAGON WORKS.

(Supreme Court of Texas. Jan. 13, 1898.)

CHattel Mortgages — Liens — Stocks of Merchandise — Reservation of Title in Vendor — Burden of Proof — Sufficiency of Consideration.

1. Rev. St. 1895, art. 2548, providing that every mortgage, attempted to be given by the owner of any stock of goods, daily exposed to sale in the regular course of business, and contemplating a continuance of possession of said goods and control of said business by sale of



said goods by said owner, shall be deemed fraudulent, does not apply to an agreement between a retail merchant and a manufacturer, whereby goods shipped to the merchant are to remain the property of the manufacturer until they are settled for in a manner stipulated in said agreement.

2. Rev. St. 1895, art. 3327, provides that all reservations of title to property in chattels as security for the price shall be held as chattel mortgages, and void as to creditors and bona fide purchasers, unless registered, where possession is delivered to the vendee. Section 3328 provides that a chattel mortgage which is not accompanied by immediate delivery, and is not followed by an actual change of possession of the property mortgaged, shall be void as against creditors, subsequent purchasers, mortgagees in good faith, etc. *Held* that, under these sections, holders of claims secured by a mortgage on the stock of a retail merchant are entitled to priority over a manufacturer who had shipped goods to the merchant, but had, by an unrecorded agreement, reserved in himself the title to the goods.

3. Before claimants secured by a mortgage on the stock of a retail merchant can enforce their claims to priority over a prior unrecorded lien, under Rev. St. 1895, arts. 3327, 3328, they must show a consideration advanced, and that they had no notice of the unrecorded lien; and a pre-existing debt, where there is no extension of time, is not a sufficient consideration to support such claim.

Certified questions from court of civil appeals of Third supreme judicial district.

Action by Lansing Wagon Works against R. S. Bowen and others. Certified questions.

Sims & Snodgrass, for appellants. J. B. Scarborough, for appellee.

DENMAN, J. In this cause the court of civil appeals of the Third supreme judicial district has certified to us the following questions and explanatory statement: "This suit was brought October 6, 1896, by the Lansing Wagon Works, a corporation doing business in Lansing, Mich., against appellants, R. S. Bowen and B. H. Pittman, on certain promissory notes executed by Bowen to the company, and to foreclose a lien on certain wagons. There was an agreement between plaintiff and defendant Bowen, as shown by letter of the plaintiff to defendant dated February 22, 1896, indorsed by defendant, March 2, 1896, by which the latter accepted the terms of the contract that the company should ship to defendant, at Waco, Tex., wagons, and that all wagons so shipped were to remain the property of plaintiff until he (Bowen) settled for them, as follows: Upon the arrival of the goods, defendant Bowen was to give plaintiff his note for the purchase price of the wagons, and when he sold any of the wagons he was to forward to plaintiff his customers' notes, to be held by it as collateral security for the purchase price. The notes sued on were given by defendant for wagons shipped to him by plaintiff pursuant to the foregoing agreement, and the wagons upon which plaintiff sought to foreclose the lien were wagons shipped under the agreement. Not having been sold by Bowen, these wagons had not been settled for, as provided in the agree-

ment, and they were consequently the property of the plaintiff. It was agreed that the amount due at the time of trial on notes of defendant Bowen to plaintiff was \$984, principal and interest, and \$98.40 attorney's fees, for which the suit was brought. The contract between plaintiff and defendant was never authenticated, deposited with the clerk, or registered as a chattel mortgage. Bowen was engaged in the business of buying and selling, by retail, wagons, buggies, surreys, phaetons, harness, cultivators, plows, and a general implement business in the city of Waco, McLennan county, and was so engaged when he procured the wagons in question in this suit; and it was understood between him and plaintiff, at the time the contract between them was made, and at the time he got possession of the wagons, that they were to be by defendant Bowen daily exposed for sale in the said business at retail, and to sell them in the usual course of business; and he did keep them in his stock, and daily exposed and offered them for sale by retail in Waco, from the time he received them until they were turned over to the trustee under the trust deed hereinafter mentioned. The wagons involved in this suit were wagons delivered to Bowen under his contract with plaintiff, and these he exposed for sale, as stated, with other stock in trade. Neither the trustees, nor the beneficiaries under the trust deed, had any notice of plaintiff's rights under the contract until this suit was brought. On the 14th day of September, 1896, Bowen made, executed, and delivered a certain deed of trust to Perry Jennings, as trustee, of McLennan county, conveying all the property in question in this suit upon which plaintiff seeks to establish and foreclose a lien, as well as other property, for the purpose of securing certain creditors named in class A in the payment of their pre-existing debts due and owing them by Bowen, and also in class B, the creditors in class A to be preferred to those named in class B; providing that the trustee should sell the property and pay the creditors named, and stipulating that when the debts were paid, if there was sufficient of the property to do so, and all expenses of executing the trust, the residue of the same, or its proceeds, should be delivered to him (Bowen). Perry Jennings immediately, on the same day, took possession of the property mentioned in the instrument, and proceeded to execute the same immediately, and the creditors beneficiary, as named in class A, except one, before suit, duly accepted the benefits of the deed, after which Jennings refused longer to act as trustee, and resigned. Whereupon the county judge of McLennan county, as provided in the deed, duly appointed B. H. Pittman, of McLennan county, trustee to execute the trust, as substitute trustee; and he thereupon immediately took possession of the goods mortgaged by the trust deed, and proceeded to execute and carry out its provisions. On the day of its exe-

cution the deed of trust was deposited with the county clerk, and filed and registered in the office of the county clerk of McLennan county, Tex., as directed by law, in case of filing, depositing, and registering chattel mortgages. It was proved that the goods mortgaged by the deed of trust were not of value more than sufficient to pay the expenses necessary to be expended in carrying out the trust, and to pay the creditors who had accepted its terms, as named in class A. The wagons mentioned in plaintiff's petition were, at the time the suit was filed, in the possession of the trustee, Pittman, in Waco, and were by him, by consent of plaintiff, sold, and the proceeds of the sale, \$426, were held by him, subject to the decision in this case. The court below, trying the case without a jury, found the facts substantially as stated above, and decided that the legal effect of the contract between plaintiff and defendant Bowen was to create a lien in favor of plaintiff against the wagons in the hands of Bowen, and that, inasmuch as he could not convey a greater right thereto than he possessed, the conveyance made by him by the trust deed was subject to plaintiff's lien; that as neither the trustee nor the beneficiaries under the deed of trust had paid any consideration therefor, but simply accepted the same, as security for pre-existing debts, surrendering no rights which they theretofore held at the time of the conveyance, the rights of the parties thereunder were subject to plaintiff's lien. The court rendered judgment for plaintiff for the amount of its debt, \$1,082.40, and that Pittman pay into the registry of the court, for the benefit of plaintiff, the proceeds of the sales made by him, the \$426, which was directed to be paid to plaintiff. Judgment was accordingly so rendered, and the defendants have appealed. We propound the following questions to the supreme court, arising in this cause, which is now pending in this court: Does section 17 of the assignment law of 1879, declaring that 'every mortgage, deed of trust, or other form of lien, attempted to be given by the owner of any stock of goods, wares or merchandise, daily exposed to sale in parcels in the regular course of business of such merchandise and contemplating a continuance of possession of said goods, and control of said business by sale of said goods by said owner, shall be deemed fraudulent and void,' apply to the lien asserted by the plaintiff, and should it be enforced in this case? 2 Sayles' Civ. St. art. 65r; Rev. St. 1895, art. 2548. If the court holds that the article of the statute referred to does not apply, then, in view of the fact that plaintiff did not have its contract deposited, filed, and registered, as in case of chattel mortgages, as required by statute (Sayles' Civ. St. art. 3190a; Rev. St. 1895, art. 3327), should the trust deed securing a lien to the creditors named therein before suit prevail over the contract of plaintiff, so far as to enforce the rights of the lien creditors

accepting under the deed of trust, there being no notice to them or the trustees of plaintiff's claim at the time the deed of trust was executed and accepted? To protect such creditors, must they have paid a valuable consideration for their mortgage lien at the time of its execution in addition to their pre-existing debts? or does the fact that they are lien creditors to secure pre-existing debts give them protection against plaintiff's claim, they having no legal notice of the same, at the time when or before their liens were created, and duly deposited, filed, and registered?"

At the time of and after the passage of section 17 of the assignment law of 1879, above quoted (Rev. St. 1895, art. 2548), the transaction in this case would not have been considered a "mortgage, deed of trust, or other form of lien attempted to be given by the owner," within its purview. We are of the opinion that the language and scope of this severe provision was not intended, by the subsequent enactment, in 1885, of what are now articles 2549, 3327, Rev. St. 1895, which read as follows: "All reservation of the title to or property in chattels as security for the purchase money thereof shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered as required of chattel mortgages; provided, that nothing in this article shall be construed to contravene the landlord and tenant act,"—to be extended so as to include the transaction before us, which is a reservation by the vendor, and not any "form of lien attempted to be given by the owner." We therefore answer the first question certified in the negative, without passing upon the question whether a mortgage given upon specific articles, which could not be reasonably held to be the "stock of goods," is affected by said section 17.

In order to answer the second group of questions above certified, we must determine whether the parties secured by the trust deed were "creditors," within the meaning of article 3327, above quoted, which must be construed in connection with article 3328, which reads as follows: "Every chattel mortgage, deed of trust or other instrument of writing intended to operate as a mortgage of or lien upon personal property which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void as against the creditors of the mortgagor or person making the same, and as against subsequent purchasers and mortgagees or lienholders in good faith, unless such instrument or a true copy thereof shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated, or if the mortgagor or person making the same

be a resident of this state, then of the county of which he shall at the time be a resident." This article divides the persons who are to be protected against the unrecorded instrument into two classes: (1) "Creditors," and (2) "subsequent purchasers and mortgagees or lienholders in good faith." "Creditors," as here used, has been generally held to mean persons whose claims have been fixed by some legal process as liens upon the property (*Brothers v. Mundell*, 60 Tex. 240; *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248); and has been by this court held to include a landlord whose lien was fixed by statute (*Berkey & Gay Furniture Co. v. Sherman Hotel Co.*, 81 Tex. 135, 16 S. W. 807). The logic of these decisions would seem to include within the term "creditors" all persons whose claims are upon certain conditions charged by law as specific liens upon certain property, such as holders of attachment, execution, judgment, landlord and mechanics' liens, and to exclude therefrom all others. Therefore we are of opinion that the holders of claims secured by the trust deed in this case are not to be classed as "creditors." The second class of persons protected by the statute, as above stated, are "subsequent purchasers and mortgagees or lienholders in good faith." The word "purchasers" has been generally held to include mortgagees and holders of claims secured by trust deed, and, while this holding was originally probably based upon the ground that by such instruments in other states the legal title passed, still we are of opinion that, when our statute used the same well-understood words, it was intended that it should receive the same construction as elsewhere. This view is strengthened by the fact that the statute adds the words, "mortgagees or lienholders," which insures such construction. As said in *Overstreet v. Manning*, 67 Tex. 663, 4 S. W. 248, the statute is here referring to persons who have fixed their liens by "contract or act of the parties." We are of opinion that the word "creditors," in article 3327, means the same as in article 3328, and that the word "purchasers" in the first includes the same persons as "purchasers," etc., in the second, and therefore that the holders of the claims secured by the trust deed in this case are included within this second class of persons, and that in order to bring themselves within its terms they must show that they hold "bona fide" or "in good faith," and that in order to do so they must show a consideration advanced, and that they had no notice of the unrecorded lien. It is well settled that a pre-existing debt, where there is no extension of time, is not a consideration. *Overstreet v. Manning*, 67 Tex. 663, 4 S. W. 248; *Cook v. Porham*, 63 Ala. 456; *Port v. Embree*, 54 Iowa, 14, 6 N. W. 83. We therefore answer the first of said group of questions certified in the negative, the second in the affirmative, and the third in the negative.

GALVESTON, H. & S. A. RY. CO. v.  
MASTERSON et ux.

(Supreme Court of Texas. Jan. 18, 1898.)

WRIT OF ERROR — JURISDICTION OF SUPREME COURT.

1. When a cause has been remanded by the court of civil appeals, the supreme court will not have jurisdiction unless in the application for writ of error it is stated that the judgment in the court of appeals settles the case, and it also appears from the record that its opinion is conclusive of the case, provided the evidence shall be the same upon another trial.

2. Where, in an action for personal injuries, defendant claimed that the injury was caused by a fellow servant in defendant's employ, and the court of civil appeals held that the person causing the injury was not a fellow servant of the one injured, and that the company was responsible for his act if he was negligent, it did not settle the question of negligence so that a writ of error would lie.

Application for writ of error to court of civil appeals of Fourth supreme judicial district.

Action by P. T. Masterson and wife against the Galveston, Harrisburg & San Antonio Railway Company. The plaintiff appealed from a judgment for defendant to the court of civil appeals (42 S. W. 1001), which reversed the judgment. Application dismissed.

Upson, Bergström & Newton, for applicant.

GAINES, C. J. This suit was brought by the father and mother of one Joseph P. Masterson to secure damages for injuries resulting in the death of their son, alleged to have been caused by the negligence of the applicant, the Galveston, Harrisburg & San Antonio Railway Company. Upon the trial the court instructed a verdict for the defendant. Upon appeal the court of civil appeals held that there was evidence to support the allegations of the petition, and that the case should have been submitted to the jury, and reversed the judgment, and remanded the cause. The defendant company applies to this court for a writ of error, and, in order to give us jurisdiction, states in its petition that judgment of the court of civil appeals "practically settles the case." We have held that, when a cause has been remanded by the court of civil appeals in order to give this court jurisdiction upon the ground that the judgment of that court settles the case, the applicant must not only so state, but that it must appear from the record that its opinion is conclusive of the case, provided the evidence shall be the same upon another trial. Does the decision of the court of civil appeals practically settle the case? The allegations and proof were that the injury was caused by the act of one Church in moving an engine and train. Church was a switchman of the applicant, the defendant in the trial court. The defendant contended that Church, in moving the train, acted without the scope of his authority, and also that he was a fellow servant of the deceased, and that for both reasons it was not responsible for the injury. The court of civil appeals held, in effect, that

under the evidence Church was not the fellow servant of Masterson, and also that the company is responsible for his act, if, in fact, it was negligent. This settles two issues in the case, provided the evidence is the same upon another trial. But does it settle the question of negligence? We think not. Their conclusion is merely that under the evidence the case should have been submitted to the jury. Under their ruling it is a question for the jury whether the conduct of Church was negligent or not, and a verdict might be given either for the plaintiffs or the defendant. Evidently the decision of the court of civil appeals does not settle the case, and we have no jurisdiction to grant a writ of error to their judgment. Therefore the application is dismissed.

#### WHEELER v. TYLER S. E. RY. CO.

(Supreme Court of Texas. Jan. 10, 1898.)

DAMAGES—EVIDENCE—RES GESTÆ—APPEALS—OBJECTIONS NOT RAISED BELOW.

1. In an action for damages for personal injuries, testimony of a physician of complaints made by plaintiff at the various times he was examining him of "a roaring, dull, aching pain in the head, more especially in the back of the head," is not hearsay, such complaints being part of the *res gestæ*.

2. Upon a bill of exceptions to evidence admitted, the supreme court will consider only such objections as were presented in the trial court and as are stated in the bill of exceptions.

3. In an action for damages for personal injuries, it was error to submit to the jury the question of a medical bill agreed to be paid by plaintiff, where there was no proof that the amount was a reasonable compensation for the services rendered.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Burrell Wheeler against the Tyler Southeastern Railway Company for personal injuries. From a judgment of the court of civil appeals (41 S. W. 517), reversing a judgment of the district court for plaintiff, he brings error. Affirmed on condition that plaintiff enters a remittitur for \$250.

Reaves, Walker & Reaves and J. F. Onlon, for plaintiff in error. Sam H. West, H. B. Marsh, and J. W. Fitzgerald, for defendant in error.

**BROWN, J.** This suit was brought by the appellee, plaintiff in error, against the Tyler Southeastern Railway Company, to recover damages for a personal injury received by the explosion of a boiler to a passenger locomotive owned and operated by the railway company. The only question presented on this application arises upon the action of the district court in admitting the testimony of Dr. Driskill, which was at the time objected to, and a bill of exceptions reserved. That portion of the testimony objected to is as follows: "I believe that there are no other symptoms that you have not asked me about, except that he complains all the time with a roaring and a dull, aching pain in his head, more especially in the back of his head."

The defendant objected to the testimony (1) because it was hearsay; (2) because it was evidence with respect to the symptoms of a disease or injury not testified to by the plaintiff; which objections the court overruled. Wheeler recovered judgment in the district court, from which an appeal was taken, and the judgment was reversed by the court of civil appeals of the Fourth supreme judicial district on account of error in admitting the foregoing evidence. The evidence of the witness Dr. Driskill, which was objected to by the defendant in error upon the ground that it was hearsay, is stated in the bill of exceptions, as above copied, as follows: "He complains all the time with a roaring and a dull aching pain in his head, more especially in the back of his head." We understand from this language that, while the witness was engaged in examining the plaintiff at the several times named by him, the plaintiff complained of a roaring and pain in his head. This indicates that the pain of which he complained was present at the time that the complaint was made, and that the complaint was not a recital of what had transpired, nor a mere statement of existing conditions, but was the natural expression produced by the sensation of roaring and pain in the head at the time; that is, that the complaint made was induced by the roaring and the pain as it then existed, and that the complaint itself was in fact a part of the *res gestæ*, and therefore not subject to the objection that it was hearsay. *Railway Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034; *Railroad Co. v. Shafer*, 54 Tex. 641. Upon the argument of the case in this court the defendant in error urged the objection to the testimony that at the time the plaintiff made the complaint testified to by Dr. Driskill the latter was engaged in examining the plaintiff for the purpose of testifying in his case, the witness being employed by the plaintiff for that purpose. The plaintiff in error met and combated that proposition as if it had been properly presented. We presume that the same course of argument was pursued in the court of civil appeals, and that this led the honorable court of civil appeals to place its decision upon the ground stated; that is, that the witness Driskill being, at the time the declarations were made, employed by the plaintiff to make an examination of him with a view to testifying in the case, and being at the time engaged in that examination, the complaints of the plaintiff, made under such circumstances, were not admissible in evidence. The objection presents a very interesting question, and Chief Justice James in the opinion prepared by him discusses it in a very clear and able manner; but we do not feel authorized to consider it in this case, for the reason that it was not presented to the trial court, and not embraced in the bill of exceptions taken to the evidence of the witness. It is the well-established rule of this court that, upon a bill of exceptions to evidence admitted, this court will consider only such objections as

were presented in the trial court and as are stated in the bill of exceptions. *Railway Co. v. Adams*, 63 Tex. 206; *Rector v. Hudson*, 20 Tex. 237; *Hamilton v. Rice*, 15 Tex. 385; *Hernndon v. Casiano*, 7 Tex. 333; *Waller v. Leonard*, 89 Tex. 507, 35 S. W. 1045. In *Rector v. Hudson*, supra, the objection presented to the evidence was that the declarations offered were made by one who was not a party to the suit. This court held that an objection based upon the fact that it did not appear that the declarations were made at the time of the transaction could not be considered under the bill of exceptions, and the court said: "If the objection had been that they [the declarations] were not made at the time, it might have been brought out by an examination of the witness to that point that the admissions of the party that he had bribed the rider, which was a material part of the declaration deposed to, was made at the time of the principal transaction, or in such time as to have been plainly admissible in evidence. It has been constantly held that in revising the ruling of a court in the admission of evidence the appellate court will consider only the objections to the evidence taken at the trial." In *Railway Co. v. Adams*, cited above, the witness in answering the question expressed his opinion in regard to some matters instead of stating the facts from which the jury could draw their own inferences; but the testimony was not objected to upon that ground, and that objection did not appear in the bill of exceptions. The court said: "The bills of exceptions not showing that the questions and answers were objected to on the ground of the manner in which the questions were asked and the answers given, the matter of the answers being admissible, the ruling of the court below in this respect will not be revised." If the objection here urged had been presented to the trial judge, he might have sustained it, or the plaintiff in the court below might have abandoned it, or he might have called out other facts to explain it, so as to avoid the force of the objection. It would be unfair to the opposite party and unjust to a trial court to entertain objections of this character, when not presented upon the trial, and properly reserved in the bill of exceptions. We conclude that, upon the face of the bill of exceptions, it does not appear that the court committed any error in admitting the testimony of the witness Driskill, and that the court of civil appeals erred in reversing the judgment of the district court upon that ground.

Having acquired jurisdiction of this case, it becomes our duty to examine all the assignments of error made by the appellant in the court of civil appeals, to ascertain if the judgment of the trial court should have been reversed upon any one of the grounds assigned. We have examined the various assignments presented in that court, and find no error except in the ruling of the court upon the fourteenth and fifteenth grounds of error assign-

ed by the appellant railroad company. The plaintiff below testified that he had agreed to pay Dr. Driskill \$250 as his fee for attending him as a physician, but there was no evidence offered to prove that that sum, or any other sum, was a reasonable charge for the services rendered by Dr. Driskill to the plaintiff. One who is injured as the plaintiff claims to have been, if entitled to recover against the party charged with the negligence which caused the injury, is entitled to judgment for his expenses necessarily incurred in the treatment of the injuries sustained by him, but he cannot recover what he may agree to pay the physician for his services, because the other party is not bound by such agreement. Under such circumstances, the injured party must prove what would be reasonable compensation to the physician for the services rendered, and would be entitled to recover that amount if he had paid or was liable to pay the same. It was error in the trial court to submit to the jury the question of the medical bill paid by the plaintiff for services rendered to him, because there was no proof that such amount was a reasonable compensation for the services rendered. *Railway Co. v. Warren*, 90 Tex. 566, 40 S. W. 6; *Railway Co. v. Harriett*, 80 Tex. 82, 15 S. W. 556. The judgment of the district court must be reversed upon the ground last stated, unless the plaintiff shall enter a remittitur of the sum of \$250 within 10 days from this date, in which event the judgment of the court of civil appeals reversing the judgment of the district court will be reversed, and the judgment of the district court will be affirmed.

#### GALVESTON, H. & S. A. RY. CO. v. GORMLEY et al.

(Supreme Court of Texas. Jan. 17, 1896.)

#### MASTER AND SERVANT—RAILROADS—NEGLIGENCE —INSTRUCTIONS—RULES FOR EMPLOYEES —EVIDENCE—NOTICE.

1. An instruction defining negligence as any omission to perform a duty imposed by law on one for the protection of his own or another's person or property, the negligence to some extent to be measured by the character and risk of the business engaged in, does not furnish a guide to the jury in deciding the question of a railroad company's negligence, as against a brakeman in allowing a water tank to remain out of repair, and a water spout attached thereto to overhang the track.

2. A brakeman, while riding on top of a moving train, was struck by an overhanging spout attached to a water tank. The court charged that the degree of care of all parties was higher when the life and limbs of themselves and others were endangered than in ordinary cases. *Held* erroneous, as requiring a greater degree of care to be exercised by the company towards the brakeman, who was in danger, than towards another employe, who was not in such danger.

3. In an action for the death of a brakeman employed by defendant, the court defined ordinary care as that degree of care which might reasonably be expected of a person in the situation of the injured person when injured. *Held* erroneous, as making the degree of care requir-

ed of defendant towards deceased dependent on what the latter would be expected to do under the circumstances.

4. A railroad company, as a duty to its employes, in erecting and maintaining its structures and appliances in a reasonably safe condition, is required to use only such care as a person of ordinary prudence would use under like circumstances.

5. When a railroad company claims that an employe's death resulted from a violation of a rule of the company, an instruction that the latter must prove, not only the existence of the rule, but that the employe knew of its existence, and of its enforced observance, is an immaterial error, when it does not appear that the death resulted from a violation of the rule introduced in evidence.

6. When the existence of a rule of a railroad company governing its employes is proven, the presumption arises that an employe had knowledge thereof at the time he was injured.

7. A party relying upon the nonenforcement of a rule governing a railroad company's employes, which is proven to have existed, must establish such fact.

8. Where a requested charge is included in another which has been submitted, a refusal to give the former is not error.

9. It is not error to admit all the testimony, although a part is inadmissible, when the objection is to the whole.

10. Notice of the condition of a water tank owned by a railroad company, to an agent whose connection with the tank was not such as to make it his duty to give notice or to repair it, is not notice to the company.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Lillie Gormley (now Burnett) and others against the Galveston, Harrisburg & San Antonio Railway Company. A judgment entered on a verdict for plaintiffs was affirmed in the court of civil appeals (42 S. W. 814), and defendant brings error. Reversed.

McNeal, Harwood & Walsh and A. L. Jackson, for plaintiff in error. A. B. Davidson and Atkinson & Abernethy, for defendants in error.

BROWN, J. This suit was instituted by Lillie Gormley (now Burnett) in her own right and as next friend of her infant son, D. J. Gormley, and by Thomas and Ann Gormley, to recover of the railroad company damages for the death of David Gormley, who was the husband of Lillie and the father of the minor, D. J. Gormley, and was the son of Thomas and Ann Gormley. During the pendency of the suit, Lillie Gormley intermarried with V. D. Burnett, who joins her in this action. The court of civil appeals filed the following conclusions of fact: "On the 27th day of August, 1892, the appellee Lillie Burnett was the wife of D. J. Gormley. The appellee David J. Gormley is his son, and Thomas and Ann Gormley are deceased's parents. On the date above mentioned D. J. Gormley was in the employ of appellant company in the capacity of a brakeman on one of its freight trains, which was then being run over its road. That on the night of the day stated D. J. Gormley was sitting on top of one of the cars of said moving train, in the performance of the duty of his employment, and that while

so riding upon said car in his place of duty he was, without any fault or negligence on his part proximately contributing to the accident, struck by a spout attached to one of appellant's water tanks, which spout the appellant negligently allowed to be and remain out of repair, and to overhang its railroad track and car upon which Gormley was sitting, and the force of the blow from said spout knocked him off the car, and he was run over by the cars attached to said train, and thereby so injured that he died on the following day. That by reason of his death, which was proximately caused by said negligence of appellant, his wife, Lillie, was damaged in the sum of \$2,500, and his son, David J., in the sum of \$4,000." Upon a trial before a jury, verdict was returned and judgment rendered for the plaintiffs for \$6,500, which was apportioned as follows: \$2,500 to Lillie Burnett and \$4,000 to the son, D. J. Gormley, which judgment was affirmed by the court of civil appeals.

In its application for this writ of error the railroad company sets up a number of grounds that we do not think it necessary to give special attention to, because they are either immaterial or not well taken. We will consider such of the grounds presented in the petition for writ of error as we deem to be material and necessary to be examined with a view to another trial.

The judge of the trial court charged the jury as follows: "(4) Negligence, in a general sense, is any omission to perform a duty imposed by law for the protection of one's own person or property or the person or property of another. (5) Negligence to some extent should be measured by the character, risk, and exposure of the business engaged in, and the degree of care of all parties is higher when the lives and limbs of themselves or others are endangered than in ordinary cases." "(7) By ordinary care is meant that degree of care which may reasonably be expected of a person in the situation of the person alleged to have been injured at the time the injury was inflicted."

The fourth and fifth paragraphs of the court's charge to the jury announce abstract principles of law, which furnished no guide to the jury in deciding upon the issue of negligence. That portion of the fifth paragraph which informed the jury that "the degree of care of all parties is higher when the lives and limbs of themselves or others are endangered than in ordinary cases" is not correct, as applied to this case. According to that statement, the degree of care required of the defendant towards the deceased would be higher if his life and limbs were endangered in the service than towards another employe who was not exposed to such danger. The law imposed upon the defendant the exercise of ordinary care to provide for each and all employes machinery, roadbed, and appliances reasonably safe, and to exercise like care to maintain them in that condition. The de-

gree of care does not vary with the increase or diminution of danger. It continues to be ordinary in degree, but the quantum of diligence to be used differs under different conditions. *Railway Co. v. Smith*, 87 Tex. 348, 28 S. W. 520. For example, we will suppose that in the construction of defendant's railroad it built a culvert over a small ravine, the foundation and timbers of which were comparatively light, and that it also constructed a bridge over a river, putting in piers with heavy foundations, deeply laid in the earth, and using iron for the superstructure instead of wood. In each instance the degree of care required, as to employes, was ordinary, but the amount of care to be exercised in the construction of the bridge was much greater than in building the small culvert, because there would be greater danger in its use, and a man of ordinary prudence would use more diligence to provide against injury.

The seventh paragraph gives the only definition of ordinary care that is to be found in the charge of the court. If intended to apply to the defendant, it was erroneous in making the conduct to be expected of the deceased the standard, leaving each juror to determine what might be reasonably expected of the injured party. The care which the defendant was bound to exercise towards deceased could not be determined by what the latter would be expected to do. The degrees of care to be used by both might be the same, but not necessarily so. If the deceased had been a passenger, the care exacted of him would have been ordinary, while the law would have imposed upon defendant the highest degree. The degree of care is fixed by the relations of the parties as master and servant or carrier and passenger, but the quantum of vigilance to be exercised must be determined by the circumstances. More care must be used whenever there is greater danger.

The tenth paragraph in the court's charge is in part as follows: "It is a duty imposed by law upon the railway companies to do everything that can be reasonably done for the safety of their employes, and to have the structures erected along and by their lines of road for use in connection with the running and operating of their trains along such lines of road to be reasonably safe; and a failure to do so will render a corporation liable for any damage resulting to such employes." This charge imposed upon the railroad company a degree of diligence which is not required of it except as a carrier of passengers. To "do everything that can be reasonably done" is all that could be expected of very prudent persons, and constitutes the highest degree of care that the law imposes upon railroad companies. The law does not require the railroad company, as a duty to employes, "to have the structures to be reasonably safe," but requires that it should exercise ordinary care to keep them in that

condition. It may be that the judge who drew this charge intended that it should read, "And do everything that can reasonably be done to have the structures," etc. If, however, we read it in that way, it is still subject to the objection that it imposes a greater burden upon the railroad company than is required by law. The railroad company was required by law to use such care as a person of ordinary prudence would have used under like circumstances to furnish structures and appliances which were reasonably safe, and to use such care to maintain them in that condition.

In the thirteenth paragraph of the charge given by the court to the jury it is, in substance, stated that it is lawful for a railroad company to make reasonable rules and regulations for the government of its employes in the discharge of their duties, and that an employe who willfully or negligently disobeys such rules or regulations, and is thereby injured, cannot hold the railroad company liable for such injury; and the charge continues in the following language: "But, in order to find for the defendant company on this issue, you must find from a preponderance of the evidence that the defendant company was exacting the observance of such rules by its employes, and that said Gormley knew of the existence of said rules, and of their enforced observance by the defendant, at the time he was injured, and that at the time of his injury he was violating said rules, and that the act done by him in violation of said rule was the proximate, and not the mediate, cause of his death." We think there was error in the latter part of the charge above quoted, but that it was immaterial, and would not require a reversal of the judgment in this case, because it does not appear from the evidence that the injury which was received by Gormley resulted from a violation of the rule introduced in evidence. But we have thought proper to comment upon this charge, and point out its error, in view of another trial. When the proof shows that the railroad company has made and promulgated rules and regulations for the government of its employes, it is not necessary that the evidence should show that the employe claiming to have been injured had knowledge of the existence of such rule, but, in the absence of proof to the contrary, he will be presumed to know of the rules and regulations established by the company. *Pilkinton v. Railway Co.*, 70 Tex. 230, 7 S. W. 806; *Railway Co. v. Watts*, 63 Tex. 532; *Railway Co. v. Callbreath*, 66 Tex. 528, 1 S. W. 622. This charge not only required of the defendant to prove that the deceased knew of the rule, but also to prove that the defendant was insisting upon and enforcing the observance of the rule by its employes. If the plaintiffs relied upon the abrogation of the rule by its nonenforcement, it devolved upon them to establish that fact.

The first special charge asked by the de-



fendant, which was given by the court, contains every material proposition applicable to this case that is embraced in the seventh special charge requested by the defendant which was refused by the court, and which is here complained of as error. There was no error in the court refusing to give in charge that which had already been submitted to the jury.

The trial court did not err in overruling the objection to the testimony of Robinson, as shown in bill of exception No. 4, because a part of it was admissible, and the objection was to the whole. The court was not required to separate the admissible from what was inadmissible. The objector should do that. If the evidence did not show that the agent to whom notice was given had such connection with the tank as to make it his duty to give notice of its condition, or to repair it, that part of the evidence should have been excluded on proper objection or motion.

The district court erred in the fifth, seventh, and tenth paragraphs of the charge given to the jury, for which errors the judgments of said district court and of the court of civil appeals are reversed, and this cause remanded.

#### MITCHELL COUNTY v. CITY NAT. BANK OF PADUCAH, KY.

(Supreme Court of Texas. Jan. 10, 1898.)

COUNTY BONDS—ISSUANCE—VALIDITY—BONA FIDE PURCHASER.

1. Under Const. art. 11, § 7, providing that no debt shall be incurred by any city or county unless provision is made for levying and collecting a sufficient tax to pay the interest, and providing at least 2 per cent. as a sinking fund, provision must be made at the time of creating the debt, or previously, by which the rate of tax to be levied shall be so definitely fixed that it is merely a ministerial act to determine it.

2. Const. art. 11, § 2, providing that the construction of jails, court houses, and bridges shall be provided for by general law; and section 7, providing that a county may issue bonds for the construction of works for sanitary purposes, under certain conditions as to tax levy; and article 8, § 9, providing that no county or city shall levy more than one-half of the state tax, nor a tax exceeding 50 cents on the \$100 for the erection of public buildings in any one year,—are the only parts of the constitution which bear upon the subject of the issue of bonds by a county for the purpose of building a court house and jail, and constructing bridges, and are not self-enacting. The legislature therefore has authority, subject to the constitutional limitations, to grant power to a county to issue bonds for the construction of bridges and a court house and jail, and to make provisions for the taxes to pay the interest and create the sinking fund required.

3. Gen. Laws 1881, p. 5, provides, in section 1, that the county commissioners' courts may issue bonds in an amount necessary to erect court houses, limiting the time and rate of interest, and, in section 2, that "the commissioners' court of the county shall levy an annual ad valorem tax, \* \* \* and create a sinking fund for the redemption of such bonds, not to exceed one-fourth of one per cent. for one year." Held that, under said section 2, the commissioners' court should levy an annual ad valorem tax sufficient to create a sinking fund

of not less than 2 per cent. as provided by the constitution for the redemption of such bonds, not to exceed one-fourth of 1 per cent. for any one year.

4. Gen. Laws 1881, p. 5, providing for issue of county bonds for building court houses and jails on certain conditions; and Gen. Laws (Sp. Sess.) 1884, pp. 29, 30, authorizing the issue of county bonds for the purpose of constructing bridges, conferred authority on the county commissioners' courts to create debts by the issue of bonds for the purposes designated, and to levy the tax therein provided; and, since they could be compelled by mandamus to provide for at least the minimum tax required by law, the fact that they did not so provide does not make the bonds issued invalid in the hands of a holder thereof, where all data is at hand from which to calculate the tax.

5. Bridge bonds issued under Gen. Laws (Sp. Sess.) 1884, pp. 29, 30, providing for the issuance of bonds by the county commissioners' courts of the state for the construction of bridges, are valid in so far as they are issued for the purposes designated in the act, and invalid when issued by resolution to pay a debt for building a court house, even as against a bona fide purchaser; since he is required to know the provisions of the act giving authority to issue them, and the provisions of the order of the county commissioners' court by which they were issued, whether the order appears on the face of the bonds or not.

Error to court of civil appeals of Second supreme judicial district.

Action by the City National Bank of Paducah, Ky., against the county of Mitchell. From a judgment of the court of civil appeals (39 S. W. 628) affirming a judgment for plaintiff, defendant brings error. Reversed.

R. H. Looney and Smallwood & Smith, for plaintiff in error. Millard Patterson, W. B. Brack, M. M. Crane, Atty. Gen., and W. M. Knight and E. P. Hill, Asst. Attys. Gen., for defendant in error.

BROWN, J. The defendant in error sued Mitchell county in the district court of that county to recover upon interest coupons alleged to have been attached to and representing the interest on certain bonds issued by the county for the purpose of building a court house and jail, and also to recover upon interest coupons alleged to have been attached to and representing the interest upon certain bonds issued by the said county for the purpose of constructing and purchasing bridges. The petition alleged, in substance, that Mitchell county, being without a court house on the different days therein mentioned, executed and delivered to Martin, Byrne & Johnston a certain negotiable or written obligation, in which it was recited that the said bonds or obligation were issued for the erection of a court house in said county of Mitchell, each and all of them being of like tenor and effect except their dates; each bond being for the sum of \$1,000, and bearing interest at the rate of 7 per cent. per annum, excepting Nos. 51 to 55, inclusive, which bear 8 per cent. interest from date, each of the said bonds payable 15 years from date. It was also alleged that the said county, upon the different dates therein alleged, is



sued to bearer other bonds, described in the petition, for the purpose of constructing and purchasing bridges for the said county, which said bonds were each for the sum of \$500, payable in 20 years, bearing 8 per cent. interest from date. It was alleged that the plaintiff was the legal and equitable owner and holder of the said bonds, and that the coupons sued upon represented the interest upon them for the several years mentioned therein, which the said county of Mitchell had failed and refused to pay, and that the said coupons had each been presented to the commissioners' court of Mitchell county for payment according to law, which had been refused. It was alleged in the petition that all of the said bonds were issued according to the laws of the state of Texas which authorized their issue. The defendant filed a general demurrer to the said petition, and special exception thereto, upon the grounds that the petition showed that the defendant was a municipal corporation; that the alleged debt sued for is a debt not contracted for current expenses, and wholly fails to allege that, at the time of the creation of the several debts evidenced by said alleged bonds and coupons, the county made any provision for levying and collecting a sufficient tax to pay the interest thereon, and provide at least 2 per cent. as a sinking fund to pay said indebtedness. The defendant also filed a general denial, and a special plea, in which the county set up the fact that no provision had been made by it for levying and collecting a tax to pay the interest and the sinking fund upon the said bonds. The district court overruled the special exception No. 2, the substance of which is above stated, but no action appears to have been taken on the general demurrer. Trial was had before the court, without a jury, and judgment was given for the plaintiff bank against the defendant, upon the coupons representing the interest of a portion of the bonds, and denied as to others; but it is not necessary here to designate the particular bonds which were sustained, or those which were declared to be invalid.

The trial court filed conclusions of fact, from which we make the following statement of the facts, necessary in the consideration of the questions presented on this writ of error:

On the 10th day of August, 1881, Mitchell county entered into a contract with Martin, Byrne & Johnston to build for it a court house and jail, for which the county was to pay them \$33,250; the court house to cost \$21,323, and the jail \$11,927. The county was to pay in its bonds, which were to bear interest at 7 per cent. per annum, the bonds to be payable in 15 years from their date, and to have coupons attached representing the interest for each year. The first payment of \$10,000 in bonds was to be made upon completion of the first story of the jail and foundation of the court house; the sec-

ond payment to be made, of \$10,000 of the bonds, when the jail was completed and accepted; and the last payment, \$13,250, to be made in bonds when both the court house and jail were completed. On January 12, 1882, the county paid to the contractors \$10,000 in 10 bonds, numbered from 1 to 10. On July 5, 1882, the county paid to the contractors 10 bonds, for \$1,000 each, numbered 11 to 20, inclusive. April 25, 1883, the county paid to the contractors \$10,000 in bonds, numbered 21 to 30, inclusive. Of the aforesaid bonds, the plaintiff owns Nos. 11 to 16 inclusive, and 24 to 30 inclusive. The others are outstanding in the hands of other parties. In 1884, the county, being again without a court house, issued to the same parties, Martin, Byrne & Johnston, 22 bonds, of \$1,000 each, numbered from 34 to 55, inclusive, which were the same in form as the first bonds issued, and like them in every particular, excepting the date, and that the latter bonds bear interest at 8 per cent. instead of 7. Of these last-named bonds the plaintiff owns Nos. 51 to 55, inclusive. Each of the aforesaid bonds was payable to Martin, Byrne & Johnston or bearer. At different times, as hereinafter stated, Mitchell county caused to be issued bonds numbered from 1 to 62, payable to bearer, each for the sum of \$500, due 20 years from date, with 8 per cent. interest, and a coupon representing the interest for each year attached to each bond. Each of the said bonds contained the following recital: "This bond is issued for the purpose of obtaining money to buy and construct bridges for public uses within the said county of Mitchell, in pursuance of an act entitled 'An act to authorize counties to issue bonds for bridge purposes, and to levy a tax to pay the same,' passed at the special session of the eighteenth legislature convened at the city of Austin, Texas, January 8th, and adjourned the 6th day of February, 1884." The plaintiff is the owner of these last-named bonds, numbered 1 to 26, inclusive, and Nos. 34, 35, 60, and 61. The plaintiff paid value for all of the bonds herein stated as belonging to it, and acquired them in the regular course of business, without notice of any defect in them except such as the law would charge it to have upon the facts as shown upon the record of the commissioners' court of Mitchell county. The commissioners' court of Mitchell county did not at any time make any provision for levying and collecting the tax to pay the interest upon the aforesaid bonds, or any of them, nor to raise a sinking fund for their redemption, except that for the year 1881 the court levied a court house and jail tax of 25 cents on the \$100. In 1882 it levied 50 cents on the \$100 for the same purpose, and since that time until 1896 it has levied annually 25 cents on the \$100. For each year since the issuing of the bonds for bridge purposes, the court has levied 15 cents on the \$100 as a tax for road and bridge purposes. The taxable

values of Mitchell county were for the different years as follows: For 1881, \$592,961; for 1882, \$1,155,479; for 1883, \$2,250,489; for 1884, \$3,118,239. And the counties attached to Mitchell county for judicial purposes had taxable values for the different years as follows: For 1881, \$138,861; for 1882, \$318,248; for 1883, \$361,355; for 1884, \$995,080.

The court found to be due upon the coupons in suit the following sums: Upon the court-house bonds the sum of \$1,820, and upon the bridge bonds the sum of \$2,720. The coupons which were sued upon were all presented to the commissioners' court of Mitchell county, Tex., in proper form, and payment demanded, and all of them have been by said court wholly refused and disallowed. On February 11, 1884, the commissioners' court of Mitchell county made the following order, which was duly entered upon the minutes of that court: "Ordered that bonds of Mitchell county to the amount of ten thousand dollars issue and be set apart for the building and improving of bridges, and for opening and improving public roads of said county, said bonds to bear 8 per cent. interest, and to run to the extent of the law, and to be taken up as the exigencies of the county demand." On June 3, 1884, bonds numbered 1 to 6, inclusive, were issued under this order. May 27, 1884, the commissioners' court ordered that a bond for \$500 issue in favor of W. L. Pendleton, contractor for building bridges, etc. The clerk issued to Pendleton bond No. 9. August 13, 1884, the said court directed bonds for \$100 (\$1,000) to be delivered to Mahoney & Evans, bridge builders, on their contract for \$5,800, and two bonds, numbered 7 and 8, were delivered to them August 16, 1884. August 13, 1884, the commissioners' court directed the clerk to issue bridge bonds to Mahoney & Evans for the balance due them on their contract; and the clerk issued five bonds, and delivered them to the contractors, being Nos. 14 to 18, inclusive. On August 28, 1884, the commissioners' court entered the following order: "That a special fund be established as the cash fund, which shall be set apart for the purpose of meeting any demands against the county that must necessarily be paid in cash; and that the clerk of this county issue four bonds on the road and bridge fund, for the sum of \$500 each, to run twenty years, with interest at 8 per cent. per annum; said bonds to be sold, and the fund transferred from the road and bridge fund to the cash fund." Four bonds were issued, being Nos. 10 to 13, inclusive, under the first order copied herein; and on January 12, 1885, two bonds were issued to pay for repairing bridges, being Nos. 19 and 20, which exhausted the order for the issuing of \$10,000 of bonds.

We copy from the findings of the trial court as follows: "On February 13, 1885, it was ordered by the court 'that instead of issuing scrip on the general fund to cover the amount of Martin, Byrne & Johnston's note, that same

be paid out of money resulting from the sale of bridge bonds, and that the clerk is ordered to issue six bridge bonds, of \$500 each, and deliver the same to Wm. Martin, who is authorized to make sale of said bonds, and after deducting the amount of his note, with interest thereon, to pay the remainder into the treasury to the credit of the road and bridge fund. Under this order, bonds numbered from 21 to 26, inclusive, were issued the 13th of February, 1885. On May 14th, 1885, the court made an order 'that road and bridge bonds be issued to Martin, Byrne & Johnston for the balance due on the new court house when it can be ascertained what said amount of balance is, after paying on said house all available cash that can be used for paying for same'; and on the same day, by order of the court, E. F. Swinney was appointed financial agent of the county to sell bonds so issued. On June 25, 1885, the court made the following order, viz.: 'It is hereby made an order of this court that the road and bridge bonds ordered issued at a previous term of this court be issued and sold as directed in the minutes of that meeting. And it is further ordered to be recorded that the sum of money represented in and by the bonds to be issued is made a loan from the road and bridge fund to the court house and jail fund, there being an excess of unexpended bonds in said road and bridge fund, and that the same be paid back to the road and bridge fund as it accumulates in the court house and jail fund from the collection of taxes in that fund. And it is made a part of this order that the sum of \$15,000 in road and bridge bonds, the same being thirty bonds, of \$500 each, be issued and sold as the law directs,—that is, at not less than par value; the contractors to receive what cash there is now in the county treasury belonging to the court house and jail fund, the sum of \$1,306.56, and to be paid by an order of this court the sum of money yet uncollected as taxes in the court house and jail fund on the tax roll to be collected this fiscal year, amounting, probably, to \$1,900; this last payment to be made only after deducting all legal offsets claimed by the county in the way of rents, unfinished work on the court house, reservations in the contract as to delay in its completion,' etc.; the same to be ascertained by the commissioners' court at a regular meeting when there is a full board present. Upon this order on June 27, 1885, thirty bridge bonds were issued, numbered from 33 to 62, inclusive. On August 14th, 1885, there was an order of the court that the clerk issue a warrant on the court house and jail fund in favor of Martin, Byrne & Johnston for the sum of \$16,892.11, balance due on the new court house, and ordering the treasurer to collect of E. F. Swinney, financial agent, the sum of \$14,925, the amount for which said bonds were sold, less \$75, commissions allowed him, and that the same be paid on the said warrant."

This suit was instituted by the defendant in error against Mitchell county to recover of it the amounts specified in the several coupons described in the petition which represent the interest that had accrued upon the bonds of the said county which defendant in error claims to own. The plaintiff in error contends that the bonds are void because at the time the debt was created no provision was made by the county for levying and collecting a tax to pay the interest, and to provide a sinking fund as required by the following section of the constitution: "All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law), to levy and collect such tax for construction of sea-walls, breakwaters or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund; and the condemnation of the right of way for the erection of such work shall be fully provided for." Const. art. 11, § 7. The defendant in error claims that the article quoted does not apply to counties other than coast counties. Without deciding that question, we will examine the case under the assumption that the article of the constitution applies to all counties, and that the legislature so regarded it in enacting the laws under which the bonds in question were issued.

It was not the purpose of the convention in adopting the foregoing article to require that a city or county should, at the time of creating a debt, ascertain the rate per cent. required to be levied upon the taxable values of the county in order to raise a sufficient sum to pay the interest and provide a sinking fund upon that debt, and to actually levy that rate of tax at the time. *Bassett v. City of El Paso*, 88 Tex. 175, 30 S. W. 896. In the case cited, the city of El Paso had at the time that it determined to issue its bonds, by an ordinance, provided for the collection annually of a given sum for the purpose of paying the interest which might accrue upon the said bonds, and also a given sum to be raised annually as a sinking fund. This court said: "The language and purpose of these provisions [of the constitution] seem to be satisfied by an order providing for the annual collection by taxation of a sufficient sum to pay the interest thereon, and create a sinking fund, etc., though it does not fix the rate or per cent. of taxation for each year by which such sum is to be collected, but leaves the fixing of such rate for each successive year to the commissioners' court or city council. \* \* \* As stated above, we have not deemed it necessary to de-

termine whether the order of August 11, 1893, actually levied a tax, as we are of the opinion that it fully complied with the law by making provision for the collection of the interest and sinking fund by taxation." What the constitution requires is that provision shall be made at the time, or shall have been previously made, by which the rate of tax to be levied is so definitely fixed—as was done in the case last cited—that it becomes merely a ministerial act to determine the rate to be levied. The legislature has the power to make all such "provision" for counties and cities, or it may leave it to officers of such corporation to make it when the debt is created. If made by either, it is sufficient. Mitchell county has not provided for the collection of such tax, and the solution of the question now before us depends upon whether the laws under which the bonds were issued made such "provision" as the constitution required.

On behalf of Mitchell county it is urged that, by the terms of section 7 of article 11 of the constitution, the provision which is required to be made for levying and collecting taxes with which to pay the interest and create a sinking fund upon the indebtedness of a county must be made by the officers of the county at the time the debt is incurred, and that the source of authority for making the levy and collecting the tax is the constitution, and not the act of the legislature. The only parts of the constitution which bear upon this subject are section 9 of article 8, and sections 2 and 7 of article 11. Section 9 confers no authority upon any officer of a city or county to levy a tax for any purpose, but by the language, "No county, city or town shall levy more than one-half of said state tax, \* \* \* and for the erection of public buildings not to exceed fifty cents on the one hundred dollars in any one year," places a prohibition or limitation upon the power of the legislature to authorize counties to impose taxes for such purposes. Section 2 of article 11 expressly requires the enactment of a general law to carry its mandates into effect; and section 7 of the same article contains no grant of authority to levy a tax nor designation of any official by whom the tax specified is to be levied and collected, but is, in effect, a limitation upon the power of the legislature to authorize such corporations to create debts. In the sense that all laws in conflict with these prohibitions are void, section 9 of article 8 and section 7 of article 11 are self-executing; but, in so far as anything is required to be done to carry them into effect, they are not so, because they prescribe no rules by which any act could be done in the enforcement of their requirements. In his work on Constitutional Limitation (page 100) Mr. Cooley says: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty impos-

may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which these principles may be given the force of law." It is quite too plain for argument that, if the laws of 1881 and 1884 or similar laws had never been passed, Mitchell county would have had no authority, under the constitution, to contract the debts represented by the bonds, nor to levy a tax for the payment of the interest and sinking fund on such debt. The power to do so could be derived from the legislature only. If the legislature had the power to grant authority to the county to make such provisions, then that department could exercise the power itself. If the terms of the law are such that, when the county has issued its bonds in compliance with it, the bondholder might resort to a court, and by mandamus compel the county to levy a tax sufficient to pay the interest annually, and to raise a sinking fund of not less than 2 per cent., then the provision would be sufficient under the constitution. Whether less certain directions might meet the demands of the constitution is not before us.

This brings us to the consideration of the question: Were the requirements of the statutes under which these bonds were issued so explicit as to constitute a compliance with the mandate of the constitution? The bonds known as "court house bonds" were issued under an act of the legislature approved February 11, A. D. 1881, sections 1 and 2 of which read as follows:

"Section 1. That the county commissioners' court of any county which has no court house at the county seat is hereby authorized and empowered to issue the bonds of said county, with interest coupons attached, in such amounts as may be necessary to erect a suitable building for a court house; said bonds running not exceeding fifteen years, and redeemable at the pleasure of the county, and bearing interest at a rate not exceeding eight per cent. per annum.

"Sec. 2. The commissioners' court of the county shall levy an annual ad valorem tax on the property in said county sufficient to pay the interest, and create a sinking fund for the redemption of said bonds, not to exceed one-fourth of one per cent. for any one year."

Gen. Laws 1881, p. 5.

The bridge bonds were issued under an act of the eighteenth legislature (special session, 1884), the first and second sections of which read as follows:

"Section 1. That the county commissioners' courts of the several counties of the state are hereby authorized and empowered to issue the bonds of said county, with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years and bear interest at any rate not to exceed eight per cent. per annum.

"Sec. 2. The commissioners' court shall levy an annual ad valorem tax not to exceed fifteen cents on the one hundred dollars valuation, sufficient to pay the interest on, and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than four per cent. on the full sum for which the bonds are issued."

Gen. Laws (Sp. Sess. 1884) pp. 29, 30.

The statutes quoted above were enacted by the legislature in view of the requirements of sections 2 and 7 of article 11 of the constitution, and with the evident purpose of giving effect to the terms of those sections. As we have said before, the legislature might have empowered the commissioners' court to provide for collecting the tax required by the constitution; but it pursued, as we think, the wiser course, of making the necessary provision by a general law, which applied to and governed the issuance of all bonds for the given purpose, whereby the taxpayer and the bondholder would be alike protected and uniformity secured. Under such system, the purchaser of bonds could easily ascertain the extent to which the taxing power of a county had been appropriated, and, by looking to the taxable values of the county, could form a just estimate of the worth of such securities, which we think would greatly tend to enhance their market value. Taxpayers would be furnished the means of learning the manner in which their finances had been managed by those to whom they had intrusted the business of the county, and, in case such officers sought re-election, could easily call them to account for any failure in the discharge of their duties. The effect of such legislation would be to compel a county to keep its indebtedness within the limits of its present power of taxation, instead of piling up a debt which would absorb the future revenues of the county.

Counsel for defendant in error, in their briefs and printed argument, as well as in an able argument before the court, contend that, by the enactment of section 2 of the act of 1881, the legislature intended to require of the commissioners' court to levy and collect a sinking fund sufficient to discharge the bonds at maturity, and that, since the bonds could not run for a greater time than 15 years, the sinking fund must necessarily exceed 2 per cent., and thus the constitution would be complied with. The position is plausible, but we are of opinion that the legislature intended by the use of the words "and create a sinking fund for the redemption of said bonds, not to exceed one-fourth of one per cent. for any one year" to fix the minimum sinking fund at the rate prescribed by the constitution, and to limit the maximum by that amount, which could be raised from a tax of one-fourth of 1 per cent. Section 7 of article 11 of the constitution, by prohibiting the creation of a debt unless provision was made for creating a sinking fund of at

least 2 per cent., thereby prescribed that the sinking fund should not be less than the rate per cent. named, and the legislature could not therefore fix a rate, nor authorize the commissioners' court to fix a rate, less than that prescribed by the constitution. If, as claimed by the plaintiff in error, section 7 of article 11 of the constitution applies to all counties and cities in the state (which we assume in this discussion), then every law enacted by the legislature which authorizes the creation of a debt by cities or counties must conform to the requirements of that section, or it will be invalid. In other words, a law which authorized the creation of a debt by a city or county, and did not provide for or authorize the municipal authorities to provide for levying and collecting a tax sufficient to pay the interest on such debt, and create a sinking fund of at least 2 per cent. for its payment, would be void. We understand that the provision required by the constitution means such fixed and definite arrangements for the levying and collecting of such tax as would become a legal right in favor of the holders of bonds issued thereon, or in favor of any person to whom such debt might be payable. It is not sufficient that the municipal authorities should by the law be authorized to levy and collect a tax sufficient to produce a sinking fund greater than 2 per cent., but, to comply with the constitution, the law must itself provide for a sinking fund, not less than 2 per cent., or require of the municipal authorities to levy and collect a tax sufficient to produce the minimum prescribed by the constitution.

The laws of 1881 and 1884 being enacted by the legislature in pursuance of and for the purpose of putting into force the constitutional provisions before cited, it is the duty of the courts to so construe the terms of the laws as to make them valid, and to give effect to them. Under section 7, art. 11, the legislature could not have empowered the commissioners' court to create a sinking fund of less than 2 per cent.; and as the commissioners' court could not, under the law and the constitution, have fixed a sinking fund at less than that rate, we must construe the language used in the act of 1881, § 2, which commands the commissioners' court to levy and collect a sinking fund for the redemption of the bonds, to mean a sinking fund of not less than 2 per cent., as defined and limited in the constitution. *Railway Co. v. Gross*, 47 Tex. 428; *McKenzie v. Baker*, 88 Tex. 677, 32 S. W. 1038; *Rosenberg v. Weekes*, 67 Tex. 579, 4 S. W. 899; *U. S. v. Coombs*, 12 Pet. 72; *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125; *Bailey v. Railroad Co.*, 4 Har. 389; *Duncombe v. Prindle*, 12 Iowa, 1; *Millay v. White*, 86 Ky. 170, 5 S. W. 429; *Temnick v. Owings*, 70 Md. 246, 16 Atl. 719; *Marshall v. Grimes*, 41 Miss. 27; *Bigelow v. Railway Co.*, 27 Wis. 478; *McGivigan v. Railroad Co.*, 95 N. C. 429; *Nolan Co. v. State*, 83 Tex. 195, 17 S. W. 823. In case of *Railway*

*Co v. Gross*, cited above, the railroad company brought suit against *Gross*, the commissioner of the land office, to compel him to issue to the railroad company certificates for lands which might be located singly, as in the case of headright certificate. The charter of the railroad company was enacted on the 2d day of February, 1875, and provided: "Whenever any section of five miles of said road has been completed, the said company, through its president and secretary, may give notice of the same to the governor of this state, in writing, whose duty it shall be, on receipt of such notice, to order the state engineer, if there be any, or if there be none, then to appoint a skillful engineer to examine the said section of road and report under oath; and if said section of five miles of said road be found to be constructed and in running order, in substantial manner, then the governor shall certify the same to the commissioner of the general land office, and he shall issue to the said company sixteen land certificates, of six hundred and forty acres each, for each and every mile of road so constructed and put in running order, and in like manner with each and every succeeding five miles of said road until the whole has been completed." Sp. Laws 1875, p. 20. In 1876 the governor gave his certificate in the manner required by law, and the railroad company applied to the commissioner of the general land office for 80 land certificates, for 640 acres each, such as might be located and surveyed in single sections, which the commissioner refused to issue, but proposed to issue certificates conditioned so as to require each certificate to be located upon two tracts of 640 acres each,—one, for the railway company; the other, for the public school fund. The railroad company refused to accept these certificates, and brought suit to obtain a writ of mandamus against the commissioner, compelling him to bring the certificates as demanded. On March 18, 1873, the legislature passed an act in which it set apart to the public school fund one-half of the public domain, and prescribed "that all land certificates heretofore issued, to \* \* \* any railroad company, or other corporation of any nature whatever, for internal improvements or any other object; or any lands hereafter granted in any manner to any of said companies or corporations for any such object, shall be located and surveyed in alternate sections of six hundred and forty (640) acres each, and as directed by an act entitled 'An act to encourage the construction of railroads in Texas by donations of land,' approved January 30, 1854." The charter of the railroad company was enacted subsequent to the last above-cited act of the legislature, and the question before the court was whether the grant of the certificates therein should be construed so as to give effect to the law of 1873. In discussing the question, this court said: "At the time the appellant's charter was granted, we hold that there was in force a general law

which required the certificates to railroads to be in alternate sections, which certificates may be located and patented on any of the public domain of this state, according to the general law on the principle of alternate sections. \* \* \* We think that the act incorporating this railroad company was passed with reference to the system of locating and surveying railroad certificates which had long been in force, and that it was the legislative intent to conform to that system, and thereby preserve uniformity in the amount and character of bounty extended." And the court held that the language of the charter must be construed as if it provided for the issuing to the railroad company of certificates to be located in alternate sections, as required in the general law.

In 1860 the legislature of the state of Mississippi enacted a law whereby certain counties of the state might subscribe to the capital stock of a railroad company upon a vote of the majority of the legal voters of the county. In 1871 the legislature of that state so amended the law of 1860 as to include in its terms the county of Grenada. In the bill amending the former law, it was provided that elections upon the subject of issuing bonds in aid of railroads should be held in accordance with the law of which that was amendatory, and in accordance with the provisions of the constitution of the state. In 1869, after the enactment of the original law, that state adopted a constitution in which was a provision forbidding the legislature to pass any law authorizing a county to subscribe for stock in a railroad unless it was assented to by two-thirds of the qualified voters of that county. The county of Grenada, upon a two-thirds vote of its qualified voters, subscribed for \$50,000 of the capital stock of a railroad company, issuing bonds therefor, and, being sued upon the bonds, defended the action upon the ground that the law under which they were issued was void, because it authorized their issue upon a majority instead of a two-thirds vote, as required by the constitution. There was a direct conflict between the language of the act of the legislature and the constitution, except that the amendatory act prescribed that the election should be held in accordance with the constitution. The supreme court of the United States, in the case of *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125, construed the statute to mean that a two-thirds vote was required in order to issue the bonds, and thereby made the act conform to and harmonize with the constitution of the state, and with the policy of the state upon this subject. That court said: "It certainly cannot be said that a different construction is required by the obvious import of the words of the statute. But if there were room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitu-

tion, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution."

Article 4861 of the Revised Statutes of 1895 reads as follows: "No court of this state shall have power, authority or jurisdiction to issue the writ of mandamus, or injunction, or any other mandatory or compulsory writ of process against any of the officers of the executive departments of the government of this state, to order or compel the performance of any act or duty which, by the laws of this state, they or either of them are authorized to perform, whether such act or duty be judicial, ministerial or discretionary." And article 946 is in the following language: "The supreme court, or any justice thereof, shall have power to issue writs of habeas corpus as may be prescribed by law; and the said court, or the justices thereof, may issue writs of mandamus, procedendo, certiorari and all writs necessary to enforce the jurisdiction of said court; and in term time or vacation may issue writs of quo warranto or mandamus against any district judge or officer of the state government, except the governor of the state." In *McKenzie v. Baker*, 88 Tex. 677, 32 S. W. 1038, the question was made that article 4861 forbids that any court in this state should issue a mandamus against the heads of the departments of the state government, and that, therefore, this court had no jurisdiction to grant the writ prayed for. The question before the court was which of these articles should yield if they could not be so construed that both could stand, and Judge Gaines, for the court, said: "The rule is that where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. This is no arbitrary canon of construction, but is a rule founded upon experience and sound reason. It follows from this rule that article 4861 should be construed to read: 'No court in this state except the supreme court shall have power,' etc. This construction preserves both articles, and that construction should always be avoided by which any provision of the statute would fall altogether." It will be observed that the court decided that article 946 should stand in preference to the other article if one must yield, and, in order that both might be preserved and given effect to, the language of article 4861 was construed so as to embrace an exception understood, but not expressed. In *Nolan Co. v. State*, 83 Tex. 195, 17 S. W. 823, the court had under consideration section 3 of the act now under examination, which is in these words: "The county shall not issue a larger number of bonds than a tax of one-fourth of one per cent. annually will liquidate in ten years, and such bonds shall be sold only at their face or

par value." Independent of the constitution, the language quoted committed to the commissioners' court the power to determine what amount of bonds could be liquidated in ten years by a tax of one-fourth of one per cent.; but the court held that this section must be construed in connection with the constitutional limitation contained in original section 9, art. 8, of the constitution of 1876, which reads: "The state tax on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation; and no county, city or town shall levy more than one-half of said state tax, except for the payment of debts already incurred, and for the erection of public buildings, not to exceed fifty cents on the one hundred dollars in any one year, and except as in this constitution is otherwise provided." Judge Gaines, for the court, said: "If our constitution were silent upon this subject, then it might be reasonably held that section 3 of the statute, quoted above, authorized the commissioners' court to determine the question as to the amount of bonds 'a tax of one-fourth of 1 per cent. annually will liquidate in ten years.' But, there being a provision in the constitution bearing directly upon that subject, we are of the opinion that this section must be construed in connection with it. The limit of the constitution being an amount upon which a tax of one-half of 1 per cent. would pay annually the interest and 2 per cent. as a sinking fund, and the statutory requirements being such an amount only as one-fourth of 1 per cent. would liquidate in a period of ten years, it was not absolutely necessary that the commissioners should be governed by the same rule in determining the two limits. An amount of indebtedness that would be liquidated within ten years, though based upon a valuation in excess of that shown by the assessment rolls, might still be within the constitutional limit, which permits the creation of such a debt as will be ultimately paid by an annual tax of one-half of 1 per cent. upon the taxable values of the county, as shown by the official assessment. But we think it more reasonable to presume that the legislature intended that the same rule should govern in determining both limits, and that the commissioners' courts should not look beyond the assessment rolls in ascertaining the amount of the indebtedness which the statute authorizes them to create." Section 3 of the same act of which we are considering section 2 was construed by this court as if it read: "The county shall not issue a larger number of bonds than a tax of one-fourth of one per cent. on the taxable values as shown by the tax rolls of the county will liquidate in ten years."

We conclude that section 2 of the act of 1881, authorizing the issuance of court-house bonds, should be read as if the words of the constitution had been introduced into the act itself; that is, as follows: "The commissioners' court of the county shall levy an an-

nual ad valorem tax on the property in the said county sufficient to pay the interest and create a sinking fund of not less than two per cent. for the redemption of the said bonds, not to exceed one-fourth of one per cent. for any one year." So reading section 2 of the law of 1881, both acts under which the bonds in question were issued are practically the same so far as the question of their compliance or noncompliance with the constitution is concerned; and we now come to inquire whether those laws make such provision for the levying and collecting of a tax to pay the interest on the bonds issued thereunder, and to create a sinking fund for their redemption, as is required by section 7 of article 11 of the constitution.

If the district court of Mitchell county could, upon a proper showing of the facts, have required the commissioners' court of that county to levy and collect a sufficient tax to pay the interest upon the bonds, and create a sinking fund of not less than 2 per cent. per annum, and could have enforced that requirement by a writ of mandamus, then the provision made by the statutes is a sufficient compliance with the constitution, and the bonds so far as that question affects them would be valid. For the purpose of testing the sufficiency of those statutes in this particular, we will examine them in reference to their application to the court-house bonds involved in this litigation. There being no court house in the county of Mitchell, the commissioners' court of that county was by law vested with the discretionary power to determine the following questions with reference to making the improvement needed: (1) Whether it would build a court house or not; (2) what the cost of the building should be; (3) whether the building should be paid for by the sale of bonds or otherwise; (4) if by selling bonds, then at what time the bonds should mature, and the rate of interest they should bear; (5) what sinking fund exceeding 2 per cent., if any, should be provided within the limits of the law. That court exercised the discretion vested in it upon all matters above named, except the sinking fund. No per cent. for a sinking fund has been named by the court, and we must examine the question upon the basis that the minimum expressed in the law is to govern as to the sinking fund to be provided for by the levy of taxes. In order to simplify the matter, we will consider the first \$10,000 in bonds issued in 1882 as if they constituted the entire series of bonds issued for the purpose of building a court house, for the reason that this issue was alone based upon the assessment of values for the county for the year 1881; and we can more readily apply the principles which are to govern in the determination of this question by thus limiting the inquiry than we could by pursuing the examination through all the various issues of the different classes of bonds.

The tax rolls of Mitchell county for the

year 1881 showed the taxable values of that county to be \$592,961. The commissioners' court of the county determined to build a court house, for which purpose bonds payable at 15 years from date, to bear 7 per cent. interest per annum, to the amount of \$10,000, were issued and sold by the county. We have here stated the data from which, by a simple calculation, we can arrive at the sum to be collected for each year for the purpose of paying the interest upon the bonds, and provide a sinking fund for their redemption. Two per cent. on \$10,000 would give \$200 annually as the sinking fund to be collected, and 7 per cent. on that sum would yield \$700 necessary to be collected as interest, aggregating \$900 to be raised the first year to pay interest and sinking fund upon a taxable value of \$592,961, which would require a levy of a fraction more than 15 cents on the \$100 of taxable values. The commissioners' court in fact levied 25 cents on the \$100 of values for the first year, and continued to levy that rate per cent. for each subsequent year up to 1896. In order to test the question that we have suggested—that is, did there remain anything to be done by the commissioners' court which involved the exercise of discretion?—let us suppose that court had refused to levy the tax after the bonds were issued and sold, and that the bondholders, upon a proper showing, applied to the district court for a writ of mandamus to compel the commissioners' court of Mitchell county to levy a tax sufficient to raise the interest and sinking fund at the rate prescribed as the minimum. What answer could the commissioners' court of that county have made to such an application? As we have before shown, the act of issuing the bonds necessarily determined every fact involved in making provision for the interest and sinking fund, except the taxable values of the county, which was a matter of record, and shown by the tax rolls, by which the commissioners' court must be governed. What remained to be done that might be done by one person or court in a manner different from that in which another person or court might perform the same act? It may be answered that the commissioners' court had the discretion to fix any rate of sinking fund not less than 2 per cent. which would not make the taxes for any one year exceed 25 cents on the \$100, and that this was a matter of discretion. That is true, but that court had not the discretion to provide for no sinking fund, nor had it the discretion to provide for a sinking fund less than 2 per cent. It therefore follows that it was a legal duty resting upon that court, after issuing and selling the bonds under the authority given in the first section of each act, to annually levy and collect the tax necessary to raise the interest and sinking fund, not less than the minimum expressed in each law; and the district court had the authority to enforce the performance of that duty by writ of mandamus, but would not control

the discretion vested in the commissioners' court to levy and collect a tax which would provide for a sinking fund greater than 2 per cent.

We think it manifest that there was no act involved in the performance of the duty enjoined by section 2 of each of the acts which required the exercise of any discretion on the part of the commissioners' court, but that, having determined the questions upon which the issuing of the bonds depended, there remained nothing to be done but to perform the ministerial act of ascertaining the sum to be collected, and the rate per cent. necessary to be levied upon the taxable values of the county each year, and that the performance of this duty the district court had the authority to enforce by a writ of mandamus. *De Poyster v. Baker*, 89 Tex. 155, 34 S. W. 106; *Commissioner v. Smith*, 5 Tex. 471; *Coy v. City Council*, 17 Iowa, 1; *Manor v. McCall*, 5 Ga. 522; *Tarver v. Commissioners' Court of Tallapoosa*, 17 Ala. 527; *Stevenson v. Summit Tp.*, 35 Iowa, 462.

The plaintiff in error insists that Nos. 10, 11, 12, 13, 21, 22, 23, 24, 25, 26, 34, 35, 36, 37, 60, and 61, of the bridge bonds are void, because they were issued for a purpose not authorized by law, and that the defendant in error is chargeable with notice of the facts which appear upon the record of the commissioners' court in reference thereto. The court of civil appeals held that the bonds were valid in the hands of the defendant in error, because it acquired them in the course of business, for a valuable consideration, before maturity, and without actual notice of such defects, and because each of the said bonds contained a recital that it was issued "for the purpose of obtaining money to buy and construct bridges for public use within the county of Mitchell, in pursuance of an act entitled 'An act to authorize counties to issue bonds for bridge purposes and to levy a tax to pay the same,'" etc. The court of civil appeals said: "We do not think, under the circumstances stated, that the purchaser was required to examine the orders of the commissioners' court for the purpose of testing their validity;" and in support of that position cited and quoted from *Nolan Co. v. State*, 83 Tex. 194, 17 S. W. 823. In that case the bonds in question were issued under an order which upon its face showed that the purpose was to build a court house for Nolan county; but some of the bonds were in fact intended at the time to be, and were afterwards, applied to the payment of a debt contracted by the county in construction of a jail, for which latter purpose the law did not at that time authorize the county to issue bonds. Each of the bonds contained the recital that it was issued for the purpose of building a court house, under the act of February 11, 1881, giving the title of the act. This court, through Judge Gaines, said: "If a purchaser were bound to inquire of the existence of the facts which empowered the



court to issue bonds to build a court house, and to know that the county had no court house, in view of the recitals upon the face of the obligation, he was bound to look no further. He had the right to rely upon the truth of such recitals. Having paid value for the bonds without actual knowledge of their illegality, the county will be estopped to set up that they were not issued for the purpose for which they purported to be issued." Taking that part quoted by the court of civil appeals from the opinion, disconnected from what precedes it, the conclusion of the court of civil appeals might be reached; but considered in connection with the preceding sentence, and with the facts upon which the opinion was based, it is apparent that the court did not intend to hold that the purchaser would not be chargeable with notice of what appears on the face of the order under which such bonds were issued. The facts recited, and of which the court was treating, were such as the commissioners' court must determine, and which would not appear of record except as stated by the court upon the record or in the bonds. The scope of that part of the opinion quoted by the court of civil appeals is shown by the following extract from the same opinion: "If, instead of being limited to the amount of taxable property as shown by the assessor's rolls, the constitution had conferred upon the commissioners' courts the power of determining that question for themselves, then, according to the rule laid down in *Marcy v. Oswego*, 92 U. S. 640, and recognized in the case of *Bank v. Terrell*, 78 Tex. 450, 14 S. W. 1003, their determination of the amount would have been conclusive, and would have precluded inquiry into the power to issue the bonds in so far as the question of amount is concerned. But, the power being limited as to the amount by the official assessment, the commissioners were not authorized to look beyond it, and to determine the extent of their power from other data within their reach. In such a case the rule established in *Dixon Co. v. Field*, 111 U. S. 94, 4 Sup. Ct. 315, and acted upon in *Bank v. Terrell*, applies." The court was here treating of a fact of record, and announced the rule applicable to the facts of this case. The commissioners' court can only authorize the issue of bonds by order entered of record. *Ball v. Presidio Co.*, 88 Tex. 64, 29 S. W. 1042.

The commissioners' court of Mitchell county entered an order on its minutes on February 11, 1884, to the effect that bonds to the amount of \$10,000 should be issued for the purpose of building and improving bridges, and for opening and improving public roads of the said county; said bonds to bear 8 per cent. interest, and to run to the extent of the law, which was 20 years. On the 28th day of August, 1884, the commissioners' court made an order, which was entered upon its minutes, "that a special fund be established as the cash fund, which shall be set apart

for the purpose of meeting any demands against the county that must necessarily be paid in cash," and directed the clerk of that court to issue four bonds upon the bridge fund, for the sum of \$500 each, to run 20 years, with 8 per cent. interest, to be sold, and the funds transferred to the cash fund. In accordance with this direction, the clerk issued bonds Nos. 10, 11, 12, and 13, under the order of February 11, 1884, which were sold, and the funds used as directed. It is contended by the county that the purchaser of these four bonds was required to take notice of the order directing the clerk to issue them, and prescribing the disposition of the proceeds. But we consider the latter order as simply a direction to the officer of the county as to the manner in which the bonds should be disposed of and the funds applied; that it does not constitute the source of power or authority for issuing the bonds, and the purchaser was not required to know the contents of that order. *De Voss v. City of Richmond*, 18 Grat. 338. But the facts are very different as to the other bonds in question. The order above quoted, which authorized the issue of bridge bonds, was exhausted by the issue of the bonds numbered from 1 to 20, each bond being for \$500, the 20 bonds make the full sum of \$10,000 authorized by that order. The bonds from 21 to 26, inclusive, were issued under the subsequent orders of the commissioners' court, upon the face of which was expressed a purpose to use the bonds in the liquidation of the court-house debt and other debts contracted by the county. On February 13, 1885, the court made an order that Martin, Byrne & Johnston be paid out of the bridge fund to be created by the sale of six bonds, of \$500 each, which were to be delivered to William Martin, to make sale of them, and pay the note due to the firm, paying the balance into the treasury, under which order the six bonds numbered 21 to 26, inclusive, were issued. On May 14, 1885, the court made an order that bridge bonds be issued to Martin, Byrne & Johnston for the balance due them on the court house when the amount can be ascertained; and subsequently on June 25th, of the same year, the court made another order, that the road and bridge bonds ordered to be issued at a previous term of this court be issued and sold as directed in the minutes of that meeting. This evidently refers to the order of May 14, 1885, which directed that E. F. Swinney should sell the bonds. In the order of June 25, 1885, the court directed that 30 bonds for \$500 each, being \$15,000, be issued and sold as the law directs, for the purpose of raising a fund to pay off and discharge the balance due to Martin, Byrne & Johnston on the court-house contract. Bridge bonds Nos. 34 to 37, inclusive, and 60 and 61, were issued under this order. From this state of facts it is evident that any person desiring to know the authority by which the bonds in question were issued, and looking

to the orders upon the minutes of the court under which the issue was made, could not fail to see that the county commissioners had undertaken to evade the law by issuing road and bridge bonds for the purpose of constructing a court house. This they could not do by law, and the bonds, if in the hands of Martin, Byrne & Johnston, would undoubtedly be void. The only question with regard to these bonds is: Was the defendant in error, or any other purchaser for value, without actual notice, chargeable with a knowledge of the facts which might be ascertained by the exercise of proper diligence and inquiry in the examination of the orders under which the bonds in question were issued? We think that this question has been settled definitely by the decision of this court in the case of *Ball v. Presidio Co.*, 88 Tex. 60, 29 S. W. 1042, in which Judge Denman, for the court, used the following language: "It results from what has been said above that the law requires a dealer in county bonds to know the provisions of the act of the legislature, and the order of the county commissioners' court, under and by virtue of which such bonds were issued, whether referred to on the face of the bonds or not." As above stated, from an examination of the orders under which and by virtue of which alone the bonds could have been issued, the purchaser would necessarily have learned that the bonds were issued for a purpose not authorized by law, and, being so notified, would have received them with only the rights of the original payee. Having failed to take the precaution to examine the order upon which the bonds were based, the purchaser was guilty of negligence, and must be charged with notice of that which could have been learned in the exercise of ordinary care. We therefore conclude that the bridge bonds from 21 to 26, inclusive, and 34 to 37, inclusive, and 60 and 61, were invalid; that the plaintiff below had no right to recover against Mitchell county upon the coupons representing interest upon such bonds; and that the trial court and court of civil appeals erred in holding said bonds to be valid, and in rendering judgment upon such coupons. All other bonds involved in this cause are found to be valid obligations of Mitchell county. It is ordered that the judgments of the district court and court of civil appeals be reversed, and this cause be remanded to the district court.

#### CITY OF BROWNWOOD v. NOEL et al.

(Court of Civil Appeals of Texas. Jan. 19, 1898.)

**MUNICIPAL CORPORATION—ASSUMPTION OF DEBT OF FORMER MUNICIPALITY—PLACE OF PAYMENT OF BONDS—VERDICT NON OBSTANTE VERDICTO.**

1. Act April 13, 1891, provides a method of abolishing municipal corporations, and declares that their property shall be turned over to the

county treasurer, and applied to the payment of the municipal debts. It also provides that, if an abolished municipality is reincorporated, the new corporation, upon majority vote of the taxpaying voters, may take the property and assume the debts of the old one. *Held* that, where the property of the former municipality was taken by the new corporation, the bonds issued to pay the indebtedness on said property were valid, although neither the taking of the property nor the assumption of the debt was submitted to a vote of the people.

2. A city which had issued bonds stipulated with the purchaser that a certain bank should be the place at which coupons should be presented for payment. Afterwards, by direction of the city council, the purchaser was notified that the place of payment had been changed to another bank. At the time of receiving this notice the bonds had been sold to third persons, and neither the former purchaser nor the subsequent purchasers gave their assent to the change of the place of payment. *Held*, in an action on unpaid coupons, where the city answered that money to pay the same had been deposited in the subsequently named bank, and was still in the possession of the said bank, that the court committed no error in rendering judgment for plaintiff non obstante veredicto.

On motion for rehearing. Motion granted. Judgment affirmed.

For former opinion, see 42 S. W. 1014.

COLLARD, J. Since our decision in this case, November 24, 1897 (42 S. W. 1014), our attention has been called to the recent decision of the supreme court of the United States in the case of *Shapleigh v. San Angelo*, 17 Sup. Ct. 957. We followed the case of *City of Quanah v. White* (decided by our state supreme court) 88 Tex. 14, 28 S. W. 1005, and, as we believe, the statute of the state, and held that, upon reincorporation of a dissolved corporation of a city, in order to assume the debts of the old corporation by the new, the matter must be submitted to a vote of the taxpayers of the new incorporation; and, inasmuch as this was not done by new reincorporation of the city of Brownwood, there was no liability of the same for the old debts of its predecessor. We defer to the decision of the supreme court of the United States, above cited, and hold that it was not necessary to submit the question to the legal taxpaying voters of the new incorporation, and recede from our former views upon the subject: holding that the bonds, the coupons of which are involved in this suit, were legal, and that they constitute a valid debt against the present city of Brownwood. This necessitates the consideration of another question in this case.

The bonds in question, 66 in number, for \$1,000 each, and interest coupons attached, except one for \$500, were issued by the reincorporated city of Brownwood, by virtue of an ordinance authorizing the same, passed by the reincorporated city March 1, 1892, stipulating that they should bear five per cent. interest from March 1, 1892, the interest payable semiannually. The ordinance provided that the interest on the bonds should be payable in New York, at such

banking house as the city council may direct. The bonds were issued in pursuance of the ordinance, but they did not stipulate where they should be paid. In compliance with the ordinance, and at request of the purchaser of the bonds, H. M. Noel, the sole promoter of the firm of H. M. Noel & Co., the city of Brownwood named the Hanover National Bank of New York as the place of payment, which was satisfactory to Noel. At this bank there was but one payment made. They demanded a commission, which the city was not willing to allow, and the city council, by ordinance, made the coupons payable at the Coffin & Stanton Bank, in New York City, and the city informed Noel & Co. of the change to the bank of Coffin & Stanton, by letter, about March 22, 1893, which was received by Noel in due course of mail. The treasurer of the city remitted funds to the bank of Coffin & Stanton necessary to pay the interest falling due on the coupons, the remittances being made in time to reach the bank on the day coupons matured each year, the first days of March and September. Mature coupons had always been presented to this bank, and promptly paid. On August 28, 1894, the treasurer remitted, to the bank of Coffin & Stanton, \$1,687.50, sufficient to pay all interest coupons due September 1, 1894, and the amount was in the bank on maturity of the coupons. All of them due were paid on that date, except those in suit, which do not appear to have been presented to the bank at that time. The bank of Coffin & Stanton failed on the 18th day of September, 1894, being only able to pay 2 per cent. of their indebtedness. The city lost the money on deposit with the bank to pay the coupons sued on,—\$187.50. Noel & Co., through H. M. Noel, bought the city bonds, and sold them to his customers, and, after receiving the notice from the city that the place of payment would be the Hanover National Bank (the first notice), he notified his customers, holders of the bonds, of the place of payment. It appears from the testimony that H. M. Noel was notified of the place of payment of the coupons sued on as at Coffin & Stanton's Bank, but it does not appear that his customers who held them were notified by him of the change before they matured. At the time Noel & Co. received notice of the change in place of payment, they did not own any of the bonds or coupons. This firm did not consent to the change, and, had they been consulted, would not have consented, as they had no authority to do so, for the holders at the time it was done, and because Noel did not consider the bank sufficiently responsible. It was about December 26, 1894, after maturity of the coupons, and after the failure of the bank, that Noel & Co. came into possession of the coupons sued on, by purchase from the holders thereof. Noel & Co. had them presented

for payment in New York, but not paid. They were then presented to the city of Brownwood, and payment refused, and were then presented again by Noel & Co. to the Hanover National Bank and the brokers, Coffin & Stanton, and payment was refused.

The plea of defendant, the city of Brownwood, on the subject of having the money on deposit with Coffin & Stanton, and loss of the same, is as follows: "Defendant alleges that by the terms of the contract, and also the city ordinance, said claims of plaintiff were at their maturity, and are now payable at the bank of Coffin & Stanton, in the city of New York, state of New York; that, at the time of maturity of said claims, defendant left and deposited with said bank the money for the payment of said claims, and said money is still in the possession of said bank for that purpose; that, if plaintiff has not received it, it is because of their own fault and negligence, and that plaintiff should not recover said money in this suit; that because of said negligence, if plaintiff is entitled to recover in this suit, defendant has sustained damages to the amount of \$200, for which it prays judgment." This plea, if true, is insufficient to constitute a defense. If the money is still on deposit in the bank of Coffin & Stanton, defendant has suffered no loss, and in such case it was not error to render judgment non obstante veredicto. Such judgment may be rendered "when the plea confesses a cause of action, and relies on matter in avoidance, which is insufficient, although found to be true, to constitute either a defense or a bar to the action." 12 Am. & Eng. Enc. Law, p. 61, and Freem. Judgm. § 7. We find that the judgment of the lower court was correct, and was not the result of any error committed by the trial court. The motion for a rehearing is granted, and the judgment is affirmed. Motion granted. Judgment affirmed.

#### GHENT v. BOYD et al.

(Court of Civil Appeals of Texas. Jan. 19, 1898.)

JUDGMENTS—PRIORITY—COMMUNITY PROPERTY—INTEREST—WHEN ALLOWED—HOME—STEAD—ABANDONMENT.

1. A judgment against a husband for a community debt is, as against the husband's interest in community land, superior to a prior judgment in favor of the wife, in a divorce suit, on the ground that he had used community property, to the amount of such judgment, in excess of his half interest, since the community estate is liable for community debts.

2. In a divorce suit by the wife, where the petition asks that the property rights between the parties be litigated and settled, the court has power to make the costs therein a charge against the community interest of the husband in land.

3. Interest is not allowable on costs, except where they have been actually paid by a party.

4. Where a woman, who has a homestead, marries, and goes to, and voluntarily lives in, the home of her husband, occupying and using it for the purposes of a home, with no present intention of abandoning it and repossessing herself of the property formerly used and occupied as her home, she cannot claim the latter as her homestead.

Error from district court, Bell county; W. A. Blackburn, Judge.

Trespass to try title by H. C. Ghent against Mrs. A. F. Boyd and J. W. Boyd, her husband. From a judgment in favor of defendants, plaintiff brings error. Reversed and remanded.

John B. Durrett and Winbourn Pearce, for plaintiff in error. A. M. Monteith, for defendants in error.

FISHER, C. J. This is an action in trespass to try title, brought by plaintiff in error, Ghent, against Mrs. A. F. Boyd and her husband, J. W. Boyd, to recover lot 1 in block 86 in the town of Belton. Mrs. Boyd (who was formerly Mrs. Trigg), in her answer, alleged that plaintiff, Ghent, asserted a pretended title to the land by virtue of a purchase thereof by him at execution sale under a judgment obtained in his favor against her former husband, C. L. Trigg, and charged that, at the time that the land was sold under execution, it was her homestead, and not subject to forced sale; she at the time being at the head of a family. It is further averred that she has a superior right to and lien upon the land in controversy to any claim of the plaintiff; that in a divorce suit between her and her former husband, C. L. Trigg, the land in question, together with other property belonging to her and her husband, was sought to be partitioned, and in which was adjudged a liability in her favor against the interest of her former husband, Trigg, in and to any of the community property owned by him; and that the judgment of the court rendered in that case was in her favor, granting her a divorce, and adjudging against the property in controversy (which was held in that case to be community property) a lien in her favor for certain moneys owing her by Trigg, and charging against the interest of Trigg in the property in controversy the costs of the litigation which arose in the divorce suit, and for which judgment was rendered against Trigg. The court below charged the jury as follows: "In regard to the question of separate property, you are instructed that the record evidence in this case establishes the title in the property, at and prior to said judgment, as being community property, and you must so consider it. And it is immaterial whether it was a homestead or not. If it was, as soon as the divorce was granted Trigg's portion became liable for his debts. And, if plaintiff's lien is superior to defendants', then you will find for plaintiff. You are instructed that the record evidence in this

case shows that at the time plaintiff's lien took effect, to wit, on the 18th day of December, 1888, said divorce suit was pending, and had been pending since the — day of March, 1888. The decrees in said divorce suit, dated on the 19th day of December, 1888, and on the 23d day of January, 1889, which declared the premises in dispute to be community property of said C. L. Trigg and the defendant Mrs. Boyd, at the same time declared a lien on C. L. Trigg's interest in the same, to the amount of four hundred and sixty-three dollars and thirty-five (\$463.35) cents. Interest on said sum is allowed at the rate of eight per cent. per annum. Said decrees also establish a lien in behalf of said Mrs. Boyd for certain costs specified therein, and the amount of which the record evidence shows to have been \$646.44 on the 5th day of April, 1889, and to have been paid by defendant Mrs. Boyd prior to the 1st day of January, 1890, on which last-mentioned sum interest is allowed at the rate of eight per cent. from 1st day of January, 1890, to the 11th day of July, 1892, and at the rate of six per cent. since July 11, 1892. These two amounts (that is, the item for \$463.35 and the item for \$646.44) are prior and superior liens to the one established by plaintiff as they take effect from the date of the filing of the suit of Ann F. Trigg vs. C. L. Trigg for a divorce, on the — day of March, 1888, while plaintiff's claim takes effect from the date of filing his abstract of judgment, on the 18th day of December, 1888. Now, if these two claims of defendant Mrs. Boyd exceed the value of C. L. Trigg's interest in said community property, then there was nothing that plaintiff's said lien could subject to the payment of his said judgment; and, if you so believe, you will find for defendants. You will say by your verdict what the present value of the property in dispute is, according to the testimony before you." In response to this charge the jury returned the following verdict: "We, the jury, find for defendant, and say by our verdict that the principal and interest is \$1,735.18, and value the property at \$2,000." Upon which the court rendered judgment as follows: "It is therefore ordered, adjudged, and decreed by the court that defendant Mrs. A. F. Boyd, who is joined in this cause, pro forma, by her husband, J. W. Boyd, has just and subsisting claims against her former husband, C. L. Trigg, amounting to the sum of seventeen hundred and thirty-five and  $\frac{18}{100}$  dollars (\$1,735.18), which are secured in their payment by a valid and subsisting lien on the land in controversy in this cause, to wit, situate, lying, and being in the county of Bell, and state of Texas, within the corporate limits of the city of Belton, and a part of the M. F. Connell league, lying south and adjoining Avenue street, and west of a lot owned by James P. Coop, north of and adjoining Noland's creek, and east of lot owned by Willie and Laura McGuire, and

being known as 'Lot No. 1, Block 86, of the City of Belton.' Said lot was conveyed by A. G. Parnell to C. L. Trigg by deed dated December 21, 1882, and recorded in Deed Records of Bell County, Texas, book 41, pp. 201 and 202, which said claims against C. L. Trigg, and the foreclosure of said lien on said land, were established by a former valid, subsisting judgment of this court, wherein Mrs. Ann Frances Trigg was plaintiff and C. L. Trigg was defendant, which said lien is a preference lien on the land in controversy in this cause, above described, to the lien and claim of plaintiff in this cause on said land by virtue of his judgment against C. L. Trigg, and the filing and indexing of his abstract of judgment, and his levy of execution on, and sale of, said land, as the property of C. L. Trigg; and it further appearing to the court that the value of said land and premises in controversy in this cause, as fixed by the verdict of this jury, is two thousand dollars, and that Mrs. A. F. Boyd's claims on said land, secured by a preference lien, as aforesaid, at the time when H. C. Ghent acquired any right, lien, claim, or title thereto, exceeds the full value of any interest C. L. Trigg had therein, and which does still so exceed the value of any interest H. C. Ghent has therein, as claimant of the former rights of C. L. Trigg: It is therefore adjudged and decreed by the court that plaintiff, H. C. Ghent, recover nothing by his suit, and that defendants A. F. Boyd and J. W. Boyd go hence without day, discharged, and that said defendants recover judgment against plaintiff, H. C. Ghent, establishing her claims, which are secured by a judgment and preference lien against the premises in controversy for the sum of seventeen hundred and thirty-five and  $\frac{18}{100}$  dollars (\$1,735.18), bearing interest from this date at the rate of six per cent. per annum, and that she may have her order of sale, and that said premises may be sold as under execution, and the proceeds applied to the satisfaction and discharge of her claims against said premises; but as to said claims against C. L. Trigg, to be hereinafter enforced, and any costs arising from the execution of said order of sale, the same are in no sense a personal judgment against H. C. Ghent, plaintiff herein. It is further ordered that the officers of court shall have their execution against each party, respectively, for the costs by him or them in this behalf incurred."

It appears from the facts that in March, 1888, Mrs. Boyd (formerly Mrs. Trigg) sued her then husband, C. L. Trigg, for divorce, and in that suit alleged that the property in controversy was her homestead and her separate property, and also alleged that Trigg was indebted to her by reason of the use by him of funds and property belonging to her in her separate and individual right, and that he had used and appropriated to his own use much of the community estate owned by

them. On the 19th of December, 1888, the jury in the divorce suit found that the property in controversy was community property; and the court then, at that time, and by a subsequent decree, found that the land in controversy was community property of Mrs. Trigg and her husband, and found that Trigg was indebted to Mrs. Trigg in the sum of \$353.35, which arose from the fact that Trigg had received from the community property an amount thereof, in value, equal to this sum, in excess of one-half of his interest therein, and rendered judgment in her favor against Trigg for that sum. The court in that case also decreed against Trigg a judgment for the costs, which appear from the facts to be \$644.79; and, in the alternative, a judgment against Mrs. Trigg for these costs. The judgment also finds that \$110 had been paid by Mrs. Trigg as a part of the costs in the divorce suit. For all of these several amounts mentioned the judgment in the divorce suit established a lien in favor of Mrs. Trigg against the interest of her husband Trigg in the community property in controversy. It further appears that, during the pendency of the divorce suit, plaintiff in error, Ghent, brought suit against Trigg for a community debt owing by him, and obtained a judgment, and on the 18th day of December, 1888, one day before the decree of divorce was granted, he had abstracted and filed his judgment, so as to create a lien against the property of Trigg. After the divorce was granted he caused an execution to be levied upon the property in controversy, and had the same sold at sheriff's sale. It appears from the meager statement in the record of the contents of the sheriff's deed that it conveyed only the right, title, and interest then owned by Trigg; and it does not appear from the statements of the deed, as shown in the record, that it conveyed the interest of Mrs. Trigg in the property in controversy. The effect of the finding of the jury in the case before us is that after charging Trigg with the amounts adjudged against him in the divorce suit, together with interest thereon, it amounted to more than the value of his community interest in the property in controversy. Therefore, taking into consideration the fact that for this amount liens existed against the property in favor of Mrs. Trigg, there was no interest remaining in Trigg to which the judgment lien of plaintiff could attach, and therefore nothing remained that could be transferred under the execution sale. The jury found that the property in controversy was of the value of \$2,000, and that the incumbrances against it in favor of Mrs. Trigg, as fixed by the judgment for divorce, were \$1,735.18. In other words, as Trigg's interest was only of the value of \$1,000, that interest would be entirely absorbed by the amounts owing her by virtue of the judgment in the divorce suit. In order to reach this amount of indebtedness due by Trigg to her, as determined in the de-

-cree of divorce, the jury, under the charge of the court, evidently included the \$353.35, with interest thereon, which the decree of divorce found to be the value of community property used by Trigg in excess of his one-half interest therein, and also allowed interest on the sum of \$644.79, the amount of costs adjudged against Trigg.

The contention of plaintiff in error is that, as he is a creditor of the community estate of both Trigg and wife, Mrs. Trigg could not assert against his right in the land acquired under execution sale an interest therein which the decree of divorce determined she was entitled to, by reason of the fact that her husband had used community property to the value of \$353.35 in excess of his half interest. In other words, as Mrs. Trigg's debt arose from the fact that her husband had used more of the community property than his half interest, she would take the community property, transferred to her in satisfaction of this claim, charged with the superior right of creditors to subject it to their debts. We think the plaintiff in error correct in this contention. The community estate, while in the hands of either Mrs. Trigg or her husband, or both of them, was liable for the community debts due by them. The husband and wife could not, between themselves, so transfer the property from one to the other as to relieve this property from liability for community debts, except where based upon a consideration emanating from one to the other,—such, for instance, as the use by one of the separate property or funds of the other, where a lien upon or a transfer is given of the community property in order to satisfy that claim. But such is not the case here. Mrs. Trigg acquired no lien on this property in order to secure the payment of a debt due her in her separate interest by her husband; but the lien obtained was for the purpose of securing her in an amount due her from the community estate by reason of the fact that the husband had used more of the property of that estate than he, upon the final division in the divorce suit, would be entitled to. When Mrs. Trigg took the property under these circumstances, she did not receive it discharged from liability for the community debts owing by her and her husband. If the husband had seen fit, on a settlement between him and his wife, to have transferred to her all of the community property, for the sole consideration that he had used more of the community estate than she, it would nevertheless have been held by her subject to the claims of community creditors. The wife, under such circumstances, would hold that part of the community estate that she received from her husband by no greater right than she would that portion of the community estate that she would be entitled to on a partition and division of the estate. Now, it is not pretended, nor could it be successfully urged, that the husband and wife, on partition of the community estate in a di-

vorce proceeding, would take their respective shares discharged from the community debts. But, upon the contrary, the law is clear to the effect that the wife, to the extent of the community assets received by her, would be liable for the community debts. In other words, the community estate is a primary fund, out of which the debts due by the community should be paid; and it is not in the power of the court, in rendering a decree of divorce, where the creditors are not parties to that proceeding, to divest them of all right to hold the community estate liable for their debts, and confer it absolutely and unconditionally upon either the husband or the wife. With these views, we think that it was error in the trial court to permit the jury to consider, in determining in Mrs. Boyd's favor, this item, as a charge against the property.

We think that it was within the power of the court that rendered the decree of divorce to make the costs that arose in that proceeding a charge against the community interest of Trigg in the property in controversy. The decree in that case was against Trigg, for costs, and declared that as to the amounts thereof paid by Mrs. Trigg, or that may be paid by her, she should have a lien upon the community interest of the husband, in order to reimburse her. In the petition for divorce, which was filed before the plaintiff in error brought his suit or obtained any judgment against Trigg, it was asked that the property rights between Mrs. Trigg and her husband be settled and litigated. The property of the spouses was there brought into litigation for final settlement in the divorce proceeding. The matter was then *lis pendens*, at the time the plaintiff obtained his judgment, and he obtained it and acquired his subsequent lien, subject to the right of the court in the divorce suit to finally charge the property of either the husband or the wife with the costs of the litigation that arose in that case; and the power of the court to finally charge the community interest of the husband with the costs of the litigation would relate back to the time of the inception of the divorce suit, because the property by that proceeding was all brought into controversy, and the court had the power to finally determine whether the property owned by the husband should be responsible for the costs that were taxed against it. The costs were taxed against Trigg, and were made a charge against his community interest in the property in controversy. This the court had the power to do, and the plaintiff in error could not deprive the court, during the pendency of the litigation, of this power, by bringing suit, and attempting to fasten a judgment lien on the property in controversy. Therefore we are of the opinion that the amount of costs charged against the property, for which Mrs. Boyd was also made liable under the judgment, and for which she was given a lien for the amount thereof, was a proper charge against the land in contro-

versy, superior to the rights of the plaintiff in error; but it was improper to allow interest on these costs, in computing the sum thereof, which was a charge against the land, except as to the amount of costs that was actually paid by Mrs. Boyd. The supreme court of Pennsylvania, in the case of *Galbraith v. Walker*, 96 Pa. St. 481, on this question, says: "In the case of *Rogers v. Burns*, 27 Pa. St. 528, we said: 'But the court below allowed interest on the judgment for costs. By the common law of England, this is not allowed. *Sweatland v. Squire*, 14 Vin. Abr. 457, 2 Salk. 623; *Butler v. Burk*, Id. 458; 3 Jac. Law Dict. tit. "Interest." In Pennsylvania the same rule prevails, and the statute allowing interest on judgments is held to apply to the debt alone, and not to the costs. *Todd v. Thompson*, 2 Dall. 105, note; *M'Causland's Adm'rs v. Bell*, 9 Serg. & R. 388.' In *Baum v. Reed*, 74 Pa. St. 322, we said: 'It is certainly the settled general rule in this state that costs do not bear interest. The best evidence of this is the universal practice of indorsing executions. On the fi. fa., or other writ, the debt is stated, followed by the date from which interest is to be computed; and then come the costs, without rate of interest. Such is the mode of indorsement, no matter how many years have elapsed from the entry of judgment. Even after a revival of the judgment the same practice is pursued; the first costs being marked as on the original, and the secondas on the scire facias.' We see no reason for changing the rule thus laid down. We understand it to be the uniform practice in all parts of the state not to allow interest on costs to the officers to whom they are due. There is no statute, course of decisions, or practice authorizing or justifying such allowance; nor is interest a natural or necessary incident to costs, in any view of the subject. Of course, we except from these remarks the case of an actual payment of costs by a party. There, interest may be allowed, as on money paid and expended." We think this case lays down the correct rule upon this subject, and that the principle there discussed is as much applicable here in this state as in Pennsylvania. The record shows that Mrs. Boyd has paid about the sum of \$110 on the costs. Upon this amount she would be entitled to interest, but not upon the balance of the costs, which have not been paid. This sum, with interest, together with the remaining costs, we think, is a superior charge upon the land in controversy to the right held by the plaintiff in error. We do not determine what right the plaintiff in error would have, under his judgment lien, in the community interest of Mrs. Boyd in the land in controversy, because it is apparent from the sheriff's deed under which he holds, as it was executed after the decree of divorce was granted, that it only conveyed, in terms, the interest of C. L. Trigg. The deed recites, "Conveys the estate, right, title, and in-

terest of C. L. Trigg in the land in controversy in this suit, for the sum of \$200." It did not pretend to convey the interest of Mrs. Trigg, and, if such had been the case, a different result, and a more enlarged finding, might have been reached in this court in favor of plaintiff in error. We cannot tell from the record just when the \$110 was paid by Mrs. Trigg, and this fact ought to be ascertained, in order to determine just what sum is here due, together with the balance of the costs, so that it could be ascertained with some degree of certainty what amount of the land was subject to plaintiff's execution deed. We, therefore, are unable to render, but must remand for another trial.

The appellee Mrs. Boyd contends, in reply to all of the grounds stated in appellant's assignments of error for reversal, that the property in controversy was her homestead at the time appellant's judgment lien was acquired, and at the time the property was sold under the execution sale, and therefore the judgment in her favor could be maintained on this ground. There is some evidence in the record which tends to show that at the time that appellant, Ghent, acquired his lien by abstracting and recording his judgment, the property may have been used as a homestead; but the facts clearly show, beyond dispute, that at the time of the sale of the homestead under the execution, in October, 1894, the property then had ceased to be used and occupied as the homestead of Mrs. Boyd. She testifies that in 1892 she married her present husband, J. W. Boyd, and has since that time been living with him in Coryell county, and that she and her husband occupied his house in Coryell county; and the facts show that the property in controversy has not been used or occupied by her, since her marriage with her present husband, as a home. Under the facts, her present homestead would be that of her husband, and such was the condition of her homestead right at the time that the appellant sold the property at execution sale. She would not be entitled to two homesteads,—that occupied by her and her husband, and also the place in controversy. Where she is voluntarily living in the home of her husband, occupying and using it then for the purposes of a home, with no present intention of abandoning it and repossessing herself of the property formerly used and occupied as her home, she cannot claim that the latter constitutes her homestead. This court has heretofore held, in the case of *Glasscock v. Stringer* (Tex. Civ. App.) 33 S. W. 678, that if the property is used as a homestead at the time that the judgment was recorded, so as to establish the lien, such lien would attach to the property whenever the homestead thereafter was permanently abandoned. We do not think that the appellee has shown a homestead right in the property, in view of the facts in the record. Reversed and remanded.

**TOMBLER v. PALESTINE ICE CO. et al.<sup>1</sup>**  
(Court of Civil Appeals of Texas. Dec. 8, 1897.)

**CORPORATIONS—TRANSFER OF STOCK—ASSIGNMENT IN BLANK—COLLATERAL SECURITY—RIGHTS OF PLEDGEE—ATTACHMENT—LIMITATIONS.**

1. The pledgee of stock of a private corporation, transferred as collateral security for valid indebtedness, by the delivery of the certificates therefor indorsed in blank, is entitled to protection as against a subsequent attachment thereof for debts of the registered stockholder, though he may have neglected to have such transfer registered on the corporate books.

2. Such pledgee may enforce payment of his debt through a sale of such stock, though such debt may be barred by limitations.

Appeal from district court, Anderson county; A. A. Aldrich, Judge.

Garnishment suit by M. C. Tombler, as a creditor of one Ed. Hogaboom, against the Palestine Ice Company. From a judgment in favor of George C. Ball and another, as interveners, plaintiff appeals. Affirmed.

Thos. B. Greenwood & Son and Greaves & Martin, for appellant. S. A. McMeans, for appellees.

**FLY, J.** This is a garnishment suit instituted by appellant, as a creditor of one Ed. Hogaboom, against the Palestine Ice Company. The latter (a private corporation) answered that Hogaboom had in his name on the books of the company 174 shares of stock, of the par value of \$100 per share, but that George C. Ball asserted a claim to 101 of the shares, and O. Wheeler claimed the remaining 73 shares. Ball and Wheeler intervened; setting up that the shares had been deposited with them by Hogaboom (101 with Ball, and the remainder with Wheeler) as collateral security for debts owing to each, respectively. Appellant, in his reply to the pleas of intervention, pleaded that the garnishee was a private corporation, under title 20, Rev. St. Tex. 1879, and that under its by-laws, as well as the statutes, all of its stock was transferable only on the books of the corporation, and that appellant had fixed a valid lien on the stock of Hogaboom while it stood in his name on the books of the corporation, without notice, actual or constructive, of any transfer. Appellant also pleaded the statute of limitation of four years against the claim of Ball. The cause was tried without a jury, and resulted in a judgment ordering the stock to be sold as under execution, and that the claim of the interveners be discharged before the claim of appellant was paid.

We find as the conclusions of fact of this court the statement of facts found in the record, which is as follows:

"That on the 2d day of May, 1896, the plaintiff instituted suit in the district court of Anderson county against Ed. Hogaboom,

for debt, upon Hogaboom's promissory note, payable to plaintiff's order, for \$6,000 and interest, dated May 30, 1894, and due nine months from date, and that on the 14th day of December, 1896, plaintiff duly recovered a judgment in said suit against said Hogaboom for the sum of \$6,163.75, with ten per cent. per annum interest thereon from said date, and for all costs of suit, amounting to \$——.

"That upon said 2d day of May, 1896, plaintiff, M. C. Tombler, duly sued out a writ of garnishment, with a view to secure his said debt, against the Palestine Ice Company, a private corporation created under title 20 of the Revised Statutes of Texas of 1879, and doing business in the city of Palestine, Anderson county, Texas, which writ was on said day duly served on said company.

"That on the 14th day of May, 1894, the said Ed. Hogaboom was the owner of 101 shares of stock of said Palestine Ice Company, of the par value of \$100 each, evidenced by certificates No. 80, for 50 shares, No. 84, for 20 shares, and No. 81, for 31 shares; and said stock at said time stood in his name on the books of said company.

"That on the date last aforesaid the said Hogaboom borrowed from the intervener Geo. C. Ball five thousand dollars in cash, executing and delivering to said Ball his note for said amount, dated said date, due one year after date, and bearing ten per cent. per annum interest, and also at said time transferred and delivered to said Ball, as collateral security for said note, the shares of stock aforesaid; such transfer being evidenced by the recitals of said note, as well as by the signature of the said Hogaboom to the following blank indorsement on the back of each of said certificates, viz.:

"For value received, I hereby sell, assign, and transfer to ——— shares of the capital stock of the Palestine Ice Company, and do hereby constitute and appoint ——— attorney to make the necessary transfer on the books of the company. Done this ——— day of ———, A. D. 188—. [Signed] Ed. Hogaboom."

"That on the 14th day of May, 1890, the said Hogaboom borrowed from said Ball the further and additional sum of five thousand dollars in cash, executing and delivering to said Ball at said time his note therefor, dated said date, due one year after date, and bearing ten per cent. per annum interest; and at said time it was agreed and stipulated orally between said Hogaboom and said Ball that (said Ball then having the possession of the said shares of stock as collateral security for said note of May 14, 1884) he, the said Ball, should also hold the same in possession as collateral security for the said additional loan of five thousand dollars.

"That said notes have never been paid, either in whole or in part, except that the

<sup>1</sup> Writ of error denied by supreme court.



interest due on same has been paid up to and including the 14th day of May, 1895, and said Ball is still the legal owner and holder of said notes.

"That on the 1st day of March, 1896, the said Hogaboom was also the owner of 73 shares of stock of said Palestine Ice Company, of the par value of \$100 each, evidenced by certificates No. 95, for 30 shares, No. 92, for 20 shares, No. 88, for 9 shares, No. 99, for 5 shares, No. 61, for 3 shares, No. 86, for 3 shares, and No. 98, for 3 shares; and said stock at said time stood in his name on the books of said company.

"That on the date last aforesaid the said Hogaboom borrowed from Intervener O. Wheeler eight thousand dollars, executing and delivering to him at said time his promissory note therefor, dated said date, due one year after date, and bearing eight per cent. per annum interest; and at said time he transferred and delivered to the said Wheeler, as collateral security for said note, the shares of stock last aforesaid, such transfer being evidenced by Hogaboom's signature to a blank indorsement on the back of each certificate of the same form as that set out in paragraph 5 of this agreement.

"That said note has not been paid, either in whole or in part except that the interest due thereon has been paid up to and including March 1, 1896, and that said Wheeler is still the owner and holder of said note.

"That said Ball and Wheeler have continuously held possession of said stock, as collateral, since its delivery to them by Hogaboom.

"That no demand was made upon the Palestine Ice Company by either Ball or Wheeler for the transfer to them on the books of the corporation of the stock held by them as collateral, prior to the service of the writ of garnishment in favor of plaintiff; but a proper demand for such transfer was made after the service of said writ, but such transfer was refused on account of the pendency of this suit.

"That each certificate of stock in the possession of Ball and Wheeler recites upon its face that the shares evidenced thereby 'are transferable only on the books of the company, in person or by attorney, on the surrender of this certificate,' and the by-laws of the company have always so provided.

"That the stock referred to and specified in the garnishee's answer herein at the time of the issuance and service of the writ of garnishment in favor of plaintiff appeared and stood in the name of Ed. Hogaboom on the books of the Palestine Ice Company, and plaintiff had no knowledge or notice of any transfer thereof for any purpose, or of the claims of interveners, or of any one else save Hogaboom, thereto, until subsequent to the service and return of said garnishment."

The first assignment of error presents the proposition that, the corporation having been created by the laws of Texas, its stock was

transferable only on the books of the company, as prescribed by its by-laws, and no secret transfer of stock by a shareholder therein could defeat or postpone a garnishment lien thereon obtained without notice of such transfer. Quite an array of authorities have been cited to sustain this proposition, many of which are not accessible to this court. Only two Texas decisions are cited (James v. James, 81 Tex. 373, 16 S. W. 1067, and Cattle Co. v. Burns, 82 Tex. 56, 17 S. W. 1043), neither of which can be held authority for the contention of appellant. In James v. James the decision as to the transfer of national bank stock is made to rest on a statute of the United States; and in Cattle Co. v. Burns, it is distinctly held that the stock in the company was assignable independent of a formal transfer on the books. The decision in the case of Iron Co. v. Lissberger, 116 U. S. 2, 6 Sup. Ct. 241, turned upon the statutes of Massachusetts, and the construction placed thereon by the state supreme court. All the other cited cases are made to turn upon the construction of local statutes, some of which provide in express terms that an attachment of stock shall be superior to an unregistered transfer of such stock. But the rule, as laid down in New York, Pennsylvania, New Jersey, Minnesota, South Carolina, Texas, Kentucky, Louisiana, and the federal courts, is to the effect "that he who purchases, for a valuable consideration, a certificate of stock, is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferor to appear to be the owner of the stock upon which the attachment or execution is levied." Cook, Stock, Stockh. & Corp. Law, § 487, and cases cited in support of the text. The rule above stated has been definitely approved in this state. *Strange v. Railroad Co.*, 58 Tex. 162; *Baker v. Wasson*, id. 150, 59 Tex. 141; *Seeligion v. Brown*, 61 Tex. 114; *Smith v. Bank*, 74 Tex. 457, 12 S. W. 113. In the case of *Seeligion v. Brown*, above cited, the facts were similar to those in the case now being considered, and the following language from Angell & Ames on Corporations was adopted and approved by the court: "Where transfers of stock are made without conforming to the requisitions of the charter or by-laws in making them or having them registered on the books of the company, the better opinion, decidedly, is that the transfer passes to the purchaser all the right that the seller had; that such provisions were not intended to, and do not, incapacitate the owner of the stock from transferring it at his pleasure, by way of equitable assignment of his interest in it, subject to the charter rights of the corporation, which all must notice or compel him to own it, unless the corporation allow him to sell against his will; and the only

effect allowed to them seems to be that the purchaser cannot claim a certificate of, or a dividend upon, the shares, unless he first applies for a transfer according to the charter and by-laws. Any other proper transfer is equally valid as between vendor and vendee, and even as against a creditor of the vendor who attached the shares before he or the corporation, through its officers, had notice of the transfer."

The evidence showed that more than four years had elapsed between the time the debt of Hogaboom to Ball became due and the filing of the attachment suit; and it is the contention of appellant that Ball was not, therefore, entitled to have his claim settled out of the proceeds of a sale of the stock. The proposition cannot be sustained, for it is generally held that a pledgee, notwithstanding the debt which the pledge is given to secure may be barred by limitation, may enforce the payment of his debts through the sale of the property, if such right be originally given by the contract of the parties. *Hudson v. Wilkinson*, 61 Tex. 606; *Goldfrank v. Young*, 64 Tex. 432. Hogaboom had placed the certificates in the possession of Ball as a security or pledge for the payment of his debts, and he could never have recovered the property without tendering the amount of his debt, and the attachment lienholder had no higher rights than the owner. *Adoue v. Seelgson*, 54 Tex. 504. No personal judgment was asked for or obtained against Hogaboom by Ball. There being no error in the judgment, it is affirmed.

#### MORRIS et al. v. TRAVELERS' INS. CO.

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

#### INSURANCE—DEATH FROM VIOLATION OF LAW—DIRECTING VERDICT—WAIVER OF FORFEITURE—ACCEPTANCE OF PREMIUM—EVIDENCE.

1. Where an accident insurance policy provides that it shall not cover accident or death resulting while engaged in fighting, or from intentional injuries inflicted by the insured or any other person, or while violating laws, or by voluntary exposure to unnecessary dangers, and the insured comes to his death from a pistol shot fired by another while engaged in a fight brought on by the insured, in open violation of the law, there can be no recovery upon the policy.

2. When there is an entire absence of testimony to support a plaintiff's case, the trial judge has the power to instruct a verdict.

#### On Motion for Rehearing.

1. The forfeiture of an accident policy, arising from the fact that insured was killed while engaged in a voluntary fight, is waived by accepting a premium after knowing how insured had died.

2. After insured's death, resulting from being voluntarily engaged in a fight, the insurer's local agent demanded a premium of the beneficiary's representative, and stated that its payment was necessary to validate the policy; whereupon he was paid the amount of the premium. He testified that he did not forward such amount to insurer, as he had previously advanced the premium, and had charged the

amount against insured as a personal debt. *Held*, the question as to whether insurer waived the forfeiture by receiving the premium should have been submitted to the jury, as it might have believed that the agent, after collecting the premium, attempted to protect insurer by claiming the debt was due him.

Appeal from district court, Harris county: John G. Tod, Judge.

Action by Richard S. Morris and another, as executors, against the Travelers' Insurance Company. From a judgment for defendant, plaintiffs appeal. Reversed.

\* McDaniel & Bowen, for appellants. C. W. Bbcock, for appellee.

FLY, J. Suit was instituted by Richard S. Morris and Mattie T. Morris, as executors of the estate of John F. Morris, deceased, against the Travelers' Insurance Company of Hartford, Conn., to recover on an accident policy for \$5,000, issued to John F. Morris. The insurance company defended against the claim on the ground that it was provided in the policy that the insurance did not cover accident nor death resulting wholly or partly, directly or indirectly, while engaged in fighting, or from intentional injuries inflicted by the insured or any other person, or while violating law, or by voluntary exposure to unnecessary dangers, and that the death of John F. Morris was the result of the violation of each and all of such conditions, and that, therefore, it was not indebted to appellants. Appellants, replying to appellee's answer, set up that appellee had, with full knowledge of the circumstances of the death of John F. Morris, accepted a premium due by him, and thereby waived the condition of the policy. The jury was instructed to return a verdict for appellee. We find as facts that on January 3, 1894, appellee insured John F. Morris against all accidents except those arising from causes therein mentioned, which were accidents from fighting, from violating law, and from intentional injuries inflicted by himself or others. We accept as a further conclusion of fact the following agreement as to the facts surrounding the death of John F. Morris, entered into by and between appellants and appellee: "On the 17th day of January, 1894, the said John F. Morris, deceased, entered James McCane's private office, in the Klam Building, in the city of Houston, Harris county, Texas; cursed and abused said McCane, calling said McCane a son of a bitch. McCane left his said office, to avoid said Morris. Said Morris followed said McCane out into the hall, Morris shaking his finger in an angry manner in McCane's face; struck McCane on the nose. A fight ensued. Morris, jumping back, carried his hand in the direction of his hip pocket. Said McCane then intentionally shot said Morris through the body with a pistol, killing him, the said Morris, almost instantly. Said McCane was acquainted with

said Morris, who was by occupation a detective, and knew said Morris' habits. When the body of said Morris was searched, immediately after he was shot by said McCane, as above, no pistol was found on or about his person, and in fact was unarmed." We further find that the premium was paid at the time of the issuance of the policy, and that the money collected by Raphael Bros., who were the agents of appellee, after the death of John F. Morris, was not to pay a premium on the policy, but to pay a debt due by said Morris to Raphael Bros. All the above facts were uncontroverted.

Under the first assignment of error, appellants deny the power or authority of a district judge, under any state of facts, to instruct a verdict, it being contended that it is a direct attack upon the right of trial by jury. It is the rule in Texas, and in every other country, so far as we know, where jury trial prevails, that a judge has the power to instruct a verdict when there is an entire absence of testimony to support the cause. In this state it has been held to be error not to instruct a verdict where there is no evidence to warrant a verdict for the plaintiff. *Railway Co. v. Faber*, 77 Tex. 153, 8 S. W. 64; *Washington v. Railway Co.* (Tex. Civ. App.) 36 S. W. 779.

There were no facts upon which a verdict could be based in this case. It was admitted by appellants that John F. Morris came to his death while engaged in a fight brought on by himself, and in open violation of law, and that the policy was thereby rendered null and void. There was no testimony tending to show a waiver of the conditions of the policy by appellee. It was uncontroverted that the money collected by Mose Raphael after the death of John F. Morris was not for the premium on the policy, but for debt due his firm by Morris. The judgment is affirmed.

#### On Motion for Rehearing.

(Jan. 19, 1897.)

Acceptance of the premium by the insurance company, at a time when it was cognizant of the facts surrounding the death of John F. Morris, would constitute a waiver of the grounds of forfeiture. *Richards, Ins. § 77*; *Beach, Ins. § 762*. In the trial of the above case, appellants attempted to bring their case within the rule enunciated, and it was held by this court that the testimony completely failed to show a waiver. A re-examination of the evidence induces a change of opinion on that point. The evidence on the question of waiver was as follows: "John C. Turley testified: 'I know about the payment of the premium on an accident policy issued by the defendant, the Travelers' Insurance Company, to John F. Morris, dated January 3, 1894, for \$5,000. The premium on the policy was made to one

of the Raphael Bros. I paid it myself, by a check. The amount was \$25. It was paid on the 18th day of January, 1894, the day after John F. Morris' death. \* \* \* The Mr. Raphael to whom I paid said premium did know of the death of John F. Morris, and how he died. \* \* \* When the money was paid, J. F. Spruce was present. He delivered the check to Raphael Bros. Raphael Bros. said that it was necessary that the premium should be paid at once. They also said that the payment of this premium did not affect the validity of the claim, or rather the insurance policy. \* \* \* They solicited the payment. I did not go to them. \* \* \* The agent said the payment would not affect the validity of the policy, but that it was better to be paid at once." Joseph F. Spruce testified: "The payment of a premium on an accident policy issued by defendant to John F. Morris was made to Mose Raphael on the 18th day of January, 1894. The payment was made to Mose Raphael. I was present; so was John C. Turley. When he came to John C. Turley's store, he called Turley to the side, and told Turley that he had a bill against John F. Morris for an accident policy, and it would be best for him (Turley) to pay the premium, as it might cause some trouble if premium was left unpaid; and, if same was paid, he (Raphael) thought that it would validate the claim. He subsequently made the same statement to me, or about the same statement. Mr. Turley consulted with me in regard to the payment, and Mr. Raphael then assured Turley and myself that it would be best for this premium to be paid before the insurance company were apprised of John F. Morris' death." Mose Raphael testified: "I am a member of the firm of Raphael Bros. The \$25 received by me on the 18th of January, 1894, of J. C. Turley, was due my firm by John F. Morris, we having advanced that sum for him when we delivered to him the policy sued on. We remitted the premium to the company at the time we issued the policy, and credited him for same as a debt due us, and not to the company. \* \* \* I did go to John C. Turley, to collect the \$25 due us as premium on said policy, because I thought, if I did not collect it, then I would not get it at all. I had already that morning read in the *Houston Post* the account of the killing of John F. Morris by James McCane, which account, as I recollect, was given by the paper in detail. I went to Mr. Turley as soon as I had read of the killing." The witness testified that he was at the time the agent of appellee.

Our former opinion was based on the conclusion that, Mose Raphael being uncontradicted, in terms, as to the premium having been forwarded to the company at the time of the issuance of the policy, there was no disputed point to go to the jury. It will be seen, however, that he demanded the money

as a premium on the policy, and claimed that its payment was necessary to validate the policy; and a jury might from the circumstances have concluded that the premium was collected after the death of Morris, and that the agent was attempting to protect the company by claiming the debt was due him. If the evidence, however weak it may have been, raised an issue of fact as to the waiver, it should have been submitted to the jury. *Lee v. Railway Co.*, 89 Tex. 583, 36 S. W. 63; *Choate v. Railway Co.*, 90 Tex. 82, 36 S. W. 247. For the reason that the issue of acceptance of the premium by appellee after the facts constituting the forfeiture were made known to it was withdrawn from the jury, the motion for rehearing is granted, and the judgment reversed, and the cause remanded.

#### FROBESSE et al. v. PEAVY.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

##### ACTION ON SALOON KEEPER'S BOND.

A widow can maintain an action on a bond executed in compliance with section 9, Act May 6, 1893, against a saloon keeper and his bondsmen, to recover damages sustained by her by reason of the sale of malt liquors to her minor son by said saloon keeper.

Appeal from Dewitt county court; R. A. Pleasants, Judge.

Action by Mrs. Bettie Peavy against William Frobese and others to recover on a liquor bond. Judgment for plaintiff. Defendants appeal. Affirmed.

Proctors and Kleberg, Grimes & Baker, for appellants. O. L. Crouch, for appellee.

NEILL, J. This suit was brought in the county court of Dewitt county against Wilhelm Goss, as principal, and appellants, William Frobese and Henry Reiffert, as sureties, upon a certain malt liquor dealer's bond, executed by them on the 5th day of October, 1895, which bond was executed in compliance with section 9 of the act of the 6th of May, 1893. The breach alleged was the sale by Goss, the principal in the bond, of malt liquors to appellee's minor son, whereby she alleged she was aggrieved and damaged in the sum of \$500. Goss made no appearance in this case. There was a trial by the court, and judgment against Goss, as principal, and appellants, as sureties, in favor of appellee for \$500 and costs of suit. From this judgment Frobese and Reiffert prosecute this appeal.

This case was before the supreme court on certified questions from the First supreme judicial district. 37 S. W. 318. That court held, in answer to the questions, that the mother of a minor, who is his only living parent, could maintain an action on the bond,

and that it is the duty of a parent to look after the moral training of his minor children, and it is his legal right to keep them away from temptation; and that this legal right of the parent is infringed when one, in violation of the law, sells intoxicating liquors to his minor child, or permits such child to enter or remain upon the premises where the liquor is retailed; and that in this case the mother had the right to sue upon the bond. It also held that the act under which this suit was brought is in conformity with the requirements of the thirty-fifth section of the third article of the constitution of this state. In view of this holding and the facts, it is not necessary for us to further consider the assignments of error in which it is contended that appellee was not aggrieved by the sale of malt liquors to her minor son, and that the law under which the action was brought is unconstitutional. The appellant admitted on the trial that Goss had sold malt liquor to appellee's minor son at the time alleged in her petition, in a saloon then kept by the said Goss, and at the said time the appellee was, and is still, a widow. The bond sued on designates the Runge Building, on Main street, in the city of Otero, as the place at which he proposed to carry on the sale of malt liquors. To our minds, the evidence is sufficient to show that he was regularly licensed to carry on said business at the place designated. Appellants were notified to produce the license upon the trial. This they refused to do, without denying or attempting to show that such license was ever issued. The testimony of the clerk of the county court and his deputy was then resorted to, and is, in connection with the fact that Goss carried on said business at the place designated, sufficient to establish the issuance of his license. There is no error in the judgment appealed from which requires a reversal, and it is therefore affirmed.

#### BRAZORIA COUNTY v. GRAND RAPIDS SCHOOL-FURNITURE CO.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

##### APPEAL BOND.

A bond on appeal from a justice of the peace is not void because made payable to appellees, "or to their certain attorney, executor or administrators, or assigns."

Appeal from Brazoria county court; A. R. Masterson, Judge.

Brazoria county appealed from a judgment of a justice of the peace to the county court. The appellee, the Grand Rapids School-Furniture Company, moved to dismiss the appeal, and from an order sustaining such motion Brazoria county appeals. Reversed.

Gaines & Masterson, for appellant. A. E. Masterson, for appellee.

<sup>1</sup> Rehearing denied.

<sup>1</sup> Writ of error dismissed for want of jurisdiction.

JAMES, C. J. The case was originally in the justice's court, and the appeal was dismissed in the county court for want of a valid appeal bond. In all respects, the bond complied with the statute, unless it was vitiated by being made payable to "the Grand Rapids School-Furniture Company, or to their certain attorney, executors or administrators, or assigns." It has been held that such bond is void. *Nones v. McGregor* (Tex. Civ. App.) 35 S. W. 1063. We are, however, of the contrary opinion. The bond, it seems to us, is in no manner materially different from what it would have been, had it been payable to the appellee. The words, "its certain attorney," mean its authorized attorney; and it cannot be doubted that such attorney, or any person having appellee's authority to do so, or standing in appellee's place as representative, might have enforced such bond, had it been drawn payable to appellee simply. It is not subject to the criticism that it is payable to parties in the alternative. Therefore the judgment is reversed, and the cause remanded.

#### WILLARD et al. v. GUTTMAN.

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

#### LIMITATION OF ACTIONS—ACCOUNT—WRITTEN PROMISE—APPEAL—FUNDAMENTAL ERROR.

1. A petition on an account made in mutual current trade between merchant and merchant is governed by the four-years statute.

2. A petition on a written promise to pay an account is not barred until four years.

3. An error of law apparent on the record is fundamental, requiring consideration on appeal without assignment.

Appeal from Galveston county court; W. B. Lockhart, Judge.

Action by Willard & Quincy against L. Guttman. A demurrer to the petition was sustained, and plaintiffs appeal. Reversed.

FLY, J. Appellants sued on an account of date August 25, 1892, the suit having been filed on April 3, 1893. It was stated in the petition that the account was made in "mutual current trade between merchant and merchant," and also "that defendant, in writing, promised and agreed to pay the same to plaintiffs, at Galveston county, Texas, on September 25, 1892." A special demurrer, setting up limitation of two years, was sustained by the court, and from that judgment this appeal has been perfected. No briefs have been filed by appellants, and the assignments must be considered as waived, but we conclude that the petition stated a cause of action, and that the judgment of the court was fundamental error.

There is some difficulty experienced in arriving at what constitutes fundamental error, but there can be no doubt that it would be fundamental error to render a judgment on pleadings that failed to state a cause of ac-

tion; and it would seem to follow that, if a petition states a cause of action, it would be error to sustain a demurrer that would preclude a recovery. The error is one of law, apparent upon the record, and is therefore fundamental, and must be considered without assignments of error. *Harris v. Petty*, 66 Tex. 516, 1 S. W. 525.

The petition states a cause of action not barred in less than four years, both as an account, mutual and current, between merchant and merchant, and as an action based on a promise to pay in writing. The judgment will be reversed, and the cause remanded.

#### LEVINSON v. TEXAS & N. O. RY. CO.

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

#### CARRIERS—TICKETS—NEGOTIABILITY—REDEMPTION.

1. A railroad company is not bound to redeem a passenger ticket once used by the purchaser over the trip for which it was bought, under Act 1893, providing for the redemption of tickets and parts of tickets unused.

2. A railroad ticket is a nonnegotiable instrument.

Error from Harris county court; John G. Tod, Judge.

Action by L. M. Levinson against the Texas & New Orleans Railway Company. Judgment for defendant. Plaintiff brings error. Affirmed.

W. G. Love, for plaintiff in error. Baker, Betts, Baker & Lovett, for defendant in error.

FLY, J. This suit was instituted by plaintiff in error to recover of defendant in error the sum of \$9.20, the amount paid for a ticket by one Eugene Christian to enable him to ride from Schriever, La., to Houston, Tex., and for the \$500 penalty authorized by statute for a failure to redeem said ticket when presented. Defendant in error answered, denying Christian's power, under the statute, to sell the ticket to plaintiff in error, and also that Christian had actually traveled on the ticket from Schriever, La., to Houston, Tex. The cause was tried without a jury, and resulted in a judgment for defendant in error. The facts show that on December 2, 1895, one Eugene Christian bought a ticket from defendant in error in Schriever, La., which entitled him to a continuous first-class passage from that point to Houston, Tex. He boarded the train at Schriever, and the first conductor detached what is known as the "auditor's stub," but did not punch the ticket proper which he returned to Christian. The first conductor's run ended at La Fayette, La., and, Christian being in the sleeping coach, the next conductor failed to take up the ticket, although it was his duty so to do. Upon arrival at Houston, Christian presented his ticket for redemption, which was refused, and afterwards plaintiff in error presented the ticket for redemption, and it was

again refused. There was nothing on the ticket to show that it had been used, and plaintiff in error paid Christian a valuable consideration for it, not knowing that it had been used. The railroad ticket was a nonnegotiable paper, and, if transferable at all, was transferred subject to all defenses that could have been set up against it in the hands of Eugene Christian. Elliott, R. R. § 1593. The ticket entitled Christian to one continuous passage between the points designated in it. It had performed its office, and it would be absurd to contend that Christian could, with any show of justice or right, demand a repayment of the money for the ticket after he had received all he had paid for. The simplest principles of honesty and regard for the rights of others would have caused him to have returned the ticket to the railway company for cancellation. This, however, was not his conception of right, and, after failing to collect the money on the ticket from the railway company, he sold it to plaintiff in error. Except as to the question of morals involved, plaintiff in error has taken his place, and cannot recover. The very statute invoked to obtain the penalty makes it incumbent on railway companies to redeem tickets that have not been used by the holder, who was, in contemplation of the statute, the purchaser. Under the facts of this case any other judgment than that rendered by the trial court would be in defiance of the plainest dictates of honesty, justice, and good morals. It is not necessary, in this case, to discuss the constitutionality of the act of 1893, which provides how and by whom tickets on railroads shall be sold, and for the redemption of tickets and parts of tickets unused. The judgment is affirmed.

#### BEARROW et al. v. WRIGHT et al.

(Court of Civil Appeals of Texas. Dec. 11, 1897.)

#### VENDOR AND PURCHASER—RESCISSION—GROUNDS—LIEN—ENFORCEMENT—LIMITATIONS.

1. An absolute warranty deed, reciting a cash consideration, was made on the faith of and pursuant to an agreement by the grantee to convey to his grantor the west half of the land. *Held*, that the grantee took a full legal and equitable title to all the land, subject only to an equitable lien for any portion of the consideration left unpaid; and hence the grantor was not entitled to rescind on the grantee's failure to convey.

2. The lapse of nearly 30 years since the sale of land bars the right to sue for the price and foreclose the equitable lien therefor.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by Eugene Bearrow and others against Jesse Wright and another. From a judgment sustaining demurrers to the complaint, plaintiffs appeal. Affirmed.

Kearby & Muse, for appellants. Simkins & Titterington, for appellees.

FINLEY, C. J. This is the second time this case has come before us upon appeal. The judgment first appealed from was in favor of the plaintiffs in the suit. Upon the first trial the court submitted to the jury only the issue of the right of the plaintiffs to recover the west half of the 320-acre tract, and upon that issue judgment was rendered in favor of the plaintiffs. This court held that plaintiffs were not entitled to recover the west half of the 320-acre tract, and upon this ground reversed the judgment of the trial court. See *Wright v. Bearrow*, 35 S. W. 190, for a full statement of the case, and the views of this court in relation to the claim of plaintiffs to the west half of the 320-acre tract of land. The cause was remanded, because the petition set up another phase of the case than that upon which it was tried, which was wholly ignored by the court. The petition prayed alternatively for a rescission of the sale of the east half of the land, and, in remanding the case, we said: "It does not appear that a specific performance of the contract to exchange lands was necessary in order to prevent a fraud, and to save S. T. Wright from losing the value of his tract of land, which he conveyed to Jesse Wright, upon the consideration that Jesse Wright should convey him the west half owned by said Jesse Wright. When Jesse Wright failed or refused to carry out the contract of exchange, his vendor could elect to rescind the contract, and recover back the east half conveyed by him, or sue for the value of said east half, and have the same enforced as a lien against the land. As this phase of the case was not tried in the court below, the case having passed off entirely upon the question of plaintiff's right to recover the west half of the land, we do not feel called upon to discuss the questions relating to this issue." It will be observed that we declined to enter into a discussion of that issue, because it had not been tried in the court below. We did not pass upon the sufficiency of the allegations of the petition as a basis for the prayer for a rescission, because that question was not necessary to be decided, and was not raised by any action had by the court below upon such issue. Inasmuch as the trial court had decided the case for the plaintiffs upon the other issue, and this court held adversely to them on that issue, we thought best to remand the case for another trial, in order that the issue of rescission might be fully developed and fairly tried. Upon the last trial the plaintiffs did not amend their pleadings, and the issue was raised by demurrer whether the petition of plaintiffs presented such facts as would authorize a recovery of the west half, or a rescission of the sale of the east half, of the 320-acre tract of land. The court below held that the petition did not state a good cause of action for a recovery of the west half, or for rescission of the sale of the east half, sustaining the demurrers; and

the plaintiffs declining to amend, judgment was rendered for the defendants, from which they (plaintiffs) have appealed to this court.

We are now called upon to decide upon the correctness of the action of the court in sustaining the demurrers to plaintiffs' case, as stated in their pleadings. The petition alleges that on September 8, 1865, S. T. Wright and wife, by their deed, conveyed to the defendant Jesse Wright his interest in the land in dispute, for the recited consideration of \$640 cash paid; that, in fact, no cash was paid or received, but the true consideration was the delivery to the grantor of certain personal property, not to exceed \$100 in value, and an undertaking upon the part of Jesse Wright to convey the west half of the 320 acres upon demand, and to hold said west half and the title thereto in trust for the said S. T. Wright and his heirs; that the conveyance of S. T. Wright and wife to Jesse Wright was duly recorded, a copy of which is attached as Exhibit B to the petition; that the said defendant Jesse Wright undertook and agreed to hold the land (the west half) in trust for said S. T. Wright and wife, and, in event of their death, for his surviving children, and further agreed to account for the rents and profits on said west half; that, under said agreement, defendant went into possession on September 18, 1865, and has continuously used and occupied said premises since that time; that said defendant has continuously held the west half of said 320 acres in trust as aforesaid since said conveyance to him, has never repudiated the same, has continuously recognized the title of the children and heirs of S. T. Wright thereto, and in all things complied with the terms and conditions of said trust until the death of Sallie J. Wright, in 1877, since which time defendant has failed to account for the rents and revenues arising from said west half; that defendant has never denied the title to the children for the west half of said land, nor repudiated the holding of same in trust for them until the year 1892, when demand was duly made, and defendant refused to convey the west half of said land to the surviving children of said S. T. Wright and wife, or to surrender them the possession, or to account to them for the rents and revenues. They alleged that, by reason of the premises, the plaintiffs are the owners in fee simple of the west half of said 320 acres; that defendant refuses to execute to them a conveyance thereto, or to surrender possession, or to account for rents and revenues which they derived from said land which they became liable to pay since January, 1878. But, should this relief be denied, then plaintiffs prayed in the alternative for the cancellation of the deed from S. T. Wright and wife to Jesse Wright to the east half; and, as a basis for cancellation, it is alleged that the conveyance from S. T. Wright and wife to Jesse Wright was in pursuance of an

agreement between them to exchange lands, whereby said Wright and wife undertook and did convey to defendant the east half of said 320 acres, and Jesse Wright agreed to convey to S. T. Wright the west half; that the conveyance of S. T. Wright and wife was executed upon the faith of the agreement to convey the west half, as before stated, which was of the reasonable value of \$3,200; that Jesse Wright has never conveyed the west half in whole or in part, and has never paid said \$3,200, which now constitutes a lien upon the east half, whereby the superior title is alleged to be in plaintiffs; that defendant has been in continuous possession of the east half since September 18, 1865, using it, for which \$1,200 is claimed as rents and profits,—by reason of which facts they say the superior title to the east half has never been divested out of S. T. Wright, and still remains in his heirs, the plaintiffs, and, being thus the legal owners and holders of the superior title, they are entitled to a rescission of the conveyance and cancellation of the deed executed by S. T. Wright and wife to defendant for the east half, and judgment for the title and possession of same.

Upon the former appeal we held that plaintiffs were not entitled to recover the west half of the 320 acres, and we now adhere to the views expressed in the former opinion. 35 S. W. 190. Does the pleading state such facts as would authorize a rescission of the sale of the east half by S. T. Wright and wife to Jesse Wright? The petition alleges that an absolute warranty deed, reciting a cash consideration, was executed by S. T. Wright and wife to Jesse Wright; and there is no allegation of any deception or fraud practiced by Jesse Wright upon his vendor, S. T. Wright. It is alleged that the deed does not recite the true consideration; that the real consideration was the payment of \$100 in personal property, and the conveyance of the west half of the land by Jesse Wright to S. T. Wright. It was further alleged that S. T. Wright executed the deed to the east half upon faith in the promise of Jesse Wright that he would convey to him the west half, and that he failed to make such conveyance. In the light of the allegations, the transaction between the parties cannot be considered as simply a contract for the exchange of lands. The facts alleged import a sale of the east half of the land by S. T. Wright and wife to Jesse Wright, and a failure on the part of Jesse Wright to pay the full consideration agreed upon as the value of the land. In the absence of fraud, the deed from S. T. Wright and wife to Jesse Wright, reciting the payment of a full cash consideration, and being absolute in its terms, conveyed both the legal and equitable title to the land to Jesse Wright; and, if any portion of the consideration was left unpaid, the vendor could only assert an equitable lien upon the

land, as for purchase money, to enforce its payment. *Railroad Co. v. Garrett*, 52 Tex. 138; *Railroad Co. v. Pfeuffer*, 56 Tex. 71; *Lott v. Kaiser*, 61 Tex. 671; *Bynum v. Preston*, 69 Tex. 287, 6 S. W. 428; *Webster v. Mann*, 52 Tex. 424-426. After the long lapse of time, disclosed by the pleadings, between the sale and the institution of this suit, the right to sue for the purchase price of the land and foreclose the equitable lien upon the land for its payment is barred by limitations. Limitations were urged by demurrer. Judgment affirmed.

### JORDAN v. CHESTER et al.

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

APPEAL AND ERROR—INJUNCTIONS—BILLS AND NOTES—CONSIDERATION—SERVICES TO BE PERFORMED—ENJOINING COLLECTION OF JUDGMENT—PART PERFORMANCE OF CONTRACT—EQUITY—TENDER.

1. Where the case is tried on its merits, exceptions to the sufficiency of the answer to authorize the court to dissolve a temporary injunction upon it alone will not be considered.

2. Where notes given in consideration of services to be performed were put in judgment before the time for performing the services had arrived, and afterwards the payee neglected to perform the services, the enforcement of the judgment should be enjoined.

3. Where notes given in consideration of services to be performed had been put in judgment, and there had been a part performance, but the payee of the note had neglected to perform the remainder of the contract, before the collection of the judgment can be enjoined, the maker of the notes must tender the reasonable value of the services performed.

Appeal from district court, Tyler county; Stephen P. West, Judge.

This suit was brought by the appellant, B. L. Jordan, against the appellees, L. F. Chester and L. G. Roberts, as sheriff of Hardin county, to restrain the collection of a certain judgment recovered by L. A. Chester against appellant in the justice court of Tyler county, Tex., on the 12th day of November, 1894, for the sum of \$175, and the sale of certain lands levied upon by said sheriff of Hardin county by virtue of an execution issued on said judgment. The district judge granted the temporary writ of injunction prayed for, which, upon a preliminary hearing, was dissolved, and the cause continued for trial on its merits. Upon the trial, judgment was rendered in favor of the appellees, from which judgment appellant has appealed. Affirmed.

John P. Work, for appellant. Votaw, Chester & Dies, for appellees.

### Conclusions of Fact.

NEILL, J. On the 23d day of August, 1893, the appellant executed and delivered to the appellee L. F. Chester his four certain promissory notes for the sum of \$50 each, aggregating the sum of \$200, all of

which were payable at Woodville, Tex., the last note maturing falling due on the 1st day of May, 1894. These notes were given in consideration of the employment by appellant of the appellee L. F. Chester, an attorney at law, to defend Tobe Jordan, a son of appellant, and Roy Jordan, appellant's nephew, upon indictments pending in the district court of Hardin county, Tex., for assault with intent to murder. Appellee partially performed his contract in the defense of Tobe, and rendered in the defense of Roy all the services contracted for. On the 12th day of November, 1894, the appellee Chester recovered a judgment on the notes against appellant for the sum of \$175, together with interest thereon from the 12th day of November, 1894, together with costs of suit. On the 31st day of March, 1895, an execution was issued on said judgment, and placed in the hands of L. G. Roberts, sheriff of Hardin county, who, as said sheriff, by virtue of said execution, on the 8th day of July, 1895, levied upon certain property of appellant situated in said county. At the September term, 1893, the venue of the case against Tobe Jordan was changed from Hardin county to Polk county, and on the 31st day of May, 1895, he was brought to trial upon the indictment in the last-named county, and convicted of assault with intent to murder. The appellee Chester was not present, and did not defend Tobe upon this trial. After Mr. Chester obtained the judgment on the notes against appellant, he requested the latter to pay a sufficient sum upon the judgment to defray his expenses to Polk county, so that he might go there and defend his son, Tobe. The appellant denied this request, and refused to pay anything on the judgment. For this reason said appellee was not present at the trial.

### Conclusions of Law.

It is unnecessary to consider the exceptions to appellees' answer going to its sufficiency to authorize the court upon it alone to dissolve the preliminary injunction, since the case was afterwards tried on its merits, and it was then determined that the facts proven were not sufficient to authorize the relief prayed for. The principle underlying the equitable jurisdiction invoked in this case is that it must be against conscience to execute the judgment sought to be enjoined, and it must appear that the person aggrieved could not avail himself, in the action in which the judgment was rendered, of the equities relied upon to enjoin the judgment. High, *Inf.* § 114. If it had been true, as was alleged by appellant in his bill, that the judgment sought to be avoided was rendered upon notes made by him to appellee solely in consideration of professional services to be performed by the latter in the defense of appellant's son, that the time when the defense of the son should have been made had not arrived when the judg-



ment was recovered, and that appellee neglected to perform any of the services for which the notes were given, we think it would be unconscionable to insist upon the enforcement of the judgment. But there is another general rule, which is that he who seeks to restrain the enforcement of a judgment at law, or of proceedings under the judgment, must first pay or tender payment of the amount really due, and, failing to do this, he will be denied relief in a court of equity. *Id.* § 180. This rule is founded on the maxim that he who seeks equity must do equity. As is seen, the facts in this case show a contract in which the consideration to be performed by the appellee was different from the one alleged in appellant's bill. According to his averments, Mr. Chester, in consideration of the payment of the money evidenced by the notes, was only to defend appellant's son, Tobe. But the facts show that the consideration was his undertaking to defend Tobe and also appellant's nephew, Roy. Appellee partially performed his contract in the defense of Tobe, and rendered in the defense of Roy all the services contracted for. Mr. Chester was willing to render in the defense of Tobe all the services contracted for, and so expressed himself to appellant, provided the latter would pay him enough on the judgment to defray his expenses in attending court in the county to which the venue of the case had been changed. To entitle appellant to the relief prayed for he should have alleged the contract just as it was made, the part performance of it by appellee, the value of the services actually performed, and tendered to him the reasonable value of his services so performed. This much equity required of him before he could invoke its aid, and, he having failed in these requirements, judgment was properly rendered against him, and it is affirmed.

### SABINE TRAM CO. v. JONES.

(Court of Civil Appeals of Texas. Jan. 5, 1898.)

#### ACTION ON CONTRACT—PLEADING—SUFFICIENCY OF ALLEGATIONS—OBJECTIONS—MEASURE OF DAMAGES.

1. In an action for breach of contract to accept certain saw logs on delivery, allegations in the petition that a tender of such logs was made in accordance with the terms of such contract, which was copied into and made a part of such petition, were sufficient, on exception thereto, to admit proof that such contract had been complied with by plaintiff.

2. An objection that the petition, in an action for breach of contract to accept certain saw logs on delivery, contains no allegation that such timber was scaled as required by the contract in question, should have been set up by plea, and not by exception.

3. Where the petition alleged the cost of cutting certain saw logs per 1,000 feet, the average price per 1,000 feet that defendant agreed to pay therefor, and plaintiff's profit thereon per 1,000 feet, such alleged profit, being certain and definite, constituted a proper measure of

damages, in an action for breach of contract to accept such logs on delivery.

4. Plaintiff was not entitled to recover for interest paid on notes due defendant, and the cost of feeding and caring for idle teams, as damages for such breach of contract.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by the Sabine Tram Company against M. T. Jones. From a judgment dismissing the action, on sustaining certain special exceptions to the petition, plaintiff appeals. Reversed.

Greer & Greer and Jones & Garnett, for appellant. Ford, Stone & Ford and Hutcheson, Campbell & Sears, for appellee.

FLY, J. Appellant sued to recover of appellee damages arising from the breach of a certain contract, under which certain pine logs were to be furnished by appellant, and paid for by appellee. Special exceptions to the petition were sustained, and, appellant declining to amend, the suit was dismissed. The first part of the contract set out the sale of certain lands by appellant to appellee, for which promissory notes were given by appellee, and that is followed by provisions: "The said Sabine Tram Company, for the purposes and considerations herein named, hereby contracts, obligates, and binds itself to deliver to the said M. T. Jones or his order, at the log boom of the Sabine Tram Company, in the Sabine river, at the upper end, and including the upper half of A. Gilmer's log boom, the same being the usual scaling place of said Sabine Tram Company at the town of Orange, in Orange county, Texas,—provided that should the said M. T. Jones or his authorized agent request that said logs, or any part thereof, not already delivered at the first-named place, be delivered at the log boom of the Orange Lumber Company, about five miles above the town of Orange, in Orange County, Texas, on the Sabine river, then the same shall be delivered as requested within a reasonable time after such request,—six million of (6,000,000) feet annually, in monthly installments,—provided, however, the said M. T. Jones shall not be required to receive more than one and one-half millions of feet on this contract during any one month,—of sound pine saw logs, of average quality, as they come from the lands this day purchased by said Sabine Tram Company from M. T. Jones, or from adjacent lands, and of such lengths, as near as may be possible, as may be from time to time ordered by the said M. T. Jones, provided said orders are made at least thirty (30) days before the date of the delivery. Said logs are to be estimated and measured according to the rate of log scaling or measurement now in use by log and sawmill men at the town of Orange, in Orange county, Texas. And the said M. T. Jones agrees to pay for said logs in the manner hereinafter stated, at the following prices, viz.: Logs 10 to 11 inches in diam-

ter, from 12 to 24 feet long, at the rate of \$4.00 per thousand feet, but of logs of these dimensions and price he is not to receive more than 3 per cent. in feet of the entire amount delivered; logs 12 inches in diameter, and over, from 12 to 24 feet long, \$5.00 per thousand feet; logs 18 inches in diameter, and over, from 26 to 34 feet long, \$6.00 per thousand feet; logs 18 inches in diameter, and over, and 36 feet long, \$7.00 per thousand feet. It is further agreed that, in addition to the above-stipulated six millions of feet, the said M. T. Jones may, at his option, order an amount of like sizes and dimensions as above stated, not to exceed six millions of feet per annum more (not more than three per cent. in feet of this as well as of the first-named six millions of feet shall be of logs 10 and 11 inches in diameter, and not less than 12 or more than 24 feet long, denominated, '\$4.00 per thousand feet long'); the same to be paid for at same rates and in the same manner, except that the logs 12 inches in diameter and over, from 12 to 24 feet long, coming under said option order, shall be paid for at the rate of \$5.25 per thousand feet, Orange log-scale measure; and the said M. T. Jones shall notify the said Sabine Tram Company during the month of January of each year of the amount of logs, in feet, Orange scale measure, he will take during the year, of said option logs, except this year, which notice shall be given as soon as practicable after this date. It is further stipulated and agreed that at the end of each month the party of the second part to this contract, or its authorized agent, for this purpose acting for it, after this contract goes into effect, and until the same is executed or terminated, shall render to the said M. T. Jones or his authorized representative a full, correct, and accurate account and statement of the number of feet of log-scale measurement, and of the dimensions and prices, of all the logs which have been furnished by said Sabine Tram Company under this contract to the said M. T. Jones or his order during said month, and also a full, accurate, and correct statement, under oath, of all logs and the number of feet, log-scale measure, cut off of said lands, so sold by M. T. Jones to said Sabine Tram Company, during said month; and at the end of each month the parties to this contract, or their authorized agents for this purpose, shall have a settlement of all accounts between them by reason of the matters of this contract not previously settled between them; and upon such settlement the said M. T. Jones shall credit the said notes of the said Sabine Tram Company, in the order in which they fall due, with \$2.00 per thousand feet, Orange log-scale measure, and at the rate for each fractional part thereof, for all logs so delivered by the said party of the second part to said party of the first part, or his order, during said month, in accordance with the terms and conditions of this contract; and the balance that may be due the

said party of the second part after entering said credit on said note or notes shall be liquidated by the said M. T. Jones, giving his notes, negotiable, therefor, to the said Sabine Tram Company, in two equal amounts, payable in thirty and sixty days from date, in lawful money of the United States of America. And it is hereby further agreed that at each monthly settlement the said Sabine Tram Company shall pay to the said M. T. Jones, or his representative, the sum of one and  $\frac{50}{100}$  (\$1.50) dollars per thousand feet, and at that rate for each fractional part thereof for all logs and timber cut or taken off of said lands hereinbefore described, sold by said M. T. Jones to said Sabine Tram Company of this date, which have not been delivered by said Sabine Tram Company to said M. T. Jones or his order. The said party of the second part is to furnish a reliable and competent man to scale and measure said logs, and keep the account of the same at the boom where they are delivered, the wages and expenses of the same to be paid by said party of the second part. And, should the said M. T. Jones at any time so desire, he may, at his own expense, provide a man who shall represent him, and the two so employed shall act together in scaling said logs and keeping said statement of accounts, provided, if the two parties so appointed by the parties of the first and second part, to this contract, to scale said logs and keep the estimates and accounts thereof, fail to agree in any matter or matters regarding the same, then and in that case the said M. T. Jones and the president of the Sabine Tram Company shall select a third man, to whom shall be referred for decision and adjustment all points of difference regarding said scaling measurement, estimates, and accounts between the said scalers."

It was alleged in the petition: "That, in accordance with said contract, this plaintiff has done and performed all the terms and conditions therein incumbent upon it, and has ever been ready, able, and willing to so perform all its said obligations therein stipulated; and, in pursuance and under the terms thereof, the plaintiff did run, float, and tender the delivery of said six millions feet at the place so stipulated in said contract for the year 1894, in that on March 19, 1894, it notified the said defendant that it had in what was known as the 'A. Gilmer's Boom,' in Sabine river, near the town of Orange, ready for delivery for the month of March, one million and five hundred thousand feet of pine logs, and then and there served notice in writing upon the defendant that such 1,500,000 feet of pine logs was so ready for delivery and acceptance by defendant; but that the defendant, wholly disregarding the terms of the said contract, failed and refused to accept the said delivery, and ignored plaintiff's said notice. That again, on March 20, 1894, in accordance with said contract, plaintiff tendered to defendant at the place designated in said contract, 1,500,000 feet of said

pine logs, and notified the defendant thereof in writing of such delivery; but the defendant again, wholly disregarding the terms and conditions of his aforesaid obligation, failed and refused to accept said pine logs so tendered, but wholly failed and refused therein. That again, in compliance with its said contract, the plaintiff, on April 13, 1894, tendered to the said M. T. Jones 1,500,000 feet of pine logs as for delivery under the conditions of said contract for the month of April, 1894, and again notified the said defendant of its said readiness and tender of said logs at the place designated in said contract, and at said time served defendant with written notice thereof, and with written notice that it was being damaged by his refusal to accept and pay for said logs; but the defendant, wholly disregarding the terms and obligations of his said contract, failed and refused to accept and pay for said logs. That again, on May 10, 1894, the plaintiff, in accordance with the obligations so stipulated in the said contract, made tender of delivery of 1,500,000 feet of pine logs, and again, in writing, notified the said defendant of said tender, and of the damages accruing to plaintiff by reason of defendant's failure and refusal to accept and pay for the same; but the defendant, wholly disregarding the terms and obligations stipulated in the aforesaid contract, failed and refused to accept the said 1,500,000 feet. That again, on June 6, 1894, in accordance with the terms and stipulations of said contract, the plaintiff tendered, at the place of delivery stated in said contract, 1,500,000 feet of pine logs in accordance with the terms, stipulations, and conditions of the said contract to the said defendant, and again notified the said defendant, in writing, of such tender; but that the defendant, wholly disregarding the aforesaid terms of his said contract, failed and refused to accept such delivery, and failed and refused to pay for the aforesaid logs. That, by the last tender of such delivery, the aggregate quantity of logs so tendered to the said defendant, up to and including June 6, 1894, amounted, in the aggregate, to the quantity of six millions feet of said pine logs for said year of 1894; and the defendant, in violation of the terms and conditions so stipulated in the said contract, has failed and refused to accept the said six millions feet of pine logs, or any part thereof, and has refused to pay for the same, or any part thereof, and has ignored all of said plaintiff's notices of its ability, readiness, and actual tender of delivery of the said pine logs as hereinbefore alleged, thereby and therein committing a breach of the contract between said defendant and this plaintiff, to its damage in the sums hereinafter averred. That, of the quality of logs so tendered by this plaintiff to the defendant, less than three per cent. thereof were of the following dimensions, to wit: 10 to 11 inches in diameter, and from 12 to 24 feet long.

That all the other logs, including more than 97 per cent. thereof, so actually tendered for delivery to the defendant, were logs averaging 12 inches in diameter and over, and 12 to 24 feet long, and were logs averaging 18 inches in diameter and over, and from 26 to 34 feet long, and logs 18 inches in diameter and over, and 36 feet long."

The following exceptions to the petition were sustained: "As to the 1,500,000 feet alleged by plaintiff to have been tendered in each of the months of March, April, May, and June, 1894, and the alleged tenders made in 1896, defendant demurs, and says that the allegations of tender and the facts upon which the tender is claimed do not constitute a tender upon the contract between plaintiff and defendant, made a part of plaintiff's said original amended petition, and the same shows on its face that it was not a compliance therewith, because there is no allegation that the said timber was scaled as required by the said contract, and as was customary in the delivery of timber; wherefore they say the said petition is wholly insufficient for plaintiffs to base a recovery on defendant's refusal to accept said timber here pleaded to have been tendered to him, of which demurrers defendant prays the judgment of the court." "To so much of the allegations of plaintiff's petition as sets up a net profit of \$1.82 per thousand, aggregating the sum of \$10,920, do not, under the facts alleged by plaintiff in this case, constitute a proper measure of damages, and is wholly inconsistent with the other facts alleged therein, and of this they pray judgment of the court." "So much of said petition as sets up and claims the sum of \$755.50 as interest paid on notes due by plaintiff to defendant is not a proper element of damage, and they demur thereto, and say that the same should be stricken out, and of this they ask the judgment of this court." "So much of said petition as sets up the feed supplied to idle teams during July, August, September, and to the 4th day of October, 1894, of \$1,117.49, and of \$640, wages paid employes for feeding said teams, and \$38, for boarding employes in caring for said teams, is not a proper element of damage in this cause, and same are remote, and not the natural or proximate result of the refusal complained of against this defendant, and of this, its demurrers, defendant asks the judgment of the court, on each and all of same."

We are of the opinion that it was error to sustain the first two exceptions above copied. It is reiterated in the petition that a tender of the logs was made in accordance with the terms of the contract, which was copied into and made a part of the petition. The allegations were sufficient to admit proof that the contract had been complied with by appellant, and the point attempted to be reached in regard to scaling or measurement was one that should have been set up by plea, and not by exception.

The ruling on the exception as to the measure of damages cannot be sustained. Where the profits to be realized from a contract which has been breached are certain and definite, they form a proper measure of damages, and it is only those which are speculative and contingent which cannot serve as a basis for damages. "Profits are not excluded from recovery because they are profits; but, when excluded, it is on the ground that there are no criteria by which to estimate the amount with the certainty on which the adjudications of courts and the finding of juries should be based." Sedg. Dam. § 176; *Griffin v. Colver*, 16 N. Y. 489; *Fraser v. Smelting Co.*, 9 Tex. Civ. App. 210, 28 S. W. 714, where the question is fully discussed and authorities cited. In this case the profits to be realized are certain and definite, not depending on any contingency. Appellant alleged that it cost it \$3.25 per 1,000 feet to cut and deliver the logs to appellee, who had agreed to pay an average sum of \$5.67 per 1,000 feet for the logs so delivered, and that its loss on the logs amounted to \$1.82 per 1,000 feet. It was alleged that many of the logs were a total loss to appellant, and that said loss was chargeable to appellee, and as to those appellant claimed and would be entitled to the full contract price. The market value of the logs which remained to appellant after being refused by appellee, if they had a market value, should be credited on the claim that appellant has against appellee; but if there was no market value, and it made due effort to sell, and did sell, any portion of said logs, the amount received by it should be the only sum for which appellee should have credit. *Lewenstein v. Chappell*, 30 Barb. 241. The reason of this rule is apparent, for if the logs had no market value, and could not be sold for any sum, they were a total loss to appellant, and appellee, having breached his contract, should be compelled to pay the whole loss; but if they had a market value, or if they had no market value, and sales were made of them, or any part of them, appellee should have the benefit of those sums.

The other two exceptions were properly sustained.

It is urged by appellee that, only a part of the exceptions having been sustained, and others overruled, appellant should have proceeded to trial on what remained, and had the action of the court reviewed on an appeal from the judgment rendered after trial, and he cites the case of *O'Neal v. Bank*, 64 Tex. 644, to sustain the contention. In that case, however, after the exceptions were sustained, there remained allegations that would have supported a judgment, while in this, the demurrers having been sustained, there was nothing left upon which to base a judgment. There remained no cause of action. The judgment will be reversed, and the cause remanded.

## DUMAS v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. Dec. 18, 1897.)

### CARRIERS—INJURY TO PASSENGER—NEGLIGENCE OF FELLOW PASSENGER.

1. Evidence that plaintiff, who was a passenger on defendant's train, endeavored to raise the car window, but, failing, a stranger to her, and presumptively a passenger, of his own motion raised the window, but not quite high enough, and in consequence it suddenly fell with considerable force, and painfully injured plaintiff's hand, which she placed there without noticing to what height the window had been raised, will sustain a verdict that the accident was due to the man's failure, without fault of defendant, to raise the window high enough to reach the catch, which would have prevented it falling.

2. In an action to recover for personal injuries received by a passenger on defendant's train, the burden of proof is on plaintiff to show that the injuries were caused by the negligence of defendant's agents, servants, or employees.

Appeal from district court, Rockwall county; J. E. Dillard, Judge.

Suit by Carrie A. Dumas, by next friend, against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for defendant, plaintiff appeals. Affirmed.

L. W. Wilkerson and Word & Chariton, for appellant. W. C. Jones, T. S. Miller, and Marshall Thomas, for appellee.

STEPHENS, J. This appeal is from a verdict and judgment denying a recovery of damages claimed in behalf of Carrie A. Dumas on account of personal injuries received by her while a passenger on one of appellee's trains. She boarded the train at Rockwall, for Dallas, and, taking her seat near the window, undertook to raise it, but failed to do so. Thereupon some gentleman, who was a stranger to her, and presumptively a passenger, of his own motion raised the window, but, as the evidence tends to show, failed to raise it high enough, and in consequence it soon and suddenly fell with considerable force, and caught and painfully injured her hand, which, according to her version, she had unconsciously placed there, without noticing to what height the window had been raised. It is plain that she trusted the strange gentleman entirely to properly raise the window for her, and the evidence sustains the verdict in the finding that the accident was due to his failure, without fault on the part of appellee, to raise the window sash high enough to reach the catch, which would have prevented its falling. The evidence not only tended to show that the accident was thus due to the act of one for whose conduct appellee was in no way responsible, but it also raised the issue of contributory

negligence on the part of appellant, both of which defenses were pleaded. We therefore overrule the first, second, third, fourth, and sixth assignments of error, complaining of the submission of these two issues, in effect, because not raised by the testimony. The charge of the court properly imposed the burden of proof on appellant of showing that the injuries complained of were caused by the negligence of the agents, servants, or employes of the railway company, and we consequently overrule the fifth assignment. The remaining assignments (the seventh and eighth) complain of the court's refusal to grant special charges requested by appellant. But we are of opinion that all the issues raised by the pleadings and evidence were fully and fairly submitted in the charges given. We hence overrule these assignments, and affirm the judgment.

### RICKER NAT. BANK v. BROWN.

(Court of Civil Appeals of Texas. Dec. 24, 1897.)

#### ACTION ON NOTE—BURDEN OF PROOF—PLEADING —EVIDENCE—SALE—WARRANTY— REVIEW ON APPEAL.

1. In a suit on notes indorsed in blank to plaintiff, the burden is on defendant to allege and prove lack of good faith.

2. In a suit on notes indorsed in blank to plaintiff, an answer that there was breach of warranty on the property for which the notes were given, and that they were transferred to plaintiff after maturity, and that the indorsement was fictitious, is sufficient to let in proof of failure of consideration.

3. The introduction of notes properly indorsed makes a prima facie case, in a suit thereon.

4. In a suit on notes indorsed in blank to plaintiff, a letter from the payee to the maker, written after the date of the indorsement, is inadmissible, where there is no evidence that plaintiff authorized or sanctioned the writing of said letter, or knew that it had been written.

5. The fact that one party to a suit had served upon the other party a written notice to produce certain letters at the trial will not authorize such party to introduce them in evidence over the objection of the party who served the notice.

6. A letter head of one corporation is not admissible against another, to prove that the same person is an officer in both.

7. Where it is evident from the findings of a court in a trial without a jury that its conclusion was based on evidence which should have been excluded, the judgment will be reversed.

8. A person who buys goods upon a warranty, and who is given an opportunity to examine them, is estopped from afterwards claiming relief for a defect in the goods only when such defect could have been discovered by a proper examination.

Appeal from Ellis county court; J. C. Smith, Judge.

Suit by the Ricker National Bank against William H. Brown. Judgment for defendant, and plaintiff appeals. Reversed.

Sherrod & Singleton, for appellant. Chas. L. Edwards, for appellee.

RAINEY, J. This was a suit by appellant to recover on four notes executed by appellee to the Hynes Buggy Company, and indorsed by said buggy company in blank, and to foreclose a mortgage lien on a certain carriage given to secure the payment of said notes; the same having been executed for a part of the purchase price of said carriage. Appellee's answer alleged that said carriage was sold under a warranty, and that the consideration for said notes had failed, and "that said notes were transferred to plaintiff after maturity, and are subject to the defenses here pleaded. Further, that the plaintiff herein is not the real owner of said notes; that the indorsement thereon is fictitious, and made for the purpose of preventing this defendant from making certain just and legal defenses he has against said notes, which would defeat a recovery thereon." The answer was sworn to. The case was tried before the court without a jury, and judgment rendered for appellee on his plea of failure of consideration, from which judgment this appeal is prosecuted.

We understand from the assignments of error that one contention of appellant's counsel is that the allegations of the answer of the defendant, though sworn to, were not sufficient to put the plaintiff on proof as to the genuineness of the indorsement, and that, as said indorsement was in blank, the presumption of law is that the same is genuine, and made contemporaneously with the execution of the notes; that appellant is an innocent holder of said notes, free from any vices, and the court erred in admitting any evidence "tending to establish a failure of consideration, as against appellant." The answer does not attack the genuineness of the indorsement, and no evidence was introduced by defendant tending to show that the indorsement was not made by the Hynes Buggy Company. What evidence was introduced was for the purpose of showing that said transfers were made after maturity, and that appellant had notice of the failure of consideration, and that the notes were subject to the defenses pleaded. The appellant holding the notes indorsed in blank, the presumption of law would be that it was an innocent holder for value; and, to overcome that presumption, the burden was on defendant to plead and show that the notes were transferred after maturity, or, if transferred before maturity, that appellant had notice of the vices therein, or that appellant is not a bona fide holder for value. The answer was sufficient to let in proof of failure of consideration, though the notes were in the hands of a third party. The introduction of the notes, properly indorsed, made a prima facie case for plaintiff, which entitled it to recover, unless the defendant, by legitimate evidence, established the defense as pleaded. *Rische v. Bank*, 84 Tex. 413, 19 S. W. 610.

The appellant complains of the action of the court in permitting appellee, over objections, to introduce certain letters written by the Hynes Buggy Company to the appellee, the contents of which tended to show that said buggy company was the owner of the notes sued on. These letters were written after the time the law presumes the notes were transferred to appellant. There is no evidence showing that appellant in any way authorized or sanctioned the writing of said letters, or had any knowledge of their having been written. The contents of said letters were ex parte statements of the Hynes Buggy Company that would bind said company if it were a party to the suit, but said letters could not be introduced against appellant without its being shown that it authorized or sanctioned the same.

It is contended by appellee that these letters were called for by a written notice from appellant to produce them upon the trial, "or secondary evidence of their contents will be offered by the plaintiff herein," and therefore appellee was authorized to introduce them as evidence. The notice merely placed the appellant in a position to use the letters in evidence if produced on the trial, or prove the contents of same if not produced. This right the appellant had an option to exercise, or not, as it saw proper; but such notice did not confer upon appellee the right, over objections, to introduce evidence that was otherwise incompetent.

The letter head showed that George E. Ricker, who was cashier of plaintiff bank, was also secretary and treasurer of the Hynes Buggy Company. This was admitted, over objection, to show that said Ricker was an officer of both concerns, upon which appellee based the theory that Ricker, being an officer of the buggy company, was bound to take cognizance of any transaction with said buggy company, and that the bank was charged with the knowledge possessed by him. The letter head of the buggy company would be evidence against said company, if a party to the suit, but could not be used against the appellant. The letter head stands upon the same footing as the letters themselves. There being no evidence to show that George E. Ricker was a member of both concerns, we do not feel called upon to express an opinion upon appellee's contention that notice to George E. Ricker, as a member of the buggy company, was notice to the bank. It is evident from the court's findings that the conclusion of the trial court was based on the letter head and the contents of the letters. Such being the case, the judgment must be reversed, though tried by the court without the intervention of a jury.

It is insisted by appellant that, under the warranty, appellee had the privilege of examining the carriage before making the cash payment or executing the notes, and

that by reason thereof he is estopped from pleading a failure of consideration. The terms of the warranty are: "This job is guaranteed as per attached specifications, and is also warranted to be as well built, and as substantial, as a Miller or Cunningham carriage. The cash payment is to be deposited in an Ennis bank, subject to the arrival of the job, and its compliance with this contract." Opportunity was given appellee to examine the carriage according to the terms of the warranty; and if the defects, if any, were apparent, or could have been discovered by proper examination, then appellee is estopped from claiming relief. If, however, the defects, if any, were not apparent, and could not have been discovered by proper examination, then appellee would not be precluded from relief upon the warranty. *Manufacturing Co. v. Griffin* (Tex. Civ. App.) 40 S. W. 755; *Aultman v. McKinney* (Tex. Civ. App.) 26 S. W. 267; *Harrow Co. v. Martin* (Ky.) 36 S. W. 178. For the error of the court in admitting in evidence the letters as above indicated, the judgment is reversed and the cause remanded.

#### HARTFORD FIRE INS. CO. v. CLAYTON. (Court of Civil Appeals of Texas. Dec. 11, 1897.)

##### INSURANCE—CONDITIONS OF POLICY—WAIVER.

1. A clause in an insurance policy, providing that "this entire policy shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced by virtue of any mortgage," is valid and binding.

2. A clause in a policy of insurance, providing that "this entire policy shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced by virtue of any mortgage," is not waived by knowledge on the part of the company of a mortgage on the property insured, which they knew would mature during the life of the policy.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Action by John B. Clayton against the Hartford Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Harris, Etheridge & Knight, for appellant. Neyland & Neyland, for appellee.

RAINEY, J. John B. Clayton, appellee, sued the Hartford Fire Insurance Company, appellant, on a policy issued by said insurance company to, and covering property belonging to, one R. N. Bragg. The policy contained a stipulation that the "loss, if any, was payable to" appellee "as his interest might appear." Said policy further contained the following stipulation: "This entire policy shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced by virtue of any mortgage or deed of trust." At the time of the issuance of the policy there was a mortgage existing on said property, given by said Bragg to said Clay-

ton, appellee, which was known to said insurance company; and it also knew that the notes, to secure which said mortgage was given, would mature during the life of the policy. The property insured was destroyed by fire. A few days before the fire, appellee, Clayton, brought suit against Bragg on the notes and to foreclose the mortgage, of which proceedings said Bragg had notice before the fire. Said insurance company was ignorant of said foreclosure proceedings until after the fire. The only question raised in this case is whether or not the institution of the foreclosure proceedings under the facts of this case avoided the policy. The clause in the policy stipulating that it shall be void if foreclosure proceedings are instituted by virtue of any mortgage or deed of trust is a valid clause, and, if breached, the policy will be avoided; and, in order to be relieved of such a breach, the insured must show that said clause was waived by the insurance company, or that the company is estopped from pleading the same. The fact that the insurance company knew that the notes which said mortgage was given to secure would mature before the termination of the policy does not affect said clause, and cannot be construed to be a waiver of same. The weight of authority is to the effect that knowledge of insurance companies of the existence of a mortgage will not prevent a forfeiture where there is a breach of such clause. *Titus v. Insurance Co.*, 81 N. Y. 410; *Armstrong v. Insurance Co. (N. Y. App.)* 29 N. E. 991; *Quinlan v. Insurance Co. (N. Y. App.)* 31 N. E. 31; *McKinney v. Insurance Co. (Ky.)* 30 S. W. 1004; *Meadows v. Insurance Co. (Iowa)* 17 N. W. 600; *Insurance Co. v. Gottsman's Adm'rs*, 48 Pa. St. 151. These authorities accord with our views as to the proper construction to be given such a contract. The case having been tried by the court without a jury, and there being no dispute as to the facts, the judgment of the court below is reversed, and judgment is here rendered for appellant. Reversed and rendered.

LA MASTER et al. v. DICKSON et al.<sup>1</sup>  
(Court of Civil Appeals of Texas. Dec. 18, 1897.)

PAROL GIFT OF LAND—IMPROVEMENTS—EVIDENCE—ADMISSIBILITY—STATUTE OF FRAUDS—TRIAL—ADMISSION OF DEPOSITIONS—HARMLESS ERROR—SPECIFIC PERFORMANCE—RENTS.

1. Plaintiffs, to whom a parol gift of a farm was made, built a house costing \$100, several outbuildings, additions, fences, etc., in all costing about 10 per cent. of the value of the farm. *Held*, the improvements were permanent and valuable.

2. A defendant cannot complain of the admission of a co-defendant's ex parte deposition, where it was limited so as not to affect defendant.

3. A defendant cannot complain of the admission of a co-defendant's ex parte deposition, where he afterwards made such co-defendant his own witness, and proved by him the facts stated in the deposition.

4. Admission in evidence of a quitclaim deed to the land in dispute executed by one plaintiff to another while the suit was pending was harmless error.

5. Where a wife sued to establish a parol gift of land, her husband's declarations, made in her absence, after her rights had fully accrued, are not admissible against her, though he had resided on the land with her, and had assisted in making the improvements necessary to consummate the title.

6. Where plaintiffs sue to enforce a parol gift of land, it is proper to exclude their deed to an interest in the land, made to their attorneys, before beginning the suit, in consideration of the services to be rendered in recovering the land.

7. Improvements may be sufficient to take a parol gift out of the statute of frauds, though their value does not exceed the value of the use and occupation.

8. The rents due from a trespasser upon a homestead are exempt to the owner thereof.

9. Where co-owners ousted from possession of land sue to establish their title, and for rents, and pending the suit one of them quitclaims to the other, the rents due the former pass to the latter.

Appeal from district court, Fannin county: E. D. McClellan, Judge.

Suit by Katie E. Dickson and her husband, C. H. Dickson, against L. C. La Master. Jennie Walcott and others were made parties defendant. Upon the death of Katie E. Dickson the suit was prosecuted by Ben Walcott, as next friend of Mark Walcott Dickson and another. C. H. Dickson filed a disclaimer. Judgment for plaintiffs, and defendants appeal. Affirmed.

G. A. Carpenter, Taylor & McGrady, and Richard B. Semple, for appellants. Gross & Gross and Hale & Hale, for appellees.

STEPHENS, J. This appeal is from a judgment establishing a parol gift of land. The gift was claimed by Katie Dickson, wife of Charles H. Dickson, as having been made to her by her father, C. H. Walcott, about the time of, or soon after, her marriage, which occurred in November, 1890. C. H. Walcott died October 20, 1893, leaving a widow and several children, to whom (including Katie) he bequeathed his entire estate, and naming L. C. La Master as independent executor of his will. At the time of the alleged gift the land had already been rented to Tom Williams for the year 1891, and consequently Dickson and wife did not take possession until January, 1892. They remained in possession, improving and cultivating the land, till November, 1893, when they were ejected by La Master. This suit was then brought by them against him, and afterwards the widow and the other children of C. H. Walcott, deceased, were included as defendants. In November, 1895, Katie Dickson died, leaving two minor children, Mark Walcott Dickson and James Dickson, her sole descendants, who were allowed to continue the prosecution of the suit by their uncle, Ben Walcott, as next friend. Thereafter C. H. Dickson filed a disclaimer, and withdrew from the case, making also a quitclaim deed to his children. A

<sup>1</sup> Writ of error granted by supreme court.

trial by jury, after one mistrial, was finally had in February, 1897, the verdict covering several controverted issues of fact, which are thus stated in appellants' brief: "(1) Did Walcott, by sufficient designation and description, give Katie Dickson the absolute fee-simple title to any part and to all of the land recovered? Or did he not give her only a limited subservient right or interest, and to a part only of such land, and without in fact sufficiently designating the land? (2) Did Katie and husband take or hold possession of the land upon the belief that it had been given her, and make improvements thereon upon the faith of such gift? Or did they not take and hold possession of the land, and put the improvements thereon, so far as they did improve it, in consideration of the present and expected future use of it, and with notice that Walcott had not and would not give her the land itself? (3) What items of improvements, their value, permanency, and when, did Katie Dickson and her husband put upon the land, and were they sufficient, when taken in connection with the value of the use of the land, and value of the land itself, to take the gift out of the statute of frauds? (4) Was not the pasture part of the land recovered a part of Walcott's homestead at the time of the alleged gift, and up to his death?"

Resolving all conflicts in the evidence, of which there were many, in favor of the verdict, we are constrained to deduce the following conclusions of fact: (1) The land in controversy, being 100 acres or more (probably about 125 or 130 acres, but possibly not more than 100) off the east end of a tract of over 600 acres in Fannin county, upon which was the homestead of C. H. Walcott, was given, about the year 1891, to Katie Dickson, by her father, who owned it in his own separate right; and, though the gift was a parol one, it was nevertheless absolute, and by sufficient description to substantially identify the very land sued for and described in the pleadings and judgment. There was, however, evidence tending to the contrary, and particularly evidence tending to show that no gift of the land itself had ever been made, but only the free use and enjoyment thereof. (2) Dickson and wife, with the knowledge of the donor, took and held possession of and improved the land upon the faith of its being a gift as above found, though there was evidence tending to show that they occupied and improved it in consideration of current and future use and enjoyment, with notice that no absolute gift had been or would be made. (3) While so in possession, and in the belief and assurance that an absolute gift had been made, the following improvements, according to the testimony of C. H. Dickson, which was in the main corroborated by his wife, were made: "Built one house on the place; dug a pool; built hog pasture and hog house, cow pen, and cow house; made an addition to the barn and stable; built a chimney; purchased a mantelboard; weatherboarded the main resi-

dence on the north side, east and west ends; bought wire, and ran around the main part of the farm; paid for digging a cistern; grubbed the stumps out of about 40 acres of the land, and cleared five acres; fenced in the front yard; set out shade trees; trimmed up a pasture back of the house, and burned the brush; and dug two ditches, and built a closet on the inside of the main residence; and built a privy. What I did not do myself, I hired done, and paid for it. I paid Kirk and Smith \$32.25 for building the house. The house cost me in work and material \$100. The chimney cost me \$50 in material and labor. The mantelboard cost me \$7.50. The cow lot and house and hog lot and house cost in work and labor, \$50. To grub the 40 acres and clear the 5 acres, cost me \$50. To build the pool cost me in work \$25. Improvements and material on house cost me \$25. Improvements on front yard and clearing and cleaning up back of the house cost me \$15. Privy cost me \$5. Paid for wire \$15." However, the testimony of several other witnesses tended strongly to rebut this evidence as to the extent, character, and value of the improvements, and to reduce the aggregate amount of \$350 or \$400, as testified to by Dickson and wife, about 50 per cent. The land was worth from \$25 to \$30 per acre, though there was evidence tending to show a value of \$40 per acre or more. The value of the use and occupation was about equal to, if it did not exceed, the value of the improvements as found above, and clearly in excess of what appellants' testimony tended to show the value of the improvements to be. We conclude that the verdict is sustained by the evidence in finding that the improvements were permanent and valuable, the value thereof being in reasonable proportion to the value of the land, to wit, about 10 per cent. of such value, and enhancing the same to that extent. (4) The evidence was not such as to require a finding that the pasture portion of the land in dispute, which was quite an insignificant part thereof, was included within Walcott's homestead, though it tended to show that it might possibly have been. This issue was not, however, submitted to the jury, nor did appellants request its submission.

As these conclusions cover all the controverted issues of fact as set forth in appellants' brief, which were fully and fairly submitted in the charge, we abstain from further findings of fact, and proceed to state, briefly, our conclusions of law.

1. The ruling first complained of is that of admitting in evidence the ex parte deposition of B. J. Walcott, one of the defendants below. But the evidence was expressly limited at the time of its admission so as not to affect the other defendants, and before the trial was concluded the defendants themselves put B. J. Walcott on the stand, and proved by him that what he had stated in this deposition was true.

2. No harm could reasonably have resulted



from the introduction in evidence of the quitclaim deed from C. H. Dickson to his children, made February 12, 1897, to which ruling the second error is assigned.

3. The declarations of C. H. Dickson made on October 10, 1898, only a few days before the death of Walcott, while on his way to Limestone county, being made after his wife's rights had fully accrued, and in her absence, and no predicate having been laid for purposes of impeachment, were properly excluded,—to which ruling the third error is assigned.

4. The deed from Dickson and wife to an undivided interest in the land, made to her attorneys before the suit was filed, in consideration of the services to be rendered in recovering the land, was also properly excluded. At most, it would have shown that the attorneys were tenants in common with the plaintiffs, and could not, therefore, have defeated a recovery. The fourth assignment, which complains of the exclusion of this evidence, is therefore overruled.

5. The tenth, twelfth, thirteenth, and twenty-fifth assignments, being the next four presented in the brief, complain of the verdict; and, as these complaints are covered by the conclusions of fact already announced, the assignments themselves are all overruled.

6. The charge of the court we approve, as being not only correct, but also as sufficiently covering all the material issues, and hence overrule the sixth, eighth, ninth, and twenty-fourth assignments, complaining of the charge given, and of the refusal to grant requested charges. Under these assignments appellants contend, upon the authority of *Ann Berta Lodge v. Leverton*, 42 Tex. 18, and subsequent cases in line with it, that the improvements in this case were not sufficient to take the parol gift out of the statute of frauds, because they did not exceed in value the rents and profits of the land during the time Dickson and wife held possession. But since the decision in *Wells v. Davis*, 77 Tex. 636, 14 S. W. 237, what was said in those cases upon the question here involved has not been accepted as authority. See the able opinion of Justice Pleasants in *Baker's Ex'rs v. De Freese*, 21 S. W. 963, 2 Tex. Civ. App. 524, for a review of the cases and a discussion of the principle.

7. The fifteenth and twenty-eighth assignments deny the right of the appellees to recover rents. The land recovered, being the homestead of the Dicksons, was clearly exempt from the claims of creditors, as were also the rents, the recovery of which was but incidental to the recovery of the land from a trespasser. See *Bank v. Kilgore* (recently decided by us) 43 S. W. 565. Whatever right C. H. Dickson may have had to the rents passed by his disclaimer to his children. These conclusions cover the propositions submitted under these assignments.

8. The remaining assignments, complaining, 43 S.W.—58

with one exception, of the rulings on the demurrers, are manifestly not well taken. The judgment is therefore affirmed.

# PLANTERS' OIL CO. v. MANSELL.

(Court of Civil Appeals of Texas. Nov. 27, 1897.)

## DAMAGES—PERSONAL INJURIES—EVIDENCE.

1. Mental anguish arising from apprehension as to the future support of one's family, as the probable result of injuries received, and the fact that rent would soon be due, cannot be considered as the result of a personal injury, in estimating the damages.

2. Admission of evidence on behalf of plaintiff that the attorney of one who was seeking damages for personal injuries was encouraged by another attorney, who had declined the case, to take it, because it was one in which he might be able to recover, was prejudicial error.

3. In an action for damages resulting from personal injuries, the main issue was whether the servant knew, or had been warned, of the danger of injury. The defendant introduced testimony that the danger was open to common observation, and that the servant had been duly warned. The court refused defendant's request for an instruction on assumed risks. *Held*, that it was error not to instruct on the law of assumed risks, though the instruction proposed was not strictly correct.

4. Where contributory negligence is pleaded, and there is evidence in relation thereto, the court should instruct thereon so as to apply the law to the facts of the case bearing upon that question.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Action by W. J. Mansell against the Planters' Oil Company. From a judgment for plaintiff, defendant appeals. Reversed.

Harry W. Kuteman, for appellant. Albert Stevenson and T. F. Temple, for appellee.

TARLTON, C. J. The appellant operated a cotton seed oil mill at Weatherford, Tex. Its premises consisted, in the main, of an engine room, fronting west, and a meal room, on the east, with a room intervening, known as the "press room." The press room is so called because in it the oil is pressed out of the caked meal of the cotton seed. The meal room is so called because in it, by means of a spout connected with the press room, the meal is collected after the cakes are ground. In a second story, and above the press room, were certain cotton gins and a cotton press. This press was in a room called by the witnesses an "offset," and which projected on the north side of the building. On the north side of the press room, near the engine room, was a door, east of which was the pump which furnished water to the employes when they desired it. On the north side of the meal room, five or six feet from the offset, was a door. On the north side of the cotton-press room were doors, below and above. As a bale of cotton was pressed, it was, and had been for a long time, the custom of the appellant to throw the bale out of the upper door

of the cotton press room, of sufficient width for that purpose. On September 23, 1895, the appellee was employed by the appellant, and assigned to work in the meal room. On the evening of October 8, 1895, he had gone from the meal room, through the door on the north side thereof, around the cotton-press room, to the pump, for the purpose of getting water; and on his return, as he reached the point beneath the upper door of the cotton-press room, a bale of cotton was thrown from above, which fell upon his head. For the injuries thus sustained he recovered a verdict and judgment in the sum of \$520, from which this appeal is prosecuted.

The appellee, over objection, was permitted to show, as an element of damage, that he was greatly annoyed, and suffered mental anguish, from the fact that a month's rent on his house would soon be due,—the rent amounting to six dollars,—and that he had only six dollars with which to pay it. We approve the appellant's proposition embodied in its objection to this testimony, that the mental anguish having its source in this fact could not be properly considered in estimating damages. The explanation appended by the court to the bill, that the witness, in this connection, further stated that he worried about the support of his family, and his future injuries, and his consequent inability to support them, would not justify the admission of the evidence objected to, because the fact stated in the explanation was itself inadmissible, had objection been urged to it. The mental anguish which the appellee experienced on account of the fact that his house rent would soon be due, which he would be unable to meet, and which (such is the implication) would result in the inconvenience or suffering of his family, does not naturally result from the injury. As said in *Railway Co. v. Douglass*, 69 Tex. 697, 7 S. W. 78, "But we think the mental suffering arising from apprehension as to the future of one's family is not a natural result of the injury, but depends upon the pecuniary condition and social relation of the sufferer, and would require the submission of elements of damage to the jury, in cases where the plaintiff was a married man, and had a family dependent on his exertions for support, that could not arise where there was no family, or where the injured party was possessed of sufficient means for the maintenance of his family, so that a person with a large and dependent family would be entitled to larger damages than a person not so situated." We are unable to conclude, with the appellee, that the admission of this testimony was harmless, because, though the item of six dollars is in itself quite insignificant, we are unable to state to what extent the sympathies of the jury may have been excited by the consideration that the inability to pay the rent would result in the homeless condition of the appellee's family.

A very salient issue made by the pleadings and the evidence of the defendant was whether the appellee knew of the fact that it was the daily custom of the appellant's employees to throw bales of cotton out of the upper door of the cotton-press room. A witness (Mr. Flannery) testified that he heard a conversation in which the appellee consulted an attorney (Maj. Bidwell) about the injuries in question, and about the facts of this case, and that in this conversation the appellee stated, among other things, that he knew the custom of throwing cotton out when he was injured. When the plaintiff was on the stand, he was asked by the defendant's counsel whether it was not true that, after having stated his case to Maj. Bidwell, he stated that he knew the fact that the cotton was being thrown out of the opening at the time he was injured, and whether it was not true that Maj. Bidwell then told him he could not recover, on account of that fact. Whereupon the plaintiff testified that, when he went back a second time to Maj. Bidwell, the latter told him he did not care to take his case, because he had other business to attend to. Whereupon the counsel for the plaintiff asked him whether it was not true that Maj. Bidwell encouraged his present attorney, T. F. Temple, Esq., to prosecute the suit, to which, over the defendant's objection, the plaintiff testified that "afterwards Major Bidwell encouraged his present attorney to prosecute the suit, and told him it was a cause in which he might be able to recover." We think that the fact that Maj. Bidwell encouraged the present attorney to prosecute this suit was wholly irrelevant, and was probably prejudicial, in that the jury might regard that gentleman's opinion as a test of the merits of the plaintiff's cause.

The principal ground of negligence relied upon in the plaintiff's petition consisted in the facts that the appellant negligently permitted bales of cotton to be thrown to the ground from the upper door or opening in the cotton-press room, and that it failed to provide any protection or means by which the bales of cotton thus thrown might be warded off, or the force of their fall in any way lessened or broken, and that one passing beneath the opening could not know when a bale of cotton would be thrown out, and that the appellee did not know that it was the custom to throw cotton out of the opening, and that he had not been warned thereof by the appellant. The appellant introduced much evidence in support of the allegations in its special answer to the effect that, in order to operate the cotton press, a necessary attachment to the oil mill, machinery was connected with that in the meal room, beneath; that any one in the meal room knows when a bale of cotton is being pressed; that there is no way of disposing of the cotton, except to roll it out of the door on the north side of the building, as is com-

monly done at any country cotton gin; that, in order to guard against danger, the appellant required the employes above, before throwing out a bale of cotton, to give due warning; that the men so engaged were competent and careful employes, and invariably gave the warning before rolling the cotton out of the door; that the appellee had worked at the cotton-oil mill for about 15 days, and knew the custom of the cotton being thrown out, and knew that it was dangerous to stand beneath the north door; that, if he wanted water, he had all the north yard within which to go around the door; that on the occasion of his injuries he was working in the meal room, and knew that a bale of cotton had just been pressed, and knew the custom of turning it out of the door; that just before he got there the employes gave the customary warning before throwing out the bale; and that he was warned of his danger by other employes calling him. So standing the pleadings and the evidence, the appellant asked the following charge: "Any one accepting employment from another assumes all risks incident to, or connected with, said employment, which are open to common observation. Therefore, if you believe from the evidence that the fact of throwing out bales of cotton was incident to, and connected with, the business where the plaintiff worked, and necessary thereto, and if you believe from all the circumstances and surroundings that the danger thereof was open to common observation, and that, by the use of reasonable care or observation, plaintiff might have known of said danger, then he will be charged with knowledge thereof, and he cannot recover in this case, whether he was warned thereof or not." Without considering whether this charge was in every respect sufficient, or whether its refusal would have required a reversal, we are of opinion that the court should have heeded the suggestion which it contained, and have instructed the jury upon the issue of assumed risks, which we think legitimately arose upon the pleadings and the testimony. The court, in its general charge, wholly failed to submit this issue.

The appellant pleaded contributory negligence in connection with its allegations setting out the facts above detailed. The court, in its charge, instructed the jury generally upon this issue. In view of another trial, and in response to assignments of error complaining of the refusal of special charges requested upon this issue, we suggest that the appellant will be entitled to have the law applied to the very facts of the case bearing upon the question of contributory negligence. *Railway Co. v. Reed*, 88 Tex. 447, 31 S. W. 1058; *Railway Co. v. Shieder*, 88 Tex. 167, 30 S. W. 902; *Railway Co. v. McGlamory*, 89 Tex. 638, 639, 35 S. W. 1058.

These conclusions are deemed sufficient to dispose of the questions presented in the appellant's brief, with the additional remark that

the objections to evidence, other than those above considered, were properly overruled. The judgment is reversed, and the cause is remanded.

## SAN ANTONIO & A. P. RY. CO. v. NEWMAN.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

### CARRIERS—TICKETS—CONDITIONS—NOTICE—EJECTION—WAIVER.

1. When a contract for transportation contains a limitation on the back, in order to bind the holder thereof it must be shown that he read or knew of such limitation at the time he accepted the contract.

2. A drover's pass was made out for two persons, the maximum number allowed to ride on such a pass; but the agent of the company, at the request of the parties, inserted the name of a third person, informing them the pass would be good for all three. The conductor of the train on which the parties sought to ride refused to allow all three to ride on the pass, and was informed by them which two persons were in charge of the stock. One of these two drew straws with the third person to determine which should get off the train, and, on losing, he was ordered off. *Held*, that he did not forfeit his right by the drawing, and the company was liable for his ejection.

Appeal from district court, De Witt county; James C. Wilson, Judge.

Action by James B. Newman against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Proctors, for appellant.

NEILL, J. This is a suit brought by the appellee against appellant to recover damages in the sum of \$5,000, for an alleged forcible ejection of him by the latter's conductor from one of its trains while riding thereon as a passenger upon a drover's pass, and for the value of the pass, alleged to be \$75. His petition alleged that the pass was issued to him by the duly-authorized agent of appellant, in accordance with the rules of the company. The appellant pleaded: (1) A general denial. (2) Specially, under oath, that, when appellee entered upon its train, the company had in force a rule which prescribed that two men were the maximum number which could be passed with any shipment under the same ownership, and in the same train, and had caused such rule to be printed in its form for drover's passes, and requested its agents to use said forms, and to comply with said instructions; that the pass sued on was issued by its station agent at Karnes City in direct violation of said rule, which was plainly set out on the pass which was issued by its agent to three persons with one shipment under the same ownership; that, therefore, the pass was not issued by appellant or by its authority, but by its station agent, in violation of its instruction to him in said rule set out in

<sup>1</sup> Rehearing denied.

the pass. (3) That appellee, at the time of his alleged expulsion, had no right on said train; that he was claiming the right thereon as a passenger by virtue of a certain pass, the terms and conditions of which were fully set out on the reverse side of a live-stock contract of shipment of 13 cars of cattle in the same train; that it was plainly stated, as one of the conditions warranting the issuance of such a pass, that two men were the maximum which would be passed with one shipment under the same ownership on the same train; that the pass was issued by the agent of appellant in direct violation of said instruction of his principal, of which appellee had full knowledge by the terms and conditions of the pass itself, in that it appeared therefrom that the agent had issued it to appellee and two other persons; that, at the time of the alleged expulsion, the other two persons, as well as appellee, were claiming the right of transportation under said pass; that the rules of the company required that its conductors should enforce this regulation that no more than two persons should be transported with one shipment under the same ownership, and in the same train; that appellee's was the last name appearing on the pass, and he was therefore apparently the person to whom it had been issued in excess and in violation of its conditions; that, when the pass was tendered to appellant's conductor, he notified appellee and the other two persons whose names were thereon that he could not pass all three of them; and that thereupon, by voluntary agreement between appellee and the other two persons, appellee left said train without any violence having been done to him by appellant's conductor, who simply performed his duty in enforcing a regulation of the company which formed a constituent element of the pass under which appellee claimed the right of a passenger on said train. The trial of the case, which was before a jury, resulted in a judgment for \$400 in favor of appellee; and from it this appeal is prosecuted.

#### Conclusions of Fact.

On the 1st day of May, 1895, the appellant then being a common carrier of freight and passengers, there were delivered to appellant company, by M. J. Baker, at Karnes City, Tex., 13 car loads of cattle, to be transported thence over appellant's road and connecting roads to Chicago, in one train, by the same shipment. Tom Alexander and the appellee were employed by Baker to accompany the cattle on the train during their transportation from the place of shipment to their destination. Baker directed appellant's station agent at Karnes City, who made out the contract of shipment, to put therein the names of Tom Alexander and James B. Newman, the appellee, for them to be transported with the cattle from the place of shipment to Chicago. Their names were written in such contract by the agent as directed, and, when so written, the contract, by its terms, entitled them to be

carried without further compensation over appellant's road and connecting lines on the train with the cattle, to their destination. There was printed on the back of the paper containing the contract these words: "Two men will be the maximum number to be passed by the same owner in the same shipment in the same train." After Alexander's and Newman's names had been written in the contract, appellant's station agent, at the request of Alexander, wrote in it the name of Will Cheeks. Whether this last name appeared before or after that of Newman is not shown, the contract containing the pass having been lost after it was taken up by the railroad company, and the duplicate kept by the company not being produced in evidence. Nor can we gather from the record whether any reference was made in the contract to the words above quoted, printed on the back of it; nor say whether they were made a part of the contract, or were merely directions of the carrier to its agents, stating a rule of the company. The appellee knew that Cheeks' name had been written by the station agent in the part of the contract containing the pass, and heard the agent say that all three of the parties could go with the train on the pass. There is no evidence that appellee had ever read the words quoted which were printed on the back of the contract, or had any actual knowledge of any rule of the company limiting the number to two persons to whom such a pass could be issued. The pass thus issued, containing the names of Alexander, appellee, and Cheeks, was by the agent placed in the hands of Alexander, for the use of all the parties; and, by virtue of it, all of them boarded the train upon which Baker's cattle were loaded. The facts thus far found are established by testimony which is uncontroverted.

Before the train reached Shiner, a station on the company's road, the contract was handed by Alexander to appellant's conductor, who, upon its inspection, told the parties that all three could not ride on the pass, and that one of them must get off. Alexander then informed the conductor that he and appellee were in charge of the cattle, and that, if anybody had to get off, it should be Cheeks, to which the conductor responded one of them would have to get off, or he would put them all off. After this, appellee and Cheeks drew straws for the purpose of determining which should get off, and the short straw was drawn by appellee. The drawing was not voluntary on appellee's part, but he was impelled by fear to participate in it, and he never agreed to abide the result. Besides, it is not shown whether the forfeiture of his right as a passenger on the train was made to depend upon his getting the short or long straw. On this question we have no judicial knowledge. When the train reached Shiner, while in rapid motion, appellant's conductor cursed appellee, and peremptorily ordered him to get off; and, through fear of being forcibly thrown

therefrom, he jumped from it while it was moving, fell, and thereby was temporarily rendered almost insensible, to his damage in the sum of money found by the verdict.

#### Conclusions of Law.

The appellant, by special charge No. 1, requested the court to instruct the jury as follows: "In this case the authority of the station agent at Karnes City to issue the pass to these three persons is denied under oath, and there is no proof in this case that the agent had any such authority. Therefore you must assume it is true that the agent had no authority to issue the pass to three persons, and his act in issuing it to three persons did not bind the defendant to carry all three persons." This the court gave with the following qualification: "Given with the proviso that plaintiff must have had actual knowledge of the fact that said agent had no such authority to issue said pass to three persons before he could be charged with notice thereof, or his right as a passenger affected thereby." This qualification is assigned as error, upon the grounds (1) that the charge in its original form was correct; and (2) that it contradicts special charge No. 2, given at appellant's request, which is: "Although the names of three persons appeared on said pass, yet you are charged that defendant was only required to carry two persons on said pass. The regulation appearing on said pass was one which it was the duty of defendant's conductor to enforce, and said pass did not warrant said conductor to pass or permit to ride thereon more than two persons." The refusal of the court to give the following special charge is also assigned as error: "Plaintiff was charged with notice of all the terms and conditions of the printed and written pass upon which he was riding. If you believe from the evidence that one of the terms of said pass was the maximum number of persons that could go with one shipment on the same train, then plaintiff must be considered by you as having had full knowledge of such condition of said pass, whether plaintiff actually read said conditions or not." In its main charge the court instructed the jury that "a person lawfully on a railway car, and entitled to transportation, is a passenger, whether the railway company receives an agreed compensation for his transportation, or is compensated therefor by the charge for the car, or for transportation of property in his charge, or receives no compensation whatever. A person on a train, and having in his possession a pass, issued by an agent of the company operating the train upon which he seeks transportation, is a passenger, if the issuance of said pass was within the apparent scope of the agent's duties, or if the authority upon the part of the agent to issue such pass is reasonably to be presumed from the nature of his agency and general conduct of its affairs. Hence, if you believe that the plaintiff had received a pass from the station of

the San Antonio & Aransas Pass Railway Company at Karnes City, and that such agent had authority to issue such pass, or that from the usual conduct of the business of such agency, or of other agencies of same company at the time, and the nature of the agency, authority on the part of the agent to issue the same was reasonably presumed, or that the issuance thereof was within the apparent scope of his agency, you will find that plaintiff was a passenger on said train; and so you will find, whether or not said pass was issued in violation of the rules of the company, if you find that plaintiff had no knowledge of such prohibitive rule of the company. You are further instructed that, in order to find that plaintiff knew of the existence of such rule, there must be evidence of such knowledge existing at the time he received the pass." This part of the charge is also assigned as error. For convenience, these assignments are thus grouped and will be considered together with reference to the facts developed upon the trial.

It is uncontroverted that appellant's agent at Karnes City was authorized to include in the contract of shipment passes for two persons to accompany the cattle on the train to Chicago, and to return thence to the station from which the animals were shipped. There can be no doubt that Baker, the owner of the cattle, had the right to employ such hands as were entitled to such passage, and direct the company's agent, who made out the contract, to place their names therein for transportation. That he employed the appellee and Alexander to accompany the shipment, and directed the agent to place their names in the contract, and that he did not employ Will Cheeks, nor direct his name written in the contract for passage, is uncontradicted. It was the plain duty of appellant's agent to appellee, as well as to the shipper, to make out the pass in accordance with his directions, so as to entitle Mr. Newman to be carried, without hindrance or molestation from any one, on the train with the shipment of cattle. Instead of performing this duty, in violation of a rule of his employer, he wrote in the contract, in addition to the names of Alexander and Newman, the name of Will Cheeks, and falsely informed them that it entitled all of them to transportation. It is not shown appellee was informed that the issuance of the pass to them was in violation of the company's rule. The law did not impose upon him a knowledge of this rule, but he had the right to assume that appellant's agent knew its rules and observed them in issuing the passes. The limitation of the agent's authority to issue passes to only two persons was printed on the reverse side of the contract, and it does not appear from the evidence that it was referred to or made a part of that instrument. It is clearly shown that the restriction so printed was never read by the appellee, nor called to his attention. Had it been shown that the limitation appeared

upon the face of the contract, it may be that appellee would have had no right to rely upon statements contrary to such limitation made by the company's agent, without proof of his authority to make them. 4 Elliott, R. R. § 1598. But, as the words expressive of the limitation appear on the contract, to bind the appellee by them it must be shown he read them, or knew of such restriction when he accepted the pass contained in the contract. Its acceptance did not bind him to all the terms and conditions printed thereon, in the absence of actual knowledge of them. Ray, Neg. Imp. Duties (Pass. Carr.) 516; The Majestic, 166 U. S. 380, 17 Sup. Ct. 597.

The agent of the company must have known when he inserted the name of the third party in the contract that the pass for all three would not be honored by the company's conductor, and that some one of the parties would probably be ejected from the train. Therefore the insertion of Cheeks' name in the pass without authority was the primary wrong proximately causing appellee's expulsion. It is well settled that a carrier of passengers must necessarily answer for all the consequences following a primary wrong. While a conductor may act strictly in accordance with the rules of a company, and do that which according to its rules he is authorized to do, it does not follow that his conduct is rightful towards the passenger. Between himself and the company, its rules upon which he acts will justify the conductor, but not as between himself as the company's representative and the passenger. *Railway Co. v. Beckett* (Ind. App.) 39 N. E. 429. The appellee was one of the drovers entitled by the contract between the shipper and the company to transportation. It was the fault of the latter's agent that such evidence of his right to carriage was not given as would be recognized by its conductor. He was led to believe by the face of the contract and statements of the station agent that he had the proper evidence of it, and, relying upon it, entered the train as a passenger in good faith, and presented to its conductor the only evidence of his right given him by the company through its agent. If the appellant did not furnish him with the proper token to convey the fact of his right under the contract of transportation to the mind of its conductor, the blame and consequences of the wrong must rest upon the company, the party in fault, rather than upon appellee, who is not. It seems to be settled by the weight of authority that the face of the ticket or pass is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and company. The reason for this is found in the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the traveling public, or the proper security of the company in collecting fares. The conductor cannot, as against the face of the ticket, decide from the

statement of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. 4 Elliott, R. R. § 1594. But in this case the conductor knew that, according to the rules of the company, the pass was void only as to one of the parties; and since its vice was caused by the wrong of the agent issuing it, when he was informed by appellee and Alexander that they were in charge of the cattle, and had the right to accompany them on the pass, their statement not being denied by Cheeks, whose name was wrongfully inserted, it was the conductor's duty to appellee, whatever may have been his duty to the company in regard to Cheeks, to have allowed the appellee passage by virtue of the pass. The appellee should not have been put in such a position as required him by any method to determine for the conductor whether he or Cheeks had the right of carriage on the train. The right was his, under the uncontroverted facts, of which appellant's conductor was informed, and should have been accorded to him. If he drew straws with Cheeks to determine which should remain on the train, he was induced to do so by the conductor's failure to recognize his right as a passenger. His right as such could not, under such circumstances, be forfeited by the result of the drawing. Whether the straw pulled by him was long or short, his right under the contract of the company to carry him remained the same.

In view of the facts and the law as above stated arising from them, the special charge first quoted should not have been given in the form requested. In that form the jury might have been led to believe, without regard to other material facts, that appellee had no right on the train as a passenger. This was certainly the purpose of the charge. If it should have been given at all, it should not have been without qualification; and the only objection that can be raised to the qualification is that it did not, under the facts in this case, go far enough in favor of the appellee. Had the verdict been against him, he could complain of it, but appellant cannot. The qualification is not in conflict with special charge No. 2. While, according to a rule of the company, the pass may not have warranted the conductor to carry more than two persons, yet, under the facts in this case, it authorized him to carry appellee, for he was one of the two entitled by it to transportation. In view of what we have said, the court properly refused to give the other special charge quoted above. Nor is there any error in the main charge of which appellant can complain. Whatever may have been the agency of the person who issued the pass, or the general conduct of the affairs of his agency, it is undisputed that he had the right to issue the pass to two persons, and that appellee was one of those who were entitled to it, and to whom it was issued.

All questions arising on the remaining as-

signments are involved and determined against appellant in our consideration of those expressly mentioned in this opinion. There is no error in the judgment, and it is affirmed.

**WOOLLEY et al. v. SULLIVAN et al.**

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

**BILL FOR NEW TRIAL—QUESTIONS IN ISSUE—WIDOW'S RIGHT TO ALLOWANCE—ABSENCE OF ATTORNEY—RES JUDICATA.**

1. An independent bill for a new trial will not be sustained where the issues presented therein were not raised by the pleadings, or necessarily involved in the original action.

2. Plaintiff in an independent bill for a new trial alleged that defendant in the original suit sued her individually and as executrix to foreclose a lien on her deceased husband's land, and that she had filed an answer, in which she prayed that she might sell the property as executrix, and retain from the proceeds such an allowance as may be made in lieu of homestead and for one year's support. *Held*, that her right to an allowance was in issue in the original suit.

3. Where an adverse judgment was rendered in the absence of a defendant, who had filed an answer, it will be presumed that the court performed its duty in disposing of the issues raised by the answer.

4. The fact that a party's attorney, who had filed an answer, "failed to appear and represent her upon the trial of the cause," will not justify setting aside the judgment.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Bill by Mary D. Woolley and others against D. Sullivan & Co. and others for a new trial. Judgment for defendants, and plaintiffs appeal. Affirmed.

This suit was filed in the district court by Mary D. Woolley and Albert P. Woolley, Charles J. Woolley, Mary D. Woolley, and Richard R. Woolley, minors, by their mother and next friend, Mary D. Woolley, against appellees D. Sullivan & Co., a firm composed of D. Sullivan, W. C. Sullivan, and H. Brendel. The petition alleges, in substance, that Mary D. Woolley is the surviving wife of Richard Woolley, Jr., who died on the 7th day of January, 1896, in Bexar county, Tex., where he resided, leaving a will, in which she was named executrix; that said will was regularly admitted to probate by the county court of Bexar county, Tex., on the — day of —, 1896; that in such will it was directed that no action be taken on the testator's estate than the probating thereof, and filing an inventory as required by law, and that the executrix should not be required to enter into any bond whatever; that Albert P., Charles J., Richard R., and Mary D. Woolley are the children of their co-plaintiff, Mary D. Woolley, and Richard Woolley, Jr., deceased; that on the 10th day of October, 1896, suit No. 3,829, styled "D. Sullivan & Co. vs. Mary D. Woolley, Executrix, et al.," was filed in the district court of Bexar

county, Tex., by D. and W. C. Sullivan against Mary D. Woolley, H. Brendel, and S. M. Johnson, in which it was alleged by plaintiffs' petition therein substantially that Mary D. Woolley was then the independent executrix of Richard Woolley, Jr., deceased; that Richard Woolley, Jr., executed to D. Sullivan & Co. three certain promissory notes,—one for \$30,000, dated August 1, 1891, one for \$1,500, dated August 15, 1892, and the other for \$2,000, dated January 3, 1893; that all of said notes were then due and unpaid; that Richard Woolley, Jr., is dead; that he left a will, wherein he appointed Mary D. Woolley independent executrix without bond, and that she had accepted said trust, and qualified as independent executrix, and as such had the property of the estate in her hands and control; that for the purpose of securing the first of said notes Richard Woolley, Jr., executed and delivered to H. Brendel, trustee, a certain deed of trust upon four certain tracts of land, in said petition fully described, one of which is a part of the Henry P. Hill league, situated in Travis county, Tex.; that Richard Woolley, Jr., joined by his wife, Mary D. Woolley, thereafter, for the purpose of securing the last two notes, and as additional security for the first, executed to S. M. Johnson, trustee, a deed of trust on certain property situated in Llano county, Tex., which land is fully described; and that he also deposited as collateral security certain stocks and bonds, etc. The prayer in the petition was that Mary D. Woolley be cited as executrix and in her individual capacity, that Brendel and Johnson be also cited, and that plaintiffs have judgment against Mary D. Woolley as executrix for the amount due on all of said notes, interest, etc., and against her as such executrix, and against Brendel and Johnson, nominal defendants, foreclosing any interest in said lands and property. Plaintiffs in the present suit further alleged: That Mary D. Woolley never signed the deed of trust upon the Travis county lands, but that it was signed by Richard Woolley, Jr., only. That Mary D. Woolley was served with citation to appear and defend said suit No. 3,829, and that W. A. H. Miller, an attorney of the San Antonio bar, informed and promised her that he would represent her interest. That thereafter, on the 7th day of December, 1896, he filed therein a pleading of which the following is a copy: "No. 3,829. D. Sullivan & Co. vs. Mary D. Woolley, Executrix, et al. Now comes Mary D. Woolley, executrix of the will and estate of Richard Woolley, dec'd, one of the defendants mentioned in the above-styled cause, and, answering in this behalf, says that there is pending in the probate [county] court of Bexar county, Texas, an application for one year's allowance in lieu of exempt property and of or for a homestead; that the estate is all incumbered; that she did not sign one of the trust deeds sought to be foreclosed by plaintiff; that she has no separate estate

for homestead purposes; that she claims two hundred acres of the Hill league, in Travis county, for a homestead for herself and children, unless she is allowed \$5,000 out of the proceeds of the sale of said Hill league. Defendant prays the court for an order or decree that any judgment rendered in the above case may be certified to the probate court for observance, and that such judgment provide that the property described in plaintiff's petition be ordered sold by defendant as executrix, and that she be authorized to retain out of the proceeds of such sale such allowance as may be made for herself and children in lieu of homestead exempt property not owned by the estate, and for one year's support for herself and children. [Signed] W. A. H. Miller, Atty. for Mary D. Woolley." That, after filing said plea, Miller took no further steps in said cause. That she and the other parties plaintiff in this suit, relying upon said attorney's repeated promises to attend to the matter, and take such steps as would be necessary to protect her interest, did nothing further in said suit, believing nothing more necessary. That, when said cause was called for trial, the said Miller did not appear and represent her in said cause, and the court, disregarding her said plea for allowance for one year's support and in lieu of homestead on file therein, rendered judgment as follows: "This cause this day, December 9, 1896, coming on to be heard, the plaintiffs appeared in person and by counsel, and announced ready for trial, and defendants Mary D. Woolley, H. Brendel, and S. M. Johnson came not. And it appearing to the court that each of said defendants had been duly cited in this cause, and that they had filed their answers herein, the court ordered the plaintiffs to proceed with the trial of the cause, and, no jury having been called, and matters of fact and of law submitted to the court, the court, after hearing the evidence, finds that Mary D. Woolley, as independent executrix of Richard Woolley, Jr., deceased, is indebted to the plaintiffs, D. Sullivan & Co., a firm composed of D. Sullivan and W. C. Sullivan, in the sum of \$52,455.07, same being due upon three promissory notes signed by Richard Woolley, Jr., and offered in evidence in this cause." The judgment also finds that the notes upon which it is rendered were secured by the deeds of trust upon the property before mentioned. It further provides that plaintiffs have and recover of Mary D. Woolley as independent executrix of the estate of Richard Woolley, Jr., deceased, judgment for the sum of \$52,455.07, with 10 per cent. interest thereon and costs, and that they have judgment against Mary D. Woolley as executrix and individually, and against H. Brendel and S. M. Johnson, trustees in said deeds of trust foreclosing the liens of the said deeds of trust, and also against Mary D. Woolley as executrix and in her individual capacity, foreclosing their lien on said collaterals, and that orders of sale

issue for the same, and that, if at such sales there is realized more than sufficient to pay said notes, costs, etc., the balance be paid to Mary D. Woolley, but that, if enough is not realized from the sale to pay the debt, then execution issue against Mary D. Woolley as executrix, etc. That Mary D. Woolley did not know of the rendition of said judgment, and was not apprised of it until the 9th day of February, 1897, and it was then too late to apply for a new trial during the term at which it was rendered. That Richard Woolley, Jr., deceased, had no homestead. That his wife, Mary D., had not, at the time of his death, and has never had since, a homestead out of her separate property, and that the estate of Richard Woolley, Jr., is insolvent. That said Mary D. Woolley has received nothing from the estate of said Richard Woolley, Jr., deceased, under said will, and that she has renounced, and hereby renounces and relinquishes, any and all right and interest she may have by reason of said will, and declines to take as a devisee thereunder, and has and does elect to take the allowance and exemptions given her by law. That the said Albert P., Charles J., Mary D., and Richard R. Woolley, minors, represented by their next friend, Mary D. Woolley, renounce and release any claim they may have under said will. That none of petitioners has received anything for his or her support or maintenance for any time whatever. That the district court is the only court having jurisdiction to make the allowance in lieu of homestead and for one year's support prayed for in the said answer and plea filed in the said suit of D. Sullivan & Co. against Mary D. Woolley, executrix, et al., and now prayed for herein, and they pray the court to take cognizance of the same in the exercise of its equity powers. That they believe that, the court having failed to pass upon the plea filed in her behalf therein, the decree entered in said cause is not final. That they have no remedy at law, and that a different result would be obtained upon a new trial by allowing them to urge their claims for one year's support and allowance in lieu of homestead. After praying for citation against defendants, the prayer in the petition is that upon a hearing a new trial be granted in the cause of D. Sullivan & Co. against Mary D. Woolley, executrix, et al. (No. 3,820), and that said property in Travis county be ordered sold by the executrix of the said estate, or that a receiver or commissioner be appointed by the court to sell the same, and that out of the proceeds of sale the said Mary D. Woolley be authorized to retain, or such receiver or commissioner be ordered to pay to her, the sum of \$6,000, being \$5,000 in lieu of homestead and \$1,000 for one year's support; and that out of the amount remaining after the payment asked for she or they apply so much thereof as may be necessary to the payment of the debt of D. Sullivan & Co.; that the court set aside and allow Mary D. Woolley



the sum of \$6,000,—\$5,000 in lieu of homestead and \$1,000 for one year's support,—and that said sum of \$6,000 be declared a lien upon the property of the estate situated in Travis county, Tex., described in the petition, the same being the only property of the estate out of which they would be entitled to such allowance, and that the executrix or receiver or commissioner appointed by the court be ordered to sell the same, and put the proceeds thereof to pay Mary D. Woolley for herself and her children the said sum of \$6,000. The petition is sworn to by Mary D. Woolley. To the foregoing petition appellees (defendants below) interposed a general demurrer and the following special exceptions: (1) It appears therefrom that the judgment heretofore rendered, and which by this proceeding is sought to be set aside, was rendered in open court, and after the defendant Mary D. Woolley had duly answered therein. (2) It appears therefrom that plaintiffs were not prevented by any fraud, accident, or any act of these defendants from making their defense in the former suit, if any they had; and that, if they failed to make such defense, it was by their own fault and negligence, or the fault and negligence of their own chosen attorney. (3) That it is shown by said petition that no diligence was used by the plaintiffs herein, or either of them, to prevent the judgment that was heretofore rendered against them, and which they now seek to set aside. Upon the trial of the cause the general demurrer and special exceptions were sustained, and, the plaintiffs declining to further plead, final judgment was rendered against them dismissing their suit. From this judgment they have appealed.

Geo. R. Hines and Carlos Bee, for appellants. Ogden & Terrell, for appellees.

NEILL, J. (after stating the facts). The assignments of error are, of course, directed only to the action of the court in sustaining the demurrers and exceptions and dismissing complainants' bill. The main question, involving all others raised, is: Are the plaintiffs in this action concluded by the judgment in cause No. 3 (No. 3,829), styled "D. Sullivan & Co. v. Mary D. Woolley et al."? An original bill in equity for a new trial necessarily rests upon the proposition that the issues raised by it were involved in the original suit, and the relief prayed for should, upon a proper disposition of such issues, have been granted by its judgment. If the issues presented by the bill were not raised by the pleadings, or necessarily involved in the original action, that case will not be reopened for the purpose of trying them; but they must be disposed of in an independent suit, brought for that purpose. Therefore appellants' bill for a new trial is tantamount to an admission that the issues presented by it were involved, and the affirmative relief prayed for could have been granted, in the original suit in which the new trial is asked. The appellant Mary D. Wool-

ley was sued by D. Sullivan & Co. as an individual and in her capacity as executrix of the estate of her deceased husband, and, in our opinion, a proper interpretation of her answer filed in that cause shows that she appeared in both capacities. The right of herself and minor children to an allowance in lieu of a homestead and for a year's support out of the property upon which D. Sullivan & Co. held their mortgage was, by such answer, placed in issue, and determined adversely to her by the judgment. She prayed for a judgment which would provide "that the property described in plaintiffs' petition be ordered sold by her as executrix, and that she be authorized to retain out of the proceeds of such sale such allowance as may be made for herself and children in lieu of homestead exempt property not owned by the estate and for one year's support for herself and children." The facts upon which she based the claim of herself and children to such allowance were fully and clearly stated. The children being hers and minors, she alone, under the statute, was entitled to receive their share of the allowance; and, being entitled to receive it, logically she had the right in their behalf to ask a court having jurisdiction of the matter for it. The administration of her husband's estate being placed beyond the jurisdiction of the county court by the will, which made her its independent executrix, the jurisdiction to make the allowance was in the district court. She nor her children can say the allowance could not have been asked for and obtained in the original suit brought against her by D. Sullivan & Co., for by their bill they ask the judgment in that case be set aside for the purpose of allowing them to come into the case, and have the allowance awarded them. Therefore it appears from the allegations of appellants that their right to the allowance was properly put in issue by the answer of Mary D. Woolley in the original suit in which she was a defendant. The judgment in that case recites that each defendant answered, and that the matters of fact and of law were submitted to and determined by the court. Though she did not, on the trial, appear either in person or by attorney, it is not shown that the matters put in issue by her answer were not included in those matters of fact and law submitted to and determined by the court. And it is to be presumed "that the court performed the duty devolved upon it upon the submission of the cause by disposing of every issue presented by the pleadings so as to render its judgment final and conclusive of the litigation." *Hackley v. Fowikes*, 89 Tex. 613, 36 S. W. 77. The judgment being final upon the issues raised by the pleadings, in order to obtain a new trial after the close of the term at which it was rendered it must be shown that the judgment was not caused by any negligence of the parties seeking to set it aside, but that diligence was used to prevent it, and that such parties had a good defense to the action,

which they were prevented from making by fraud, accident, or some act of the opposing party wholly unmixed with any fault or neglect of their own, and an allegation that an attorney who had been regularly employed to represent the litigants, and who filed an answer in their behalf, "failed to appear and represent her upon the trial of the case," shows no reason why the judgment should be set aside. *Brownson v. Reynolds*, 77 Tex. 254, 13 S. W. 986; *Johnson v. Templeton*, 60 Tex. 238; *Nichols v. Dibrell*, 61 Tex. 539; *Harn v. Phelps*, 65 Tex. 592; *Merrill v. Roberts*, 78 Tex. 28, 14 S. W. 254. In our opinion, the judgment sought to be set aside is conclusive against appellants of the matters sought by their bill to be adjudicated. Therefore the judgment of the district court is affirmed.

### GIBSON v. GRAY et al.

(Court of Civil Appeals of Texas. Dec. 18, 1897.)

ASSIGNEES FOR CREDITORS—POWERS—PERSONAL LIABILITY—REAL-ESTATE BROKER—RIGHT TO COMMISSIONS—RECOURSEMENT.

1. Plaintiff, a real-estate broker, was employed by the assignee of an insolvent estate to effect the sale of certain land belonging to it, at a certain sum, for the usual commission. The assignee did not exempt himself, by the contract, from personal liability. Plaintiff procured a purchaser at the price for which it was offered. Before the sale could be consummated, a preliminary injunction, enjoining the assignee from making the sale at that price, issued. Pending the action, defendant resigned as such assignee, and R. was appointed in his place. While the preliminary injunction was still in force the purchaser withdrew his offer for the property. At the hearing the preliminary injunction was dissolved, and the bill dismissed. *Held*, that defendant was personally liable to plaintiff for his commissions on the sale.

2. Plaintiff was entitled to an order that his judgment be paid out of the funds in the hands of the assignee R., if defendant was justified in employing plaintiff to assist in the sale of the property.

3. If defendant was justified in employing plaintiff, he was entitled to recoup, as against the estate in the hands of the assignee R., for any moneys paid to plaintiff by reason of his personal liability to him.

4. A broker employed to sell real estate has discharged his duty when he produces a purchaser able and willing to buy upon the terms and at the price fixed by the seller, regardless of whether the sale is ever actually consummated or not, provided that such failure is not due to some fault of the broker.

5. An assignee appointed in a deed of assignment made in conformity with the general assignment law (Rev. St. 1895, tit. 8, arts. 71-86) is not an officer of the court, but merely a trustee selected and constituted by the assignor.

Appeal from district court, Dallas county; William P. Ellison, Special Judge.

Action by Robert Gibson against Edward Gray and another to recover commissions as a broker, in effecting a sale of real estate. Judgment for defendants, from which plaintiff appeals. Reversed.

This was a suit in the district court of Dallas county, Tex. (Forty-Fourth judicial district), wherein the appellant, Robert Gibson, was plaintiff, and the appellees, Edward Gray and C. A. Robertson, were defendants. Plaintiff sued to recover \$1,325, alleged to be due him as commissions for services rendered by him to said Gray in negotiating a sale of certain real estate, to wit, block 57, in the city of Dallas, Tex.; the said Gray being at the time said services were rendered the assignee in a deed of general assignment made by the Tompkins Machinery & Implement Company, an insolvent corporation, and which said block 57 had been conveyed to said Gray, as assignee, by said deed of general assignment. During the pendency of this suit said Gray resigned as such assignee, and the said C. A. Robertson was appointed as his successor; and, by amendment, plaintiff thereupon made said Robertson a co-defendant with said Gray, and prayed judgment against both defendants, and that the decree might be so framed as to subject the assets in the hands of said Robertson to the satisfaction of said judgment. The pleadings consisted of plaintiff's amended original petition and his trial amendment, defendant Gray's general demurrer and a motion to dismiss, which the court treated as a general demurrer, and defendant Robertson's amended original answer and supplemental answer, which included demurrers, general and special, a denial, and several special pleas. The court sustained the defendant Gray's general demurrer, and overruled the demurrers of the defendant Robertson; and, the issues of fact having been submitted to a jury, the court directed a verdict to be rendered in favor of said Robertson, which was accordingly done, and judgment was thereupon rendered in favor of both defendants,—that plaintiff take nothing. From this judgment, plaintiff has appealed. There seems to be no controversy as to the facts shown upon the trial. They are, in substance, as follows:

On March 21, 1891, the Tompkins Machinery & Implement Company, a Texas corporation, made a general assignment for the benefit of its creditors to the defendant Edward Gray, assignee, conveying to said assignee, among other things, the aforesaid block 57 in the city of Dallas. Said block 57 was at that time incumbered by two mortgages or deeds of trust; one securing a debt of \$25,000 to the Security Mortgage & Trust Company, and the other, which was a second lien, securing a debt of \$25,000 to the City National Bank of Dallas. The bank held, as security for its debt, in addition to its said mortgage, a large amount of notes pledged with it as collateral by said Tompkins Machinery & Implement Company. The bank's debt secured by the aforesaid second lien on the land, as well as by said collateral notes, became due in March, 1892, and, not being paid, the trustee in said deed of trust, at its request, sold said block 57 under said second

deed of trust on the first Tuesday in August, 1892, and the bank bid in the property at a nominal sum, to wit, \$100. There was some irregularity in this sale, which would probably have made it necessary to readvertise and sell again, in order for the bank to acquire a valid title under its foreclosure; but instead of doing so, the bank made an agreement with the said assignee whereby it agreed that he might sell the property for \$45,000, and that upon being paid a portion of its debt it would release its claim upon the property. The defendant Edward Gray, as such assignee, began soon after the making of the assignment to try to find a purchaser for this property, and in so doing sought the assistance of several real-estate agents in the city of Dallas, but was unable to find a purchaser. In the spring or early summer of the year 1892 he employed the plaintiff to assist him in the matter; agreeing with the plaintiff that, if he would sell the property at a price satisfactory to said Gray, he (Gray) would pay plaintiff the same commissions usually paid to real-estate agents in Dallas for similar services. The commissions usually paid for such services are 5 per cent. on the first \$8,000 of the price at which the sale is negotiated, and 2½ per cent. on all over \$8,000. The plaintiff thereupon endeavored to find a purchaser for said property, and finally, through his endeavors, a sale of the property was agreed on between the said Edward Gray and Mr. C. P. Huntington, at and for the price of \$45,000 cash; Mr. Gray agreeing to convey the property to him for that amount by perfect title, clear of all liens. Gray was to furnish an abstract of title, and the purchaser was to have a reasonable time within which to examine said abstract. The exact date of this contract of sale is not in evidence, but it was some time between the 1st and 9th of September, 1892. Mr. Huntington had, in writing, authorized plaintiff, Gibson, to draw on him for \$45,000 as soon as the title was found to be good. The purchaser was ready, able, and willing to buy at the price and on the terms agreed on with Gray. The abstract of title was delivered by Gray to Gibson on September 9, 1892, and by the latter sent, by direction of Huntington, to Mr. Dillingham, at Houston, Tex., to be examined by attorneys there. The liens on the property exceeded the sum of \$45,000 by some \$4,000 or \$5,000; but, before agreeing to sell at that price, Gray had made an agreement with the City National Bank, which owned the debt secured by the aforesaid second mortgage, to the effect that he might sell at that price, and that, upon being paid what was left of the \$45,000 after paying therefrom all other liens and Gibson's commissions, they would release their mortgage, so that he could give the purchaser a clear title to the property, although the price at which he had agreed to sell, as aforesaid, was less than the amount of the liens. By making said sale the assignee expected to

reduce the bank's debt about one-half, and by so doing to be able to save for the creditors of the assignment several thousand dollars of the notes which the bank held as collateral in addition to its mortgage. On or about September 26, 1892, Gray was notified that the examination of the title was completed, and was found to be satisfactory, provided the aforesaid liens were released, and was also notified that Huntington was ready to pay the money and receive the deed. Gray, however, could not proceed in the matter, in consequence of having been in the meantime served with a restraining order, as will be hereafter more fully detailed. On the same day or the day after the said Edward Gray had contracted to sell said property to Huntington as above stated, he informed Mr. Tompkins, the president of the Tompkins Machinery & Implement Company, of what he had done, and Mr. Tompkins expressed himself as being dissatisfied; and thereupon the said Gray suggested to him that, if there was any reason why the sale should not be made, it could be stopped by an injunction, and further said that he would be glad to have the court pass upon the matter. Accordingly, on September 16, 1892, a suit was begun in the name of the Skinner Engine Company and the Union Iron Works, two of the creditors of said Tompkins Machinery & Implement Company, as plaintiffs, against the said Edward Gray, the said City National Bank, and the Security Mortgage & Trust Company, for the purpose of enjoining the sale which said Gray had agreed to make as aforesaid. This suit was finally disposed of on September 19, 1892, by a judgment in favor of the defendants. Afterwards, on September 23, 1892, another suit was begun, in the name of the Hall Self-Feeding Cotton Gin Company, as plaintiff, against said Edward Gray, said City National Bank, and the Security Mortgage & Trust Company, in which a temporary restraining order was made on September 23, 1892, restraining the defendants from selling said property until the further order of the court, and setting the — day of October, 1892, as the date for a hearing as to whether or not the interlocutory injunction should be granted. It was this restraining order which prevented Gray from proceeding when notified by Huntington that he was ready to pay the money and receive the deed. Appellant offered to prove that the allegation in the petition upon which said restraining order was issued was that the plaintiff therein, the said Hall Self-Feeding Cotton Gin Company, was willing to give \$50,000 for the property. The court, however, refused to permit any proof as to the allegations in said petition; holding that, while it was relevant and material to show the fact that an injunction was issued in said suit, it was wholly immaterial and irrelevant to show what the allegations were upon which said writ was granted. To

which ruling appellant excepted, and took his bill of exceptions. The following orders were made in said suit of the Hall Self-Feeding Cotton Gin Company against Edward Gray, assignee, et al., to wit: On October 6, 1892, plaintiff was ordered to either pay the assignee \$50,000 by 9 a. m., October 8, 1892, or by said time give bond in the sum of \$10,000 that it would pay the assignee \$50,000 for the property when the title was pronounced perfect. On October 8, 1892, the above order was extended to 5 p. m., October 10, 1892. On October 13, 1892, plaintiff was given until noon, October 24, 1892, to procure opinion on the title. On October 24, 1892, time was extended until noon, October 29, 1892. On November 12, 1892, C. P. Huntington was granted leave to intervene. He had, however, filed his petition in intervention on October 5, 1892. On December 13, 1892, Huntington brought a separate suit in the district court of Dallas county against said Edward Gray, as assignee, to compel a specific performance of the aforesaid contract of sale made between them, and his intervention in the aforesaid injunction suit was for the same purpose. In the spring or summer of 1893, Huntington notified the defendant Robertson (who, as will be hereafter stated, had then succeeded Gray as assignee) that his offer of \$45,000 for the property was now withdrawn; and on August 8, 1893, he dismissed his said suit against Edward Gray, and also dismissed his aforesaid intervention in the injunction suit. Said injunction suit was finally disposed of on October 20, 1893, by a judgment in which it is recited that the assignee could not give the plaintiff therein a good title for \$50,000, and therefore the injunction previously granted is dissolved. Not long afterwards the property was sold under the first lien thereon, to wit, the \$25,000 deed of trust to the Security Mortgage & Trust Company, and was bid in by it for the amount of its debt. The appellant understood that the said Edward Gray, in employing him to find a purchaser, and in contracting to sell the property, as above stated, was acting as assignee and in behalf of the trust estate, but there was no express agreement between them as to whether Gray should be personally liable or not. The defendant Robertson, who was assignee at the time the injunction suit was disposed of, in October, 1893, as aforesaid, testified that during the pendency of that suit he made no effort to sell the property; that afterwards he did make diligent efforts to effect a sale, but was unable to do so, or to find a purchaser, at any price.

This present suit was begun November 17, 1892, and during its pendency, and during the pendency of the injunction suit, the defendant Gray, on December 20, 1892, filed in said district court (Forty-Fourth judicial district) his report of his acts as assignee, accompanied by his account as such assignee, and tendering his resignation as such as-

signee. In said report he says, among other things, the following in respect to said block 57: "That from the date of the assignment, until July, 1892, this assignee endeavored, through every channel known to him, to sell said property, but failed to obtain an offer. That in July, 1892, the City National Bank advertised said property for sale under its trust deed, and afterwards sold same, and became the purchaser thereof; but said sale was defectively advertised, and therefore inoperative. That after the said sale this assignee, through Mr. Robert Gibson, agreed to sell said property to Mr. C. P. Huntington for the sum of \$45,000, cash; believing it for the manifest interest of the estate. That upon learning of said sale the Skinner Engine Company and the Union Iron Works, creditors under said assignment, objected to same on the ground of inadequacy of price, and brought suit in this court to enjoin same, which, upon a hearing, was decided by your honor adversely to complainants, and their bill dismissed. That shortly thereafter the Hall Self-Feeding Cotton Gin Company brought a similar suit in the Fourteenth judicial district court, offering \$50,000 for said property. This latter suit is still pending; the court granting the writ upon condition that complainants make good their offer of \$50,000, which up to this date they have failed to do. This assignee would further show to your honor that he agreed, as assignee, to pay Robert Gibson the usual commission to sell said block 57 for the sum of \$45,000, which commission, he is informed, would be \$1,325, for which said Gibson has instituted suit against him as assignee, which suit is now still pending." On December 22, 1892, an order was made by the judge of the Forty-Fourth judicial district upon the matters set forth in said report, by which order the resignation of said Gray as assignee was accepted, and he was discharged. The defendant C. A. Robertson was appointed to succeed the said Gray as assignee, and the said Robertson was ordered to make himself a party to all litigation in favor of or against the said Edward Gray then pending, and he was ordered to fully protect the said Gray against all liability on account of such litigation incurred by him as such assignee under and in accordance with law; and it was further stipulated that nothing therein was to prejudice or in any wise affect the contract of sale claimed by C. P. Huntington, or the claim of Robert Gibson for commissions upon said sale, but those matters, being then in litigation, were to be left open, and unaffected by said order. The defendant C. A. Robertson qualified as assignee under the aforesaid appointment within a day or two thereafter, and took charge of the assets of the estate, and has ever since been, and is now, acting as such assignee.

Richard Morgan, for appellant. Geo. H. Plowman, for appellee.

FINLEY, C. J. (after stating the facts). The sixth, seventh, eighth, ninth, and tenth assignments of error all relate to the same question, and challenge the correctness of the charge of the court, and the verdict rendered in accordance therewith. The court charged the jury as follows: "Gentlemen of the Jury: You are instructed as follows: Plaintiff sues defendant for services alleged to be due to him under a contract alleged to have been entered into by and between him and one Edward Gray, as assignee of the Tompkins Implement & Machine Company, whereby plaintiff, in consideration that said Edward Gray, as and in his duty as such assignee, promised to pay him certain commissions therefor, procured one C. P. Huntington to agree to pay the sum of \$45,000 for a conveyance by such assignee to said Huntington of block 57 in the city of Dallas; the same being a part of the estate assigned to Edward Gray. You are told that by the uncontroverted testimony in this case it appears that after the making of the contract for services, if any was made, and after said Huntington, at the procurement of plaintiff, agreed to purchase said lot at and for said sum of \$45,000, on the 23d day of September, 1892, and before the conveyance to said Huntington had been made, or any part of the purchase price aforesaid had been paid, an injunction issued out of the honorable district court of the Fourteenth judicial district of Texas, restraining said Edward Gray, assignee, from selling said lot at a less price than \$50,000; that said Edward Gray thereafter resigned as assignee of said estate, and defendant C. A. Robertson was appointed in his stead, and as such successor defends this suit; that such injunction remained in force until November 20, 1893. That some time in the spring of 1893 said Huntington, while such injunction was in force, notified plaintiff that he withdrew his offer of \$45,000 for said lot. Under the foregoing facts, you are instructed to find a verdict for the defendant C. A. Robertson, assignee."

Under the several assignments of error, appellant urges these propositions:

(1) A broker employed to sell real estate has discharged his duty when he produces a purchaser able and willing to buy upon the terms and at the price fixed by the seller, and is thereupon entitled to his commissions, regardless of whether the sale is ever actually consummated or not: provided, of course, that the failure to consummate it is not due to some fault of the broker. The correctness of this proposition is well established by authority. *Conkling v. Krakauer*, 70 Tex. 735, 11 S. W. 117; *Mechem*, Ag. §§ 966, 967, 612, 613; *Gauthier v. West* (Minn.) 47 N. W. 656; *Vinton v. Baldwin*, 45 Am. Rep. 447.

(2) The principle or rule announced in the first proposition is not affected, or in any manner changed, by reason of the fact that appellant's employer was an assignee, and was understood to be acting in his trust capacity. It is quite clear that trustees, ordinarily, un-

less restrained by the special terms of the trust, may employ such assistance as may be reasonably necessary to a proper administration of the trust, without violation of the principle that a delegated power cannot be again delegated. 1 Perry, *Trusts*, §§ 404-460; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268. It is equally clear that a trustee contracting for the benefit of a trust becomes personally bound, unless he stipulates to the contrary. In *Taylor v. Davis' Adm'x*, 110 U. S. 334, 4 Sup. Ct. 150, it is said: "A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined, generally, as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise. The contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee, or any other name of office or employment, will not discharge him. Of course, when a trustee acts in good faith for the benefit of the trust he is entitled to indemnify himself for his engagements out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof. If a trustee, contracting for the benefit of a trust, wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate. There are, no doubt, cases where persons occupy the position of quasi trustees, under the appointment of a court, such as receivers charged with the performance of active duties, in which it would involve much hardship to make them personally liable. But in such cases, as the parties have the right to prove their claims against the common fund and have them allowed by the court, the officer may have the protection of the court by which he is appointed, restraining parties from bringing suits against him, except where leave is given for the purpose of fixing the amount due." See, also, *Connally v. Lyons*, 82 Tex. 604, 19 S. W. 799; *Barton v. Barbour*, 104 U. S. 126; *Fitzhugh v. Fitzhugh*, 62 Am. Dec. 654. It is insisted by appellee Gray that the case of *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, is authority for the proposition that he is not personally bound by the contract of employment of Gibson, and that his successor is therefore the only proper party defendant to this suit. The case cited holds that a receiver appointed by a court

to succeed another receiver may be sued upon a cause of action arising against his predecessor, without first obtaining permission of the court in which the receivership is pending to file such suit. In discussing that question the court says: "Actions against the receiver are, in law, actions against the receivership, or the funds in the hands of the receiver; and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands." A receiver is not a mere trustee. He is an officer of the court, and acts directly under and by virtue of the orders of the court appointing him. His custody of the property is that of the court, and his acts, so far as authorized, are the acts of the court; and, of course, he incurs no personal liability while acting within the scope of his authority. An assignee appointed in a deed of assignment made in conformity with our general assignment law (Rev. St. 1895, tit. 8, arts. 71-86) is not an officer of court, but merely a trustee selected and constituted by the assignor. The manner in which he shall manage and dispose of the estate assigned for the benefit of creditors is neither fixed by orders of court, nor prescribed by statute. He is a trustee appointed by the assignor for the purpose of selling the estate and apportioning the proceeds among all the creditors of the assignor. He acts with a discretion in the premises, and the responsibility of his acts rests upon his own shoulders. We are unable to perceive any principle which would exempt such an assignee from personal liability for an obligation incurred by him for the benefit of the estate. The same principle which would make an independent executor personally liable applies with the same force to such an assignee. The case cited wholly fails to sustain the contention. The authorities establish the proposition that where the trustee acts within the line of his authority, in good faith, and with such care as an ordinarily prudent person would have exercised under similar circumstances in the conduct of his own business, the liability incurred for the benefit of the estate should be met out of the funds of the estate. *Caldwell v. Young*, 21 Tex. 801; *Kennedy v. Briere*, 45 Tex. 305; *2 Perry, Trusts*, §§ 912, 913; *Taylor v. Davis' Adm'r*, *supra*.

It is insisted by counsel for appellee Robertson that appellant is not entitled to recover his commissions as agent for the sale of the realty, and have them paid out of the funds of the estate, for the reason that the court enjoined the assignee Gray from the consummation of the sale, and thereby made performance on his part unlawful, and, in contemplation of law, impossible. In support of this proposition we are cited to a line of authorities holding that, where performance of a contract is prevented by judicial proceedings, a recovery cannot be had for failure to perform, and that such judicial pro-

ceedings, when shown, are a good defense to a suit upon an executory contract. If this were a suit against the assignee Gray, by the person to whom the property had been agreed to be sold, to recover damages on account of the breach of the contract of sale, the proposition urged would have application. The case of *People v. Insurance Co.*, 91 N. Y. 174, is an authority relied upon. That case holds that where a corporation (an insurance company) was, by judicial proceedings, enjoined from prosecuting its business, an agent employed for a specified length of time could not recover for failure to carry out the contract after the injunction was granted restraining the company from carrying on its business. His salary was paid up to the time of the injunction, and his suit was based upon a claim for salary for future services contemplated by the contract. It was held that the action of the court in preventing the company from carrying on its business operated to prevent the company and the agent from carrying out the contract, and, in effect, annulled it. It will be observed that this case does not refuse a recovery for services rendered prior to the injunction, but only for services which were contemplated in the future, and which could not, in the very nature of the case, ever be rendered. We fail to find in this case the principle contended for by counsel. *Hepburn v. Montgomery*, 97 N. Y. 617, is also cited to the same point. In this case it seems to be held that a general agent could not recover commissions contracted for on contemplated renewals of policies, when the right of the company to receive premiums upon such renewals was taken away and destroyed by the action of the state in dissolving the corporation. This authority falls far short of establishing the doctrine urged by counsel. Upon the principles hereinbefore announced, the assignee, Gray, had the right to employ the assistance of appellant, if reasonably necessary for a proper administration of his trust, and would have been justified in paying for such services out of the funds of the estate. This proposition finds a close analogy in the rules governing the actions of a guardian. Our statute makes it the duty of the guardian to manage the estate of the ward in such manner as a prudent man would manage his own property. Rev. St. 1895, art. 2625. And it provides for payment of all reasonable and proper expenses incurred by the guardian for the benefit of the estate out of the estate of the ward. Rev. St. 1895, art. 2782. Our general assignment statute, as before stated, leaves full discretion to the assignee as to how he shall manage and dispose of the estate, and provides that he "shall be entitled to reasonable compensation for his services and his necessary costs and expenses, including also his attorney's fees, all to be allowed, in case of difference between the parties, by the county judge or judge of the district court." *Id.* art. 85. In the case of *Caldwell v. Young*, 21

Tex. 802, the rule for determining whether the liability incurred by the guardian for attorney's fees shall be paid out of the ward's estate is thus stated: "The allowance to the guardian is not to be determined by the test of whether the suit resulted favorably or unfavorably. That would place the guardian in the attitude of an insurer to the extent of such expense, which would often prevent suits from being brought which any prudent man, in the management of his own business, would think it proper and necessary to bring. The true test is, would a prudent man, under all the circumstances as they existed at the time, judge it to be proper and necessary to bring and prosecute the suit to protect the interest of the minors, and would he judge it necessary and proper to make the employment of counsel to prosecute the suit? If so, then such employment would be a necessary and reasonable expense, which should be allowed to the guardian." In the case just cited, while the principle is recognized that the attorney has no direct remedy, by common law or statute, against the property of the ward, it is held that as the ward's estate should bear all necessary and proper expenses incurred by the guardian for the benefit of the estate, upon proper allegations, under our system, the estate of the ward may be directly proceeded against by the attorney for compensation for services rendered the guardian. Upon this phase of the case it is said: "Neither by the common law nor by statute has the attorney, for any such employment, any direct remedy against the property of the ward, in a suit of this kind. But as it is equitable that the ward's property should be liable for an expense which the guardian, in the proper discharge of his duty, has a right to incur, there is no inconsistency in our courts, possessing a blended jurisdiction both of law and equity, in allowing a direct recourse upon the ward's property, on the part of the attorney, upon his averring and proving such facts as would compel the county court to allow his claim to the guardian, if paid and presented for allowance, as an expense incurred by the guardian."

The deductions which necessarily follow the principles announced are these:

1. Appellant having been employed by the assignee Gray to sell the property upon a commission, and having performed the service for which he was employed, prior to the issuance of the injunction, he is entitled to pay for his said services.

2. The assignee Gray did not exempt himself from personal liability by the terms of the contract of employment, and became thereby personally liable to appellant. It was error, therefore, to dismiss the case as to him.

3. Appellant is also entitled to a decree that his judgment be paid out of the funds in the hands of the assignee Robertson, if it be found, under the principles above announced, that the assignee Gray was justified in em-

ploying appellant to assist in the sale of the property.

4. Under proper pleadings, and under conditions just stated, the assignee Gray would be entitled to a decree in his favor against the estate in the hands of assignee Robertson. All parties are before the court, and their several rights and interests should be protected by the decree.

Judgment reversed and cause remanded

BOOKHOUT, J., was disqualified, and did not sit in this case.

LEA et al. v. UNION CENT. LIFE INS. CO.  
(Court of Civil Appeals of Texas. Dec. 4, 1897.)

INSURANCE—CONTRACTS OF AGENCY—CONDITIONS  
—WAIVER—PLEADING—PROOF—PAROL EVIDENCE.

1. Where a written contract of agency provided that 50 per cent. of the first annual insurance premiums should be paid to the agent when the notes taken therefor should be collected, evidence that the company negligently failed to collect such notes, or to allow the agent to do so, should not be excluded on the ground that it varies the terms of a written contract.

2. Where a contract of agency provided that 50 per cent. of the first annual insurance premiums should be paid to the agent, and the agent procured a person to take out a policy, and such person was out of town when the policy was sent, and did not know that it was awaiting him, and the company recalled the policy and refused to return it, although the person was willing to take it and pay the premium, the agent was entitled to a commission on such policy.

3. Where a contract between an insurance company and its agent provides that premium notes taken by the agent are to be sent to the company monthly, and the company accepts such notes as soon as they are taken by the agent, and does not object to receiving them before the time expressed, it thereby waives said provision, and will be liable to the agent for his proportion of the proceeds, if it negligently fails to collect them.

On Motion for Rehearing.

Where an insurance agent claims a right to recover against the company for his share of the premium on a policy which the company recalled after sending it, and the company relies on a clause in the contract of agency which requires that all policies not called for in 30 days shall be returned, it must allege and prove that the policy was not recalled until after the 30 days.

Appeal from Grayson county court; J. H. Wood, Judge.

Suit by the Union Central Life Insurance Company against W. M. Lea and others for premiums withheld by defendant Lea, who was plaintiff's agent. Judgment for plaintiff, and defendants appeal. Reversed.

Wolfe & Hare, for appellants. F. B. Dilard, for appellee.

Reasons for Reversal.

HUNTER, J. The appellants (defendants below) pleaded in offset and counterclaim that the appellee (plaintiff below) negligently

failed to collect, or to allow them to collect, certain premium notes, one half of which, when collected, was to belong to them, and the other half to the company, for which they were acting as agents in soliciting and procuring persons to purchase life insurance in the plaintiff company. The contract of agency provided that 50 per cent. of the first annual premiums should be paid to the agents, as their commissions, when the notes should be collected, and 5 per cent. of all subsequent premiums should be paid to the company. The evidence offered, and excluded by the court, tended to prove that the company issued policies to the parties, accepted their notes for the first premiums, and negligently failed to collect same or allow appellants to do so, though the parties were solvent, and the notes could have been collected by the use of ordinary and proper diligence. The ground of objection was that the evidence varied the written contract put in evidence by appellee. We think that the evidence was admissible under the allegations of appellants.

The court also excluded evidence tending to prove that the agents (appellants) procured one Addington to take out a policy in the company, and upon his application, medical examiner's report, etc., he was accepted by the company, and the policy was issued to him, and sent to a bank to be delivered to him. He being away from home on business, and not knowing that the policy was awaiting him, the company recalled it, it seems, because not taken and paid for promptly; no other reason appearing. Upon his return home he was informed of the issuance and recall of the policy, and was willing and offered to take the policy and pay the premium, and the appellants so notified appellee, but the company failed and refused to return the policy; and the agents' one-half interest in the premium was thus lost to them. We think that this evidence ought to have been admitted. The matter had been properly pleaded, and we think that the proffered evidence tended to show that the agents had an earned interest in the premium, which could not arbitrarily be thus disposed of by appellee. If a mistake had been made, and it were shown that he was accepted by mistake or by fraud, either on the part of the agents or of the assured, which, being discovered, the company, by reason thereof, declined to execute the contract, or if any other good reason was shown for the rejection, it would be different; but no such case as this is pleaded or proved. The written contract put in evidence by appellee showed that premium notes taken by appellants were to be sent to appellee monthly, but appellants offered to prove that the notes in controversy had been reported and sent to appellee as soon as taken, not waiting until they matured, and had been held by it, and not collected or attempted to be collected. This evidence was excluded because va-

rying the written contract. We think that if the appellee accepted and held the notes, and failed to object to receiving them before the time expressed in the contract, it waived the provision of the contract, and that the evidence ought to have been admitted.

The jury were charged peremptorily to find a verdict for appellee, which is complained of. With the evidence above referred to all admitted, of course, the court would not give such a charge, and we think it unnecessary to notice the assignment complaining of the charge of the court. It is urged here, also, by an assignment, that this charge was erroneous because, the appellee having alleged itself to be a foreign corporation doing business in this state under a permit from our secretary of state, and having failed to make proof of such allegation, when a general denial thereof had been filed by the defendant, it could not recover. We think this assignment, too, is well taken. *Taber v. Association* (Tex. Sup.) 40 S. W. 954. For the reasons above given, we think the judgment in this case ought to be reversed, and the cause remanded for a new trial, and we make the order accordingly.

#### On Motion for Rehearing.

(Jan. 8, 1893.)

Appellee's counsel calls our attention to a provision in the contract requiring all policies issued and not delivered within 30 days from their dates to be returned to the company, and that in the event of such return the agents were to charge themselves with the medical examiner's fees, and insists, under this clause, that the evidence relating to the Addington policy was properly excluded by the county court, unless appellants had proved that the policy was recalled by appellee before the expiration of the 30 days. We are unable to determine from the record whether it was recalled before the expiration of the 30 days, or afterwards. If before, unless for some good reason, we think the appellee would be liable as indicated in the original opinion; but, if afterwards, we are inclined to think that this fact ought to be set up and proved by the appellee, it being in avoidance of appellants' right to recover under another and different clause of the contract. It seems that we were in error in holding that the appellee, in order to recover, should plead and prove that it had a permit from our secretary of state to do business in this state, as required by articles 745 and 746 of our Revised Statutes of 1895. The appellee being a life insurance corporation, and required by chapter 3, tit. 58, Rev. St. 1895, to procure a certificate of authority to do business in this state from the commissioner of insurance, is especially excepted from the operation of articles 745 and 746 by article 747. Otherwise adhering to our original opinion, the motion for rehearing is overruled.



## BERG v. SAN ANTONIO ST. RY. CO.

(Court of Civil Appeals of Texas. Jan. 5, 1898.)

## BROKER—COMMISSION—DEFECT OF TITLE.

1. When a broker, at the time he contracts, or performs the work for which he asks compensation, knows of the matter which ultimately defeats his efforts, he is not entitled to recover.

2. Where a broker, at the time he makes the contract or performs the work, knows of no defects in his principal's title which would defeat a sale, he has the right to assume, and his principal impliedly warrants, that the title to the property is free from infirmity.

3. The fact that the broker, in negotiating the sale, signed a contract with the purchaser providing that the title should be satisfactory to the purchaser's attorneys, is not a recognition of a defect in his principal's title which would defeat a recovery for his commission where the sale fell through on account of such defect.

Motion for rehearing. Overruled.

For former report, see 42 S. W. 647.

JAMES, C. J. We are of opinion, upon a reconsideration of the case upon the motion for rehearing, that the case has been correctly disposed of. There is no uncertainty in the writing which defined appellant's right to commissions. He was to receive a compensation for making a sale of the bonds, to be paid out of the proceeds of the sale, as the proceeds were received. Appellee's contention is substantially this: That it was a condition to the payment of his compensation that the sale should be consummated, and proceeds of sale received; and that if, for any cause, not the willful or fraudulent act of the appellee, the sale was not effected, or the purchase money not paid, appellant was not to be compensated. That the contract might have been worded to have this effect, cannot be doubted. *Pryor v. Jolly* (Tex. Sup.) 40 S. W. 939; *Flower v. Davidson* (Minn.) 46 N. W. 308; *Peet v. Sherwood* (Minn.) 45 N. W. 839. Had the sale been made on deferred payments, the payments would clearly have been a condition to defendant's liability to pay appellant under this writing. The cases cited by appellee (*Pryor v. Jolly* [Tex. Sup.] 40 S. W. 939; *Tombs v. Alexander*, 101 Mass. 255; *Walker v. Tirrell*, Id. 257) are not authority for its position. In *Hinds v. Henry*, 36 N. J. Law, 328, also cited, the cloud on the title which broke off the contract to sell was known to the agent when he received his power of attorney, and the opinion in that case states that the evidence showed that the defendant made no fraudulent concealment of the defect in his title, and that the plaintiff acted with full knowledge that his efforts might prove abortive by the defendant's inability to convey as was stipulated. It is well settled that when a broker, at the time he contracts, or at the time he performs the work for which he asks compensation, knows of the matter which ultimately defeats his efforts, he is not entitled to recover.

43 S.W.—59

er. But when he does not know, the rule is that he has the right to assume, and his principal impliedly warrants, that the title to the property he deals with is free from infirmity. *Gauthier v. West* (Minn.) 47 N. W. 656; *Loan Co. v. Thompson* (Ala.) 5 South. 473; *Sweeney v. Gas Co.* (Pa. Sup.) 18 Atl. 612; *Phelps v. Prusch* (Cal.) 23 Pac. 1111; *Peet v. Sherwood*, supra. In the case of *Gauthier v. West* it is stated that, if the broker agrees to wait for his commission until the sale is fully completed, there is an implied contract that the defendant had the ability and could confer upon the purchaser a perfect title to the property. We think this is sound. And we are unable to see any difference in this respect between cases where the owner agrees to pay the agent generally, and where there is a stipulation that he is to receive his pay when the sale is completed, or out of the proceeds when they are received. In the latter cases, it is true, the agent would have to await the completion of the sale, or the receipt of the proceeds after the sale. So far his compensation would be conditional. In cases where he is to be paid upon the completion of the sale, the authorities are that the broker is nevertheless entitled to compensation if the sale was not completed because of the owner's inability to give a good title. This being the case, how can it be said that a stipulation that he was to await the payment of the purchase money, or be paid out of the purchase money when received, relieves the owner from the implied warranty that he has a good title, when the sale is defeated, and thereby the fund out of which the agent was to be paid is defeated, for such reason? If the agent can recover in the one case, he should in the other. As a matter of course, an agreement might be made, whereby the broker will not be entitled to compensation if the sale is defeated by reason of the title, or for any other reason. There is nothing in the contract that can be so construed. It is plain and unambiguous. It was agreed that he should have for his services in selling appellant's bonds the excess over a fixed sum net, to be paid as the same should be received from the purchasers. In other words, if he sold the bonds for a surplus over the fixed sum, he was to be paid this surplus, but as to deferred payments he had to await their payment; and to this extent only his pay was conditional. There was no condition that, if the sale failed for any reason, he was to receive no commissions. If such had been his agreement, it may be that it would have done away with all implied warranties, which was held in *Flower v. Davidson*, supra. It may be proper to state in this connection that in a later case in Minnesota (*Cremer v. Miller*, 57 N. W. 318) the doctrine announced in *Flower v. Davidson* was, it seems, applied to a case where the agent's commission depended upon the payment of the purchase money;

and the court held in that case, citing *Flower v. Davidson*, in effect, that such a stipulation did away with the implied warranty concerning the title. There is no reference to *Gauthier v. West*, which seems to hold the contrary,—a case decided by the same court. We are of opinion that it requires more than the agreement shows in the present case to be construed to exclude such warranty. The charge copied in the opinion, and there stated to be correct, was in accord with the views above expressed, and the portion in conflict with these views, also set forth in the opinion, should not have been added.

It is also claimed by appellee that plaintiff cannot recover because the contract he procured to be made by the purchaser provided the title to appellee's properties, and the legality of the issue of bonds should be satisfactory to the purchaser's attorneys, and this was a recognition that such adverse contingency might arise, and was a condition made in view of possible defects liable to defeat it. If there is anything in the rule that the broker has a right, in negotiating a sale, to assume that his principal has a good and marketable title to the property given him to sell, then there is nothing in the above contention. He may proceed with a sale, and, if he is authorized to contract, he may enter into a contract, upon the theory that the property is in that condition. He cannot have a right to rely on this, and lose it merely by relying on it.

We may add, in view of what is said in the motion, that the form in which Berg's commission was stipulated did not place him in any other attitude than that of a broker. He was to get all above a fixed sum as commission so stated, and the fact that this might be great or might be small does not effect a different relation.

As already stated, if the facts or circumstances show that appellant had notice of the condition of the bonds at the time he did the work, he could not recover; or, if the defect in the issue was due to him, then he cannot recover. Nor can he recover if, as a matter of fact, the purchasers would not have completed the purchase had the bonds been without defect.

The other subjects referred to in the motion have been, we believe, correctly decided, and sufficiently explained. The motion is overruled.

#### PHOENIX INS. CO. v. SHEARMAN.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 11, 1897.)

**TRIAL—INSTRUCTIONS—INSURANCE—ASSIGNMENT OF POLICY—CONDITIONS—STATUTES—OPERATION—RETROACTIVENESS.**

1. Under *Sayles' New Civ. St. art. 1331*, providing that failure to submit an issue shall not be ground for reversal of a judgment unless its submission was requested in writing by the

complaining party, and that an issue not submitted or requested shall be deemed found by the court in such manner as to support the judgment if there is evidence to sustain such a finding, the failure to submit an issue is not ground for a reversal where the party complaining did not request the court to submit it, and took no exception to a charge stating that by agreement the special issues submitted covered all the material issues of fact involved, and the evidence supported a finding presumed in favor of the judgment.

2. Where an assignment of an insurance policy sued on by the assignee is alleged in the complaint, and the policy and assignment thereof are read in evidence, and the assignment is put in issue only by a general denial, the assignment is sufficiently proved, under *Sayles' New Civ. St. art. 318*, providing that, when a written instrument is sued on by the assignee, the assignment shall be regarded as fully proved, unless defendant shall deny in his plea that the same is genuine.

3. *Sayles' New Civ. St. art. 1331*, providing that failure to submit an issue shall not be ground for reversal, unless requested in writing by the party complaining, prescribes a method of procedure, and does not, therefore, fall within the constitutional inhibition of retroactive laws, and applies to an action tried before it went into effect.

4. An insurance policy provided that it should be void if illuminating gas or vapor should be generated in the building, or adjacent thereto, to use therein, or if gasoline should be kept or used on the premises. Insured manufactured "French Electric Fluid" from gasoline and other ingredients, which was kept in a shed separate from the insured building, and used it in a lamp for lighting said building; a portion of it being kept on a shelf in the back part of the building. Insured had used all of the fluid several days before the fire occurred, and was not using any at the time of the fire. *Held*, that the facts warranted a finding that no illuminating gas was generated in the building for use therein, and, in the absence of expert testimony that French Electric Fluid and gasoline are the same, the facts also justified a finding that no gasoline was kept or used on the premises.

5. It is proper to charge that an insurance policy providing that it shall be void in case of false swearing by insured touching any matter relating to the insurance, or the subject thereof, whether before or after the loss, is not avoided where a person honestly believes the value of destroyed property to be as he swears, even though it is not the true value, when there is no motive shown for making a false statement, and the value found by the jury was \$2,000 in excess of the amount of the insurance, though that sum was \$1,600 less than the amount fixed by insured.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by R. C. Shearman against the Phoenix Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The court submitted the issue of fraud and false swearing to the jury as follows: "(2) Were E. C. Parish and M. A. Parish, or either of them, guilty of any fraud or false swearing in stating the aggregate amount and value of the property destroyed by the fire in the statement sworn to by them before F. W. Hawes, notary public? Did they, or either of them, in said statement, claim that they, or either of them, owned and had on hand at the time of the fire any articles, as

<sup>1</sup> For opinion on rehearing, see 43 S. W. 1063.

destroyed by the fire, which they, or either of them, in fact did not own or have on hand at the time of the fire? If so, did they, at the time they made said statement, honestly believe said claim to be true, or did they at said time know said claim to be false?" And in connection therewith the court instructed the jury as follows: "In connection with the second question, you are instructed that if a person honestly believes a thing to be true, and so states it, then, even though the statement be not true, and even though the person swears to such statement, this is not false swearing, within the meaning of that expression as used in said question. On the other hand, if a person makes a statement which he knows at the time is not true, or has good reason to believe is not true, and yet swears to it, then this is false swearing, within the meaning of that expression as used in said question."

Richard Morgan and Beaty & Culver, for appellant. Moseley & Smith, for appellee.

#### Conclusions.

**STEPHENS, J.** This appeal is from a judgment on a special verdict in favor of appellee in the sum of \$1,700, the amount of a fire insurance policy issued by appellant company to M. A. Parish, January 15, 1896, and assigned to appellee after the fire, which on May 23, 1896, in the city of Denison, destroyed the stock of merchandise and store fixtures insured, then of the aggregate value of \$3,659.63, as found by the jury.

It is first insisted that the judgment must be reversed because the special verdict failed to find the fact of the alleged assignment of the policy, though this was not denied under oath, but only put in issue, if at all, by the general denial. After submitting the special issues, which did not include that of the assignment of the policy, the charge states that "it is agreed by the parties that the foregoing findings of fact you are directed to make, and the foregoing questions, cover all the material issues of fact involved in this cause." This statement was controverted for the first time in the motion for a new trial. The statement of facts contains no such agreement, and, unless it is therefore to be inferred that none was made, the record is silent upon the subject. No exception was taken to the charge, nor did appellant request the court to submit this issue to the jury. At the last session of the legislature, in order to cure such technical defects in special verdicts, a law was enacted which provides: "But the failure to submit any issue shall not be deemed a ground for reversal of the judgment upon appeal or writ of error, unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment, provided

there be evidence to sustain such finding." Gen. Laws (Called Sess.) p. 15; Sayles' New Civ. St. art. 1331. The statute regulating the assignment of written instruments provides that, when sued upon by the assignee, the assignment shall be regarded as fully proved, unless the defendant shall deny in his plea that the same is genuine, etc. Sayles' New Civ. St. art. 313. The policy, with the assignment indorsed thereon, was read in evidence. We conclude, therefore, that the above-quoted act of 1897 cures the technical defect complained of, although it was passed after the case was tried. Hence we need not determine whether, in the absence of this enactment, the verdict would have sustained the judgment. It is laid down by Mr. Cooley, in his standard work on Constitutional Limitations, that "if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered." Cooley, Const. Lim. p. 469. As the amendment in question takes the place of article 1331 of our Revised Statutes of 1895, regulating the procedure in cases of special verdicts, we have no law to govern us, unless we follow the amendment. Such amendments of statutes prescribing methods of procedure do not fall within our constitutional inhibition of retroactive laws. It is even further laid down by Mr. Cooley that "a statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute, even as to cases which had been previously appealed." Cooley, Const. Lim. pp. 472, 473.

The remaining contentions of appellant arise upon the construction and application of the following forfeiture clauses of the policy, which we quote from its brief: "This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void if \* \* \* illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein, or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises \* \* \* gasoline." "This entire policy shall be void \* \* \* in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss." The material facts relied on, and found by the special verdict, to show a forfeiture under the clause first quoted, were thus correctly summarized in the fourth paragraph of the court's charge, reading: "During the time this policy was in force, M. A. Parish, having procured a recipe for the manufacture of what is called 'French Electric Fluid,' purchased a gallon of gasoline, and used it in making some of this fluid, which was made by mixing in a gallon of gasoline a double handful of salt, a handful of soda, and a piece of gum camphor as large as the end of one's thumb.

She placed this fluid in a five-gallon can, which she kept in the coal shed on said tract of land, separate and apart from said building. From this five-gallon can she would put into a gallon can enough of said fluid to fill a lamp which was used in lighting said storehouse at night. She kept said gallon can on a shelf in the back part of the store. Other lamps were used in lighting the store at night, but in all of these coal oil was used. She had used up all of this French Electric Fluid that she had on hand several days before the fire occurred, and was not using any of the same at the time of the fire." The verdict contained the further finding: "That no illuminating gas was generated in said building for use therein, and that the light was made by the burning of said fluid direct, as a coal-oil lamp burns coal oil." We are of opinion that the undisputed facts set forth in the charge, as quoted above, not only warranted this finding, but also the further conclusion that appellant had failed to show that gasoline had been "kept, used, or allowed on the above-described premises." As forfeitures are not favored, the rule of strict construction applies, and forbids a resort to presumption or inference in establishing a forfeiture. If gasoline and French Electric Fluid were one and the same thing, it was incumbent on appellant to prove it. In the absence of expert testimony, we have no means of determining, without a resort to presumption, whether the gasoline lost or retained its identity when it became a constituent of the new compound or mixture. That the burden was on appellant to establish by proof the precise fact or facts relied on to show a forfeiture seems to be well settled, as will appear from numerous cases cited in appellee's brief. But conceding that the evidence did show that an insignificant quantity of gasoline had been used on the premises, though none was there when the fire occurred, appellee yet contends that no substantial violation of the terms of the policy was proven, and cites quite an array of authority in support of this contention. Without, however, announcing any definite conclusion thereon, we hold that appellant failed to show a breach of the clause in question, and hence overrule all the assignments of error relating thereto.

We are thus brought to the remaining issue of fraud and false swearing. The contention of appellant was and is that in making out the sworn proofs of loss an excessive value was placed upon the property destroyed, but we hardly think the testimony would have warranted, much less required, a finding of fraud or false swearing. The method of arriving at the value was fully shown in the proofs of loss. The value there stated was only about \$1,600 above what the jury found it to be; and no motive appears for the excessive valuation, as the value proven on the trial and fixed by the verdict was nearly \$2,000 in excess of the amount of the

policy. The charge submitting this issue, to which error is assigned, taken as a whole, stated the law with substantial accuracy. Something more than swearing to what is not true must be shown, to make out a case of false swearing, within the meaning of the policy; and this distinction the charge recognized, and in effect stated, at least sufficiently with reference to the facts of this case. *Insurance Co. v. Starr*, 71 Tex. 733, 12 S. W. 45; *Insurance Co. v. Swann* (Tex. Civ. App.) 41 S. W. 519. The judgment is affirmed.

#### AULTMAN, MILLER & CO. v. SMYTH.

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

#### ATTACHMENT—AFFIDAVIT—BOND—EXCESSIVE DEMAND.

1. Where the affidavit for a writ of attachment is for a less sum than is claimed in the petition, the writ is not thereby vitiated.
2. In a bond for a writ of attachment, it is not essential to its validity that it state in the caption the county where executed.
3. An attachment cannot issue upon a contingent demand.
4. A prayer for attorney's fees, when the allegations of the petition disclosed that they could not be lawfully included in the suit, would not destroy plaintiff's right to attach for so much of the debt as was properly included.
5. A writ of attachment is not void on the ground that the bond is in an amount less than double the amount claimed in the petition, where the petition prays for attorney's fees, which could not be lawfully included in the suit, and without which the bond would be sufficient.

Error from district court, Grimes county: J. M. Smither, Judge.

Action by Aultman, Miller & Co. (a corporation) against Gifford Smyth to recover on an open account, and on four promissory notes not due. From a judgment for defendant, plaintiff brings error. Reversed.

Porter & Cohron, for plaintiff in error. W. W. Meachum, for defendants in error.

JAMES, C. J. Plaintiff in error sued, declaring on an open account aggregating \$47.55, and on four notes which were not due when the suit was commenced. The suit was by attachment, and upon a motion the court quashed the writ and (as the account was not, of itself, large enough to give the court jurisdiction) dismissed the action. The petition alleged that the notes were dated September 30, 1896, and in sums that aggregated \$649.50, and maturing, respectively, on December 30, 1896, March 30, 1897, June 30, 1897, and September 30, 1897; the last three bearing interest at 8 per cent. from March 30, 1897, and all stipulating for an attorney's fee of 10 per cent. if not paid when due, and suit be brought on same. The account was stated thus: "One steel-beam plow, \$6.90; one bicycle, \$40.65; making the sum total, \$46.55,"—which shows an erroneous addition, patent on the face of the petition; the true total being \$47.06.

The first ground for quashing the writ was that there was a variance between the amount sued for, stated to be \$47.55, and that mentioned in the affidavit, which was stated as \$46.55. Where the affidavit is for less than is claimed in the petition, the writ is not thereby vitiated. *Lathrop v. Snyder*, 16 Wis. 293; *Evans v. Lawson*, 64 Tex. 201. As will be explained hereafter, the plaintiff, in his affidavit, swore that defendant was justly indebted to him in the sum of \$696.05, which is the precise sum of the principal of the notes and the amount of the account as erroneously footed up in the petition, and was less than was sued for.

The second ground was that the bond did not state in the caption the county where executed. This, we hold, was not essential to the bond.

The third and fourth grounds may be considered together: (3) The attachment bond is in a sum less than double the debt sworn to be due and to become due, and sued upon, as set out in the petition; (4) the debts sued on not being due when the suit was brought, the account was not sufficient to give jurisdiction to the court. This proposition is correct, if the attachment was void, because the action, as to what was not due, could only exist by virtue of the attachment. We are of opinion that the third ground was not tenable. An attachment cannot issue upon a contingent demand. The statute requires the plaintiff to make oath that the defendant is justly indebted to him in the sum claimed. The attorney's fees were to accrue on these notes only in the event that they became due and were not paid, and suit were brought on the same,—a strictly contingent liability. *Madrox v. Craig* (Tex. Sup.) 16 S. W. 328; *Brown v. Wyatt*, 72 Tex. 62, 10 S. W. 321. It would not have been possible, at the time of filing this suit, for plaintiff to swear, with reference to the attorney's fees, that defendant was justly indebted to him. The petition mentioned the attorney's fee clause, in describing the notes, and prayed for judgment for the debt, interest, and such other amounts or sums as might be met and proper in the premises. The petition should certainly be construed as a petition for such of the sums stated therein as would authorize suit by attachment, and it should be given effect, in reference to the notes, so far as the attachment would warrant the suit; that is to say, as a suit on the notes, irrespective of the attorney's fees. A prayer for attorney's fees, when the allegations disclosed that they could not be lawfully included in the suit, would not destroy plaintiff's right to attach so much as was properly included. The petition, then, should be regarded as a suit exclusive of the attorney's fees. The affidavit proceeds upon this theory, and states the amount of the debt existing by reason of the notes and account as \$696.05. It is true that this affidavit un-

necessarily goes further, and states the notes, their terms and dates of maturity, and interest and attorney's fee clauses, and also the account,—the latter as amounting to \$46.55; but the affidavit made was that defendant was justly indebted to plaintiff in the sum of \$696.05, in regard to such notes and account. It reasonably and sufficiently appears that plaintiff excluded all interest and attorney's fees, and computed only the principal of the notes and the account, in stating the amount for which it sought a writ. The bond was for \$1,400, and more than double this sum. The motion should not have been sustained, and therefore the judgment is reversed, and the cause is remanded.

#### TEXAS FARM & LAND CO. et al. v. STORY.

(Court of Civil Appeals of Texas. Jan. 19, 1898.)

#### APPEAL—ASSIGNMENTS OF ERROR—MOTION FOR NEW TRIAL—AFFIDAVIT.

1. An objection, on a motion for a new trial, that the verdict and the judgment are contrary to the evidence, without stating the particulars wherein they are against the evidence, is not sufficient upon which to base assignments of error.

2. In order to raise an objection to the verdict and judgment on the ground that they are not supported, there must be a motion for a new trial made in the court below, raising that particular question.

3. The overruling of a motion for a new trial on the ground of the interest of one of the jurors in the action cannot be reviewed when there is no bill of exceptions raising the question, nor any reference made to it in the statement of facts, nor any ruling by the court upon it, other than the order overruling the motion.

4. An affidavit filed in connection with a motion for a new trial on the ground of the disqualification of a juror is insufficient, when simply stated on information and belief.

Appeal from district court, Coke county; J. W. Timmons, Judge.

Action by the Texas Farm & Land Company and another against R. L. Story. From a judgment for defendant, plaintiffs appeal. Affirmed.

Thos. Shearon and G. W. Perryman, for appellants. L. H. Brightman, for appellee.

FISHER, C. J. The controversy in this case is one of boundary. There are two grounds urged for the reversal of the judgment below. One is, in effect, that the evidence establishes the boundary in accord with the theory of the appellants. This question is not presented in such a way that we feel called upon to pass upon it, but, however, we may say that the verdict and the judgment of the court below are not without evidence to support them.

It appears from the record that this was a trial before a jury. The only complaint urged in the motion for a new trial on the facts is that the verdict of the jury is contrary to the

law and the evidence. It is the rule that obtains in this state that an objection to the verdict and the judgment, urged in the motion for a new trial only upon the ground that it is contrary to the evidence, without stating the particulars wherein it is against the evidence, is not sufficient upon which to base assignments of error. *Railway Co. v. Commander* (Tex. Civ. App.) 29 S. W. 263; *Railway Co. v. Lancaster* (Tex. Civ. App.) 30 S. W. 490. And it is also held that in order to raise an objection to the verdict and judgment, where the case is tried before a jury, on the ground that it is not supported by the evidence, or is against the evidence, there must be a motion for a new trial made in the court below, raising that particular question. *Clark v. Pearce*, 80 Tex. 151, 15 S. W. 787.

The motion based upon the interest of the juror Sternman is insufficient. It appears from the affidavit that Sternman sat as juror in the case, and at the time he had an interest in the settlement of the boundary identical with that of the appellee, and that at the time the appellants did not know that he was on the jury, but thought, from the list handed them by the clerk, that another man was on in his place, and did not know that Sternman had any interest in the question to be passed on. There is no bill of exception raising this question, nor is any reference made to it in the statement of facts, nor any ruling made by the court upon it, other than the order overruling the motion for a new trial. There the court states, "There came on to be heard the motion of the plaintiff and intervener for a new trial," and, after hearing and considering said motion, it was of the opinion that the same should be overruled. Now, it appears from this order that the court heard and considered the motion. We do not know what facts were before it at that time, and, as there is nothing appearing to the contrary, it may be assumed that the court heard evidence upon the issue as to the disqualification of the juror Sternman, and decided against appellants on that question from the facts before it. The question is not raised or presented in this court in such a way as we can determine that the court erred in overruling the motion on that ground. Besides, the affidavit that was filed in connection with the motion raising the question of the incompetency of the juror Sternman is insufficient. It simply says that affiant is credibly informed and believes that one Sternman had such an interest as would disqualify him as a juror. The affidavit did not state from whom affiant got his information, nor was it accompanied by any affidavit of his informant, and the statements of the affiant are only based upon information and belief; and the court, in the absence of any testimony whatever other than this affidavit, could very well have concluded that it did not show a disqualification of the juror. We find no error in the record, and the judgment is affirmed. Affirmed.

**MCLEOD ARTESIAN WELL CO. et al. v. CRAIG.**

(Court of Civil Appeals of Texas. Oct. 30, 1897.)

**SEQUESTRATION — BOND — VALIDITY — REPLEVIN BOND — RIGHTS AND LIABILITIES OF SURETIES — PLEADING — COSTS — HARMLESS ERROR — CORPORATIONS — OFFICERS.**

1. The fact that a replevy bond recites three persons as principals, and was executed by only one of them, will not invalidate the bond if the person who executed it was the one who replevied the property described in the bond.

2. A sequestration bond conditioned that plaintiff (a woman) will pay to defendants all such charges and damages as may be adjudged against "them" is defective.

3. The refusal to quash a defective sequestration bond is immaterial where defendant has replevied the property sequestered, and plaintiff has recovered judgment, since defendant and his sureties are liable on the replevy bond, notwithstanding any quashing of the sequestration process.

4. In an action on a bond given in replevin for property sequestered in an action to foreclose a mortgage given by a corporation, the mortgage cannot be attacked on the ground that the president and secretary of the corporation were without power to execute the mortgage.

5. In an action to foreclose a chattel mortgage, the property was sequestered, and afterwards replevied by defendant. The judgment subsequently rendered against defendant and the sureties on the replevin bond did not, in terms, foreclose plaintiff's lien, but provided that, if any of the sureties should pay any part of the judgment against themselves, they should have an order commanding a sale of the property, and should receive from the proceeds an amount equal to what had been applied to such payment. *Held*, that the sureties could not complain of the omission alluded to.

**On Motion for Rehearing.**

1. Where, in a suit for the enforcement of a mortgage, the property is sequestered, and defendant replevies it, the measure of liability on the bond is the value of the property at the date of the approval of the bond, with legal interest.

2. In an action on a bond given in replevin for property sequestered in a suit to foreclose a mortgage, the value of the property replevied was alleged in the petition in one place as \$1,200, and the petition also contained the allegation that the value of the property replevied was "as stated above," and the preceding statement fixed it at \$1,250. This latter sum was the value fixed by the affidavit in sequestration, and was the value as fixed by the replevy bond. *Held* sufficient to sustain a judgment for \$1,250 against the sureties on said bond.

3. In an action to foreclose a mortgage, the property was sequestered, and afterwards replevied by defendant. The sureties on the replevin bond were made parties to the suit by citation, and they litigated the question of their liability. *Held*, that they should pay the costs incidental to such litigation, the judgment being that they were liable on the bond.

4. When two judgments are obtained in an action—one against the main defendant, and another against his sureties—on a replevin bond, the judgment should provide that the proceeds of the sale of the property which might be returned to the officer should be applied first to the judgment against the sureties.

Appeal from district court, Wichita county; George E. Miller, Judge.

Action by Sarah F. Craig against the Mc-

1 Writ of error denied by supreme court.

Leod Artesian Well Company and others on a promissory note, and to foreclose a chattel mortgage. Judgment for plaintiff, from which Joseph Laing and others appeal. Modified.

Dickson & Moroney, for appellants. A. H. Carrigan, for appellee.

TARLTON, C. J. This cause is incorrectly docketed. It should be styled "Joseph Laing et al., Appellants, v. Sarah F. Craig et al., Appellees." On August 15, 1892, the McLeod Artesian Well Company, a private corporation organized according to the laws of Iowa, executed and delivered its promissory note in the principal sum of \$2,000, payable to the order of Sarah F. Craig, appellee. To secure this note, the corporation, on June 3, 1893, executed its chattel mortgage upon a certain artesian well boring outfit. On September 18, 1893, Sarah F. Craig instituted this suit upon her note, which had in the meantime matured, seeking to recover a personal judgment for the amount thereof from the McLeod Artesian Well Company, and seeking also to foreclose the mortgage upon the property above referred to. N. J. McLeod was made a party defendant, as lessee in possession of the property. On September 18, 1893, the plaintiff, through her agent, Rice H. Bell, sequestered the mortgaged property, alleging, among other matters, the location of the property as in Johnson county, Tex., and that "the plaintiff and affiant fears that the defendants will remove said property out of Johnson county, Texas, during the pendency of this suit." The sequestration bond executed by the plaintiff was conditioned that the plaintiff, Sarah F. Craig, "will pay to the defendants all such damages as may be adjudged against them, and all costs, in case it shall be decided that such sequestration was wrongfully issued." On September 23, 1893, N. J. McLeod, as principal, with Brown & Laing (a firm composed of F. O. Brown and Joseph Laing), together with O. Van Ordstrand, as sureties, executed a replevy bond conditioned "that the defendant will not remove the above-described property out of Johnson county, Texas, during the pendency of the above-mentioned suit, and that they (the defendants) will have such property, with the value of the fruits, hire, and revenue thereof, forthcoming to abide the decision of the court, or they will pay the value thereof and of the fruits, hire, and revenue of the same, in case they be condemned so to do." On October 31, 1896, a judgment previously rendered for the plaintiff having been reversed (see 36 S. W. 142), the cause was tried without a jury, resulting in a judgment in plaintiff's favor, from which Brown & Laing, J. Laing, F. O. Brown, and O. Van Ordstrand, sureties on the replevy bond, appeal to this court.

We dispose as follows of the material questions presented in the appellants' brief:

1. We regard the replevy bond as a completed instrument as to the principal, N. J. Mc-

Leod, and the sureties already named. The fact that the bond recites two other parties, the McLeod Artesian Well Company and W. R. Kent, once a party defendant, as principals with N. J. McLeod, it appearing that the artesian well company and Kent did not execute the instrument, does not affect our conclusion. This recital finds easy explanation in the fact that when the bond was drawn it may have been thought that the remaining defendants would sign it as principals. It does not appear that the sureties signed this obligation upon the condition that the McLeod Artesian Well Company and W. R. Kent should execute it as principals before it should be binding on the sureties. On the other hand, a contrary inference is to be drawn from the constable's return on the writ of sequestration, which recites that the property was replevied by N. J. McLeod, one of the defendants, by giving replevy bond as required by law, and from the evidence of N. J. McLeod, who testifies that he is the party who replevied the property.

2. The sequestration bond, conditioned that the plaintiff will pay to the defendants all such damages as may be adjudged against them (instead of against her), was manifestly defective, and should have been quashed; but the refusal of the court to quash the process is regarded by us as immaterial, in view of the fact that the defendant McLeod replevied the property, and of our conclusion that the sureties on the replevy bond would be liable thereunder, notwithstanding the quashal of the sequestration process. On this question we adopt the views of the court of civil appeals for the Fifth district in *Bemis v. Wells*, 31 S. W. 827, and in the later case of *Cahn v. Jaffray*, 34 S. W. 372.

3. We think that the allegations of the plaintiff's amended petition sufficiently stated the value of the property as at \$300, and the extent of its depreciation at \$1,175, to apprise the defendants of the nature and extent of the plaintiff's demand against them; and thus overrule the third, fourth, fifth, sixth, seventh, and eighth assignments of error, complaining of the action of the court upon certain exceptions presented to the plaintiff's first amended petition.

4. There was sufficient evidence to justify the conclusion that the McLeod Artesian Well Company was solvent at the time of the execution of the mortgage, and hence the proposition that an insolvent corporation cannot execute a chattel mortgage preferring creditors is inapplicable. Nor will the instrument be condemned on the further ground that the president and secretary of the corporation were without power to execute the mortgage.

5. The court found that during the period intervening between the replevy of the property, October 2, 1893, and the trial of the cause, October 31, 1896, the property mortgaged had depreciated in value in the sum of \$965, and rendered judgment for that amount against the sureties on the bond, in addition to the sum of \$285, found by it to be

the value of the property at the date of the trial. It does not appear that this depreciation was due to the negligence of the sureties, but, on the contrary, the evidence indicates that it was an incident to the ordinary use of the property. The question is presented, under the appellants' fourteenth assignment of error, whether the sureties upon the defendant's replevy bond, in a suit to foreclose a lien upon personal property, are liable for depreciation in the value of the property to which they have not contributed. The liability of the sureties must be tested by the terms of their obligation, and as prescribed by the statutes. In the present instance these terms were that the defendant would not remove the property out of Johnson county, where it was then situated, and that he would have such property, with the value of the fruits, hire, and revenue thereof, forthcoming to abide the decision of the court, or that he would pay the value thereof, and of the fruits, hire, or revenue of the same, in case he should be condemned so to do. By article 4882, Rev. St., it is provided that in suits for the enforcement of a mortgage or lien upon property the defendant, should he replevy, is not required to account for the fruits, hire, revenue, or rent of the property. In this case the defendant N. J. McLeod, as the lessee of the mortgagor, occupied towards the property the relation of the mortgagor. Hence the defendant, the principal in the replevy bond, and the sureties, are not liable, under the terms of this bond, for the fruits, hire, or revenue of the property. Hence, also, the alternative obligation which rests upon the sureties is that, if they removed the property beyond the county, and failed to have it forthcoming to abide the decision of the court, they would pay the value thereof. Consequently, we conclude that the measure of the liability of the sureties is the value of the property, and, according to the law as announced in this state, that value must be fixed as at the date of the trial, and not as at the date of the execution of the replevy bond. *Watts v. Overstreet*, 78 Tex. 571, 14 S. W. 704. We apprehend that the reason underlying the provision exempting the mortgagor from liability for the fruits, hire, or revenue of the property grows out of the fact that, until foreclosure of the mortgage, the mortgagor is the owner of the property, and is entitled to its use, and that he should not, as a consequence, until such foreclosure, be held liable for the depreciation in the property which is incident to that use. It follows that the judgment rendered by the court against the sureties was excessive in the sum of \$965, representing the extent of the depreciation.

It is suggested by the appellee that this conclusion will enable the party replevying the property to wear it out by use, or to let it decay, and thereby exempt himself from liability; to which the reply is that in the present instance the diminution in value was due

to the ordinary use, and not to the abuse of the property; and, besides, the liability of the sureties, as already indicated, must be tested by the terms of their obligation as fixed by law. As the policy of the law in regard to a mortgagor who has replevied property sequestered in an attempted enforcement of the mortgage permits him, as the owner of the property until foreclosure, to enjoy its use, and absolves him from liability on account of depreciation incident to the proper use of the property, courts are not at liberty to look to the consequences. It is their duty to interpret the law as they find it. Perhaps the remedy against such a consequence would be in the prompt enforcement of the mortgage by the mortgagee. The ruling on this subject of depreciation in *Investment Co. v. Shelton* (Tex. Civ. App.) 29 S. W. 494, involving a question of title, is not authoritative in the present case, involving the enforcement of a mortgage.

6. The court erroneously adjudged the sureties on the replevy bond to be liable for the costs of the suit. *Henderson v. Brown* (Tex. Civ. App.) 41 S. W. 403.

7. The judgment does not, in terms, foreclose the plaintiffs' lien upon the property, but it provides that, if any of the sureties should pay any part of the judgment against themselves, they shall have an order commanding the sale of the property, and that they should receive from the proceeds an amount equal to that which had been applied by them to the payment of the judgment against themselves. Hence the sureties are in no attitude to complain of the omission alluded to, if it was erroneous.

The judgment will be in all things affirmed as to the McLeod Artesian Well Company and as to N. J. McLeod, who does not complain thereof; but as to the appellants the sureties on the replevy bond it will be reversed, reformed, and rendered, so that the recovery as to them will be limited to \$235, the value of the property at the date of the trial, with 6 per cent. interest from the date of the judgment below. The appellants will recover the costs of appeal.

#### Motion for Rehearing of Appellee.

Dec. 31, 1897.

This motion is granted upon the following conclusions:

1. It is believed that this court erred in holding that the measure of the liability of the sureties on the replevy bond involved in this case must be fixed as at the date of the trial, and not as at the date of the approval of the bond. In thus stating the rule, we sought to follow the decision of our supreme court adopting the opinion of Judge Collard of the commission of appeals in *Watts v. Overstreet*, 78 Tex. 571, 14 S. W. 704, since also adopted by this court in *Investment Co. v. Shelton*, 29 S. W. 494. The language of the opinion in *Watts v. Over-*



street is that "the value of the property for which defendant and the sureties on his replevy bond may be liable is not the value at the time the petition or affidavit is filed, but at the time of the trial." This language is quite broad, but, reading it in connection with the facts of that case, we think that it was not the intention of the learned judge who wrote the opinion to announce the rule as of invariable application. That was a suit involving a sequestration and foreclosure of a mortgage upon certain sheep, and it appears that the property enhanced in value after the replevy thereof by the defendant, and it was held that it would be unjust to the plaintiff that the defendant should secure the enhancement in value pending the litigation, and that, in the administration of justice to the plaintiff, the measure of damages upon the replevy bond should be the value of the property at the trial, enhanced, as it was, rather than at the date of the institution of the sequestration proceeding. The purpose of the replevy bond in this instance was indemnity to the plaintiff in the sequestration proceeding. This indemnity should be measured by the damage which she sustained, and the character and extent of this damage must, in turn, be gauged with reference to her legal rights as they stood at the time that the bond was approved. These rights consisted in a demand which had then accrued, secured by a mortgage according to the terms of which she was entitled to the possession of the property mortgaged. In other words, at the time of the approval of the bond, she was entitled to a foreclosure of the mortgage, and to have the proceeds of the property applied to the payment of her indebtedness. Of this right she was deprived by the action of the sureties, appellants here, in entering into the bond. In redressing the injury which she thus sustained, it seems to be our duty to place her as nearly as possible in the situation which she would have occupied but for the conduct of the appellants in executing the bond. This would be to afford her compensation for the actual injury sustained. She was deprived of the right, fixed by her contract with the mortgagor, to apply the value of the property as it existed at the approval of the bond to the payment of her debt, and we think that this value should be the measure of her actual damages, legal interest being allowed thereupon as compensation for the detention of the property. The court in this instance rendered judgment for the sum of \$1,250, but did not assess interest thereupon, save from the date of the judgment. We are not, therefore, at liberty to assess interest in accordance with our view of the law, as the appellee does not complain of the judgment. We therefore conclude that the judgment should be affirmed for the sum of \$1,250 and legal interest from the date thereof. Our conclusion upon the question presented is that the rule as to the time when the value of

the property shall be assessed in adjudging the liability of sureties on a replevy bond, whether such assessment shall be made at the date of the replevy or at the time of the trial, will vary with the facts and circumstances of the particular case, having in view the purpose of the bond which is indemnity to the obligee in the instrument. See *Suydam v. Jenkins*, Sedg. Lead. Cas. P. 561. It is insisted by the appellants in their thirteenth assignment of error that the judgment for \$1,250 exceeds any amount authorized by the pleadings in the case, in that it is alleged in the amended petition that the total value of the property at the time it was replevied was \$1,200. It is true that the petition contains this allegation, but it also alleges that the value of the property so replevied at that time was "as stated above," and the preceding statement fixed it at \$1,250. This was the value fixed by the affidavit in sequestration, and indicated by the replevy bond which the appellants signed as sureties. In *Watts v. Overstreet*, 78 Tex. 573, 14 S. W. 706, it is held that "the rights of plaintiff on the defendant's replevy bond do not depend on the pleadings," and that "there is no need of pleading on the part of plaintiff to fix the value as a predicate for the judgment." We deem it proper to follow the law thus stated, and to adhere to the conclusion above announced.

2. We think that our original opinion is also erroneous in exempting the sureties on the replevy bond from all the costs of the suit. This case is distinguishable from that of *Henderson v. Brown* (Tex. Civ. App.) 41 S. W. 406, cited by us, in that the sureties were made parties to the suit by citation, that they answered herein, and have continuously litigated the question of their liability upon the bond. The costs incident to this litigation they should pay. They are chargeable with all costs accrued from and after the filing of the amended original petition by which they were made parties to this suit, but as to the costs accruing prior thereto they are not liable. These prior costs seem to be quite insignificant in amount, but, as the excessiveness of the judgment to that extent was called to the attention of the court in the ninth ground of the appellants' motion for a new trial, they are entitled to the correction here, perforce of which they will recover the costs of this appeal. In response to appellants' nineteenth assignment of error, we hold that the judgment should have provided that the proceeds of the sale of the property, or any part thereof which might be returned to the officer, should be applied first to the judgment against the sureties on the replevy bond, which was in a smaller sum than the main judgment. Our final conclusion is that the judgment stand affirmed as heretofore against the McLeod Artesian Well Company and N. J. McLeod, and that it be also affirmed as to the appellants herein in accordance with the fore-

going views, save as to the two features last considered, in which respects it will be reformed as above indicated. The costs of appeal will be taxed against appellee, Sarah F. Craig. Ordered accordingly.

**COLEMAN v. FIRST NAT. BANK OF WAXAHACHIE et al.**

(Court of Civil Appeals of Texas. Dec. 24, 1897.)

**CONVERSION—PETITION—SUFFICIENCY—BANKS—ACTION TO RECOVER DEPOSITS—WIFE'S SEPARATE PROPERTY—POWERS OF HUSBAND.**

1. A petition in conversion alleged a deposit in defendants' bank of money in plaintiff's own name, as her separate estate, and not to be checked out by any other person; that she had only given some small checks, and that there was a balance still in the bank, although the cashier claimed to have paid out money on checks not signed by her, and for which she was not responsible; that she could not give the exact dates or amounts of the checks, as all the facts were in possession of defendants, who claimed that all the deposits had been accounted for, and that demand and refusal to pay had been made. *Held* sufficient on general demurrer.

2. In an action against a bank to recover deposits made, a failure in the petition to allege the exact amounts and dates of the deposits is sufficiently excused, where it alleges the depositor's want of knowledge of these facts.

3. If it be necessary to draw a check on a bank for the amount claimed to be on deposit before an action to recover the amount can be maintained, a failure to allege same on the petition would be excused where it does allege that plaintiff did not know the amount of the balance in the bank, and defendants claim that all the funds have been accounted for.

4. A special demurrer to the petition will not lie on the ground that it does not allege that plaintiff's husband did not draw out the funds deposited in defendants' hands.

5. In an action against a bank for money deposited by a married woman as her separate estate, and which was paid by the bank to her husband, to entitle plaintiff to recover, the petition must allege and the proof show a state of facts that would amount to a conversion by the bank, or collusion on the part of the bank, for the fraudulent purpose of enabling him to convert plaintiff's estate.

6. Rev. St. 1895, art. 2967, giving the husband the sole management of the wife's separate estate, does not authorize the husband to convey title to such property.

7. The husband cannot convey title to choses in action and securities belonging to the wife without her consent; and, so long as her separate property can be identified, she can recover it in the hands of third parties, although it may have been conveyed for value, and the party who received it was ignorant of the wife's title.

8. Rev. St. 1895, art. 2967, giving the husband sole management of the wife's estate, authorizes him to collect the purchase money of the wife's separate estate, and gives him possession of her property.

9. Rev. St. 1895, art. 2967, giving the husband sole management of the wife's separate estate, authorizes him to check out money deposited by the wife in a bank as her separate property.

10. The fact that the officers and agents of a bank knew the husband to be an unsafe man to intrust with money, and a man of dissolute habits, addicted to gambling, drinking, and squandering his money, would not of itself make

the bank liable for the payment of checks drawn by him against his wife's money on deposit in her name, or show fraud and collusion upon the part of the bank.

11. In order to show fraud and collusion on the part of a bank in connection with the fact that a husband drew money from such bank belonging to the wife's separate estate, and deposited in her name, it must be guilty of some act which amounts to a fraud against her.

Appeal from district court, Ellis county: J. E. Dillard, Judge.

Suit by Mrs. R. J. Coleman against the First National Bank of Waxahachie and others. From a judgment entered on demurrers to the petition, in favor of defendants, plaintiff appeals. Reversed.

The appellant instituted this suit in the district court of Ellis county, Tex., on August 27, 1895, against the First National Bank of Waxahachie and R. G. Phillips, to recover moneys alleged to have been deposited by her in said bank. The defendants filed exceptions to the petition, which were sustained by the court, and judgment was entered for defendants, from which plaintiff has appealed. The facts are fully stated in the opinion.

Stripped of its unnecessary verbiage and irrelevant allegations, the petition, after the formal allegations as to citizenship of the parties, the incorporation of the defendant bank, and that defendant Phillips was its cashier at the time of the happening of the things charged, alleged, substantially, that on or about July 30, 1889, petitioner deposited with the defendant bank the sum of \$4,000 in her own name and to her sole credit, and the defendant so accepted it; that on or about the — day of —, 189—, she deposited the further sum of \$800 in her own name and to her sole account and benefit, which defendant so accepted; that said money was her sole separate estate, and that same was subject to her personal check and order, and hers only; that plaintiff had given some small checks, for which the bank is entitled to credit; that she cannot state the dates nor the amounts of the said checks, but that defendants had a full record thereof; that a very large portion of the sum so deposited has never been checked out or otherwise withdrawn by her, nor by any one else authorized by her; that there now remains due her between \$4,000 and \$5,000 of said deposits, for which said bank has never accounted to her. She further alleged that defendant Phillips claims to have paid out certain sums on checks which, although not signed by plaintiff, he claims that she is responsible for, and for which he claims that credit must be allowed as against said deposits. She denies that she is responsible for said checks, and says they were not executed by her, nor by any one authorized by her; that she never received the proceeds of the same, or any part thereof; that the bank is not entitled to credit for said checks; that defendants well knew the moneys deposited were

her separate estate; and that payment made to any person other than herself or on her individual check would be illegal, invalid, and a conversion pro tanto of her funds. She alleged a demand upon the bank, and its refusal to comply. She also alleged that Phillips is liable by reason of his negligence and breach of duty in payment of checks not drawn by her. Plaintiff, as a further cause of action, alleged that she was the widow of J. W. Coleman, who died, intestate, in Ellis county, Tex., on or about September 23, 1893; that at his death he was indebted to her in the sum of \$2,500, and that, as his widow, she is entitled to his estate; that her husband was a depositor in the bank, and that the bank was indebted to him at the time of his death in a large sum, the exact amount of which she is unable to state, but largely more than \$500, the same being community property of herself and said Coleman; that Phillips claims that all of said deposits have been accounted for; that plaintiff cannot state the exact dates or amounts of such deposits, or whether any portion of same has been paid by the bank or Phillips since her husband's death; but she charges that no one has qualified as his administrator, and no one is authorized by law to receive the same, and that payments made by defendants were illegal and a conversion. Plaintiff alleges that a knowledge of the facts is in possession of defendants, and in order that plaintiff may be fully advised as to all the facts connected with said transactions, both as to her separate estate and the funds deposited by her said husband, and especially as to the liability of defendant Phillips, she asks that he be required to specially answer and state fully his connection therewith. She alleged a demand on defendants and their refusal to comply therewith. The prayer was for a discovery, and for a judgment for the amount found due her. There was also a prayer for general relief. To this petition defendants filed a general demurrer, and special demurrers (1) that plaintiff failed to state with certainty when and how much money she deposited with defendant bank; (2) that plaintiff failed to show that she had drawn any check the payment of which had been refused; (3) that the petition shows she was a married woman prior to September 23, 1893, and does not allege that her husband did not, on proper checks, draw out all moneys deposited by her, nor does the petition show any facts which would deny the right of the husband to draw out money deposited in plaintiff's name. Defendants answered by a general denial and special pleadings not here necessary to set out. It did admit deposits in the name of plaintiff, aggregating \$5,165.17. Plaintiff filed a supplemental petition, consisting of a general denial of the matter set out in the answer, and other special matters not here necessary to state. The exceptions to plaintiff's petition were sustained by the court; and, plaintiff having failed to amend,

the cause was dismissed, to which action of the court plaintiff excepted, and has perfected her appeal to this court.

Lancaster, Beall & Gammon and Seay, Seay & Seay, for appellant. M. B. Templeton, for appellees.

BOOKHOUT, J. (after stating the facts). Was there error in sustaining the exceptions to plaintiff's petition? Counsel for appellees contend that this question should be determined by the allegations contained in the original petition, and that the petition can derive no aid from the averments contained in the supplemental petition. If the original petition was sufficient when tested by the above exceptions, the judgment of the court below must be reversed. We have only set out what, in our opinion, were the material allegations of the petition. The petition contained all the formal averments of a bill of discovery in chancery, and contained a prayer for discovery. We have no such form of action in Texas. *Love v. Keowne*, 58 Tex. 191. If the petition alleges sufficient matters to form the basis of a recovery, the unnecessary matters set out therein should be treated as surplusage. The petition does allege a deposit by the plaintiff of moneys in the defendant bank in her own name, the same being her separate estate, and not to be checked out by any other person,—all of which was known to defendants,—and which they so received on deposit. The petition alleges that she has only given some small checks, and that there is between \$4,000 and \$5,000 of said moneys still in the bank. It alleges that Phillips, the cashier, claims to have paid out certain sums on checks not signed by her, and for which she is not responsible; that said checks were not signed by her, nor by any one authorized by her to sign the same; that she did not receive the proceeds thereof, or any part of same; that defendants well knew that the moneys deposited were her separate estate, and that payment of same to any person other than herself or on her individual check would be illegal, invalid, and a conversion pro tanto of her funds. She further alleged that she could not give the exact dates or amounts of the deposits or of the checks drawn by her; that all the facts are in the possession of the defendants. She alleged that Phillips claimed that all the deposits have been accounted for, and denies that the bank owes her. She also alleged a demand and a refusal to pay. These averments in the petition charged a conversion of plaintiff's property by the defendants, and were sufficient, tested by a general demurrer. The petition alleged her want of knowledge of the facts, and that all the matters were in the possession of defendants, and sufficiently excused the failure of plaintiff to state with certainty when she made each deposit, the amount and date of same. This disposes of the first special exception.

If it be admitted that the bank would not be liable until a check had been drawn against the funds by the proper person, and its payment refused (a proposition which it is unnecessary for us to here decide), then this formality was excused by the facts pleaded. It is alleged that Phillips claims to have fully accounted for the funds, and that he had paid them out on checks drawn by another party, and that he denied the bank's liability for the same. It would have served no useful purpose to have gone through the idle formality of drawing a check, and having its payment refused. Besides, under the facts stated, it is shown that plaintiff did not know the amount in the bank after crediting the deposits with the checks drawn by her. We think the second special exception should have been overruled.

We do not think the third special exception well taken.

If the defendants wished to defend upon the ground that plaintiff was a married woman when the moneys were deposited, and that the same were drawn out by her husband under circumstances that would relieve the bank from liability, it had a right to do so by proper pleadings.

The special prayer for relief is subject to criticism, but, in addition to the prayer for specific relief, there was a prayer for general relief, which would entitle plaintiff to such relief as the pleadings and evidence would entitle her to. *Trammell v. Watson*, 25 Tex. Supp. 210; *Silberberg v. Pearson*, 75 Tex. 288, 12 S. W. 850; *Garvin v. Hall*, 83 Tex. 301, 18 S. W. 731. We think the trial court erred in sustaining defendants' exceptions to plaintiff's petition, which will necessitate a reversal of the judgment.

It appears from defendants' answer and plaintiff's supplemental petition that the real issue in the case is as to the authority of the husband over the wife's separate estate. In view of the fact that this question has been raised by the pleadings and in the brief of both parties, and of another trial, we deem it proper to lay down the principles governing this phase of the case.

It is made to appear by the pleadings that, when plaintiff deposited her moneys in the bank, she was a married woman, the wife of J. W. Coleman, and that the bank claims to have paid out the deposits on checks drawn by J. W. Coleman, and signed by him; whether in his own name or in the name of his wife is not shown, and whether payable to himself or other parties is not shown. To entitle plaintiff to recover in a case of this kind, the pleading must allege, and the proof show, a state of facts that would amount to a conversion by the bank, or collusion on the part of the bank, its officers and agents, with J. W. Coleman, husband of plaintiff, for the fraudulent purpose of enabling Coleman to convert her estate. This is not a case where the wife is seeking to charge the estate of the deceased husband, or the community es-

tate of herself and deceased husband, with a debt due her by her deceased husband, or to make them liable for her separate property converted by the husband. The pleadings show that plaintiff seeks to hold the defendant bank, a third party, liable for moneys deposited by the wife in her own name, the same being her own separate estate, and known to be such by the officers of the bank, and which the bank paid out on checks executed by the husband. This raises the question as to how far the husband is authorized to deal with the wife's separate estate.

Is a husband authorized to check out moneys belonging to the wife, and deposited by her in bank in her own name, and known by the officers of the bank to be her separate property? The statutes of Texas give the husband the sole management of the separate estate of the wife. Rev. St. 1895, art. 2967. The husband is not authorized by this statute to convey title to the separate property of the wife (*McKay v. Treadwell*, 8 Tex. 176); nor can the husband convey title to the choses in action and securities belonging to the wife without her consent (*Hamilton v. Broaks*, 51 Tex. 145; *Richardson v. Hutchins*, 68 Tex. 89, 3 S. W. 276; *Kempner v. Comer*, 73 Tex. 198, 11 S. W. 194). So long as her separate property can be identified, she can recover it in the hands of third parties, although it may have been conveyed by the husband for value, and the party who received it from the husband was ignorant of the wife's title to it. *Kempner v. Comer*, supra. The husband has authority by virtue of the statute to collect the purchase money for the wife's separate estate. *Douglas v. Baker*, 79 Tex. 500, 15 S. W. 801. The authority conferred by the statute on the husband to have the sole management of the separate estate of the wife gives him the right to the possession of her property. *Brown v. Brown*, 61 Tex. 58; *Richardson v. Hutchins*, supra. We think the authority to have the sole management of the separate estate of the wife authorizes the husband to check out the wife's money deposited by her in bank in her name. The bank would be protected in payment of checks properly drawn by the husband against a deposit in the wife's name, although it was known by its officers and agents that the money was the separate property of the wife. The husband, however, has no authority to convert the wife's separate estate, and if he did convert it, and the bank participated in such conversion, or knowingly received the benefits of his conversion of it, it would be liable. *Bank v. Jones*, 18 Tex. 811.

Again, if there was collusion between the bank, its officers or agents, and J. W. Coleman, plaintiff's husband, for the fraudulent purpose of enabling him to convert her estate, the bank would be liable. *Rose v. Houston*, 11 Tex. 325. It is alleged by plaintiff that her husband was a man of notoriously dissolute, reckless, and careless habits in regard to man-

ey; that he squandered all money that came into his hands, in gambling and drinking, and in many ways; that he was an unsafe man to intrust with money; and that all this was known to defendants. She further alleged as a conclusion that the defendants clandestinely concealed the facts from her. It is not alleged that she ever made inquiry of the officers of the bank as to the state of her account, and that they misstated its true condition. She alleges that she was accessible to the bank, and seems to have assumed that it was the duty of the agents of the bank to hunt her up, and keep her informed of the condition of her account. In this she was mistaken. The fact that the officers and agents of the bank knew the husband to be an unsafe man to intrust with money, and a man of dissolute habits, addicted to drinking and gambling, and that he squandered his money, would not of itself make the bank liable for the payment of checks drawn by him against his wife's moneys on deposit in her name. These facts are not sufficient to show fraud and collusion upon the part of the officers or agents of the bank with J. W. Coleman. They must have been guilty of some act in connection with her husband which amounted to a fraud as against her. The plaintiff's pleadings fail to conform to the rules of pleading in this state. The judgment will be reversed, and the cause remanded, and plaintiff is ordered to replead her cause of action in accordance with the rules. Judgment reversed, and cause remanded.

RAINEY, J., disqualified, and did not sit in this case.

### LEVY v. TATUM.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 8, 1897.)

#### RECEIVER—BREACH OF CONTRACT—INSTRUCTIONS—QUESTION FOR JURY.

1. Where a woman owning land through which a railroad company had built its road, without condemnation, deeded to the railway company the ground for its right of way and also for a depot, the deed containing a recital that the railway company binds itself and its assigns to the grantor forever "to construct and maintain a depot building for the passenger and freight traffic so long as the said railway remains in operation," her son (who, on her death, became the owner of the land) can sue the receiver of the railroad for damages for discontinuing the maintenance of said station, although such receiver was ordered to discontinue the station by the court having jurisdiction over him as receiver.

2. When a case has been tried on both sides on the theory that the measure of damages is the depreciation of the value of land up to the time of the trial, an instruction to that effect to the jury, instead of limiting it to the time the action was commenced, is not error.

3. The question whether a contract "to maintain a depot building for the passenger and freight traffic" requires the employment of an agent at the depot is one for the jury to deter-

mine from a consideration of the circumstances and the intention of the contracting parties.

4. A judgment against the receiver of a railway company, based upon a failure on the part of the company or its receiver to perform a contract by which the company acquired its right of way, for damages to land, through which the tracks and right of way of said company run, properly provides that if it is not paid by the receiver, he having funds on hand applicable therefor, the right of way be sold to satisfy it.

Appeal from district court, Busk county; W. J. Graham, Judge.

Action by Paul Tatum against R. R. Levy, Sr., receiver, for damages. Judgment for plaintiff, and defendant appeals. Affirmed.

Mrs. Mary C. Tatum owned about 1,000 acres of land, through which the Galveston, Sabine & St. Louis Railway Company built its road, without condemnation. She and the company left the matter to arbitrators, who awarded her \$1,000 as her damages. Thereupon the company settled with her, in lieu of paying her this sum, by having her convey the right of way and depot grounds, etc., to the company, by deed dated February 6, 1887, in consideration of the enhanced value expected to arise to her lands by the location and construction of said railway, and reciting that the railway company binds itself and its assigns to the grantor, forever, "to construct and maintain a depot building for the passenger and freight traffic of said Tatum Station so long as the said railway remains in operation." Prior to this time there was a station there known as "Tatum Station," which was without a depot building or an agent. Upon the execution of said deed, a depot building was constructed for freight and passenger traffic, and an agent placed and kept there until July, 1896, when the district judge of Gregg county, in whose court a receiver had control of this railway, ordered that the agent be withdrawn from said station. It appears that all the property rights and franchises of the Galveston, Sabine & St. Louis Railway Company had become vested in the Texas, Sabine Valley & Northwestern Railway Company, and that the district court of Gregg county appointed a receiver for the property of the latter, and that appellant, Levy, was such receiver, operating the railway. Mrs. Tatum having died, the plaintiff, Paul Tatum, was shown to be the owner of all the land described in the petition. The suit is brought against the receiver, alleging that, under said agreement, the Galveston, Sabine & St. Louis Railway Company erected the depot building for freight and passenger traffic at Tatum Station; and that same was maintained by keeping an agent thereat up to July 17, 1896, when the receiver ceased to maintain said depot for freight and passenger traffic according to the contract, since which date no agent has been kept there to sell tickets or keep the depot in condition for the traveling public, or to give bills of lading for goods, so that in reality there is no longer any depot at said station;

<sup>1</sup> Rehearing denied.

and that thereby plaintiff has been damaged in the decrease of the value of his said land in proximity to the depot, caused by the inability of the people to ship produce or merchandise as theretofore, when an agent was kept there, and in the loss of rents. The only matter of damages submitted to the jury, however, was the depreciation in value of the property. In addition to the facts already stated, there was testimony going to show that the withdrawal of the agent from said station caused a decrease in the value of plaintiff's lands.

Levy, Turner & Howard and M. R. Geer, for appellant. J. H. Jones and J. H. Turner, for appellee.

JAMES, C. J. (after stating the facts). First and second assignments of error: The charge first states the issue thus: "Plaintiff alleges that the said receiver breached the contract made between said parties in this: That it ceased to maintain said depot for passenger and freight traffic for the said Tatum Station, on July 17, 1896, and that since said date there has been no agent at said station to sell tickets or to keep said depot in condition for the traveling public, or to give bills of lading, or to receive freight, etc., whereby plaintiff says he has been damaged, for which he sues. The damages alleged to have been sustained by reason of the alleged breach of the contract is to the property described in plaintiff's petition. Defendant pleads a general denial." Then follows this clause: "To entitle plaintiff to recover, the burden of proof is upon him of proving (1) that the defendant broke the contract referred to substantially as alleged by plaintiff; and (2) that he has been damaged thereby in his property set out in his petition. If he has so proved, he is entitled to recover the sum that he has been damaged thereby. If you find that there was a breach of said contract in the manner substantially complained of by plaintiff, then you will allow only such damages as resulted directly from the breach of the contract to the property of plaintiff, taking into consideration what said property would have been fairly worth had there been no breach of the contract, if there was any, and what it is worth now, and then allow him the difference in the price, if by reason of the breach, if any, of the contract, the value of said property has been decreased. If plaintiff has not shown a breach of the contract substantially as alleged by him, and that he has been damaged thereby, you will find for the defendant." The objections advanced against this charge are (1) that it allowed the jury to construe the contract, and leaves to them to determine what constituted a breach of the contract; and (2) that the proper measure of damages was the value of the land at the time the agent was removed, or at the time of filing this suit, and not the value of the land at the time of

the trial; and (3) that the charge was on the weight of evidence.

Appellant contends that the intention of the parties to the contract is plainly expressed in the instrument, and that the fact was uncontradicted that a depot building, as the contract stipulated, had been constructed and maintained. If this were so, it would have been error to submit any matter to the jury. But the word "maintain," in the connection in which it appears, is not unambiguous, and the sense in which it was used by the parties was, under the evidence introduced, a question of fact; and this disposes of the first of said objections.

Was the charge on the weight of evidence? We think that any tendency of the portion of the charge above quoted to state that the failure to keep an agent at said station was a breach of the contract is wholly removed by the remainder of the charge given, which is thus: "It is for the jury alone to determine whether or not there has been a breach of said contract from the evidence, and in determining this, if you find that defendant has not maintained a depot building for the passenger and freight traffic of said station, then the contract was breached. If it has maintained a depot for the passenger and freight traffic of said station, then it was not; and, if not, then there can be no recovery by plaintiff, even though you might believe he has been damaged." The part of the charge singled out for objection could only be said to be on the weight of evidence by hypercriticism, but when the entire charge is read, as the jury is presumed to have done, there is nothing to mislead.

The second objection bears on the measure of the damages. On this subject it is not necessary for us to determine whether or not this was a case for the application of the rule fixing the damage at the difference between the value of the land at the time just prior to the act complained of and immediately afterwards. The case was tried upon the theory that the measure was the depreciation in value, to be arrived at by considering the value of the land at the time of the act and its value at the time of the trial. There was no objection made to the evidence introduced in this regard and for this purpose, and that it was the rule recognized by both parties is further indicated by a charge given at defendant's request, as follows: "You are charged that if you believe from the evidence that plaintiff's property has not decreased in value, or, if it has, such decrease was not caused by the removal of the agent at Tatum, Texas, but by some other cause, such as the general depreciation in values, or any other cause than the removal of said agent from said depot, you will find for defendant." Defendant cannot, we think, claim that the rules he now invokes should have been applied.

These remarks dispose, also, of the fourth and sixth assignments.

The third and eighth assignments complain of the charge that "the order of the district judge of the Seventh district would not bar a recovery by plaintiff if he has otherwise shown himself entitled to recover," and in refusing to charge the reverse. We understand the cases of *Brown v. Warner*, 78 Tex. 546, 14 S. W. 1032, and *Howe v. Harding*, 76 Tex. 17, 13 S. W. 41, as ruling against these assignments.

Under the tenth assignment there is a proposition that "appellee was not shown to have been a party to, or that he had any interest in, the right of way contract, as would give him any right of damages." If this question made is based on the evidence, it was not mentioned in the motion for new trial. If it is based on the pleadings, his title to the property and to the rights of his mother in the contract are alleged. Another proposition under this assignment is that the court erred in establishing a lien upon the right of way and roadbed, in the nature of a vendor's lien for the damages found. The receiver is shown to have taken possession of the line, and was operating it, and using the property acquired by the deed; and the proposition is refuted by the cases of *Brown v. Warner* and *Howe v. Harding*, supra, and by *Railway Co. v. Henderson*, 86 Tex. 309, 24 S. W. 351. A third proposition is that the judgment is erroneous in prescribing that the amount of the judgment should be paid out of the receivership funds, and in default of which an order of sale should issue. The judgment, as entered, declared the amount of the verdict to be a vendor's lien upon said roadbed and right of way as described, and provided that no order should issue hereon while said road remains in the hands of the receiver; and the judgment further provides: "It is ordered by the court that this judgment be paid out of any funds in the hands of the receiver, as such receiver; and in the event this judgment is not paid by said receiver, and it shall be made to appear to the court by the affidavit of the plaintiff that he has applied to the court appointing said receiver for an order to pay said judgment, and that the court appointing said receiver has refused to order said judgment paid, and that there is money in the hands of said receiver subject to the payment of said judgment, then and in that event an order of sale issue hereon as in other cases of the foreclosure of vendor's lien." The opinion in the above case of *Howe v. Harding* is authority in favor of the correctness of this provision of the decree.

The fifth assignment and the proposition thereunder do not disclose any error. The verdict reads: "And we further find that said sum is the damage to which plaintiff is entitled on account of the failure of defendant to pay the contract price for the right of way conveyed to the Galveston, Sabine & St. Louis Ry. Co." It is difficult to gather from the assignment and propositions the precise point intended to be made. The statement

is wholly foreign to the proposition. We are of opinion that all we can consider in this regard is whether or not there is any pleading to authorize this portion of the verdict, or the charge directing this form of verdict in the event of a finding for plaintiff. There was no dispute about the contract, which is a part of the petition. The pleadings of both parties recognize it. The issues submitted, viz. the breach thereof, and the amount of damages, being resolved in the plaintiff's favor, it was unnecessary, in view of the pleadings for the jury, to find more to authorize the damages to be foreclosed as a lien on the property described in the contract, this following as a matter of law; hence the court's directing said form of verdict was proper, and warranted by the pleading claiming a lien and asking for general relief.

The eleventh and twelfth assignments are, in substance, that the evidence does not support the verdict, as the uncontradicted evidence shows the maintenance of a depot building and a substantial compliance with the contract, which does not require the equipment of a station and the keeping of an agent there. As already stated, the meaning of the word "maintain," as intended by the parties, admitted of a question of fact. The conditions and surrounding circumstances and the acts of the parties were properly investigated, for the purpose of arriving at such intent. It was shown that, at the time the contract was entered into, the road was in operation, and that this point was a station. It is not probable that Mrs. Tatum intended to yield her right to the \$1,000 awarded her, when the place was already a station, for any other purpose than to have a depot building erected and kept in order. It is a circumstance of much force that the railway company not only constructed the building, but at once placed an agent there, and that he was retained there nine years, when it would appear from the withdrawal of such agent the business of the company did not demand it, or that it was economy not to have one. In one sense, and as commonly understood, the maintenance of a depot building for freight and passenger business would carry with it the equipment and service usual in such cases. We think there was evidence making the submission of the issue proper.

In reference to the twelfth assignment, we may add, although it involves repetition, that plaintiff stood in the place of his mother in respect to the contract and her rights under it; that the suit was properly brought against the receiver, as was the decision in *Howe v. Harding*; and that, as also decided in the same case, the order of the district judge that the receiver dispense with the service of the agent at Tatum could not, in good conscience, be made without compensation, and was not a bar to this action.

The provisions of the decree in this case are substantially those that appear to have been approved in *Howe v. Harding*. Here

it is provided that if the court, having control of the receiver, has, upon an application to it, refused to order the judgment paid out of appropriate assets on hand, then, upon plaintiff making these facts known to the court by his affidavit, an order of sale should issue upon this decree. We take it that the court would not be precluded by the filing of such affidavit from determining its truth, if questioned; and hence we think it substantially accords with what is decided in the last-mentioned case. The judgment is affirmed.

SCHOTT et al. v. PELLERIM et al.

(Court of Civil Appeals of Texas. Dec. 11, 1897.)

TRESPASS TO TRY TITLE—HEARSAY EVIDENCE—DECLARATIONS.

1. Declarations relating to identity, not made ante litem motam, are inadmissible.

2. The declarations of an alleged grantee in a patent to land, made to the father of the plaintiffs, that he "had been in Texas, and acquired property there," are admissible in evidence, in an action to recover land brought by the heirs of the patentee, to prove the identity of such patentee.

3. In an action by the heirs of an alleged patentee of land, to recover possession, where the only issue was as to the identity of the patentee, a deed of the premises, purporting to have been executed and recorded some years after the death of plaintiff's alleged patentee, by a person of the same name, was introduced in evidence by defendants. The judge charged that said deed could not be considered as proving, or tending to prove, that said instrument was ever executed by the party to whom the original grant was made, nor as proving that defendants have any title to said land; but said instrument could be considered by them for all other purposes. Held that, as the deed was some evidence that some one of the patentee's name was claiming the land, the instruction was erroneous.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by Laura T. Pellerim and another against Joseph Schott and others to recover certain land. Judgment for plaintiffs. Defendants appeal. Reversed.

Head, Dillard & Muse, for appellants. C. Von Carlowitz, for appellees.

STEPHENS, J. The land in controversy, one-third of a league, situated in Grayson county, was patented February 25, 1856, to "John Palms, his heirs or assigns," by virtue of certificate No. 262, issued by the board of land commissioners of Harrisburg county on the 9th day of February, 1838. Appellees, Laura T. Pellerim and E. F. Mazarat, as heirs (nieces) of the grantee, recovered one-fifth of the land. The other heirs, being barred by limitation, did not join in the suit. That appellees were heirs of one John Palms, who died without issue, in New Orleans, April 17, 1854, was clearly established. His mother had already been dead about 20 years, but his father, Ange Palms, survived

him, and died July 28, 1866, leaving several children, including Ange Palms, Jr., since deceased, as well as grandchildren, the appellees. The single controverted issue of fact submitted to the jury was whether or not the land had been granted to appellees' uncle, or to some other John Palms. The testimony relied on by them tended to establish the affirmative of this issue. On the other hand, appellants relied on the following circumstances as tending to rebut the inference of identity upon which recovery was had: Besides the continuous and peaceable possession of the several appellants, and those under whom they claimed, for 20 years, under various recorded deeds, together with the prolonged silence of the adverse claimants, they proved that a deed, which, though attacked for forgery, it was agreed had been lost and could not be produced, had been on record in Grayson county since 1872, purporting to have been signed by John Palms, and duly acknowledged before the clerk of the district court of Caddo parish, La., June 14, 1866, in terms conveying to Samuel Preston the land in controversy, and thus describing it: "One-third of one league of land, being fourteen hundred and seventy-six acres of land, lying and being situate in Grayson county, state of Texas, and being the identical land patented to me by the state of Texas by virtue of a headright certificate issued me by the board of land commissioners of Harris county, Texas." They also proved that the original survey upon which the patent issued, February 25, 1856, was made August 11, 1855.

The first error is assigned to the admission in evidence from the deposition of appellee Mazarat of the following answer to the eleventh interrogatory: "My uncle, Ange Palms, Jr., told me, I believe it was in 1802, that my uncle John had lived in Texas; that he had been sent by grandfather to hunt John up; that it was in the latter part of 1834 or 1835; that he found him in Harrisburg; that he was well, and left him there." The objection, among others, interposed and overruled, to this evidence, was that it was hearsay, and the declarations so proven self-serving. Tested by the rule laid down and the views expressed by our supreme court in *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1066, and 29 S. W. 760, the testimony, we think, should have been excluded. Appellees, through their counsel, undertake to distinguish the ruling complained of from that condemned in *Byers v. Wallace*, in that they do not claim through the declarant, their uncle Ange, but only through their grandfather and uncle John, and in that the inherited title of the declarant was barred by limitation when the declarations in question were made. But, if we concede that for these reasons the declarations were not self-serving, the objection to the admissibility of the evidence upon the ground that it was hearsay is still not obviated, because, though relating to pedigree and identity, the declara-



tions do not appear to have been made ante litem motam. Not appearing to have been so made, they did not fall within the exception to the rule which excludes hearsay evidence; it being incumbent upon the party offering hearsay testimony, in order to avoid that objection, to bring it within some of the recognized exceptions to the rule so invoked. *Johns v. Northcutt*, 49 Tex. 444; *Wallace v. Howard* (Tex. Civ. App.) 30 S. W. 711; *Cook v. Cattle Co.* (Tex. Civ. App.) 39 S. W. 1010. These declarations, made in 1892 or later (for the indefinite statement of appellee Mazarat that she thought they were made in that year is to be taken most strongly against her), were made long after the appellants and those under whom they claim had openly, by adverse possession for nearly 20 years, disputed the identity, which these declarations were offered to establish, of the John Palms under whom appellees claimed with the grantee of the land. Indeed, the record warrants the suspicion that they were made after appellees had begun to prepare for this litigation. True, suit was not filed till May, 1895, but the father of appellees made a deed to them the year before of his interest in the land, which was within two years, if not less, after the declarations were made. If, then, John Palms, Jr., was conscious, when he made the declarations, that the adverse possession of appellants had divested him of his interest in the land, he nevertheless, and quite naturally, was doubtless interested for his nieces, not barred by limitation, in lending them a helping hand. As was said by Justice Brown in *Byers v. Wallace*, 29 S. W. 760, "In pedigree, matters of public interest, and ancient boundaries, the law excludes declarations of all persons made post litem motam, because it presumes that even that interest one may feel in the success of his friend might bias the statement, and deprive it of its value as a statement impartially made." He had already quoted in that opinion from Phillips on Evidence, as sustained by numerous authorities cited, the following: "It has been thought to be some safeguard, sufficient to warrant the admissibility of the evidence upon points where no better evidence can commonly be expected, that the declarant could derive no advantage from his own statements, and that there was at the time no exciting cause to induce him to depart from the truth." So we conclude that if, on account of the long-continued adverse possession of appellants, Ange Palms, Jr., could "himself have derived no advantage from the statements," it cannot be said, in view of the interest he naturally must have felt in the success of his friends and nieces, whose title was then disputed, "that there was at the time no exciting cause to induce him to depart from the truth." It would not do to allow one long in peaceable possession of land to be dispossessed by declarations made, pending such possession, in the interest of adverse claimants.

The second error is assigned to the admis-

sion in evidence, over like objection, of the answer of witness Wilder, father of appellees, to the effect that John Palms said to him that he had been in Texas, and acquired property there. But, on the authority of *Hickman v. Gillam*, 66 Tex. 314, 1 S. W. 339, and that line of cases, we are inclined to the opinion that this was admissible upon the issue of identity, as an assertion of title or claim on the part of the alleged grantee.

The third error is assigned to so much of the charge as instructed the jury not to consider the purported deed from John Palms to Samuel Preston "as proving, or even tending to prove, that said instrument was ever executed by the John Palms to whom the original grant was made," nor "as proving, or even tending to prove, that defendants have [had] any title to said land." The charge submitting the issue of identity, which was the only issue in the case, with the added qualification complained of, reads: "If you believe, from the evidence, that the John Palms under whom plaintiff and intervener Emily F. Mazarat claim was the John Palms to whom the original grant of the certificate was made, by virtue of which the land was surveyed and the patent was issued, you will find for the plaintiff and the intervener an undivided one-fifth of said land. The burden is upon plaintiff and intervener to show the facts that would entitle them to recover, as set forth in this clause, by a preponderance of the evidence, which means the greater weight of credible testimony, before they could recover; otherwise, your verdict should be for the defendants. In this connection you are instructed that the instrument which on its face purports to be a deed conveying said land from John Palms to Samuel Preston cannot be considered by you as proving, or even tending to prove, that said instrument was ever executed by the John Palms to whom the original grant was made, nor can said instrument be considered by you as proving, or even tending to prove, that defendants have any title to said land; but said instrument can be considered by you for all other purposes." Appellants ascribe the giving of this qualifying paragraph to a holding by the court that the execution of a deed cannot be proven by circumstantial evidence, and cite, as opposed to such holding, *Bounds v. Little*, 75 Tex. 320, 12 S. W. 1109, and *Crain v. Huntington*, 81 Tex. 614, 17 S. W. 243, which seem to be in point on the proposition. It is, however, not entirely clear to us that the court meant to so hold. It is to be inferred, from the language of this qualifying paragraph, that the court entertained the opinion that, while it might be inferred, from the circumstances in evidence, that the purported deed had been executed in the name of, and even by, one John Palms, there was no evidence that it had been executed by the grantee in the patent, and that the fact of its registration for more than 20 years, under a purported date subsequent to the death of the John Palms

whose heirs appellees were, did not even tend to prove that it had been executed by such grantee. But, however this may be, we are of opinion that the charge complained of was uncalled for and misleading, if not in itself erroneous. As already seen, there was but the one issue in the case,—that of disputed identity. The deed evidently was not relied on by appellants to show title in themselves, but only the circumstance of its being found on record as early as 1872, and purporting to have been executed and acknowledged, in 1866, by a John Palms other than the one who died in 1854, was relied on to rebut the contention of appellees that the latter John Palms was the true grantee. It cannot be said that this circumstance did not at all tend to rebut this contention, and, if so, it was because it tended to show that the deed in question had been executed by the John Palms to whom the land had been granted. If it had no such tendency, we are at a loss to know what it did tend to prove; and yet the court, in the last paragraph of the charge, informed the jury that it might be considered for all other purposes. It was at least some evidence of an assertion of claim by one having the name of the original grantee, made after the death of the John Palms under whom appellees claimed, and hence bore upon the issue of disputed identity. *Hickman v. Gillum and Byers v. Wallace*, supra. If it was evidence at all, however slight, upon any phase of that, the only issue in the case, the court should have left it to the jury to determine its probative force, without comment or qualification, except, possibly, to limit the evidence to its bearing upon that issue. The case was not one which made it incumbent on the judge to state to the jury the legal effect of a written instrument read in evidence as a muniment of title.

The other assignments of error seem to be without merit. For the reasons given, the judgment is reversed, and the cause remanded for a new trial.

#### MISSOURI, K. & T. RY. CO. v. FARRINGTON.

(Court of Appeals of Indian Territory. Jan. 8, 1898.)

##### RAILROADS—KILLING STOCK.

In an action against a railroad company for killing a cow, the evidence showed that the view of the track was unobstructed, and no effort was made to slacken the speed of the train, but it was rather increased. *Held*, that where the evidence as to the speed of the train, and as to its distance from the cow when she first got upon the track, was conflicting, it was for the jury to determine whether she was killed through the negligence of the company.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice Yancey Lewis, June 26, 1896.

Action by Charles B. Farrington against the Missouri, Kansas & Texas Railway Company

for damages for killing stock. From an order overruling a motion for a new trial, and a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

This is an action brought by the appellee, the plaintiff below, against the appellant, the defendant below, on the 21st day of March, 1893, before Joseph G. Ralls, United States commissioner for the Second judicial division of the Indian Territory, at Atoka. The plaintiff, in his complaint, alleged that on the 13th day of November, 1892, he was the owner and in possession of a certain cow, cream color, about five years old, branded WS on side, and of the value of \$25; that on said day said defendant did carelessly and negligently, and without fault on plaintiff's part, with a train run and operated by its agents and servants strike said cow, and so bruised and injured her that she died therefrom, to the damage of plaintiff \$25. The cow was so struck opposite the freight house on defendant's track at Caddo, Ind. T. Summons was issued and served on the 21st day of March, 1893, and on the 31st day of May, 1893, the defendant filed its answer, denying all the allegations in the plaintiff's complaint; and on the same day the case was tried before S. M. Rutherford, the then commissioner, and a jury of six good and lawful men, and, after hearing the evidence, the jury returned a verdict for the plaintiff, and assessed his damages at \$20. Upon this verdict judgment was rendered. Defendant gave notice and filed affidavit and bond for appeal on June 3, 1893, to the district court. On the 9th day of January, 1894, motion was made for a change of venue from the Second judicial division of the Indian Territory to the First judicial division of the Indian Territory, and on the 24th day of June, A. D. 1896, the case was tried before Hon. Yancey Lewis, special judge, in the absence of Hon. William M. Springer, regular judge, and a jury, and a verdict returned for the plaintiff in the sum of \$20. On the 25th day of June, 1896, defendant moved for a new trial, which was overruled, and judgment rendered upon the verdict, to the entering of which judgment the defendant excepted, and appealed to this court; and afterwards, on the 12th day of October, 1896, defendant filed a bill of exceptions, which bill of exceptions contains the evidence adduced on the trial of the case, together with numerous requests on the part of the defendant for instructions to be given to the jury, which requests were overruled by the court, and the court gave the following charge to the jury: "The court instructs the jury that the right of the plaintiff to recover in this case rests upon the proof of negligence on the part of defendant company's employes. If there be no proof of such negligence, you will find for defendant. The court instructs the jury that there is no obligation on the part of said defendant company to fence the track, and, if the track's not being fenced was the cause of the injury, then you

cannot find for plaintiff. Now, if you find that defendant's servants and employes, in operating its train and engine, failed to exercise ordinary care to discover the animal on the track, and to avoid injuring it after it was discovered, and that said failure caused the injury, then you will find for plaintiff. If the evidence fails to show that the defendant's employes were lacking in ordinary care,—ordinary care meaning that care which a reasonably prudent man would use under the same circumstances with like agencies,—then you will find for defendant. The burden of proof is on the plaintiff to establish his right to recover. If he has failed to show negligence, or if the evidence is evenly balanced with the defendant's, find for the defendant, for negligence must be shown on the part of the defendant. You are the judges of the weight of the evidence and the credibility of the witnesses. Take a standard which is the care that an ordinarily prudent man would exercise under like circumstances with like agencies; apply that standard to the proof in this case. If it shows that the employes failed to exercise that care, find for plaintiff. If the proof falls short of showing that they failed to exercise that care, find for defendant. If you find for plaintiff, find for a reasonable market value of the animal."

Clifford L. Jackson and Joseph M. Bryson, for appellant. Z. T. Walrond and J. F. Gordon, for appellee.

TOWNSEND, J. (after stating the facts). There is some conflict in the evidence in this case as to the distance the train was from the cow when the cow got upon the track, and also as to the speed the train was running. The evidence of the plaintiff is that the train was 200 yards from the cow when she got upon the track, and the evidence of the engineer is that she was about 90 feet from the engine; that she got off the track, and he thought she would remain off, but that she came back on the track when the engine was about 50 feet from her. The evidence is that there was a slight curve, but it was upon the prairie, and the view unobstructed, and, as witness White testified, the "engineer could have seen a dog." The evidence further is that the train made no effort to slacken its speed, but, as it approached the cow, rather increased it, and the speed they were running is estimated from 10 miles per hour, by defendant's witness, to 40 miles per hour, by plaintiff's witnesses. The evidence, we think, properly went to the jury, and it is the province of the jury to say whether the circumstances are sufficient to warrant a finding that the cow was killed through the negligence of the railway company. The duty of railway companies to keep a lookout for stock on their tracks is no longer an open question. We think the charge of the court properly stated the law to the jury. The questions involved in this case are fully discussed in *Railway Co. v. Ellis*, 10 U. S. App. 640, 4

C. C. A. 454, and 54 Fed. 481; *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347; *Railway Co. v. Elledge*, 4 U. S. App. 136, 1 C. C. A. 295, and 49 Fed. 356; *Railway Co. v. Johnson*, 10 U. S. App. 629, 4 C. C. A. 447, and 54 Fed. 474, and cases cited. We do not think there is any error, and the judgment is therefore affirmed.

SPRINGER, C. J., and CLAYTON and THOMAS, JJ., concur.

## HARGADINE-McKITTRICK DRY-GOODS CO. et al. v. BRADLEY.

(Court of Appeals of Indian Territory. Jan. 8, 1896.)

CHattel Mortgages—Contemporaneous Writings—Construction—Assignment—Validity.

1. Where a chattel mortgage and a contract in the nature of a power of attorney were executed at the same time by the same parties, and related largely to the same property, and the contract was two days later superseded by another instrument differing from the first only in being more specific, the mortgage and the last instrument are to be considered together as parts of one transaction.

2. At the same time that a chattel mortgage, which was duly recorded, was executed, an instrument purporting to be a power of attorney was also executed, giving the mortgagee absolute power to control and dispose of a large part of the mortgaged property. The instrument was not recorded, and one purpose of the transactions was to prevent the mortgagor's property from being attached or levied upon. *Held*, that the two conveyances constituted an assignment, and, since no provision was made for executing a bond or filing an inventory, it was fraudulent and void.

3. Where, by reason of a contemporaneous, unrecorded agreement, a chattel mortgage became, in effect, an assignment of the property, the fact that the assignment was void in part made it void as a whole.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Kilgore, April 18, 1896.

Replevin by John L. Bradley against the Hargadine-McKittrick Dry-Goods Company and another. From an order overruling a motion for a new trial, and from a judgment for plaintiff, defendants appeal. Reversed.

This was an action of replevin, brought in the United States court for the Indian Territory, at Ardmore, by the plaintiff below, John L. Bradley, against the Hargadine-McKittrick Dry-Goods Company and J. J. McAlester, United States marshal, to recover the possession of certain personal property. The plaintiff below alleged that the defendants were in possession of the property, and unlawfully detained the same from the plaintiff. The plaintiff further charged that "on or about the 14th day of December, 1893, Wm. Hull executed a mortgage or deed of trust on the property heretofore described in favor of this plaintiff, to secure the payment of four certain promissory notes, aggregating \$4,900; that said notes are yet wholly unpaid; that said in-

strument was duly acknowledged, and on the 18th day of December, 1893, was filed for record in the office of the United States clerk at Ardmore, Indian Territory; that thereafter, to wit, on or about the — day of July, 1894, the defendant the Hargadine-McKittrick Dry-Goods Company, caused an execution to be issued, directing the defendant J. J. McAlester to levy upon the aforesaid property; that said defendant J. J. McAlester has taken wrongful and forcible possession of all of said property, and advertised it for sale on the 4th day of August, 1894, as the property of the said Wm. Hull, wholly disregarding the right of this plaintiff in the premises." The defendants, in their answer, specifically denied that the plaintiff was the owner of the property, or entitled to the possession of it, or any part of it, and denied that they unlawfully detained the same, or any part of it, from the plaintiff. "Further answering, the defendants say that the mortgage described in said complaint is fraudulent and void as to the creditors of said William Hull in this: That the mortgage referred to in said complaint as recorded in the office of the clerk of the United States court was not the full and complete instrument and agreement made and entered into by and between the said William Hull and the plaintiff in this action, in this: that on, to wit, the 11th day of —, 189—, at the time said mortgage was executed, simultaneously with the execution of said mortgage, and as a part thereof, the said William Hull executed a power of attorney, whereby he authorized and directed the said John L. Bradley to take immediate possession of a lot of sewing-machine property, which was a part of the property embraced in the mortgage, and dispose of it immediately for the purpose of raising a fund to pay the debts secured by said mortgage, and that said power of attorney and said mortgage together constituted an assignment of the property therein conveyed, but, as an assignment, the same was fraudulent and void in this: that it does not provide for nor contemplate that the said John L. Bradley shall execute the bond and file the inventory required by law, and permits and directs the said John L. Bradley, the grantee therein, to take possession of the property therein conveyed without executing the bond and filing the inventory as required by law." The case was tried before a jury, and resulted in a verdict in favor of the plaintiff for the possession of 111 head of cattle, consisting of 46 head of steers, two and three years old, and 65 head of cows; and assessed their value at \$1,832. A motion for a new trial was filed, and overruled by the court. Thereupon the court rendered judgment for the plaintiff according to the verdict, and for costs. A motion for appeal was duly made and granted, and the defendants below have prosecuted their appeal to this court.

Ledbetter & Bledsoe, for appellants. Poterf & Bowman and J. F. Sharp, for appellee.

SPRINGER, C. J. (after stating the facts). There were 18 errors assigned by appellants in this case. The second assignment seems to be conclusive of the case. Hence we have stated above such facts only as relate to this assignment, and we will confine our consideration of the case to this error. The second error assigned by appellants is as follows: "The court erred in admitting in evidence, over the objection of defendants, the mortgage executed by William Hull to John L. Bradley on December 14, 1893, because the description of the property in said mortgage is too indefinite, and does not describe the property as being located in the Indian Territory, and because said mortgage is not the entire instrument that was executed at the time, as the testimony shows that a power of attorney was executed simultaneously with the mortgage, and the mortgage and power of attorney taken together constitute an assignment and an appropriation of the property thus conveyed to raise a fund to pay the debt therein described; and as an assignment said instruments are void, for the reason that they authorize and permit the grantee therein to take possession and control of the property therein conveyed, and dispose of the same without requiring him to execute the bond and file the inventory required by law, and do not contemplate that the grantee therein shall comply with the provisions of the assignment law in regard to executing bond and filing inventory before taking possession of the property." The mortgage to which reference is made in this assignment provides, among other things, as follows: "Whereas, the said John L. Bradley has agreed to execute four promissory notes in favor of the White Sewing-Machine Co., amounting to some \$4,900, as surety for the said William Hull, he, the said William Hull, being in debt to the said company in said amount, said Hull has agreed to execute these presents to secure the said Bradley." The mortgage further provides, in substance, that, in case the said William Hull should make default in payment of said indebtedness as therein set forth, the mortgagee, John L. Bradley, or his agent or attorney, "is hereby authorized and empowered to take charge and possession of said property on demand without process of law, and sell the same, or as much thereof as shall be necessary. \* \* \* And out of the proceeds of said sale the said Bradley is to detain the sum for which he may be liable on said notes as herein set forth, and the costs of this trust and sale." At the time the mortgage was delivered, the mortgagor executed another instrument, enlarging the powers of the mortgage in reference to the sale of the property, which reads as follows: "Know all men by these presents,

that I, William Hull, do hereby agree with John L. Bradley that said Bradley is to take possession of all the sewing-machine property mentioned in the mortgage of this date, and to collect, as far as possible, the amounts due on said notes, to sell the sewing machines, wagons, harness, and horses to the best advantage as to him appears, and retaining all expenses, to pay the balance to the White Sewing-Machine Co. on the notes of the said William Hull on which said Bradley is surety; that, in cases in which it appears to him that the notes cannot be collected, the said Bradley is authorized to exercise his own discretion in regard to compromise and settlement, taking back the machines, if he thinks advisable, and he shall be held responsible for such money and property as he shall receive in settlement of said notes. Dated this 14th day of December, 1893." There was another instrument executed on the 16th day of December, the same year, which counsel for appellee contend was intended to take the place of the foregoing agreement. It was called a "power of attorney," and it is as follows: "Know all men by these presents, that I, William Hull, of Paul's Valley, Indian Territory, have appointed, and by these presents constitute and appoint, John L. Bradley, of Paul's Valley, Indian Territory, my sole, true, and lawful agent and attorney in fact, for me and in my name, place, and stead, to collect all notes and accounts due me in the sewing-machine business; to settle and compromise same as he may deem advisable; to sell the sewing machines, wagons, and harness and horses now on hand, and used in connection with said business, to the best advantage as to him appears; hereby granting to my said attorney, for the period of twelve months from date, full power and authority to do and perform all things in the premises requisite and necessary, to the full performance of the powers aforesaid, hereby ratifying and confirming any and all things which my said attorney shall lawfully do in the premises, by virtue hereof. Witness my hand this — day of December, 1893. [Signed] William Hull." This power of attorney was acknowledged before a notary public, December 16, 1893. There was some conflict in the testimony as to whether the agreement above set forth was to be set aside by the power of attorney, and whether the power of attorney, the agreement, and the mortgage were to be considered as one transaction. The contention of appellants is that the agreement and the mortgage were a part of the same transaction, and, taken together, they constitute an assignment, and as such are void, for the reason that they authorize and permit the grantee therein named to take possession and control of the property, or a large part of it, and dispose of the same, without requiring him to execute the bond and file the inventory required by law. The counsel for appellee contend

that the grantee, Bradley, did not take possession of the property until after the execution and delivery of the power of attorney; that the power of attorney was executed in lieu of the first agreement, for the purpose of definitely showing the intention of the parties, and fixing the powers conferred upon Bradley, and that he proceeded to take possession of the sewing-machine property and notes as agent of Hull, under this power of attorney; that the property was not turned over to Bradley under the first agreement, and that when the power of attorney was executed the first agreement was annulled. It is conceded that both instruments were executed, the first-named at the time the mortgage was executed, and the last-named two or three days thereafter. The first-named agreement was never taken up or destroyed. The attorney for Bradley spoke of it as "the agreement that went along with the mortgage," and referred to the second power of attorney as an offer on the part of the mortgagor, Hull, "to do about the same thing that is provided for in the agreement."

It seems to us immaterial whether the mortgage and the first agreement are to be considered as one instrument, or whether the mortgage and the second agreement, or power of attorney, are to be regarded as evidencing the whole transaction between Hull and Bradley. In either event we are of the opinion that the transaction on its face is fraudulent and void. The mortgage on record, and either of the other instruments being in existence and acted upon, and not being of record, show conclusively that a deception was being practiced, and that the other creditors were to be misled as to the true situation of the property. As the attorney for Bradley admitted in his testimony, Hull's attorney "was willing to go into some sort of an arrangement that he thought would lessen the chance of attachment of Mr. Hull's property, and he thought that was the safest plan to do it." This shows conclusively that the attorneys for Bradley and Hull were devising some scheme which would prevent Hull's other creditors from collecting their debts. The mortgage, in connection with either of the other instruments, would, in effect, constitute an assignment of the property of Hull. It was evidently the intention of Hull to set aside the property mentioned in the mortgage, or a portion of it, as a fund to be used in paying the debt due Bradley or the sewing-machine company, and it was not his intention to secure the debt by a lien thereon, reserving the right to discharge the debt out of other funds, and release the lien. *Apollos v. Stanforth* (Tex. Civ. App.) 22 S. W. 1060. Judge Caldwell, in the case of *Apollos v. Brady*, 1 C. C. A. 299, 49 Fed. 401, referring to certain Arkansas cases on the subject of what constitutes an assignment, said: "These cases declare the test to be, has the party made an absolute appropriation of the property as a means of raising a fund to pay debts without reserving to himself in good

faith an equity of redemption in the property conveyed?" Counsel for appellee contend that, as only a portion of the property conveyed by the mortgage, and as that property so levied on was not covered by the power of attorney or by the agreement, the validity of the mortgage as to the other property was not impaired. We do not agree with the learned counsel in this contention. If the mortgage and the agreement or power of attorney constitute an assignment, as we hold they do, and if the assignment is void in part, it is void as a whole. The principle that an assignment fraudulent in any of its provisions is void in toto is too well established to need any reference to authorities to support it. *Burrill*, Assignm. § 352. We do not deem it necessary to pass upon the other assignments of error in this case. Entertaining the views we do as to the invalidity of the mortgage and the power of attorney, the case should be reversed, and judgment should be rendered for the appellants by this court; and it is so ordered.

CLAYTON, THOMAS, and TOWNSEND, JJ., concur.

#### JULINSON v. ANDERSON.

(Court of Appeals of Indian Territory. Jan. 8, 1898.)

##### NEW TRIAL—TIME FOR MOVING.

A motion for a new trial filed September 14th, after a verdict and judgment rendered September 10th, is not in time, under *Mansf. Dig. Ark. § 5153*, providing that the motion "shall be [made] within three days after the verdict or decision was rendered."

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Kilgore, September 10, 1896.

Action by G. G. Anderson against C. C. Julinson. Judgment for plaintiff. Defendant appeals. Affirmed.

On the 20th day of January, 1896, Anderson (appellee) instituted suit in the district court at Chickasha, Ind. T., against Julinson (appellant), to recover the possession of a certain tract of land, which he claimed that appellant held under a lease from appellee. The appellee alleged in his complaint that he rented a certain tract of land described therein to the appellant in January, 1894, for the term of one year, for which the appellant paid the appellee rents, and prior to January 1, 1896, he notified appellant to quit and deliver up the possession of said premises. He further alleged that, notwithstanding said notice, appellant continued in possession of said premises. Appellee prayed for possession, and \$490 damages. On February 6, 1896, the appellant filed an answer, wherein he set forth his defense, which it is not necessary to set out at length. The case was tried by a jury, and a verdict rendered on the 10th day of September, 1896. The verdict of the jury

found the issues in favor of the plaintiff, for the possession of the premises in controversy. On the same day a judgment was entered in the case for the plaintiff, in accordance with the terms of the verdict of the jury. The appellant filed a motion for a new trial in open court on September 14, 1896, which motion was by the court overruled. An appeal was prayed for, and allowed, to this court.

Riddle & Payne, for appellant. Abernethy & Cherryhomes, for appellee.

SPRINGER, C. J. (after stating the facts). The appellee in his brief calls attention to the fact that the motion for a new trial was not filed within the time required by law, and that, therefore, the bill of exceptions cannot be considered on appeal. Section 5153 of *Mansfield's Digest* is as follows: "The application for a new trial must be made at the term the verdict or decision is rendered, and, except for the cause mentioned in subdivision seven of section 5151, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." The record in this case shows that the motion for a new trial was not filed within the time prescribed by the statute. It should have been filed within three days after the verdict, and it could not have been filed thereafter, except for newly-discovered evidence or unavoidable delay; and there is nothing in the record to show that these provisions of the statute were complied with. The case of *City of St. Joseph v. Robison* (Mo. Sup.) 28 S. W. 168, is cited for the purpose of supporting this contention. That was an action of ejectment for the recovery of the possession of a small parcel of ground. There was a trial by a jury, and a verdict was rendered for the defendant, and plaintiff appealed. The verdict in that case was rendered on the 6th day of November, 1891, and the motion for a new trial was filed on the 16th day of November, 1891, next thereafter. The court held that the motion was filed out of time, and the bill of exceptions could not be considered by the supreme court; that it should have been filed within four days after the verdict, under section 2243 of the Revised Statutes of Missouri of 1889, and could not be filed thereafter. The same decision was made in *Maloney v. Railway Co.* (Mo. Sup.) 26 S. W. 702. In the case of *Nichols v. Shearon*, 49 Ark. 75, 4 S. W. 167, the supreme court of Arkansas held that section 5153 of *Mansfield's Digest* requires that a motion for a new trial, except it be for newly-discovered evidence, must be made within three days after the verdict or decision, unless unavoidably prevented. In that case the supreme court stated: "No showing is made why the motion was not made earlier. And, besides, the defendants had, for a consideration, of which they received the benefit, abandoned in open court their right to insist on their motion. They are estopped by the record, and by their own

agreement, to reopen the case; there being no effort to show that they were deceived or misled by any artifice." That case was decided at the November term, 1896, of the supreme court, prior to the time when the section of Mansfield's Digest to which reference has been made was put in force in the Indian Territory. Congress, therefore, having put said section in force in the Indian Territory after this decision of the supreme court of Arkansas, the provision came to the Indian Territory with the construction given to it by the supreme court of that state. The motion for a new trial in the case at bar not having been made within the time required by section 5153 of Mansfield's Digest, this court cannot consider the bill of exceptions in the case; and the judgment of the court below should be affirmed, and it is so ordered.

CLAYTON, THOMAS, and TOWNSEND,  
JJ., concur.

#### SCHWAB CLOTHING CO. v. CROMER.

(Court of Appeals of Indian Territory. Jan. 8, 1898.)

#### LIMITATION — TO WHOM APPLIES — ACTION ON FOREIGN JUDGMENT — EVIDENCE — BURDEN OF PROOF — PAROL EVIDENCE.

1. The statute of limitations as contained in Mansfield's Digest of the Laws of Arkansas, put in force in Indian Territory by Act Cong. May 2, 1890, applies to and runs in favor of nonresidents as well as residents, under Mansf. Dig. § 4490.

2. In an action in Indian Territory on a judgment of the county court of U. county, Tex., the answer denied that plaintiff ever recovered "any such judgment" against defendant "as alleged in said complaint," and alleged that the court was wholly without jurisdiction of defendant's person, and said judgment was a nullity, etc. *Held*, that the answer was sufficient denial of the material allegations of the complaint to require plaintiff to prove the judgment.

3. In an action on a foreign judgment parol evidence is not admissible to prove the judgment.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Kilgore, November 14, 1895.

Action by the Schwab Clothing Company against R. A. Cromer. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

September 11, 1893, appellant, hereafter called "plaintiff," filed suit in United States court, Third division (now Southern district), at Ardmore, against appellee, R. A. Cromer, hereafter called "defendant," for \$1,019.12, with 8 per cent. interest per annum from May 24, 1886, upon a judgment rendered in the county court of Upshur county, Tex., and alleging that said foreign judgment was based upon an account for merchandise sold and delivered, and prayed judgment on the alternative upon said account if for any reason it was not entitled to recover upon said judgment. July 12,

1894, plaintiff filed its amended complaint, to which were attached as exhibits abstract of judgment and itemized account. To the account declared on defendant demurred, and stated said account was barred by limitation. This demurrer the trial court sustained, and plaintiff excepted. October 22, 1895, defendant filed his answer to the amended complaint, and stated "that this action ought not to be maintained against him on the pretended judgment described in the complaint herein, for the reason that the same is a nullity, and that the plaintiff never recovered any such judgment against him as alleged in said complaint in Upshur county, in the state of Texas, or anywhere else," and further stating that he did not reside in Upshur county, Tex., when the judgment was rendered, and under the laws of Texas he was entitled to be sued in the county of his residence, and that, therefore, said county court had no jurisdiction of his person; and further stating defendant was never served with process prior to the rendition of said judgment, did not enter his appearance in said court, and that, therefore, for that reason, also, said court had no jurisdiction of his person. Upon the trial, plaintiff introduced defendant as its witness to prove—First, that he and his brother, T. H. Cromer, as partners, under the firm name of Cromer Bros., purchased the merchandise in question from plaintiff at the time alleged, and had never paid for same; second, that defendant was served with summons prior to rendition of the Texas judgment. Depositions of other witnesses were read in evidence by plaintiff. Defendant offered no evidence, and after the conclusion of the evidence defendant moved the court to withdraw from the jury all evidence in reference to the Texas judgment, and to instruct the jury to return a verdict for defendant. Thereupon the court charged the jury to return a verdict for defendant, to which action plaintiff excepted. Pursuant to the court's instructions, the jury returned a verdict for defendant, upon which judgment was duly entered. Plaintiff filed motion for new trial, which was presented to and overruled by the court, and plaintiff saved its exception. Plaintiff was allowed appeal in open court, and 60 days from November 15, 1895, to file bill of exceptions. The motion for new trial is substantially the same as the assignments of error filed herein.

C. L. Herbert, for appellant. Ledbetter & Bledsoe, for appellee.

SPRINGER, C. J. (after stating the facts). The first, second, third, and fourth assignments of error relate to the open account declared on in the complaint, and present the question whether said account was barred by the statute of limitations. The statute of limitations was put in force in the Indian Territory by the act of congress of May 2, 1890, which ex-

tended over the territory certain chapters of Mansfield's Digest of the Laws of Arkansas, among which was the statute of limitations. If the statute ran in favor of all persons, both residents and nonresidents, then it is conceded that the account was barred, for the reason that more than three years had elapsed from the date of the passage of the act to the time when the suit was brought. Section 4490 of Mansfield's Digest, which was a part of the statute of limitations put in force in the Indian Territory by the act of May 2, 1890, provides as follows: "This act and all other acts of limitation now in force shall apply to non-residents, as well as residents of this state." The account sued on was, therefore, barred, and the trial court properly so held.

The other assignments of error relate to the Texas judgment sued on. Counsel for plaintiff contend that the answer of defendant did not so directly and specifically deny the facts stated in the complaint as to the recovery of the judgment as required the plaintiff to prove the rendition thereof, or that he so evasively attempted to plead such denial that it amounted to an argument only, and not to a denial, as is required by the practice. The answer of defendant is as follows: "Now comes the defendant, R. A. Cromer, and says that this action ought not to be maintained against him on the pretended judgment described in the complaint herein, for the reason that the same is a nullity, and that the plaintiff never recovered any such judgment against him as alleged in said complaint in Upshur county, in the state of Texas, or anywhere else; that on, to wit, the 24th day of May, 1896, the date when said judgment is alleged to have been obtained, this defendant was not a resident of Upshur county, in the state of Texas, and had not been a resident of said county for nearly two years, and that part of said time this defendant had resided in Limestone county, and on the date said judgment is alleged to have been obtained he was a resident of Hill county, in the state of Texas; that under the laws of the state of Texas defendants are entitled to be sued in the county of their residence, and no other county in the state has jurisdiction over their persons, unless by an instrument of writing such person had agreed to perform some obligation in the county in which suit is brought; and that in this case no such agreement was made. Defendant alleges that the county court of Upshur county was wholly without jurisdiction of the person of this defendant, and said judgment is a nullity; that no service of process was ever served on this defendant to answer in the alleged cause of Schwab Clothing Co. against Cromer Bros. in the court of Upshur county or in any other court, and this defendant never entered his appearance in said cause, and never authorized any one to appear for him, and said county court of

Upshur county never at any time had jurisdiction over this defendant by reason of service of process, or his appearance in person or by attorney in said cause in said court." This answer was verified, as required by the statute. It seems quite sufficient as a complete denial of the material allegations of the complaint. It denied that the plaintiff ever recovered "any such judgment against him as alleged in said complaint; that the court was wholly without jurisdiction of the person of the defendant, and said judgment is a nullity." Those were sufficient allegations to require the plaintiff to prove his foreign judgment, upon which he sought to obtain a judgment in the Indian Territory. Plaintiff then offered in evidence a copy of the Texas judgment, to which was attached a certificate of the clerk of the court. But there was no certificate of the presiding judge of the court, as is required by section 906 of the Revised Statutes of the United States. Bump, Fed. Proc. p. 618. Objection to the introduction of the record was made by the defendant and sustained by the court. Counsel for plaintiff do not, in their brief, contend that the court erred in ruling out the copy of the judgment which was offered in evidence. They offered then to prove the judgment by parol testimony. But such testimony was incompetent. The foreign judgment could only be proven in the manner required by the statutes. The open account sued on having been barred by the statute of limitations, and there being no competent evidence to support the alleged foreign judgment, the trial court very properly instructed the jury to return a verdict for the defendant, which was done. There is no error in the record, and the judgment is affirmed.

CLAYTON, THOMAS, and TOWNSEND, JJ., concur.

McALESTER, United States Marshal, et al. v. SUCHY et al.

(Court of Appeals of Indian Territory. Jan. 8, 1898.)

#### ACTION ON REPLEVIN BOND.

An action can be maintained on a replevin bond which provides that plaintiff "shall duly prosecute the action," where plaintiff dismisses the action of her own motion, still retaining the property, of which she obtained possession by giving the bond.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Kilgore, April 30, 1898.

Action by J. J. McAlester, as United States marshal (for the use and benefit of others), and others, against Mary Suchy and others, on a replevin bond. From a judgment entered on a demurrer to plaintiffs' complaint, they appeal. Reversed.



Howard Ross, as cashier, and Nix, Halsell & Co., brought suits, by attachment, against the firm of W. F. King & Co., in the United States court at Ardmore, Ind. T. Orders of attachment were issued, and a stock of goods, at Wayne, Ind. T., was seized by the United States marshal, J. J. McAlester, under said orders of attachment. Afterwards the firm of W. F. King & Co. executed a deed of assignment to James Rennie for the benefit of their creditors; and the United States marshal, J. J. McAlester, was in possession of the stock of goods, by virtue of the orders of attachment, for the amount of the claims, and as agent of the assignee, James Rennie, by agreement, for the residue. The defendant herein, Mary Suchy, claimed the goods, and procured an order of delivery in an action of replevin brought in the same court against J. J. McAlester and Howard Ross, as cashier; and after appointment of special officer, and the execution of the statutory bond, as by section 5575, Mansf. Dig., required, with the other defendants herein as sureties thereon, the stock of goods was taken from the possession of the United States marshal, and delivered to Mary Suchy. The present action is for a breach of the bond, given under section 5575, Mansf. Dig., brought by the obligees, the United States marshal, for the use and benefit, etc., and Howard Ross, cashier. Plaintiffs filed their complaint in the United States court at Purcell, and the defendants filed general demurrer thereto. The demurrer was sustained by the court. The plaintiffs excepted to the ruling of the court, and exceptions allowed; and, refusing to plead further, judgment was entered against them, and they prosecute error to this court, assigning as error the action of the court in sustaining the demurrer to plaintiffs' complaint.

Hocker & Woods, for appellants. Geo. M. Miller, for appellees.

SPRINGER, C. J. (after stating the facts). The bond executed by appellees was given under the provisions of section 5575 of Mansfield's Digest of the Laws of Arkansas, in force in the Indian Territory. It provided that Mary Suchy "shall duly prosecute this action, and shall perform the judgment of the court therein," etc. The complaint in the case at bar alleged "that the said Mary Suchy has wholly failed and neglected to prosecute said action in any manner, and the same has been dismissed and finally determined." The complaint further alleged that "the defendants have wholly failed to return the property, but have converted the same to their own use and benefit," and "have wholly failed to pay plaintiffs the value thereof." The defendants below (the appellees in this court) filed a general demurrer to this complaint, alleging, among other things, that the complaint did not

state facts sufficient to constitute a cause of action. The court below sustained this demurrer, and, the appellants refusing to plead further, judgment was entered against them. The question raised by this demurrer, and which this court must pass upon, is whether a failure to prosecute the suit would be a breach of the conditions of the bond.

In an action of replevin, the plaintiff may take possession of the property in controversy before the suit is determined, by giving a bond as required by law. This bond is given with the condition that the plaintiff shall duly prosecute the action, and shall perform the judgment of the court therein by returning the property, if a return be adjudged, and by paying such damages as may be awarded. The contention of the counsel for appellants is to the effect that in actions on replevin bonds it is not necessary to allege the special facts constituting the breach of conditions, but where a declaration is on a bond given to prosecute with effect a writ of replevin, and the breach assigned is that the suit was not prosecuted with effect, it is sufficient, and he cites *Gorman v. Lenox's Ex'rs*, 15 Pet. 115, as authority to sustain this contention. Counsel for appellees insists that the case cited is not in point; that that case was decided in favor of the obligees or defendants therein, the decision in the case meaning that the defendants recovered damages and costs, and that the plaintiff did not prosecute with success, but was beaten. Counsel for appellees drew a distinction between the phrase "to prosecute with effect" and to "duly prosecute"; contending that to prosecute "with effect" means to prosecute successfully, and "to duly prosecute" means "in due manner, regularly, legally, in the proper way." We are not disposed to draw nice distinctions in construing remedial statutes. The lawmakers had no such distinctions in their minds. They were providing legal methods for ascertaining and determining property rights between man and man. The Code, which has been adopted in many of the states of the Union, and put in force by congress in the Indian Territory, does not require the fullness and exactness of the common-law pleadings; but it requires the courts to disregard all informalities and technicalities which do not affect the substantial rights of the parties. In the case at bar the plaintiff below sued on a replevin bond. It appears that in the suit out of which this bond arose, the plaintiff, after acquiring possession of the property in question, failed to prosecute further, and it was dismissed. Her bond required her to "duly prosecute" the action. She did not prosecute it, but dismissed it, still retaining the property. Has the defendant in that action no remedy? Can a person thus take advantage of his own wrong, and deprive the injured party of any redress? Unless a suit upon the replevin bond can be

maintained in such case for failure "to duly prosecute," the obligees of the bond, who were the other claimants to the property, are without any remedy whatever. Such a construction, if given to the statute on replevin, would render that action a device for legally obtaining property by false pretenses. The lawmakers could not have intended to enact such a fraudulent contrivance. We are of the opinion that the complaint in the suit at bar did state a cause of action, and that the demurrer should have been overruled. The merits of the case not having been determined, the right of property may be tried in the suit on the replevin bond. The judgment of the court is reversed, and the case remanded, with direction to overrule the demurrer, and proceed further in accordance with this opinion.

CLAYTON, THOMAS, and TOWNSEND, JJ., concur.

#### MISSOURI, K. & T. RY. CO. v. WARD.

(Court of Appeals of Indian Territory. Jan. 8, 1898.)

#### RAILROADS—KILLING STOCK—NEGLIGENCE—EVIDENCE.

In an action against a railroad company for negligence, plaintiff's evidence showed that his bull was killed by an engine in the night; that, at the point where it was killed, the track was clear on each side for 50 feet; and that it could have been seen for at least a quarter of a mile by the engineer. Defendant introduced no evidence whatever. *Held*, that a verdict for plaintiff was sustained.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice Yancey Lewis, June 26, 1896.

Action by W. G. Ward against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant appeals. *Affirmed*.

This was an action instituted on the 21st day of March, A. D. 1893, before Joseph G. Ralls, United States commissioner for the Second judicial division of the Indian Territory, at Atoka, by the plaintiff, alleging that on or about the 21st day of July, 1891, he was the owner of a certain red cherry bull, about 2½ years old, of the value of \$50, and that the defendant carelessly and negligently, and without fault on the part of plaintiff, by its servants and agents and train, struck said bull, and so injured the same that it died from the effects thereof; that said bull was injured on defendant's railroad about three miles north of Caddo, Ind. T.; whereupon the plaintiff prayed judgment for the sum of \$50 with interest thereon from the 21st day of July, 1892, and his costs. The defendant answered, denying all the allegations in the complaint. The case was tried before the commissioner, and judgment rendered for the sum of \$35 and costs in favor of the plaintiff. Defendant appealed.

On February 1, 1894, the defendant moved for a change of venue from the Second to the First judicial division of the Indian Territory; and on June 23, 1896, the case was tried before a jury, who returned a verdict for the plaintiff, and assessed his damages at the sum of \$40. Defendant moved for a new trial, and the same was overruled; whereupon judgment was rendered upon the verdict, and the defendant appealed to this court, and on the 12th day of October, 1896, filed its bill of exceptions in the United States court for the Indian Territory, Northern judicial district. From the bill of exceptions it appears the testimony of all the witnesses was preserved, and the defendant, by its counsel, requested the court to give certain instructions to the jury, which requests were overruled by the court, and the court thereupon proceeded to instruct the jury as follows: "The court instructs the jury that the right of the plaintiff to recover in this case rests upon the proof of negligence on the part of defendant company's employes. If there be no proof of such negligence, you will find for defendant. The court instructs the jury that there is no obligation upon said defendant company to fence the track, and, if the track not being fenced was the cause of the injury, then you can not find for plaintiff. Now, if you find that defendant's servants and employes, in operating its trains and engine, failed to exercise ordinary care to discover the animal on the track, and to avoid injuring it after it was discovered, and that said failure caused the injury, then you will find for plaintiff. If the evidence fails to show that the defendant's employes were lacking in ordinary care, ordinary care meaning that care which a reasonably prudent man would use under like circumstances with like agencies, then you will find for defendant. The burden of proof is on the plaintiff to establish his right to recover. If he has failed to show negligence, or if the evidence is evenly balanced with the defendant, find for the defendant, for negligence must be shown on the part of the defendant. You are the judges of the weight of the evidences and the credibility of the witnesses. Take a standard which is the care that an ordinarily prudent man would exercise. Apply that standard to the proof in this case. If it shows that the employes failed to exercise that care, find for plaintiff. If the proof falls short of showing that they failed to exercise that care, find for defendant. If you find for plaintiff, find for a reasonable market value of the animal."

Clifford L. Jackson and Joseph M. Bryson, for appellant. Z. T. Walrond and J. H. Gordon, for appellee.

TOWNSEND, J. (after stating the facts). The evidence in this case shows the bull was killed by an engine or train in the night, and that, at the point where he was killed,

the track was clear for a distance of 50 feet on each side of the track, and that the bull could have been seen for a distance from a quarter to one-half of a mile by the engineer had he been on the lookout. These circumstances tended strongly to show negligence, and from which we think the jury could rightfully infer negligence. We think this evidence was properly allowed to go to the jury, and under the charge of the court, which, in our opinion, states the law correctly, the jury were justified in returning a verdict for the plaintiff. The defendant introduced no evidence whatever, and, if there were any circumstances in its favor, the information was all with them. "It is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion." *Railway Co. v. Ellis*, 10 U. S. App. 643, 4 C. C. A. 454, and 54 Fed. 481. All the questions set forth in the specifications of error have been fully decided in the United States court of appeals in the foregoing cited case, and in the following cases: *Railway Co. v. Johnson*, 10 U. S. App. 629, 4 C. C. A. 447, and 54 Fed. 474; *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347; *Railway Co. v. Elledge*, 4 U. S. App. 136, 1 C. C. A. 295, and 49 Fed. 856. The judgment is therefore affirmed.

SPRINGER, C. J., and CLAYTON and THOMAS, JJ., concur.

#### FLETCHER v. DULANEY et al.

(Court of Appeals of Indian Territory. Jan. 8, 1898.)

PLEADING—INDEFINITENESS—DEMURRER—APPEAL  
—INSTRUCTIONS—PAYMENTS—EVIDENCE  
—SUFFICIENCY—COMPETENCY.

1. Demurrer is not the proper remedy to cure indefiniteness and uncertainty in pleading.

2. The refusal of an instruction is proper where one already given embodies the same principle.

3. One may prove that he has paid a note by partial payments, though he cannot show the exact date and amount of each payment.

4. Evidence that one pays his bills promptly is incompetent to show payment of a certain note.

5. The erroneous admission of the testimony of defendant's other creditors, that he always paid his bills promptly, was prejudicial, where he was unable to specify any payments other than those set forth in plaintiff's books.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Kilgore, April 17, 1896.

Action by John S. Fletcher against H. N.

Dulaney and another. Judgment for defendants, and plaintiff appeals. Reversed.

This is a suit brought by appellant (plaintiff below) against appellees (defendants below) upon certain promissory notes executed by defendants, and fully described in plaintiff's amended complaint, it being alleged that the plaintiff is the owner and holder of said notes. Defendants demurred to plaintiff's complaint, and, their demurrer being overruled, answered, admitting the execution of the notes sued upon, by pleas of payment, and a plea of the statute of limitations as to two of the notes. To this answer plaintiff filed general and special demurrers, which demurrers (after agreement of counsel that said amended answer should be considered as further amended by the addition of an allegation that defendants kept no book of accounts, either of goods received or payments made to Cleaves & Fletcher, but depended entirely upon the bookkeeping of said Cleaves & Fletcher for payments made, and that said receipts had been lost or destroyed, and they could not plead such payments with any more certainty for such reasons) were overruled, to which ruling plaintiff duly excepted; whereupon it was agreed by counsel that plaintiff denied all new and affirmative matter in defendants' said amended answer, and the parties went to trial. The court held the burden of proof to be upon the defendants, and gave them the opening and the closing both in the introduction of testimony and the argument. The substance of the testimony is set out in the bill of exceptions. After the introduction of testimony, plaintiff requested two special charges, each of which was refused by the court. To each refusal plaintiff excepted. The jury then, after hearing the charge of the court and the argument, returned a verdict for defendants. This was on April 17th, and on the 20th plaintiff filed a motion for a new trial, and on the 22d his amended motion for a new trial, which motion was overruled by the court, exceptions saved, petition for appeal granted, and, by order of the court, plaintiff was given 60 days in which to prepare and file his bill of exceptions.

A. Eddleman, for appellant. W. B. Johnson and A. C. and Lee Cruce, for appellees.

SPRINGER, C. J. (after stating the facts). The appellant submits six assignments of error in this case, as follows: "First, the court erred in overruling plaintiff's general demurrer to defendants' answer; second, the court erred in overruling plaintiff's special demurrers to defendants' amended answer; third, the court erred in refusing plaintiff's first requested instruction; fourth, the court erred in refusing plaintiff's second requested instruction; fifth, the court erred in admitting, over plaintiff's objection, the testimony of the witnesses Tom Williams, W. H. Brady, Whit Hyden, and Dr. A. J. Wolverton, as to

defendants' character for promptness in paying their debts; sixth, the court erred in overruling plaintiff's amended motion for a new trial."

The general and special demurrers referred to in the first and second assignments of error were properly overruled. Some of the allegations in the answer might have been stricken out as surplusage, and plaintiff might have moved the court to require the defendants to make their allegations more definite and certain, but demurrer was not the proper remedy to cure such defects.

The first instruction that the plaintiff requested the court to give the jury was that the jury should find for the plaintiff the amount sued for. This instruction was properly refused, there having been evidence submitted to the jury tending to show full payment of the notes sued upon.

The fourth assignment of error is based upon the refusal of the court to submit to the jury plaintiff's second requested instruction, which is as follows: "Gentlemen of the Jury: The only question for you to determine in this cause is whether the defendants are entitled to any credit upon the notes sued on, not allowed and credited thereon by the plaintiff; and the court propounds to you this query: 'Did the defendants, or either of them, or any one upon their behalf, ever make any payment of money or property not allowed by plaintiff, and credited upon said notes?' If you answer this question in the negative, you need go no further; but, if you should answer the same in the affirmative, you will then find the dates and amounts of such payments." It was not error to refuse this instruction, in view of the general charge given to the jury by the court. It might, however, have been error to have refused it had the court not given an instruction embodying substantially the same principle. This instruction, in view of all the facts of the case, is too restricted in its directions. It was contended on the part of the defendants that they had more than paid the amounts due upon the notes, and were entitled to judgment for the amount of excessive payments. The instruction requested also required the jury to find "the dates and amounts of such payments." It was in evidence in the case that the only books in which the payments were entered were kept by the plaintiff, and that he had adopted the double-entry system of bookkeeping. The evidence disclosed the fact that the defendants were unable to fix the dates and amounts of their respective payments. If the jury had believed, however, from all the evidence in the case, that the notes had been paid in full, the defendants would have been entitled to a judgment in their favor, notwithstanding they might not have been able to show the exact dates and the exact amount of each payment. It was not error, therefore, to refuse the instruction which was requested, in view of the evidence in the case. No ex-

ceptions were taken to the court's general charge to the jury in the case, and it is therefore conceded that such charge was correct.

The fifth assignment of error is to the effect that the court erred in admitting, over plaintiff's objection, the testimony of the witnesses Tom Williams, W. H. Brady, Whit Hyden, and Dr. A. J. Wolverton as to defendants' character for promptness in paying their debts. In order to understand fully this contention, it will be necessary to refer to the testimony of the witnesses indicated. Thomas Williams, a witness called by defendants in rebuttal, testified, among other things, as follows: "Q. What was the custom of Dulaney Bros. with reference to payment of their bills? A. Were prompt." The witness had already testified to the fact that he had for three or four years been accustomed to dealing with the defendants in a business way. W. H. Brady, a witness called by defendants in rebuttal, testified, among other things, as follows: "Q. Did you ever have any dealings with Dulaney Bros.? A. Yes, sir. Q. What custom did they observe in the payment of their bills? A. Very prompt. Q. For how long a time did you have dealings with them? A. At Ardmore, and for the last several years. When I had an account against them, they either came in and paid it, or I didn't have to wait long for it." Whit Hyden, a witness called by defendants in rebuttal, testified, among other things, as follows: "Q. Did you ever have any dealings with Dulaney Bros.? A. Yes, sir. Q. For how long a time? A. I have sold them goods off and on up to 8 years ago. Sold William Dulaney quite a bill of goods about 8 years ago. Q. What custom did they observe as to the payment of their bills? A. Very prompt. I don't think I ever had to dun them. I don't believe I did. Q. Did they always pay their bills. A. Yes, sir. I think they did. Q. Paid everything they owed? A. Yes, sir; paid all off as far as I know." Dr. A. J. Wolverton, a witness called by the defendants in rebuttal, testified, among other things, as follows: "Q. Did you ever have any dealings with Dulaney Bros.? A. Yes, sir; they had an account with me. Q. What custom did they observe in settling their bills and drafts? A. Very prompt."

The questions put to each of these witnesses, and their answers thereto, were severally objected to by the plaintiff, as immaterial, and as not tending to show payment. The objections were overruled by the court, and the testimony was permitted to go to the jury. It is unnecessary to submit authorities to support the proposition that the testimony above set forth was incompetent, and prejudicial to the rights of the plaintiff. In the case at bar, the plaintiff sued the defendants on certain promissory notes. Defendants submitted pleas of payment. The burden of proof was upon them to establish payment of the notes in whole or in part. The plaintiff submitted his

mercantile books, showing credits for all payments made by defendants in money or property. The books were kept by a bookkeeper, and clearly showed a balance due on the notes as claimed by plaintiff. Defendants were unable to specify payments of property or money other than those set forth in plaintiff's books. The effort, therefore, to prove payment by the custom which the defendants had observed in reference to their other creditors, was utterly incompetent, and the testimony should not have been permitted to go to the jury. The consideration of this incompetent testimony by the jury, and the comments made by counsel in reference to the methods of keeping books practiced by the plaintiff, are cited by counsel for plaintiff as the only explanation which could be given for the verdict for the defendants in this case. We are of the opinion that the testimony was incompetent, and prejudicial to the plaintiff's rights, and its admission was reversible error. The judgment of the court below is reversed, and the case remanded.

OLAYTON, THOMAS, and TOWNSEND,  
JJ., concur.

# BYRNE et al. v. FT. SMITH NAT. BANK.

(Court of Appeals of Indian Territory. Jan. 8, 1898.)

## REFORMATION OF INSTRUMENTS—PAROL EVIDENCE—LACHES—RIGHTS OF ASSIGNEE FOR CREDITORS.

1. Parol evidence will be received in a proceeding in equity to reform a mortgage, so as to make it express the intention of the parties at the time it was executed.

2. In all cases of mistakes in written instruments, equity will interfere only as between the original parties or those claiming under them, in privity, and will grant no relief against bona fide purchasers for value and without notice.

3. The assignee and preferred creditors of an insolvent firm take the property assigned subject to all the equities that might be urged against the assignors.

4. Certain cattle on a range were assigned for the benefit of creditors. A portion of the cattle were covered by a mortgage. It was agreed that the assignee should look after the property until the following spring, when it was to be sold, and the proceeds of the cattle described in the mortgage were to be paid to the mortgagee. The assignee held the property five months. The amount realized was insufficient to satisfy the mortgage. On discovery of the mistake in the mortgage, 10 days after the assignee filed his report, the mortgagee sued to reform the instrument to cover other cattle. *Held*, that he was not estopped by reason of his delay.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice Yancey Lewis, June 28, 1896.

Suit by the Ft. Smith National Bank against P. J. Byrne, as assignee of Grayson Bros. for the benefit of their creditors, and others, to reform the description in a chattel mortgage. From a decree for plaintiff, defendants appeal. *Affirmed*.

This is an appeal from the decree rendered by the United States court for the Northern district of the Indian Territory. The facts are as follows: On the 24th day of June, 1895, Grayson Bros., who were, and had been for long time prior thereto, conducting a large mercantile business at Eufaula, I. T., applied to the Ft. Smith National Bank for and obtained a loan of \$4,000, and to secure the same executed a mortgage to the bank on the following described cattle, to wit: "500 head of cattle of the ages of two, three, and four years, running on our range on Coal creek, Creek Nation, about thirty miles west of Eufaula, I. T.; the said cattle being branded a shield on left hip and 'G 7' on left hip and 'Cross S' on left side." The note for which these cattle were mortgaged was to run 90 days. At the maturity of the note it was extended 90 days, which made it mature December 24, 1895. On the 11th day of December, 1895, Grayson Bros. made an assignment for the benefit of their creditors, making the appellants preferred creditors under their deed. P. J. Byrne, the assignee named in the deed, qualified and took charge of all property assigned, including the mortgaged cattle. The mortgagee, the Ft. Smith National Bank, consented for the assignee to manage and look after the cattle until the following spring. The court, on application of the assignee, and the consent of most of the preferred creditors, extended the time of the selling of the cattle beyond the 120 days in which the law required the property to be sold, and on the — day of May, 1896, the assignee rounded up all the cattle, making a list of the different ages and brands. He then sold the same, keeping the prices that each brought and the brands separate. It was then ascertained that the amount received for the ages and brands described in the Ft. Smith National Bank mortgage was not sufficient by about \$1,500 to satisfy same. The assignee made his report to the court, and thereafter, to wit, on the 25th day of June, 1896, the Ft. Smith National Bank filed its petition, alleging that there was a mistake in drawing their said mortgage, and that it was the intention to cover the cattle of all ages of the brands described in the mortgage, and praying the court to reform the mortgage, and to correct said mistake, and to determine its rights under the mortgage when so reformed. To this petition the assignee filed a demurrer, and the preferred creditors (appellants herein) joined in said demurrer. The court overruled said demurrer, and appellants saved their exception, and then filed their answer to said petition. After hearing the testimony and the argument of counsel, the court entered a decree holding that the petitioner was entitled to have said mortgage corrected so as to include all the cattle of any age in the brands described in said mortgage, and found that there were 97 head of cattle, of the value of \$1,149, that should be included in said mortgage, and the proceeds paid over to

said bank. The assignee and preferred creditors (appellants) excepted to the finding and decree of the court, and sued out this appeal, and ask to have the same reversed, and a decree entered for appellants.

Denison & Maxey, for appellants.

SPRINGER, C. J. (after stating the facts). Counsel for appellants assign as error the overruling of their demurrer to appellee's petition. As will be seen from the statement of the case, the petition alleged a mistake in the description of the mortgaged property, and prayed the court to reform the same, so as to correct said mistake, and that its rights might be determined according to the terms of the mortgage as it would stand when so reformed. To this petition appellants demurred, for the reason that, if the matters stated were true, they do not entitle the petitioner to the relief prayed for. The court overruled the demurrer, and permitted the petitioner to introduce testimony, over the objections of the appellants, showing the mistake in drafting the mortgage. The testimony having been conclusive as to the mistake, the court entered a decree reforming the mortgage, and allowing the appellee the proceeds of the sale of the cattle which the mortgage, when so reformed, included. The admission of this testimony and the entering of this decree are the only errors assigned by the appellants. To sustain their contention, appellants quote the following from Mr. Cobbe's work on Chattel Mortgages: "The description itself is conclusive as to what it is. Outside evidence is only admissible to apply the description to the proper articles. The mortgage itself is the only competent evidence of the contract between the mortgagor and the mortgagee, and shows the particular property covered by it. It is competent to prove that the property in question is the identical property, but not to go further than this. An understanding between the parties that certain after-acquired property should be embraced in the mortgage is only good between the parties. As to third parties, who have acquired an interest before the mortgagee has taken possession of the new property, it is the same as if there was no understanding. The recitals of the mortgage must govern. Parol evidence is permissible to aid—not to make—a description in a chattel mortgage. It is only when the mortgage suggests inquiry which will result in identification of the property that parol evidence is competent to point out and identify it. There can be no substitution of other property which will be bound by the agreement. Thus, where a mortgage was made of one horse, the mortgagor at that time owned a sorrel horse, which, with the consent of the mortgagee, he exchanged for a bay horse. Held, that the record imparted a notice of a lien upon the first, and not upon the second, horse; for, upon inquiry, a person

would have found that the mortgagor then owned the sorrel horse, and not the bay horse. And the description cannot be enlarged, so as to cover property not fairly within its scope, because it refers to a schedule attached, which schedule, besides particularly describing the property referred to in the mortgage as machinery and fixtures, also described a stock in trade of brass and iron ware." See 1 Cobbe, *Chat. Mortg.* p. 184, § 158, and cases cited. The law as laid down in this section from Mr. Cobbe's work on Chattel Mortgages is unquestionably correct in all cases where the mortgage is introduced in evidence, in a proceeding to foreclose it, or for the purpose of proving its contents. But the rule is otherwise in a proceeding in equity to reform a contract or mortgage so as to make it express the intention of the parties who executed it at the time it was executed. Courts of equity have not hesitated to entertain jurisdiction to reform all contracts where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake. 1 Story, *Eq. Jur.* §§ 154, 155. In such case parol evidence must, of necessity, be received; otherwise, no relief could be obtained. In case of written instruments, the relief will be granted only where there is a plain mistake, clearly made out by satisfactory proof. *Id.* § 157. But, in all cases of mistakes in written instruments, equity will interfere only as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors or purchasers from them with notice of the facts. *Id.* § 165. As against bona fide purchasers for valuable consideration without notice, courts of equity will grant no relief. *Id.* § 166. In the case at bar it was clearly established, by satisfactory proof, that there was a mistake in the description of the cattle covered by the mortgage. It is also conclusively shown that the court reformed the mortgage, so as to make it express the intentions of the parties who executed it. We are therefore of the opinion that parol evidence was admissible in this case, and that the court had the right to reform the mortgage, so as to make it express the intentions of the parties to it.

The further question, however, arises in the case, whether the rights of third parties have intervened. The defendant, Byrne, is the assignee of Grayson Bros., who executed the mortgage. There can be no doubt of the fact that the assignee stands in the place of Grayson Bros. He takes the property in this case in trust for the benefit of their creditors, and in order to execute their wishes in the premises. Swofford Bros. and others, who are made defendants, are the preferred creditors of Grayson Bros. in their assignment, and claim under them. Hence, the case at bar is between the original parties to the mortgage.

the Ft. Smith National Bank and those claiming under Grayson Bros. in privacy. The assignee, Byrne, and the preferred creditors of Grayson Bros., stand in Grayson Bros.' place, and take the property assigned subject to all the equities that might be urged against the assignors. They are not in the position of bona fide purchasers for value. The preferred creditors of Grayson Bros., by their acceptance of the terms of the assignment, acquired no greater right to the property of the assignors than the assignors themselves had. They took only that which the assignors might rightfully grant, and subject to all the equities to which they were subject. The preferred creditors had not advanced any money or credit upon the faith of the description of the property as it stood in the mortgage before it was reformed. They cannot claim any loss or extension of credit on account of the reforming of the mortgage. They would undoubtedly have accepted the benefits of their preference as creditors if the mortgage had been reformed before the assignment. The acceptance of the assignment certainly put them in no worse position than they would have been if they had refused to take under it. Whether the mortgage was reformed, or in its original form, could not have influenced their acceptance of the assignment. They were preferred as creditors, and were to be paid in full before other creditors could participate. Their acceptance was an agreement to take all they could possibly get,—all they were in law or equity entitled to take.

Counsel for appellants insist that the appellee should have asserted its claim to the cattle not covered by the mortgage in its original form at the time the assignment was made, or before the appellants accepted the preference given them; that appellee knew the defect in the mortgage at the time of the assignment, and that it should then have asserted its claim, and made known its rights; and, not then having asserted its rights, it is now, after other rights have intervened, estopped from so doing. An examination of the testimony in the case will disclose the fact that the assignee was not guilty of any laches in the matter. The president of the Ft. Smith Bank, the appellee, testified that he told Mr. Byrne, the assignee, in the first and only conversation he ever had with him, his (the president's) understanding of the matter. Mr. Byrne testified that, when he rounded up and sold the cattle, which was in May, 1896 (the assignment having been made in December, 1895), he sent a copy of the report of sales to the appellee. This report showed the brands of the cattle, and how much the cattle of each particular brand brought. He was not notified, until after the sale, that the appellee claimed more of the cattle than were covered by the terms of the original mortgage. But appellee informed him that it reserved all its rights, and Mr. Hutchings, the attorney for appellee, told him

what the bank claimed. It seems that the appellee had no means of ascertaining, at the time of the making of the assignment, whether the number of cattle it claimed were covered by the mortgage or not. When the cattle were rounded up and sold, and a report of sales furnished to appellee, it was discovered by Mr. Byrne and appellee that there was a mistake somewhere, and the assignee was then notified that the bank claimed other cattle than those mentioned in the original mortgage. The petition to reform the mortgage was filed in the United States court at Muskogee on June 25, 1896. On the 15th day of June, 10 days previous to the filing of appellee's petition, Mr. Byrne, the assignee, filed his report in court of the sale of the cattle. In this report he stated that the Ft. Smith Bank had a mortgage on 500 head of cattle, to secure its claim of \$4,000, but that he could find only "164 head of cattle of the ages and brands said mortgage covered, and that, at the prices said cattle were sold for, the 164 head covered by said mortgage only brought \$2,964." This was the first authentic information that the appellee could have obtained. If the 164 head of cattle mentioned had brought a sum sufficient to pay off the bank's demand, there would have been no necessity for reforming the mortgage, even if the descriptions were erroneous. The bank, having learned all the facts, at once filed its petition in court to reform the mortgage. We cannot see wherein the bank could have acted more promptly than it did.

Entertaining these views, we are of the opinion that there is no error disclosed by the record in this case. It is therefore affirmed.

OLATON, THOMAS, and TOWNSEND, JJ., concur.

#### WALKER et al. v. STILSON et al.

(Court of Appeals of Indian Territory. Jan. 8, 1898.)

#### EVIDENCE—HEARSAY.

In an action against a carrier for failure to furnish cars, as agreed, in time to have cattle shipped therein arrive at stock yards in St. Louis by a certain date, by reason of which the cattle were necessarily shipped to Chicago, evidence by plaintiff, not present in either city, as to conditions in such places which made the shipment to Chicago necessary, the fact of such shipment, and the cost of it, was inadmissible, as hearsay evidence.

Appeal from the United States court for the Northern district of the Indian Territory; before Chief Justice William M. Springer, April 18, 1896.

Action by Stilson, Case, Thorp, Ryburn & Co. against Aldace P. Walker and another, as receivers of the St. Louis & Santa Fé Railway Company. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

This was an action brought by the appellees (the plaintiffs below) against the ap-

pellants (the defendants below) for damages for refusal to ship certain cattle from Catoosa, Ind. T. The plaintiffs alleged in their complaint that on or about the 10th day of July, 1894, the defendants had possession and control of, and, through their agents, servants, and employes, operated, the St. Louis & San Francisco Railway Company, together with its tracks, cars, locomotives, and other appurtenances, and were common carriers of live stock and goods for hire from the town of Catoosa, Ind. T., to St. Louis, Mo., and from said St. Louis, Mo., through its connecting and forwarding lines, to East St. Louis, in the state of Illinois; that on or about the 8th day of July, 1894, the defendants assumed and contracted, as such common carriers, to furnish and supply at the town of Catoosa, Ind. T., a station on the line of said railway, to said plaintiffs, on the 10th day of said July, 1894, 12 cattle cars, suitable and proper for the transportation of cattle, which said cars, when loaded with cattle, were to be transported from said station of Catoosa, Ind. T., to the National Stock Yards, at East St. Louis, in the state of Illinois. They allege further that the defendants were informed and knew that said cattle were being shipped for market, and that the cars for their shipment were to be delivered and loaded at said station in time, if possible, for the market of the following day, and at least for the early market of the 12th day of July, 1894. Plaintiffs further allege that they delivered on the said 10th day of July, 1894, 299 head of beef cattle, and placed the same in the stock yards of said defendants at their said station, divided into car-load lots, as directed by the agent of said defendants, who so directed that they might be ready for loading on said 10th day of July, 1894. They further allege that although said cars were there, sufficient and ready for loading said cattle, said defendants negligently, and contrary to their duty in the premises, failed and refused to permit plaintiffs to load their cattle into said cars, or to transport them from said station of Catoosa, Ind. T., nor were said cattle loaded upon said cars and started from the said station of Catoosa, Ind. T., until early on the following morning of July 11th. They further allege that, in consequence of such delay and negligence on the part of said defendants, said cattle did not arrive at the National Stock Yards until about 10 o'clock on the morning of July 12, 1894, at which time the market at said place had closed, owing to the butchers' strike in the city of Chicago, in the state of Illinois. They further allege that if the cattle had been loaded on the morning of the 11th of July, and had been run through to the National Stock Yards within the usual time, they would have reached the same by 7 o'clock of the following day, and in ample time for the early market of said day. They further allege that, owing to the failure of the defendants to deliver said cattle in time for

the early market of the 12th of July, said cattle could not be sold at all at the National Stock Yards, in East St. Louis, in the state of Illinois, knowledge of which strike was communicated from Chicago to the National Stock Yards, at East St. Louis, in the state of Illinois, at about 10 o'clock on the said 12th day of July, 1894, and said cattle had to be shipped on to Chicago for sale, and were sold on said market on the 16th day of July, 1894, at which time the market price of said cattle had greatly declined, and said cattle had greatly diminished in weight, by which decline in market price and great shrinkage in weight these plaintiffs have been greatly damaged, in the sum of \$1,870.43. They further allege that in consequence of being compelled to hold said cattle over, and to reship them to the Chicago market, they were compelled to pay out money for feeding and care of said cattle which they would not have otherwise had to do, as well as extra freight for their conveyance to the said Chicago market. Wherefore they asked for judgment for \$2,170.43 and costs of suit. On the 19th day of September, 1895, defendants filed an answer, and on the 4th day of February, 1896, filed an amended answer, to the complaint of the plaintiffs, in which defendants deny that they were on the 10th day of July, 1894, common carriers between St. Louis, Mo., through any connecting and forwarding lines, to East St. Louis, in the state of Illinois. Deny that they contracted on the 8th day of July, 1894, to furnish cars to be loaded with cattle to be transported from Catoosa, Ind. T., to the National Stock Yards, at East St. Louis, in the state of Illinois. Deny that they were informed and knew that said cattle were being shipped for market, or that said cattle were to be delivered and loaded in time for the market of the next day, or the early market of the 12th of July, 1894. Defendants deny that they failed and refused to permit plaintiffs to load said cattle. Deny that they were guilty of any negligence which delayed the arrival of said cattle at the National Stock Yards, at East St. Louis, in the state of Illinois, until about 10 o'clock on the morning of the 12th day of July, 1894. Deny that they are liable for any damage owing to the butchers' strike in the city of Chicago in the state of Illinois. Deny that they were guilty of any negligence whatever on account of the nonarrival of said cattle at the National Stock Yards, at East St. Louis, in the state of Illinois. Deny that there was any agreement or understanding between said plaintiffs and defendants that the cattle should arrive at the National Stock Yards, at East St. Louis, in the state of Illinois, by 7 o'clock on the 12th day of July, 1894, and in ample time for the market of that day. Deny that said cattle could not be sold at all at the National Stock Yards, at East St. Louis, in the state of Illinois, on said market. Deny that they are in any wise responsible to said plaintiffs on account of said strike in



the city of Chicago and state of Illinois, knowledge of which was communicated to the National Stock Yards, at East St. Louis, in the state of Illinois, about 10 o'clock on the morning of said 12th day of July, 1894. Further deny that said cattle had to be shipped to Chicago for sale, and were sold on said market on the 16th day of July, 1894. Further deny that the market price for said cattle had greatly declined, and that said cattle had greatly diminished in weight, and further deny that said plaintiffs have been damaged in any sum whatever for which the defendants are responsible. They deny that their agent at Catoosa, Ind. T., had any right or authority to bind these defendants for the delivery of the cars, or the transportation of said live stock to the National Stock Yards, at East St. Louis, in the state of Illinois. And for a further defense the defendants aver that there was a strike of railroad employees in the city of St. Louis upon the lines of connecting carriers at St. Louis, over which lines said cattle would have to be transported to reach said National Stock Yards, at East St. Louis, in the state of Illinois; that said plaintiffs were fully advised of said strike, and further advised on the 10th day of July, 1894, that the said Missouri Pacific Railway Company, on account of said strike, had no crews on its lines in the city of St. Louis, Mo., to handle any cars of freight thereupon between the hours of 7 p. m. and 7 a. m. at said time, and had given notice that no freight would or could be handled between said hours. And further aver that the end of its line at St. Louis is at Chouteau avenue, in St. Louis, and that at the said time the only connecting carrier which could handle the said cars of defendants was the said Missouri Pacific Railway Company, and that in order to complete the carriage of any live stock to the National Stock Yards, at East St. Louis, in the state of Illinois, said live stock must be delivered to the said Missouri Pacific Railway Company, and then to the Terminal Railroad Association of St. Louis, a common carrier by rail, which handles all freight from Twelfth street, on the line of the Missouri Pacific Railway Company, in St. Louis, to the National Stock Yards, at East St. Louis, in the state of Illinois; that said defendants had no control over said striking switchmen or railroad employees of said Missouri Pacific Railway Company, nor any control over the striking employees of said Terminal Railroad Association of St. Louis, which companies could not handle any freight at night, or between 7 o'clock p. m. and 7 o'clock a. m., on account of a strike on their lines at the time mentioned in plaintiffs' complaint. They further aver that said cattle arrived at the terminus of their line in the city of St. Louis at 6:20 a. m. on the morning of July 12, 1894; that these defendants promptly notified the Missouri Pacific Railway Company and the Terminal Railroad Association of St. Louis of the arrival of said cars of stock to be trans-

ported over their lines to the National Stock Yards, at East St. Louis, in the state of Illinois. And aver that these cattle were transported over defendants' line without any negligence or delay. Further aver that the plaintiffs were duly informed about the strikes on the lines connecting with the defendants. They further aver that a written and printed contract was entered into between plaintiffs and these defendants, for and by the terms of which, only, were the cattle to be transported; that said written contract provided that said cattle were not to be shipped within any specific time, nor delivered at the destination at any particular hour, nor in season for any particular market. By the terms of said contract the defendants were exempted from liability on account of loss caused by any mobs, strike, or threatened or actual violence, and all liability of these defendants absolutely ceased and terminated upon delivery by them of said cars of cattle to their connecting carriers, and that each carrier was only liable for such damage as was caused by its own negligence on its own line of railway. Defendants deny that the agent of defendants at Catoosa, Ind. T., had any authority to make any contract for the carriage of said cattle by defendants from Catoosa, Ind. T., to the National Stock Yards, at East St. Louis, in the state of Illinois, unless in writing, and authorized by these defendants, and allege that said plaintiffs were fully aware thereof; and, with other averments set out in their answer as matters of defense, they deny any and all damage.

On the 26th day of February the case was tried before a jury, and under the instructions of the court the jury returned special findings as follows: Item 1, difference in market price, \$968; Item 2, shrinkage in excess of customary shrinkage, \$154.45; Item 3, expenses of reshipment to Chicago, \$300; amount, \$1,432.46,—and also returned a general verdict for said amount of \$1,432.46. On the 14th day of March, 1896, the defendants moved the court for a new trial, which was overruled, and judgment rendered upon the verdict of the jury, whereupon the defendants moved in arrest of judgment; which said motion was overruled by the court, whereupon the defendants prayed for an appeal to this court, with leave to file a bill of exceptions; and afterwards, on the 8th day of May, 1896, they filed in the office of the clerk of the United States court of the Indian Territory, Northern district, at Vinita, their bill of exceptions in said cause. Said bill of exceptions contains the evidence submitted to the jury, both by plaintiffs and defendants, and also the defendants' request by their counsel of certain instructions to be given to the jury, which requests were denied, and the court instructed the jury as follows: "Gentlemen of the jury, you are instructed that if you believe from the evidence that plaintiffs contracted with defendants' agent at Catoosa, Indian Territory, that

defendants would furnish cars in which to ship cattle at a time certain, and that said agent failed to receive and ship said cattle at the time agreed upon, and that, by reason of the failure to receive and ship said cattle, plaintiffs were damaged, then plaintiffs are entitled to recover. And, in determining whether their agent had authority to make such a contract, you may consider the nature of the business intrusted to him, and the course of business pursued by the defendants. The measure of damages will be the difference between the fair market value of the plaintiffs' cattle in the condition they were in at the nearest market at which such cattle could have been sold after their arrival at their destination, East St. Louis, Ill., and their fair market value at the same place had they arrived at the time they should and would have arrived there had the cars been furnished according to the contract between plaintiffs and defendants, if you find the same existed, and the cattle carried with reasonable care and diligence. You may further take into consideration, in estimating the damages, the actual shrinkage, if any, caused by the negligence of the defendants; and this loss is to be determined by the state of the market at the time said cattle might have arrived, had the plaintiffs been furnished cars pursuant to contract, if such contract existed. And you must further take into consideration the amount plaintiffs actually got for their cattle. But it is in evidence that plaintiffs shipped their cattle to Chicago for sale, and you are therefore instructed that if plaintiffs, under the circumstances, acted as an ordinarily prudent person would have done under similar circumstances, the damage will be the difference between market value of their destination, as before explained, and what they sold for, together with their actual shrinkage, as charged before, and the additional costs plaintiffs were put to in payment of freight, feed, and hand hire. A station agent of a railway company has not, by mere reason of being such station agent, and authorized as such to receive freight for shipment, and issue bills of lading therefor, the authority to make a contract and receive and ship freight to points beyond the line of railway for which he is agent; and in this case, before you would be authorized in finding that the defendants had contracted to carry the cattle of plaintiffs to a destination beyond where the defendants' line reached, you must find from the evidence that the defendants, or some one thereto authorized by them, made such a contract. You are instructed that the giving of a through rate of freight by a station agent of the railway company does not of itself evidence a contract made by such agent, or by the company he represents, to transport the cattle over a connecting line of road to the destination to which the rate is fixed, and does not of itself evidence a

contract under which the railway company would be liable for the acts or negligence of the connecting carriers, or any loss that occurred upon such connecting lines. If the jury find from the evidence that, in order to reach the point to which plaintiffs' cattle were shipped, it was necessary for such cattle to pass over another or other lines of railway than the one operated by the defendants, no negligence on the part of such other line or lines, if there was any, would render the defendants liable for damages, in the absence of an express agreement made on the part of the defendants by some authorized agent to transport the cattle to the point of destination within a given time. If the jury believe from the evidence that had the cattle of the plaintiffs been loaded at the time of their arrival at Catoosa, and had been promptly started from there by the defendants, they would not have reached East St. Louis at an earlier hour than they did reach there, then the plaintiffs could not recover any damages for the time the cattle remained at Catoosa waiting to be loaded. You are further instructed that the usual and ordinary shrinkage which cattle sustain in shipment in the course of their transportation from Catoosa, in the Indian Territory, to the National Stock Yards, at East St. Louis, in Illinois, is one of the incidents of said shipment, and that under no circumstances are defendants responsible for such ordinary, usual, and customary shrinkage; and, before you can find them liable for any shrinkage, it must be for the shrinkage which was caused by their express negligence, and was in excess of the usual and customary shrinkage of all such classes of shipments. If, under the testimony in this case, and instructions as given you by the court, you should find that there was any liability on the part of the defendants to the plaintiffs, it would be your duty to ascertain the amount of the damages resulting; and in the investigation of that question, upon that portion of it relating to shrinkage, it would be your duty to ascertain from the proof what, if any, shrinkage there was, directly attributable to the negligence of these defendants, and which, if any, of it occurred between the time the cattle reached Catoosa and the time they were shipped, and what, if any, of it that was directly attributable to the delay in shipment occurred in the ordinary course of shipment, and would have occurred, as shown by the testimony, if there had been no delay in the transportation of the cattle; and in this connection you may consider whether there was any greater shrinkage of these cattle by reason of their remaining in the yards from the afternoon of the 10th until the morning of the 11th, before they were loaded and shipped, than would have occurred had they been loaded promptly upon their arrival at Catoosa, and shipped from there immediately after loading; and in this connection con-

sider all the evidence tending to show the length of time required to make the run from Catoosa to the National Stock Yards, and any testimony tending to show that, had they left Catoosa immediately upon being loaded, they would have been delayed by reason of labor troubles (a strike upon the Missouri Pacific) so that they would not have reached the National Stock Yards at an earlier time than they did. Under the pleadings in this case, the right of the plaintiffs to recover anything rests upon their being able to prove by a preponderance of the evidence that the loss claimed to have been suffered by them, if the proof shows you any loss was suffered, was the natural, direct, proximate result of some negligence on the part of the defendants. The court instructs the jury that, if you find for plaintiffs, you will state in your verdict the items upon which you have computed the damages, and of what they consist, specifying each item, and the amount allowed under the same, and such findings shall be stated in writing. A form for such finding is hereto attached: 'Stilson, Case, Thorp, Ryburn & Co. vs. Receivers St. L. & S. F. Ry. Co. Special Findings of Jury. We, the jury, in estimating the damages of plaintiffs, find the damages as follows, and that said damages consist of the following items, and the damage to each of the said items is as follows: item 1, difference in market price, —; item 2, shrinkage in excess of ordinary shrinkage. —; item 3, expenses of reshipment to Chicago, —.'"

L. F. Parker, P. L. Soper, and G. B. Denison, for appellants. William T. Hutchings and Albert Z. English, for appellees.

TOWNSEND, J. (after stating the facts). Some quite interesting questions of law are presented by this record, as, for instance, whether the local agent at Catoosa had authority to contract for delivery of the cattle at a time certain, when the terminus of the shipment was beyond the line of the road operated by defendants; whether the strike of the butchers in Chicago, unknown when the shipment was made, should have been allowed to go to the jury for their consideration in estimating the amount of damages; whether the delay caused by striking employes on the Missouri Pacific and St. Louis Terminal lines in St. Louis, and beyond the terminus of defendants' road, could bind the defendants. Besides these questions, many others are presented by the record, and the appellants have filed 31 specifications of error. But, in the view we take of the record, it is necessary to consider only the fourth, fifth, and seventh specifications of error, which are as follows, to wit: "(4) That the court erred in permitting the witness S. M. Thorp to testify, in response to a question of plaintiffs' counsel, over the objection of the defendants (which said objection was duly

saved by an exception), as to the price the cattle brought in Chicago. (5) That the court erred in permitting the witness S. M. Thorp to testify, in response to a question of plaintiffs' counsel, over the objection of the defendants (which said objection was duly saved by an exception), as follows: Q. Did you ever pay anything, Mr. Thorp, for the reshipment of the cattle from East St. Louis to Chicago?" "(7) That the court erred in permitting the witness S. M. Thorp to testify, in response to a question by plaintiffs' counsel, over objection of defendants (which said objection was duly saved by an exception), to the fact that the cattle were reshipped from East St. Louis to Chicago, when the only source of information of witness was hearsay." These relate wholly to the admissibility of testimony, and we have copied that part of the testimony of S. M. Thorp relating to these specifications:

"Q. What became of those cattle, Mr. Thorp? A. They kept them there until the 13th, the next day,—the 14th would be Saturday. Then they shipped them to Chicago for sale. Mr. Soper: Q. Were you there? A. No, sir. (Counsel for defendants objects to his stating what became of the cattle, on the ground that it would be hearsay, and moves the court to strike out his answer to the question.) Mr. Hutchings: It will be withdrawn. Q. What became of those cattle? A. They were shipped to Chicago. Q. How do you know the cattle were shipped to Chicago? A. I received the returns of the sale from Godair, Harding & Co. Q. Have Godair, Harding & Co. a place of business in Chicago? A. They run under that name, and have offices in Chicago, St. Louis, and Kansas City. Q. Did Godair, Harding & Co. have the authority, express or implied, from you, to ship those cattle, or any cattle,—or, we will say, those cattle from East St. Louis,—to the Chicago market? A. It is supposed that our commission men will use their best judgment. Q. In what event do you instruct them to ship from the East St. Louis market to Chicago? A. If they cannot get a satisfactory price, to send them to Chicago. That was the general understanding. Q. What did those cattle bring you in Chicago, per hundredweight? (Counsel for the defendants objects to the question on the ground that it is not the best evidence, unless the witness was present. If he had a commission man, he should have taken his deposition. How does he know but what this commission man sold some other cattle? I object to what his commission man ever told him or wrote him, as being incompetent and improper.) The Court: The witness has stated that he authorized his commission merchants at East St. Louis, if they could not obtain a satisfactory price, to ship the cattle to Chicago. Mr. Soper: He says that was the general understanding. The Court: I understood him to say that he authorized them, in all shipments, and including this shipment, if they could not

get a satisfactory price in East St. Louis, to ship to Chicago. Q. Is that what you said? A. Yes, sir. The Court: And that he was advised by his commission merchants that they were shipped to Chicago, and that he got his returns from the commission house in Chicago. The objection is overruled. (To which action of the court in so overruling said objection the counsel for the defendants then and there duly excepted.) A. \$2.40. Mr. Soper: We move to strike out the answer on the ground that, from the testimony of Mr. Thorp, it is merely hearsay, and is not the best evidence. (Which said motion to strike out is by the court overruled. To which action of the court in so overruling said objection or motion to strike out the counsel for the defendants then and there duly excepted.) Q. Did you ever pay anything, Mr. Thorp, for the reshipment of the cattle from East St. Louis to Chicago? (Counsel for defendants objects to this question on the ground that it is not a part of the measure of damages in this case. It has been shown that the cattle arrived at East St. Louis on the 12th of July, 1894, four hours before the market closed; and there is no evidence in the case showing that it was necessary for the protection of the best interests of the plaintiffs that these cattle should be transported to Chicago, so as to charge these defendants with the cost of transportation of those cattle to Chicago. Nor is it shown that they might not have been sold in East St. Louis subsequent to that day; it already being in evidence that there was a market on the 13th day of July, 1894.) The Court: This testimony would be irrelevant and incompetent if it appeared that the market was as good in East St. Louis, all things considered, as it was in Chicago, and, unless it should appear by subsequent testimony that that fact is brought out, it will be incompetent; but it may be submitted at this time, assuming that it will be made relevant later on. Mr. Hutchings: It has been proven that these cattle were left with the commission merchants who had offices in Chicago, St. Louis, and Kansas City. It is presumed that they were acquainted with the market, and that they would not have shipped the cattle to Chicago if it had not been for the protection of the interests of the plaintiffs. I have proven that the market was getting lower all the time in St. Louis. The Court: The court is of the opinion that some evidence should be introduced by the plaintiffs to show that, when he shipped these cattle to Chicago, he could have done better with them there than anywhere else. Mr. Hutchings: I have shown that the day we arrived in East St. Louis the market was completely closed down, and the next day it was still lower. It is for the jury to say whether, if they had been in our commission man's place, they would have sent the cattle to Chicago. The Court: The court is of the opinion that all evidence that tends to show the condition of the market may go to the jury.

The objection is overruled. (To which action of the court in so overruling said objection the counsel for the defendants then and there duly excepted.) Q. How much did you pay, Mr. Thorp? A. \$255 additional expenses, and \$37 for the extra amount of feed. Q. Extra amount of feed? A. On account of the delay in taking our cattle to Chicago, he had to buy extra feed. Q. Did you have to employ a man to accompany the cattle? A. Yes, sir. Q. How much did you pay him? A. \$8. Mr. Soper: Were you there? A. No, sir. Mr. Hutchings: Q. You paid for it, did you? A. Yes, sir. Mr. Soper: I move to strike that part of his testimony out, for the reason that it is based entirely upon hearsay, and not upon facts within his own knowledge. The Court: I think these facts come within the res gestæ of the case. The motion to strike out is overruled. (To which action of the court in so overruling said objection to strike out the counsel for the defendants then and there excepted.) Q. Mr. Thorp, Godair, Harding & Co. were your authorized agents, were they? A. Yes, sir. Q. When does the greatest shrinkage in cattle occur? A. After they have been shipped to market, and unloaded, and fed and watered, then is the time that they are in the best condition to go on the market. As soon as they have had a drink of water and been fed their hay, then they are in the best condition they will ever be in. They don't take a second fill. After the first fill, then there is a general decline in weight; and, if they go any length of time, there is quite a shrinkage. There is a shrinkage in the pounds of flesh, as well as the offal, the longer they are delayed."

Cross examination: "Mr. Soper: Q. As a matter of fact, you left the disposition of your cattle entirely with your commission man? A. We have to do so. We cannot be on the market ourselves. Q. You know none of these facts, except by hearsay? A. I have the word of my men. Q. I mean, you have been informed by some one? A. Yes, sir. Q. You were not there yourself? A. No, sir. Q. Whatever was done was done by Godair, Harding & Co. without consulting you? A. They have a right to use their best judgment. Q. I was asking as to the facts in the case. A. Yes; in this case, and in all cases. Q. You testified, I believe, Mr. Thorp, that these cattle were sold in Chicago for \$2.40 per hundredweight? A. Yes, sir. Q. Your cattle would average about 925 pounds? A. We thought so. Q. I have here the National Live Stock Reporter, published at East St. Louis, for July 16, 1894, which shows the market at East St. Louis on the same day you sold your cattle in Chicago. That was the day on which you sold your cattle? A. Yes, sir. Q. I notice here, in reference to the Indian and Texas steers, as follows: '24 steers, \$33, 265; 20 steers, 917, 280; 21 steers, \$39, 230.' Was the market in Chicago any higher than it was in East St.

Louis on that day? A. I don't know that I can tell you. Q. Was the market any better in Chicago on that day than it was at East St. Louis? A. I don't know."

Redirect examination: "Mr. Hutchings: Q. Have you at any time since had any conversation with either of your commission men about the shipment of those cattle from East St. Louis to Chicago? A. Yes, sir. Q. Has either of them personally informed you that those cattle were reshipped from East St. Louis to Chicago? (Counsel for the defendants objects to the question on the ground that it is leading, and puts the language in the witness' mouth, which objection is by the court sustained.) Q. How do you know they were reshipped from East St. Louis to Chicago? (Objected to by counsel for the defendants on the ground that it is incompetent and irrelevant, because the witness has already testified that he was not present, which objection is by the court overruled. To which action of the court in so overruling said objection, counsel for the defendants then and there duly excepted.) Q. How do you know that these cattle were reshipped from East St. Louis to Chicago? A. By the returns that I have received from there. Q. Did anybody ever personally tell you so? (Objected to by the counsel for the defendants on the ground that it is leading, which objection is by the court overruled. To which action of the court in so overruling said objection, the counsel for the defendants then and there duly excepted.)

It appears that Anderson, who went to St. Louis with the cattle, arrived there at about 9 o'clock a. m. of July 12th, and that he left St. Louis about 2 o'clock p. m. of that day. What became of those cattle after that is testified to by no witness with any knowledge of the facts. All that Mr. Thorp testified to was wholly hearsay testimony. Whether the cattle could have been sold in East St. Louis, whether any necessity existed to ship them to Chicago, whether they ever were shipped to Chicago, is testified to by no one with any knowledge of the facts. We do not think that Mr. Thorp was a competent witness to these facts, and his testimony should have been excluded as hearsay. We do not think damages can be proven by this kind of testimony, and therefore the case should be reversed and remanded.

CLAYTON and THOMAS, JJ., concur.

PEAY v. WESTERN UNION TEL. CO.  
(Supreme Court of Arkansas. Jan. 8, 1898.)

DAMAGES—MENTAL ANGUISH.

For mental pain and anguish alone, caused by failure to deliver telegram, unaccompanied by physical injury, damages are not recoverable at law.

Appeal from circuit court, Green county;  
William H. Cate, Judge.

Action by James H. Peay against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This action was commenced to recover damages by the appellant against the appellee for a failure to deliver promptly the following telegram, sent to appellant, at Paragould, Ark., to wit: "Central City, Ky. 6—23—1894. To James Peay, City: Sallie, Dot, Saline Smith, and Jim Maddox killed in accident at McHenry to-day. Madge Smith seriously injured. [Signed] Ed Batall." The complaint stated that the telegram was received at Paragould, Ark., where plaintiff resided, at 9:15 o'clock p. m., and that it was not delivered until 8:10 o'clock the next morning; that, if it had been promptly delivered, the plaintiff could and would have left Paragould on a north-bound train, on the Cotton Belt Railroad, that departed thence at or about 8:30 a. m. of said morning, and would have reached McHenry, Ky., in time to have attended the funeral of the persons named in the telegram, who were killed, and to have administered to the wants of the person named therein who was injured, who, the complaint alleged, were all of close kin to the plaintiff. The complaint further alleged that, by reason of the delay in delivering said telegram, he could not leave Paragould on that road till the second morning succeeding the day of the receipt of the telegram by the company's agent at Paragould, or arrive at McHenry, Ky., until after the burial of the relatives of his who had been killed in the accident referred to; that, by reason of such delay in delivering said telegram, he was deprived of the opportunity to attend the burial of his dead relatives, or to administer to the wants of his relative who was injured; that, by reason thereof, he suffered great mental anguish, disappointment, and grief, and was damaged \$1,000. A general demurrer to the complaint was sustained, and the plaintiff declined to amend. Judgment was rendered against him, and he appealed to this court.

Luna & Johnson and W. C. Rodgers, for appellant. Rose, Hemingway & Rose and Geo. H. Fearons, for appellee.

HUGHES, J. (after stating the facts). Premitting discussion of other questions in the case, we proceed to consider the main and most important question involved. In considering this question, the labor of the court has been minimized in the investigation of cases by the full and excellent briefs of counsel on both sides of the question. The question we propose to consider is whether or not injury to the feelings,—anguish and pain of mind,—unattended by physical injury, occasioned by the breach of duty on the part of the telegraph company, in failing to deliver the telegram promptly, can be regarded as an element of damages, under the law. Are damages recoverable at law for mental an-

guish, caused by the negligent omission of duty upon the part of the telegraph company, when such mental anguish is independent of and unaccompanied by physical injury of any kind? Upon this question the decisions of the courts of last resort are not harmonious.

While there is considerable conflict in the adjudged cases upon this question, we are of the opinion that the better considered cases are against the right of recovery for mental pain and anguish, unaccompanied by physical injury. The best cases we have read which so hold are *Chapman v. Telegraph Co.*, 88 Ga. 763, 15 S. E. 901; *Telegraph Co. v. Rogers*, 68 Miss. 748, 9 South. 823; *Francis v. Telegraph Co. (Minn.)* 59 N. W. 1078; *Connell v. Telegraph Co.*, 116 Mo. 34, 22 S. W. 345. See, also, *West v. Telegraph Co.*, 39 Kan. 93, 17 Pac. 807; *Russell v. Telegraph Co.*, 3 Dak. 315, 19 N. W. 408; *Butner v. Telegraph Co. (Okl.)* 37 Pac. 1087; *Summerfield v. Telegraph Co. (Wis.)* 57 N. W. 973; *Curtin v. Telegraph Co. (Sup.)* 42 N. Y. Supp. 1109. The first case in this country of which we have any knowledge that held damages recoverable for mental anguish, independent of physical injury, is the case of *So Relle v. Telegraph Co.*, 55 Tex. 308, decided in 1881. Judge Lumpkin, in his able discussion of this question in *Chapman v. Telegraph Co.*, says that the court in the *So Relle Case* "adopts as law a bare suggestion made by the text writers *Shearman and Redfield*, in their work on *Negligence* (volume 2, § 756); and that the cases referred to in the opinion were actions for physical injuries, of which the mental agony forms an inseparable component. The decision in the *So Relle Case* is followed in Texas in quite a number of other cases, and the doctrine seems to have involved that court in some inconsistencies commented upon in *Telegraph Co. v. Rogers*, 68 Miss. 748, 9 South. 823. This doctrine, which seems to have had its origin, in this country, in Texas, has been followed in *Beasley v. Telegraph Co. (U. S. Cir. Ct. Tex.)* 39 Fed. 181; *Chapman v. Telegraph Co. (Ky.)* 13 S. W. 880; *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044; *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, 8 S. W. 574; *Telegraph Co. v. Henderson*, 89 Ala. 510, 7 South. 419; *Reese v. Telegraph Co.*, 123 Ind. 294, 24 N. E. 163; *Thomp. Electr.* § 378 et seq.; and in Iowa, in *Mentzer v. Telegraph Co.*, 62 N. W. 1. In case of *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, 8 S. W. 574, Judge Caldwell delivered the opinion of the court, and maintained his position with much ability; but we are of the opinion that the very able dissenting opinion in that case by Judge Lester announces the correct doctrine. We adhere to the doctrine announced in the cases which held that for mental pain and anguish alone, unaccompanied by physical injury, damages are not recoverable at law. We could not hope to add anything in support of this view to the able, full, and elaborate

discussion of this question in the cases we have referred to.

It is not to be controverted that in cases of torts that produce physical injury, attended with mental suffering, the mental suffering is an element of damages, recoverable in an action at law, because they are so intimately connected as to make separation impracticable. So, also, damages may be recovered for torts that are willful and calculated to injure the feelings, but only in aggravation of damages, on account of the wanton and willful character of the wrong done; but no action lies for injury to the feelings merely, or for mental anguish alone. It will be borne in mind that the damages claimed in this case are alleged to have been caused by a breach of contract. In a majority of instances the breach of a contract merely causes disappointment, annoyance, and more or less mental trouble or distress. But it would be an unwarranted stretch of the law, in our opinion, to hold that, for mental anguish caused by violation of a contract merely, damages could be recovered in an action at law. We do not think that damages for mental pain and suffering alone can be measured by any practical or just rule.

It is asked, what difference can there be between allowing damages for mental pain and anguish unattended with physical wrong and allowing damages for pain and anguish resulting from physical injury? There is the difference with us that damages for mental pain and anguish caused by physical injury have always been allowed by law, while damages for mental pain and anguish unattended with physical injury have been allowed by law only since the decision of the *So Relle Case*, in 1881, when the decision of the Texas court departed from the doctrine of the common law, which we think sound, and announced a new doctrine, unsupported by authority, as we believe, of any well-considered case before it. While we do not want to be understood as clinging to ideas and doctrines that are ancient, because they are ancient merely, if they are contrary to reason and right, yet we have great respect for the conservatism of the law, and will not depart from its long and well-settled doctrines, supported by eminent authority, and founded in reason and justice. Even if the difference in principle between allowing damages for mental pain and anguish, the result of physical injury, and disallowing damages for such pain and anguish unaccompanied by physical injury, be such as not to be defined,—merely chimerical,—this is no reason why we should say that damages for mental anguish, independent of physical injury, should be allowed. No statute allows them in such case. The common law does not allow them, and, in our opinion, the weight of adjudication is against the right of recovery in such cases. In determining a principle in the law which in its application, at least, seems to be new and but recently thought of, it is highly im-

portant to consider precedents, and is legitimate, in our view, to look to consequences that will follow as certainly as night follows the day from the recognition of a doctrine that will affect most seriously the welfare of the people. The intolerable and interminable litigation such a doctrine would foster is beyond the reach of an ordinary imagination.

The decisions of the state courts repudiating this doctrine find support in the decisions of the courts in England. In *Lynch v. Knight*, 9 H. L. Cas. 598, the court says: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act causes that alone." In *Allsop v. Allsop*, 5 Hurl. & N. 584, Pollock, C. B., said: "We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it." In *Commissioners v. Coultas*, 13 App. Cas. 22, the court holds that an action cannot be maintained for mental shock unaccompanied by physical injury. This seems to be the settled doctrine of the courts in England. In the case of *Railway Co. v. Barker*, 33 Ark. 350, Judge English, in delivering the opinion, said: "There must be a loss to the claimant that is capable of being measured by a pecuniary standard; \* \* \* and mere injury to the feelings cannot be considered." Pages 359 and 360. He said this is the rule in England, under Lord Campbell's act, and in this country, under similar statutes. However, the precise question at bar has not been decided in this court before this. The federal courts have also repudiated the doctrine that an action can be maintained for mental pain and anguish not accompanied with physical injury, in *Telegraph Co. v. Wood*, 6 C. C. A. 432, 57 Fed. 471; *Ohase v. Telegraph Co.*, 44 Fed. 554; *Crawson v. Telegraph Co.*, 47 Fed. 544; *Tyler v. Telegraph Co.*, 54 Fed. 634; *Kester v. Telegraph Co.*, 55 Fed. 603; *Gahan v. Telegraph Co.*, 59 Fed. 433; *Cobb v. Telegraph Co.* (Kan.; not yet published) 84 Fed. —. Only one federal court in Texas has followed the Texas cases, as far as we know. In *Woods' Mayne on Damages*, at page 75, it is said: "Mental anguish of itself has never been treated as an independent ground of damages, so as to enable a person to maintain an action for that injury alone; neither has insult nor contumely." *Pierce on Railroads* says (page 302): "Mental is not readily distinguished from physical suffering. Pain of mind, when connected with bodily injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity. See *Poll. Torts* (Enlarged Am. Ed.) pp. 54-56, and note by editor, page 56; 2 *Greenl. Ev.* 267; *Field, Dam.* §§ 26, 73; 26 *Am. & Eng. Enc. Law*, p. 862. Several of the recent text writers have approved the doctrine of the Texas courts, notably *Thompson on Electricity and Sedg-*

wick on Damages. To support the opinion in the *So Relle Case*, section 756 of *Shearman & Redfield on Negligence* is quoted in the opinion, which is as follows: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages." This may be true, but, if so, it presents a question for the action of the legislature. The courts do not make law, but determine what it is, not what it ought to be. At furthest, this is their legitimate province only. After the fullest argument by the learned counsel in this cause, and the best consideration we have been able to give the question, we are all agreed that no recovery can be had at law for damages for mental suffering alleged to have been endured in this case, no physical injury having been alleged. The judgment of the circuit court is affirmed.

#### WEIL v. ST. LOUIS S. W. RY. CO.

(Supreme Court of Arkansas. Jan. 8, 1898.)  
RAILROADS—FRIGHTENING HORSES—TRIAL—QUESTIONS FOR JURY.

1. A railroad company is liable for frightening horses by needlessly blowing the locomotive whistle in the street of a populous city.
2. Whether the blowing of a locomotive whistle, that frightened plaintiff's horses, was required in the prudent working of the train, is a question for the jury.

Appeal from circuit court, Jefferson county; John M. Elliott, Judge.

Action by Max Weil against the St. Louis Southwestern Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

W. P. & A. B. Grace and Irving Reenberger, for appellant. Sam H. West and J. M. & J. G. Taylor, for appellee.

**BATTLE, J.** Max Weil sued the St. Louis Southwestern Railway Company to recover damages for personal injuries. The defendant recovered a verdict and judgment, and the plaintiff appealed.

A part of the track of appellee's railway is located on and along a public street in the city of Pine Bluff, in this state, which is known as and called "Third Avenue," and is much traveled by persons, and by vehicles drawn by horses. On the 23d of June, 1894, while appellee was operating its railroad along this street, appellant, a baker, was delivering bread to his customers, and was using his horse and delivery wagon for that purpose. He drove into Third avenue, and stopped his horse and wagon near the sidewalk between Alabama and State streets. He testified that while seated in his wagon, at this time and place, one of appellee's locomotives, near by and east of him, "blew a loud blast of its whistle, \* \* \* and this was immediately answered by a blast of the whistle of another of appel-

lee's locomotives, behind and west of him, and on the same square," which caused his horse to run away and seriously injure him. He testified further that his horse was gentle, and accustomed to see locomotives and hear them whistle; that, in the 2½ years in which he had driven her, she never had been frightened; that the sound of the second whistle was peculiar and extraordinary; that he had driven along Third avenue for 15 years, and had never before heard such a terrific whistle; and that, though the street is frequently crowded with vehicles, his was the only wagon on the block at the time, and there was nothing to obstruct the view of it by the engineer of either locomotive. The testimony of other witnesses is in conflict with his, as to the sound of the whistle, but it is not necessary to set it out in this opinion. The signals were not given in obedience to any statutory regulation.

The court gave to the jury three instructions, at the instance of the appellee, to each of which appellant objected. But we will notice only one of them, as the test applied to it will be sufficient to determine whether the others are erroneous. It is as follows:

"Third. Before the jury can find for the plaintiff, they must find from the evidence that, when the engineer sounded his whistle, he knew it would cause the horse to take fright, or intended to frighten the horse, or was guilty of such willful neglect of Well's rights, in view of all the circumstances, as would justify them in finding that the conduct of the engineer was willful, and intended to cause injury.

"And if they find that the engineer did not know that the horse would take fright, and did not intend to cause injury to Well, they will find for the defendant."

This instruction is not a correct statement of the law. Appellant had the right to go on Third avenue in the pursuit of his business or pleasure; and appellee had the right to operate its railroad along the same street, and "to make the noises incident to the management and working of its engines and trains, as in the escape of steam and the rattling of cars, and also the right to give the usual and proper admonitions of danger, as in the sounding of whistles and the ringing of bells." But each was under obligations to observe the rights of the other. The maxim, "*Sic utere tuo ut alienum non lædas*," applies with equal force to both. They were under reciprocal obligations to use a degree of care commensurate with the danger of the situation, to avoid injuring each other.

Having located its railway along the street of a populous city, along which horses are frequently driven, appellee knew the hazard that must ensue, and should have avoided needlessly or negligently making noises which were calculated to frighten horses upon the street, and cause them to run away. In the absence of statutory regulations, as in this case, it was limited to the reasonable use of signals,

and "is liable for injuries, caused by the whistle, when sounded carelessly or recklessly, or at an improper place, or when not required in the prudent working of its engines and trains." What was an improper use was a question for the jury, subject to the instructions of the court. *Railroad Co. v. Hite*, 81 Va. 767; *Hill v. Railroad Co.*, 55 Me. 438; *Railway Co. v. Harmon*, 47 Ill. 298; *Hahn v. Railroad Co.*, 51 Cal. 605; *Railway Co. v. Gaines* (Ind. Sup.) 4 N. E. 84, and 5 N. E. 746; *Bittle v. Railroad Co.* (N. J. Sup.) 28 Atl. 805; *Railroad Co. v. Dickson*, 88 Ill. 431; *Railway Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551; *Abbot v. Kalbus* (Wis.) 43 N. W. 367; *Pierce, R. R.* 348; 3 Elliott, R. R. § 1264.

For the error indicated the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

### BEENE v. BEENE.

(Supreme Court of Arkansas. Jan. 8, 1908.)

#### DIVORCE—CUSTODY OF CHILDREN—ALIMONY.

1. In a decree of divorce, where each parent appears to have the proper amount of love for the children, but the father is in poor health and irritable, while it is proper to award the care and custody of a boy nine years old to the father, the court should award the custody of a five year old boy to the mother, subject to modification as his interests may demand as he grows older.

2. Under Sand. & H. Dig. § 2517, providing that a wife who is entitled to receive alimony at all is entitled to one-third of the husband's personal property absolutely, and to a life estate in one-third of his real estate, it is error to decree to a wife, as alimony, one-third of the remainder of the husband's estate after deducting his indebtedness.

Appeal from circuit court, Pike county, in chancery; Will P. Feazell, Judge.

Bill by Sarah F. Beene against W. F. Beene for divorce. From the decree of the court with reference to the custody of two children, and as to the alimony, plaintiff appeals; and from the decree dismissing his cross bill, and as to the custody of two other children, and as to alimony, defendant takes a cross appeal. Reversed.

W. C. Rodgers, for appellant. J. D. Shaver and W. S. & Farrar L. McCain, for appellee.

BUNN, C. J. This is a bill by the wife against the husband for divorce, for alimony, and for the custody of the children. The defendant filed his answer and cross bill, and the prayer of plaintiff for divorce was granted. Alimony was allowed to the extent of one-third of the ascertained value of defendant's estate, after deducting his indebtedness; and, of the four children, the plaintiff was awarded the custody of the two girls, Lena A. Beene and Mary Grace Beene, aged at the time of the hearing, respectively, six years and one year, and the defendant was awarded the custody of the



two boys, W. Ray Beene and Morgan Beene, aged at the time, respectively, eight and four years, and that "both plaintiff and defendant should permit the other to visit and see the children, respectively awarded to them, at all reasonable times." And the cross bill of defendant was dismissed. From this decree, as to alimony, and the awarding the custody of the two boys to defendant, the plaintiff appealed; and the defendant took a cross appeal from the decree dismissing his cross bill, and on the question of alimony, and awarding the custody of the two girls to the plaintiff.

The evidence adduced in the case is certainly not very complimentary to either party, in respect to their treatment of, and deportment towards, each other, showing an almost total absence of that love and affection which should characterize those sustaining the marital relation to each other; and yet there is little to aid us in determining what has been, or what probably will be, the conduct of either in the treatment of their children. There is little from which we could infer any unusual presence or absence of parental love and affection for the children on the part of either. The consequence is that the proper disposition of their children can only be determined from circumstances such as the physical condition and ability of the parents to care for their children, and the superior qualification for such duties which nature has conferred upon the one or the other. The father (the defendant) is shown to be in most wretched physical health, and consequently laboring under the usual infirmity belonging to such a state of health,—of irritability and impatience. The mother, on the other hand, appears to be the very opposite. The elder of the boys, now about nine years old, has probably arrived at that age when a father's peculiar character of oversight and control may begin to be more necessary than the mother's, and for that reason we do not desire to disturb the directions of the chancellor as to him; but the younger of the boys, not yet five years old, it seems to us, is in special need of a mother's care and control,—that care and control which a father is ill suited by nature to exercise. We think that the mother should have the present custody of this little boy; but, whatever orders are made in this regard, they should be expressly temporary in their operation, and subject at all times to be revoked or modified, to the end that the care and control of the child may be under the strict supervision of the court.

As to the question of alimony, that is settled by statute. See section 2517, Sand. & H. Dig. The legislature seems to have enacted that statute for the purpose of putting an end to all after-controversies as to dower rights, and to settle the matter when a divorce is granted dissolving the marital bonds. Hence the allowance to the divorced wife, who is entitled at all, is exactly or sub-

stantially the same as would be her dower interest in case of the death of her husband; that is to say, one-third, for life, of all the real estate of which he has been seised of an estate of inheritance at any time during the marriage, except such as she has relinquished in due form. The court therefore erred in decreeing her only one-third of the remainder of his estate after deducting the amount of his debts, and should have allotted her one-third the value of his personalty, absolutely, without taking his indebtedness into consideration, and should have given her one-third of his realty for her natural life, and ordered otherwise as the statute provides. For these errors the decree is reversed, and the cause remanded, with directions to modify the decree appealed from as herein indicated.

### LITTLE ROCK & FT. S. RY. CO. v. SMITH (two cases).

(Supreme Court of Arkansas. Jan. 15, 1898.)  
RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

1. It is error to instruct that a railroad company is liable in damages, notwithstanding the contributory negligence of the injured party, provided the injury was caused by the failure of the railroad company to use proper care after it had become aware, or "by the exercise of reasonable diligence might have become aware," of such contributory negligence.

2. Act April 8, 1891, making a railroad liable for all damages resulting from neglect to keep a constant lookout on its trains for persons or property on the track, does not preclude the defense of contributory negligence.

Appeal from circuit court, Conway county; Jeremiah G. Wallace, Judge.

Action by Simon Smith against the Little Rock & Ft. Smith Railway Company for damages for personal injury; also, action by W. B. Smith, father of the above-named plaintiff, against the same company, for damages for injury to the son. From a judgment for plaintiff in each case, defendant appeals. Reversed.

Dodge & Johnson, for appellant. Watkins & Heard, for appellee.

BUNN, C. J. These two cases are suits against appellant railway company, by the respective appellees, for damages for personal injuries alleged to have been done, by the negligence of appellant and its servants in operating one of its trains, to Simon Smith, the son,—claimed in the one case by himself, and in the other by his father, W. B. Smith. Judgment in each case was for appellee, and in each appellant duly appeals; and the cases, involving the same facts, are heard together. The evidence tends to show negligence on the part of the railway company, and contributory negligence on the part of Simon Smith, the injured person.

The defendant asked the following, as its first instruction: "The court instructs the jury that one who is injured by the negligence of another cannot recover any compensation for

his injury if he, by his own negligence or willful wrong, contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him, except where the direct cause is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequence of such negligence." This was refused, and in lieu thereof the court, over the objection of the defendant, gave it modified as follows, to wit: "The court instructs the jury that one who is injured by the negligence of another cannot recover any compensation for his injury, if he, by his own negligence or willful wrong, contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him, except where the direct cause is the omission of the other party, after becoming aware of the injured party's negligence, or by the exercise of reasonable diligence might have become aware of it, to use a proper degree of care to avoid the consequence of such negligence." The modification, in effect, so shapes the instruction as practically to do away with the defense of contributory negligence, which, when established, is a good defense, notwithstanding the negligence of the defendant. Presumably, the modified instruction is in accordance with the view the lower court took of the "Lookout Act," approved April 8, 1891; but in construing that act this court has, in several cases, ruled that it does not preclude the defense of contributory negligence, and that the same, therefore, is still a good defense, when properly pleaded and established. *Railway Co. v. Leathers*, 62 Ark. 235, 35 S. W. 216; *Railway Co. v. Dingman*, 62 Ark. 245, 35 S. W. 219; *Martin v. Railway Co.*, 62 Ark. 156, 34 S. W. 545. This error affects one or more of the instructions asked by the defendant, and modified to the same extent, and so given over its objections; and perhaps it also affects one or more of the plaintiff's instructions. For this error the judgment is reversed, and the cause remanded for a new trial.

#### HARRISON v. LUCE.

(Supreme Court of Arkansas. Jan. 15, 1896.)

#### ESTOPPEL—ALTERATION OF INSTRUMENTS—DECLARATIONS OF MAKER.

Where a note which had been altered was presented to the maker by an intending purchaser, who knew nothing of the alteration, and the maker, after examining it, gave assurances that it was all right, and would be paid, he is estopped from denying its validity in an action by the one to whom the statement was made.

Appeal from circuit court, Sebastian county; Edgar E. Bryant, Judge.

Action by B. Luce against E. M. Harrison on a note. From a judgment for plaintiff, and an order overruling a motion for a new trial, defendant appeals. Affirmed.

B. Luce sued upon a note executed by E. M. and W. S. Harrison, for \$200 and interest, dated on April 22, 1889, payable to J. B. Nedry, and by J. B. Nedry assigned to Gus A. Gill, and by Gus A. Gill assigned to appellee. He alleged in his complaint that J. B. Nedry changed the date of the note from the 22d to the 24th, without the consent or knowledge of E. M. Harrison, but that, before Gill purchased the note from Nedry, he found Harrison on the street, and exhibited the note to him (Harrison), and asked him if it was all right; that Harrison assured Gill that said note was all right, and that he intended to pay it. E. M. Harrison answered that the note was changed in date after its execution and delivery, and was void, and denied that he ever promised to pay Gill, or that the note was exhibited to him by Gill. He alleged that Nedry was the real plaintiff, and that Gill had withdrawn his suit upon the note, and transferred same to B. Luce, for the reason that Luce had Nedry in a place where he could force payment. Upon the trial, plaintiff proved by Gus A. Gill that, before purchasing the note from Nedry, he exhibited same to E. M. Harrison, and that Harrison took it, and, after looking at it, said it was all right, and that he (Gill) could safely purchase it, and promised to pay it; that he did not call Harrison's attention to the change in date; that, when he sold the note to Luce, he told Luce of the conversation with Harrison. J. B. Nedry swore that he changed the date from April 22d to 24th; that he sold to Gus A. Gill; that he was in Gus Gill's office, and Gill asked him if he wanted to sell the note, and that Gill said, if it was all right, he would buy it; that Harrison was not present at this conversation. The defendant objected to the evidence, for the reason that Harrison was not present. The court admitted the evidence, and the defendant saved his exception; and, over the objection of defendant, he was permitted to state: "Gill told me to stay in his office until he went to see Harrison about it." Defendant saved his exception. Over objection of defendant, he was permitted to state: "After Gill came back, he told me it was all right, and that he would buy it." Defendant saved his exception for same reason,—that Harrison was not present. B. Luce testified that he purchased the note, and never had a conversation with E. M. Harrison before doing so. The defendant swore that the note was changed in date, and a mortgage given by Nedry to secure same, without his consent or knowledge, and that he never agreed to pay Gill; that Gill never exhibited the note to him; that he did not know of change in date of note until Gill first sued on it; that, when Gill's collector presented same for payment, they refused to allow him to look at it; that Gill never pointed out any change in date of note. Defendant further offered to swear that Gill told him he withdrew his suit on the note because he had secured a place for Nedry's daughter, and that

Nedry would pay him, and that he could transfer it to Luce, who could force him to pay it. This evidence was ruled out, and defendant saved his exception. Defendant offered to prove by W. S. Harrison, one of the makers of the note, that he was in Ft. Smith, and that Gill never presented the note to him to see whether it was all right. The court refused to admit this testimony, and defendant saved his exception. He also offered to prove by W. S. Harrison that the sale of the note was made to Luce for the purpose of forcing Nedry to pay same, and that Gill withdrew the original suit because he had gotten Nedry's daughter a position, upon the promise that he would pay him. The court refused to admit this evidence, and defendant saved his exception. The court instructed the jury as follows: "The court tells you that the change of the date of the note by Nedry invalidated the note, and made it void, and plaintiff cannot recover on it, unless you find that, before buying the note, Gill, not knowing that Nedry had changed its date, went to E. M. Harrison, and, showing the note to him, asked him if it was all right, and told him he was about to purchase it, and that Harrison, after looking at it, told Gill it was all right, and that he could safely purchase it, and that Gill thereafter, relying on said assurance of Harrison, bought the note of Nedry, in which case you should find for the plaintiff." The defendant objected, and saved his exception to the giving of this instruction. Defendant asked the following instruction: "I charge you that, before there could have been a ratification on the part of Harrison, it would have been necessary to call his attention to the change in the contract. In other words, after the change in the date, the contract became another from that executed by Harrison; and, before he could be bound by the new contract, he should have been informed of the change which rendered the original contract a new one, and then a promise from Harrison to pay Gill if he bought it." The court refused to give instruction, and defendant saved his exception. Defendant filed motion for new trial, setting up the usual grounds therefor, which was overruled. Defendant excepted, and prayed an appeal to this court, which was granted.

E. M. Morrison, pro se. Thos. E. Ward, for appellee.

HUGHES, J. (after stating the facts). We are of the opinion that, according to the general principles of the doctrine of estoppel, the appellant is estopped to deny his liability upon the note sued upon in this case. When Gill took the note to Harrison to ascertain if it was valid, the proof is that Harrison took it, looked at it, and told Gill it was all right, and promised to pay it, and that, upon this assurance, Gill bought the note, not knowing it had been altered. Harrison did not know it had been altered, but it was his note orig-

inally, and he owed the debt, and promised Gill, who, he was informed, desired to buy it, that he would pay it, and thereby induced Gill to buy it. He ought not now to be allowed to take advantage of the fact that it had been altered. It would work a fraud to allow this. *Plummer v. Bank*, 90 Ind. 388. See *Jowers v. Phelps*, 33 Ark. 468; *Gill v. Hardin*, 48 Ark. 409, 3 S. W. 579.

Affirmed.

#### McFARLANE v. JOHNSON.

(Supreme Court of Arkansas. Jan. 15, 1898.)

BILL OF EXCEPTIONS—SIGNING BY CLERK—AMENDMENT.

Under Sand. & H. Dig. § 5848, requiring the presiding judge to sign the bill of exceptions if true, and, if not, to correct it, or suggest the correction to be made, and when corrected to sign it, a bill of exceptions, signed by the clerk under written authority of the judge, within the time allowed for filing, and amended by the judge after such time has expired, cannot be considered on appeal.

Appeal from circuit court, Sebastian county; Edgar E. Bryant, Judge.

Action by G. W. Johnson against R. W. McFarlane, as administrator of the estate of Boney Lipsey, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

R. W. McFarlane, in pro. per. Jo. Johnson, for appellee.

RIDDICK, J. The appellee, G. W. Johnson, brought suit against R. W. McFarlane, as administrator of the estate of Boney Lipsey, deceased, upon a claim against said estate. On trial of said action the circuit court gave judgment in favor of Johnson, and allowed McFarlane time in which to prepare and file his bill of exceptions. A bill of exceptions was prepared and presented to the presiding judge, but for some reason he did not sign it at that time. Afterwards, on account of the fatal sickness of his father, the judge was suddenly called to the state of Mississippi. Remembering, after he arrived there, that the bill of exceptions had not been signed, and that the time allowed for filing the same was about to expire, he telegraphed to the clerk of the circuit court at Greenwood to sign his name to the bill of exceptions, which the clerk did. The bill of exceptions was then filed within the time allowed by the court.

Our right to review the judgment appealed from depends upon this bill of exceptions. The appellee contends that it was not signed by the circuit judge, and cannot be considered here. We are of the opinion that this contention must be sustained. The presiding judge is required by our statute to sign the bill of exceptions, if true. "If the writing is not true, the judge must correct it, or suggest the correction to be made, and when corrected sign it." Sand. & H. Dig. § 5848. He is supposed to have personal knowledge of the facts stated in the bill of exceptions, and by placing

his signature thereto he attests officially that he knows the contents thereof at the time he signs it, and has decided that it is an accurate record of the proceedings had upon the trial. The duty of signing the bill of exceptions being thus imposed personally upon the presiding judge, and partaking also of the nature of a judicial act, the power to sign cannot be delegated to another. *Bullock v. Neal*, 42 Ark. 280; *Cowall v. Althul*, 40 Ark. 174; *Watkins v. State*, 37 Ark. 370; 3 Enc. Pl. & Prac. 452, 453, and cases cited.

Now, even if the circuit judge had read the bill of exceptions in this case before leaving the state, he could not know that it was correct at the time the clerk signed it, or that it was the same bill of exceptions, for he was not present, and did not see the bill, at the time his name was signed thereto. The evils that might follow from allowing bills of exception to be authenticated in that way is shown by what actually happened in this case. After the judge returned, the bill of exceptions came before him again, upon a motion to strike from the records. He examined it, and found that it was not correct, and not such a bill as he had intended to sign, and he thereupon amended it. This amendment was made long after the time allowed for filing the bill had expired, and cannot give validity to it, but tends to confirm the conclusion that the circuit judge at the time he ordered his name signed to the bill of exceptions was not in a position to attest its correctness. He could not decide that the bill was correct when it was not before him, and the clerk had no right to make such decision for him. We therefore conclude that the bill has not been signed and authenticated as required by statute, and cannot be considered. *Stinson v. Shafer*, 58 Ark. 110, 23 S. W. 661. There being nothing before us to show error in the judgment of the circuit court rendered against the appellant, it is therefore affirmed.

#### WILSON v. STATE.

(Supreme Court of Arkansas. Jan. 15, 1898.)

PERMITTING GAMING IN A SALOON—NOTICE TO EMPLOYE—EFFECT ON OWNER.

Under Sand. & H. Dig. § 1904, providing that "if any person having a license to keep a tavern or dramshop shall knowingly permit any person to play at any game of cards" he shall be deemed guilty of a misdemeanor, the owner of a saloon cannot be convicted where gambling was permitted by the barkeeper without the owner's knowledge, and contrary to his orders.

Appeal from circuit court, Hempstead county; Rufus D. Hearn, Judge.

M. W. Wilson was convicted of permitting gambling in a saloon, and appeals. Reversed.

The appellant was indicted and convicted for violating section 1904, Sand. & H. Dig., which is as follows, to wit: "If any person having a license to keep a tavern or dramshop shall knowingly permit any person to

play at any game of cards, dice or other gaming device, within his house, outhouse, curtilage or inclosure, he shall be deemed guilty of a misdemeanor, and, on conviction, in addition to the punishment prescribed by law, for such offense, his license shall be canceled." Upon conviction the appellant was fined \$50, and his license was revoked. He appealed to this court. The appellant kept a licensed saloon.

The evidence in the case shows that appellant lived at Hope, in Hempstead county, this state; that the saloon of the appellant, where the gambling is charged to have been done, was at Washington, in said county, about nine miles from Hope; that he was not present when the gambling, for permitting which he was indicted, took place. The saloon was in charge of Brit Allen, the employé of the appellant, who had been forbidden by appellant to allow any gambling in the house. The proof tended strongly to show that appellant did not know of the gambling in his saloon; that he was not often at the saloon at Washington, and he swore that he did not know of it, and did not know that gambling had been permitted in his saloon until after he was indicted; that he would not have permitted it had he known of it. The court instructed the jury as follows: "If you find from the evidence beyond a reasonable doubt that the defendant is a licensed keeper of a saloon or dramshop in this county, and that he knowingly permitted the gaming charged in the indictment in his house or building in which he kept his dramshop or grocery, or if you find that his employé or employes, who were kept by him in charge of or keeper for the dramshop, knowingly permitted the said gaming to be carried on in his said house, the knowledge of the employé would bind the defendant, and you may find him guilty." To the giving of this instruction the appellant excepted, filed his bill of exceptions, and brought the case to this court.

W. M. Greene and F. T. Vaughan, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

HUGHES, J. (after stating the facts). The question presented by the instruction above copied is, does the knowledge of the employé bind the principal under the statute making the principal guilty if he knowingly permits gambling in his saloon or dramshop? Is the principal guilty if without his knowledge or consent, the employé or bartender permits gambling in house of the principal where or in which his dramshop is kept? We think it clear from the language of the statute that he is not guilty in such case. Before he could be guilty, it would have to be shown that he knowingly permitted the gambling. This implies personal knowledge, or not the knowledge merely of his agent or employé. If the agent or employé permitted the gambling, without the knowledge or consent of his prin-

cial, the principal is not guilty of knowingly permitting it, for he did not know it; and the employé cannot bind his principal especially for a criminal violation of the law. In the case of *Cloud v. State*, 36 Ark. 151, which was a prosecution for selling liquor to a minor, this court held that "the general rule of law as to criminal agency applies. If the liquor was sold to the minor by the partner or clerk of the appellant, in his absence or without his direction, authority, consent or approbation, he would not be liable, upon the general principle that a man is not responsible for the criminal acts of his partner or agent. They must answer for their own criminal misconduct." In *Mogler v. State*, 47 Ark. 109, 14 S. W. 473, and other cases decided since the case of *Cloud v. State*, supra, it is held that the fact that whisky is sold to a minor, without the written consent of his parent or guardian, by the bartender in the absence of the saloon keeper, is no defense. This was because since the decision of *Cloud v. State* the statute had been extended so as to make it a misdemeanor to be interested in the sale of liquor to a minor, "without the written consent or order of his parent or guardian." Act March 8, 1879, p. 38, § 19. In the case at bar there has been no such extension of the prohibition, and it must be confined to one who knowingly permits gambling in his saloon. For the error of the court in instructing the jury as above set out the judgment is reversed, and the cause is remanded for a new trial.

### GREEN v. STATE.

(Supreme Court of Arkansas. Jan. 8, 1898.)

CRIMINAL LAW—DEFENSE OF INSANITY—EVIDENCE—  
—ERROR—EXPERT WITNESSES—COMPETENCY—DISCRETION.

1. The mother of the defendant, who was being tried for manslaughter, and whose defense was insanity, had testified as to defendant's strange conduct on the night preceding the killing. She was asked by defendant's counsel, "From what she said, and from her conduct, did she seem to know what she did?" and answered, "No, sir; she did not." On objection, the question and answer were excluded. *Held* error.

2. The testimony of a witness, who had known defendant and her ancestors all his life, as to the sanity of such ancestors, is competent, after evidence had been adduced that defendant had shown signs of her own insanity, as being cumulative, and corroborative evidence thereof.

3. A witness testified that he was the sheriff of the county, and had defendant in custody since the evening of the killing. Defendant offered to prove by him that he had frequent conversations with defendant, from the time he arrested her until the trial, and that she seemed very unconcerned, and to think that she had done right, to be unconscious of her condition, and to have no apprehension or fear of punishment, and frequently laughed and engaged in singing. *Held*, that the court erred in rejecting the evidence.

4. When a hypothetical question is put to a physician called as a witness for the defendant in a criminal case, in which the defense is in-

sanity, which question embodies a correct statement of the facts of the case as proved by the evidence, and his opinion is asked thereon as to whether, assuming such facts to be true, the crime was an act of insanity, his testimony is competent, and its rejection is error.

5. The question of how much knowledge or experience a witness must possess, to qualify him to testify as an expert, rests within the fair discretion of the court, which will not be reviewed on appeal, unless it clearly appears to be wrong.

6. A person who kills another, knowing at the time that she was committing a wrong act, is not legally responsible for the act if at the time of the killing she was so affected with a disease of the mind as thereby to have lost the power to choose between right and wrong and to avoid doing the act, provided that at the same time the crime was so connected with such mental disease, in relation of cause and effect, as to have been the product of it, solely.

Appeal from circuit court, Jackson county; Richard H. Powell, Judge.

Frances Green was convicted of manslaughter, and appealed. Reversed.

M. M. Stuckey and Phillips & Campbell, for appellant. El. B. Kinsworthy, Atty. Gen., for the State.

BATTLE, J. Frances Green was indicted in the Jackson circuit court, at the July term, 1897, for the crime of manslaughter, committed by shooting Walter Donaldson with a gun. She pleaded not guilty, was tried and convicted, and appealed.

The evidence adduced in the trial tended to prove the following facts: Walter and Frances were engaged to be married. She was 18 years old, never had been married, and was of good standing, as a colored girl, in Jackson county, where she resided. She was second teacher in the Sunday school, and had a class of little girls. During her engagement to marry, Walter seduced her, by virtue of a promise of marriage, and she became pregnant with a child. At his instance, she visited Pine Bluff. He was to follow, and they were to be married. On the Friday next before the killing, she returned home, and learned that Walter was to marry in a few days a woman named Lettia. She was greatly distressed. From the time of her return until Monday following, the 24th of May, 1897, she did not eat or sleep. Her conduct was entirely changed. "She would start," a witness said, "to do one thing, and do another, and start to say one thing, and say another." Her mother testified that during Sunday night she went to bed, and then arose and went to her, "and kept walking backwards and forwards, patting her breast," and "she would just squat down and put her hands on her breast." When her mother spoke to her, she said, "My mind is worried to death." After making the foregoing statement, and while testifying, appellant's counsel asked, "From what she said, and from her conduct, did she seem to know what she did?" and witness replied: "No, sir; she did not. She did not know what she was doing." And, the state objecting to the question and an-

swer, the court excluded it, and the appellant objected and saved exceptions. On that night (the Sunday night mentioned), the 23d of May, 1897, Walter and Lettia were married. On the morning next following, Lugenla Carter and Walter, with Lugenla's baby in his arms, and Lettia, in company, walking, passed near the house where Frances was residing with her parents. Frances was in the house at the time, and saw them pass; and after they did so, and had gone a short distance, she seized a gun and followed, and, when she approached near, commanded him to halt; and he turned, and she said: "Walter, you have fooled me long enough. You told me yesterday it was a long lane that had no turn. You have to die. Hand Lugenla the baby." She testified that he then moved the baby from his right to his left arm, and his hand, as she thought, for his pistol, and she, without taking any aim, shot him, and that she killed him because he had "stolen her virtue," and had threatened to kill her, and had "scandalized" her among her people. She made no attempt to escape.

After the testimony tending to prove the foregoing facts had been adduced, Dr. Hurt, who had been in active practice as a physician for over 50 years, and had studied diseases of the mind, seen insane persons, and treated persons suffering from diseases of the mind frequently, testified that the condition and acts of Frances, as before stated, indicated an aberration of the mind.

After Joel Jackson had testified that he was acquainted with appellant, her father, mother, grandmother, her great-uncle, and her great-aunt, and had known them all his life, the appellant offered to propound to him questions, and prove by him what he stated in reply thereto, in the presence of the court and in the absence of the jury, as follows:

Question. "State to the jury some of his [Peter Speed, great-uncle of defendant] acts, showing his condition of mind."

Answer. "Well, he was a kind of crazy fellow. They could not do anything with him, so they put him in a house, and chained him there. His sister Rose got in the same fix, and they built a little house and put her in it."

Q. "State what you know as to how his owner had to keep him."

A. "They could not do anything with him. They had to chain him and put him in a little house, as I have said."

Q. "State any acts of hers [great-aunt of defendant], that you know of, showing her condition mentally."

A. "She got crazy, and they had to put her in a little house, too; put her in a house, and chained her there. There is always some of the family in that condition. There is some of them in Woodruff county now, in the same fix."

Q. "State such facts as you may know about her [grandmother of defendant] that will show her condition of mind."

A. "Her grandmother has no mind. She is

in Woodruff county now. She is so crazy they have to keep her tied up."

Q. "State if you know any acts of her [mother of defendant] that go to show her mental capacity during the time she was pregnant."

A. "Yes, sir; there was an old man that went into the woods to get logs. He came up missing in two or three days. We thought he was gone, as we could not find him. One day we went out to hunt him. They knew he was cutting some logs. They found him dead, lying on a log, and he had turned right black. That time of day, when the two fellows found him, they told us, and this girl went out there with the others, and she got frightened at him; and in two or three days she found this girl, but it was good while until she got her mind again."

Q. "Do you know any circumstances that happened just before Frances' birth that brought about a great shock to her mother?"

A. "Yes, sir; that is about the old gentleman I have just stated."

Q. "State how much alike defendant and her mother are in disposition."

A. "They are just about the same. There is not a bit of difference in them."

Q. "While Frances' mother was pregnant with Frances, what was her disposition towards the members of her family?"

A. "She was mighty unruly and hard to get along with,—what I call crazy, so you could not do much with her."

Q. "How did she treat the members of her family during that time?"

A. "Treated them mighty cruel,—what I call cruel."

Q. "Did they give her any cause for such treatment during that time?"

A. "No, sir; they did not give her a bit. I think she just had those foolish spells,—just gave herself them."

And the court refused to allow the interrogatories to be propounded, and the answers to go to the jury as evidence.

J. J. Walker having testified that he was sheriff of Jackson county, and had had the appellant in custody since the evening of the killing, she offered to prove by him that he had frequent conversations with her, from the time he arrested her to the present, and that she seemed very unconcerned, and to think that she had done right, to be unconscious of her condition, and to have no apprehension or fear of punishment, and frequently laughed and engaged in singing. And the court refused to allow her to do so.

Appellant then recalled Dr. Hurt, and offered to prove that the tendency of insanity is to run in families, and propounded to him the following question: "Doctor, assuming it to be a fact that there was a strong hereditary taint of insanity in the blood of the defendant; that she had a great-uncle and a great-aunt, on her mother's side, who were so violently insane that they had to be kept in confinement; that her mother was of a

very nervous temperament, and, especially during pregnancy, was unusually irritable and excitable, and often, while in such condition, did acts without apparent motive, and was subject to outbursts of rage, and violent abuse of the members of her family, without any adequate cause, and that such was her conduct especially while pregnant with and carrying this defendant in her womb; assuming, further, that defendant, in physical appearance, and in constitution, habits, and disposition, strongly resembles her mother; that defendant, at the age of 18 years, became greatly infatuated with a young man of her own color, who promised to marry her, and by virtue of such promise of marriage induced her to yield to him in repeated acts of sexual intercourse, and she became pregnant by him; that he suddenly, and unexpectedly to her, married another woman; and assuming, further, that a few days after such marriage he unexpectedly came in her way with his wife, and carrying a small child in his arms, and that she shot and killed him; that immediately after doing so she seemed mentally relieved, made no attempt to escape, openly avowed she was glad of her deed, and declared she wanted to be hanged; assuming, further, that while confined in jail, and up to the time of her trial, she seemed to fear no punishment for her deed, and frequently laughed and engaged in singing; assuming all these propositions to be true, state your opinion as to whether the defendant was sane or insane at the time she fired the fatal shot,"—and offered to prove by him that, if the facts assumed be true, he was of the opinion that the shooting was an act of insanity, but the court refused to allow the testimony to be introduced.

Dr. Burns then testified that he was a physician and surgeon, and had been in the practice since 1892 (about five years), and "had studied mental diseases, so far as ordinary cases were concerned"; that the physician, in this country, in the scope of his general practice, treated mental diseases and disorders; and that he had studied them as a branch of the medical profession, but never had "experience in the treatment of aberration or mental diseases" to any extent. Appellant then undertook to examine him as a witness touching her sanity, but the court refused to allow her to do so, because he was not an expert.

A. G. Brewer testified that he was a regular physician and surgeon; had been practicing more than 21 years; knew something about insanity, having made a study of nervous diseases, and treated them to some extent; that every physician who had practiced 20 years would have that to do. Appellant also undertook to examine him as a witness as to her sanity, but the court would not permit her to do so, because he was not an expert.

Instructions to the jury upon the subject of insanity were given by the court over the

objections of appellant, and others were asked for by her and refused, and exceptions were saved, but it is unnecessary to set them out in this opinion. A statement of the law upon the subject of the same will be sufficient to show what instructions upon the subject should have been given.

The court erred in excluding the testimony of the mother of the appellant as to the sanity of the daughter on the night preceding the killing. She stated that Frances, the accused, did not seem to know what she did. Before making this statement, she had testified as to how appellant had acted,—of her strange conduct. Having stated the facts upon which the opinion was based, the testimony excluded was competent. *Shaeffer v. State*, 61 Ark. 241, 245, 82 S. W. 879.

The testimony of Joel Jackson as to the sanity of the ancestors of appellant was competent. His testimony tended to show that insanity had existed in the family for some time,—first in the grandmother and great-uncle and great-aunt, and then temporarily in the mother. But this testimony was not admissible until some evidence had been adduced that appellant had shown signs of her own insanity. Evidence of hereditary insanity is only admissible as cumulative evidence,—as corroborative of the other. Upon the evidence adduced in this case at the time it was offered, as before stated, the testimony of Jackson should have been admitted. *People v. Smith*, 31 Cal. 466; *People v. Garbutt*, 17 Mich. 10; *Laros v. Com.*, 84 Pa. St. 200; *Baxter v. Abbott*, 7 Gray, 71, 81; 1 Whart. Cr. Law, § 85, and cases cited.

In *State v. Christmas*, 51 N. C. 471, it is said that, "where hereditary insanity is offered as an excuse for crime, it must appear that the kind of insanity proposed to be proven as existing in the prisoner is no temporary malady, but that it is notorious, and of the same species with which other members of the family have been afflicted." The court in that case seems to have assumed that hereditary insanity of a permanent type, and notorious, is capable of being established by general reputation, and not dependent upon particular facts and proof, about which witnesses may differ, and that it does not change its species when transmitted from the ancestor to his descendants. This is an assumption of fact. Surely the court did not mean to say that a prisoner cannot show that he has been rendered irresponsible for crime by inheriting insanity of any description. As a statement of fact, it should not be accepted as true, in judicial proceedings, without evidence of its truth. According to our information, it is not true. Wharton, in his work on Medical Jurisprudence, says it is not, and further says: "Insanity, it has been well said, is protean. Sometimes it may be so concealed that it may escape the knowledge of all but the closest observers. Often, as has been seen,

it changes its form from time to time in the same individual, and when passing from parent to child it almost always varies its type." 1 Whart. & S. Med. Jur. § 376.

The facts which appellant offered to prove by Walker come within the spirit of the rule stated in *Bolling v. State*, 54 Ark. 588, 16 S. W. 658. In that case it was said: "As a rule, the conduct as well as the language of a defendant after the commission of a crime, not forming a part of the *res gestæ*, is inadmissible in his favor, but when insanity is set up the rule is sometimes different. They are then admissible whenever they are so connected with, or correspond to, evidence of disordered or weakened mental condition preceding the time of the offense, as to strengthen the inference of continuance, and carry it by the time to which the inquiry relates, and thus establish its existence at that time, or whenever they are of such a character as of themselves to indicate unsoundness, to such a degree, or of so permanent a nature, as to have required a longer period than the interval for its production or development. *Com. v. Pomeroy*, 117 Mass. 143. As such acts, conduct, and declarations were admissible, was it competent for the witness, after stating them, to state his opinion, based upon them, as to the sanity of the defendant? The affirmative was expressly ruled in *Kelly's Heirs v. McGuire*, 15 Ark. 601, and has been since then the settled rule of this court." The facts which the accused attempted to prove by Walker in this case so corresponded with the evidence of her disordered mental condition before and at the time of the offense as to strengthen the inference of its existence at such time, and of its continuance thereafter to the time to which they relate. They tend to show an unconsciousness of having done wrong, and an incapacity to appreciate the nature and consequences of her act. They may shed a dim light upon the subject of inquiry, but they give enough to have entitled them to be shown by evidence, and to receive such consideration by the jury as to them it may have appeared they deserved.

The evidence improperly rejected should have been admitted, and Dr. Hurt should have been required to answer the hypothetical question propounded to him as an expert. 2 Bish. Cr. Proc. (3d Ed.) § 683.

Our next subject of consideration is the refusal of the court to allow Drs. Burns and Brewer to testify as experts. The competency of a witness to give testimony as an expert is confined to matters pertaining to his special calling or profession. *Dole v. Johnson*, 50 N. H. 452; *Railway Co. v. Finley*, 88 Kan. 550, 560, 16 Pac. 951; *Rog. Exp. Test.* (2d Ed.) p. 45, § 19. Such persons are allowed to give testimony by way of opinion, because they are presumed to have acquired more skill and knowledge, and are more capable of forming a correct opinion as to the subject-matter of inquiry, by previous study, ed-

ucation, or experience, than jurors of average intelligence; and their opinions are admitted as evidence for the purpose of aiding the court or jury to understand questions which inexperienced persons are not likely to decide correctly without such assistance. *Fordyce v. Lowman*, 62 Ark. 74, 34 S. W. 255.

The reason for allowing him to testify as an expert, and the object of his testimony, indicate to some extent the qualifications he should possess in order to make him a competent witness. His competency depends upon either his actual experience with respect to the subject of investigation, "or his previous study and scientific research concerning the same, and sometimes on both combined." If otherwise qualified, he may express an opinion as an expert on a matter pertaining to his special calling or profession, although his knowledge of that particular matter has been derived from study alone. *Taylor v. Railway Co.*, 48 N. H. 304; *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *State v. Wood*, 53 N. H. 484; *Tullis v. Kidd*, 12 Ala. 648; *Heating Co. v. O'Brien*, 19 Ill. App. 231; *Rog. Exp. Test.* (2d Ed.) p. 45, § 10.

On the subject of opinions based on study, Mr. Justice Campbell truthfully says: "No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion; and, if he has not given the subject involved such careful and discriminating study as has resulted in the formation of a definite opinion, he has no business to give it. Such an opinion can only be safely formed or expressed by persons who have made the scientific questions involved matters of definite and intelligent study, and who have by such application made up their own minds. In doing so, it is their business to resort to such aids of reading and study as they have reason to believe contain the information they need. This will naturally include the literature of the subject. But if they have only taken trouble enough to find, or suppose they find, that certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinions must be of very moderate value, and, whether correct or incorrect, cannot be fortified before a jury by statements of what those authors held on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows to make his opinion worthy of respect." *People v. Millard*, 53 Mich. 63, 76, 18 N. W. 562, 567.

No rule can be laid down by which it can be accurately determined how much skill, knowledge, or experience a witness must possess to qualify and entitle him to testify as an expert. He must at least have sufficient to enable him to be of some assistance. "That question, however, rests within the fair discretion of the court, whose duty it is to decide whether the experience or study of the witness has been such as to make his opinion of any value." *Hls* (circuit court's)



decision of the question will not be reviewed by this court unless it clearly appears to be wrong.

According to the foregoing test, the qualification of Dr. Burns as an expert was doubtful. He never had experience in the treatment of mental diseases to any extent, and had only studied them "so far as ordinary cases were concerned." How far ordinary cases were concerned, does not appear. His own testimony does not clearly or satisfactorily show that he was qualified to give an opinion as an expert that would have been of any aid or assistance to the jury.

Dr. Brewer should have been allowed to testify as an expert. His testimony does not show that he is possessed of the highest degree of skill, or is very learned, as to insanity (and he does not profess to be), but enough appears to have entitled his opinion to go as evidence to the jury. By means of a cross-examination, it could have been shown how much it was worth.

The most important question in the case is, what are the legal tests of responsibility of a person who has committed unlawful homicide, for that crime, where the defense of insanity is interposed? The principal test is the ability to distinguish right from wrong. If a person is incapable, because of idiocy or lunacy, from distinguishing between right and wrong, as to a particular act, at the time he does it, he is not criminally responsible for the same. If he has such capacity, mere emotional insanity, or passion or frenzy produced by anger, jealousy, or other passion, will not excuse him. Moral insanity, also, will not excuse. If, from evil association and indulgence in vice, his conscience ceases to control or influence his actions, and he is otherwise capable of committing crime, he is responsible.

The rule as to the effect of insane delusions upon the responsibility of the person entertaining them for crime was stated by this court in *Bolling v. State*, 54 Ark. 588, 16 S. W. 658.

It is insisted that, although appellant knew right from wrong, as to the particular act in question, at the time it was committed, yet she would not be legally responsible, if, in firing the fatal shot, she "acted from an irresistible impulse, arising from a defect of will, caused by the diseased condition of her mind, and not from mere anger or revenge." It is true that a person may have such knowledge, and yet be irresponsible for a crime committed by him. But it is not true unless the two following conditions, as held in an exceptionally able and comprehensive opinion, in *Parsons v. State*, 81 Ala. 577, 2 South. 854, concur: Such person, at the time he committed the act, must have been so afflicted with a disease of the mind as thereby to have "so far lost the power to choose between the right and wrong, and to avoid doing the act, as that his free agency was destroyed; and (2) at the

same time the alleged crime must have been so connected with such mental disease, in relation of cause and effect, as to have been the product of it, solely,"—that is to say, without the aid of any other cause. This subject is fully discussed in the following authorities: *Parsons v. State*, 81 Ala. 577, 2 South. 854; *State v. Jones*, 50 N. H. 389; *Bish. New Cr. Law*, c. 26; 3 *Rice*, Ev. §§ 402-416; *Clark, Cr. Law*, pp. 52, 60; 1 *Whart. Cr. Law* (10th Ed.) §§ 34, 45; 1 *McClain, Cr. Law*, §§ 156, 157.

For the errors indicated the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

#### CHESTNUT v. HARRIS et al.

(Supreme Court of Arkansas. Jan. 15, 1898.)

##### TAX SALE—DESCRIPTION—SUFFICIENCY.

The description, "N. E. S. E., Sec. 24, Tp. 13, R. 7, 40 acres," is sufficient in an assessment list and notice of sale for taxes, under a statute providing that lands shall be described, if practicable, according to government surveys.

Appeal from circuit court, Drew county; Marcus L. Hawkins, Judge.

Action by M. F. Chestnut against Bashie Harris and others. Judgment for defendants, and plaintiff appeals. Reversed.

Z. T. Wood, for appellant. Wells & Williamson, for appellees.

**BATTLE, J.** An action was brought by appellant against appellees in the Drew circuit court, to recover possession of the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 24, in township 13 S., and in range 7 W., containing 40 acres. He claimed by virtue of a sale thereof by a collector of revenue for the taxes assessed against the same for the year 1891. Appellees disputed the validity of the sale on two grounds: (1) Because the description of the land in the assessment and in the notice of sale is insufficient; and (2) because it was sold for too much cost.

The issues in the case were tried upon an agreed statement of facts. It was admitted that the land was described in the assessment list as follows:

Township 13, Range 7.			
Owner's Name	Parts of Sec.	Section	No. of Acres.
Bashie Harris.	N. E. S. E.	24.	40.

And in the notice of the sale of delinquent lands as follows:

Owner's Name	Parts of Sec.	Sec.	Township	R.	No. of Acres.
Bashie Harris.	N. E. S. E.	24.	13.	7.	40.

It was also admitted that it was sold for the taxes of 1891 and penalty, and for 60 cents costs, which included a fee of 10 cents of the county clerk for attending the sale, and 5 cents for furnishing the printer with a description of it in the list of delinquent lands advertised for sale.

Upon this statement of facts, the court held that the sale was void, because the description of the land in the assessment and in the notice of sale was insufficient, and rendered judgment in favor of the appellee. Did the court err?

The statutes of this state provide that each tract or lot of real property shall be so described in the assessment thereof for taxation as to identify and distinguish it from any other tracts or parts of tracts; and that the same shall be described, if practicable, according to section or subdivisions thereof and congressional townships. They recognize the survey of the United States, and the division of lands, according thereto, into townships and ranges, and sections and parts of sections, and that a description according to such a survey will be good and sufficient. For this reason, it has been held that a description of land for assessment by the abbreviations commonly used to designate government subdivisions would be sufficient. *Cooper v. Lee*, 59 Ark. 460, 27 S. W. 970.

In the case at bar the assessor attempted to assess a 40 acres in section 24, in township 13, and range 7, in Drew county, in this state. It was a legal subdivision of land,—a fourth of a quarter of a section of land. As described, it was unquestionably a legal subdivision of section 24. It was described as the "N. E. S. E." of that section. The first is the abbreviation of "northeast," and the last of "southeast." In the order they are used, they could designate only one legal subdivision of a section into 40 acres, and that is the northeast quarter of the southeast quarter. They are not reasonably susceptible of any other interpretation. We think the land was sufficiently described in the assessment and notice of sale.

We have not overlooked the ruling of the court in *Cooper v. Lee*, 59 Ark. 460, 27 S. W. 970. In that case the land in controversy was described as, "N. N. E. section 2, township 15, range 6, 87.19 acres." The section was not described as a fractional section, and 87.19 acres were not a legal subdivision, according to survey of the government, of a regular and complete section. There was nothing in the description in that case to show what was meant by the abbreviations, as in this. The "N." might have as reasonably been construed as meaning the north part as the north half. The description was not sufficiently certain to protect the interests of the owner.

The question we have decided is the only one presented by counsel in their briefs for our consideration. We decide no other.

Reversed and remanded for a new trial.

## NOBLE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

### CRIMINAL LAW—APPEAL.

Where the bills of exception are not approved by the trial judge, and the record contains no statement of facts, the grounds of a motion for a new trial cannot be considered on appeal.

Appeal from Hill county court; C. Moorman, Judge.

John Noble was convicted of petty theft and appeals. Affirmed.

Mann Trice, for the State.

HURT, P. J. Appellant was convicted of petty theft, and his punishment assessed at one day's imprisonment in the county jail and a fine of \$25.

What purport to be four bills of exception appear in the record, but none of them are approved by the trial judge. There is no statement of the facts in the record. As this record is presented, the grounds of the motion for a new trial cannot be considered, as they are based upon the testimony and the supposed bills of exception. As before stated, the bills cannot be considered, because not approved by the judge. The judgment is affirmed.

## ELLIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

### APPEAL—RECORD—REVIEW.

1. Bills of exception filed 10 days after adjournment of the term of court cannot be considered.

2. The action of the court in overruling an application for a continuance cannot be considered in the absence of a bill of exceptions.

3. The finding of a jury on the question of the sale of intoxicating liquors cannot be disturbed by the court of criminal appeals.

Appeal from Johnson county court; F. E. Adams, Judge.

Ooley Ellis was convicted of violating the local option law, and he appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail; hence this appeal.

The bills of exception found in the record were filed 10 days after the adjournment of the term of court, and therefore cannot be considered. The action of the court in overruling the application for a continuance cannot be considered in the absence of a bill of exceptions. The same may be said with reference to the evidence of the witness Long.

It is contended in the motion for a new trial that the evidence is not sufficient to

sustain the conviction. The testimony introduced by the state is clear and unequivocal that the witness bought lager beer from the defendant, and that it was intoxicating liquor. This was denied by the defendant. The jury settled this controversy adversely to the appellant, and we cannot disturb their finding. The judgment is affirmed.

#### STEWART v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### ADULTERY—EVIDENCE.

That defendant traveled over the country in his peddler's cart, taking with him a woman, whom he on several occasions falsely represented as his wife, and with whom he camped, is enough to warrant conviction of adultery, without any eyewitness of intercourse.

Appeal from Hill county court; W. C. Morrow, Judge.

J. L. Stewart, alias A. Anderson, appeals from a conviction. Affirmed.

Mann Trice, for the State.

HURT, P. J. Appellant was convicted of adultery, and his punishment assessed at a fine of \$100, and he prosecutes this appeal.

There are no bills of exception in the record. It is contended by appellant that the evidence is not sufficient to convict, in that no witness testifies to the fact directly that acts of carnal intercourse occurred between himself and the woman with whom he is alleged to have had such adulterous intercourse. It may be admitted as a fact that no witness, so far as this record is concerned, saw any such act of intercourse; but the evidence is uncontroverted that appellant represented himself to be a peddler; that he lived in Hamilton county, and, the crops being bad in that section, he was peddling his goods out in Hill county, in a two-horse wagon, carrying the woman with him on these peddling excursions, and on several occasions represented the woman to be his wife, and on more than one occasion sought to obtain a boarding place for her. The witness Williams testified that the man whom he takes to be the defendant, and the woman in question, driving the same team that all of the other witnesses identify as the defendant's team, camped near his residence one night. As he went to their camp, they were in the wagon together; but, as he approached, they separated, and got out of the wagon. He was not positive that the defendant was the man, but he stated that he believed the man then on trial was the same man he saw in the wagon at the time, and the man there represented himself and the woman to be husband and wife. While no witness saw the parties in the act of intercourse, these circumstances are sufficiently strong to indicate the fact that they were

living as man and wife. This being true, the testimony would be sufficient.

Attached to the motion for a new trial are the affidavits of two parties, who testify that they saw a man very much like the defendant in a two-horse wagon, driving a team of horses resembling appellant's, with this same woman. This was in the town of Hillsboro. The defendant lived in Hillsboro. They asserted the fact that they were intimately acquainted with the defendant, and that this man was not the defendant, but looked very much like him. These witnesses were warm personal friends of the defendant, and one of them was in the court room during the trial of the case. If the testimony of these two witnesses be true, that the woman was seen with a party other than the defendant at any time, other than the dates testified by the witnesses on the trial, we take it, would hardly be material as against the testimony of the witnesses save that of Williams; for the other witnesses knew the defendant, and testified that he was the man who owned the team described, and who was carrying this woman about with him over the country. What they state might be true; yet this does not militate against the state's case. The judgment is affirmed.

#### BLADES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Affidavits in support of a motion for new trial on the ground of newly-discovered evidence, which show on their face that the transaction concerning which the witnesses propose to testify occurred in a conversation with accused, in connection with the commission of the offense, are insufficient to show newly-discovered evidence.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Albert Blades was convicted of theft, and he appeals. Affirmed.

Mann Trice, for the State.

HURT, P. J. Appellant was convicted of the theft of a box of "tamales." A jury was waived, and the cause submitted to the court. He was convicted, and his punishment assessed at a fine of one dollar, and imprisonment in the county jail for one hour.

The proof shows beyond any question or controversy that he took the tamales, as stated in the information, and carried them off, and, after going some distance, was overtaken and arrested by the city marshal, being still in possession of the property. When arrested, he set the tamales down on the sidewalk, and the marshal arrested and placed him in jail. This proof is uncontroverted. Attached to the motion for a new trial are the affidavits of two witnesses, contain-

ing their testimony, which appellant alleges to be newly discovered. This evidence, on the very face of the affidavits themselves, shows that it was not newly discovered, because the very transaction of which they speak occurred in conversation with defendant, in connection with the commission of the offense by the defendant. He was a participant in the very acts and matters set up in said affidavits, and, of course, was cognizant of all said transactions. It is shown that he was drinking some, but he seems to have known what occurred and what he had done on the occasion referred to. We deem it unnecessary to recapitulate the testimony in the case and the matters and things set up in the motion for a new trial by the affidavits. This evidence is not newly discovered, and does not come within any rule in regard to newly-discovered testimony. Defendant offered no testimony upon the trial of the case. The court found that he intended to appropriate the property when he took it, and the officer shows that he was carrying it away when he overtook and arrested him, and, after his arrest, set it down upon the sidewalk. As the case is presented to us, we find no error in the record, and the judgment is affirmed.

#### MALONEY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

#### NEW TRIAL — APPLICATION — CONTINUANCE — ABSENT WITNESS.

1. In passing on a motion for a new trial, the court may look to the evidence of a witness, on the examining trial, to ascertain whether it is probably true that a witness will swear to the facts as stated in the motion.

2. A new trial will not be granted on account of the court's refusing a continuance because of the absence of a witness, where it does not seem probable that the witness, who is a fugitive from justice, can be procured.

3. Nor where it does not appear that the witness was present at the time of the transaction in question.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

J. L. Maloney was convicted of the theft of a horse, and he appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of a horse, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

Appellant reserved a bill of exceptions to the use made by the state of the examining trial evidence of P. I. Murdock in the state's contest on said motion. We see no impropriety in such use as was made of the examining trial evidence in this case. In passing on the motion for a new trial, it was competent for the court to look to the evidence of said Murdock on the examining trial to ascertain

whether or not it was probably true (as urged by appellant in his motion for a continuance) that he would swear to the facts therein stated that he could prove by said witness. In the application for continuance, appellant stated that he expected to prove by said Murdock that, on the 15th of April, he saw the defendant ride a small chestnut sorrel mare past his house, on the Paris and Garrett's Bluff Road, in Lamar county, Tex., and knew that defendant owned said mare; that shortly afterwards, on the same day, the said Murdock saw the defendant again riding by his house on the mare alleged to have been stolen. Now, looking to the examining trial evidence, it will be seen that said witness Murdock testified that he saw defendant on Friday, April 16th, and that he did not see him make a trade for a mare on that day or any other day. He further testified on cross-examination that defendant was riding a sorrel mare when he came to his house, on April 16th, and that this sorrel mare was left at his (witness') house by defendant. Witness thought that this mare was left at his house on the night of the 15th of April. So, evidently, this sorrel mare (which is the only sorrel mare shown to have been in appellant's possession about that time) could not have been traded by him for the roan mare alleged to have been stolen. Furthermore, appellant, who was a witness on his own behalf, testified that Paul Murdock was present when he traded the sorrel mare for the red roan mare, and that said Murdock saw him make the trade. It was competent for the court also to look to defendant's testimony, in connection with the application for a continuance and new trial, in order to judge whether or not said Murdock would swear to the facts as stated by appellant, and whether or not, if he would so swear, it was probably true. In the face of the record in this case, it could not be reasonably expected that said Murdock would swear to the facts as stated by appellant, and, even if he did, that his evidence would not probably be true.

Appellant also insists that he should have had a new trial on account of the action of the court in overruling his application for a continuance because of the absence of the witness Mabry. From the sheriff's return and the contest filed by the state's attorney, it does not seem probable that Mabry (who is a fugitive from justice) could likely be procured by a postponement of the trial or a continuance of the case. Moreover, it is not likely that said witness would have been of any benefit to the appellant had he been present. In the application for a continuance, appellant stated that he expected to prove by the witness Mabry that he was present when defendant traded a chestnut sorrel mare for the alleged stolen mare, which was a red roan. In his testimony, appellant stated that he did not know whether Mabry was present when the trade was made or not, but that he was near enough to see the trade. We do not think the court erred in overruling the appli-

cation for a continuance, nor in refusing a new trial based on that ground.

In this connection we might state that the witnesses for the state show beyond question that the roan mare appellant is alleged to have stolen was in possession of the owner, S. U. Parsons, who lived some distance from where the alleged trade was made, at the very time appellant claims he traded for said roan mare. He claims that the trade was made some time about 12 or 1 o'clock of the day on Friday, the 16th of April, 1897. The state's evidence established clearly that the roan mare of Parsons was in his possession, as stated above, some miles from where said alleged trade was made, after sundown of said day. This, in conjunction with the clash between defendant's witnesses and himself, as to what they would swear, serves to lend force to the idea that this alleged trade for the mare is a fabrication on the part of the appellant, and that said witnesses would not swear to the facts as alleged by him, or, if they did, that such testimony would not probably be true.

We have examined the charge of the court carefully, and, in our opinion, it is correct, and covers every phase of the case presented by the evidence; and the facts show an unquestioned case of theft. The judgment is affirmed.

#### JONES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1898.)

#### LOCAL OPTION—PUBLICATION OF ORDERS — PROVINCE OF JURY.

Under Rev. Civ. St. 1895, art. 3391, providing for the publication of an order of court announcing the result of a local option election, and prohibiting the sale of intoxicating liquors, and also providing that the fact of publication shall be entered by the county judge on the minutes of the commissioners' court, and that such entry or a certified copy thereof is prima facie evidence of publication, testimony by a publisher that "an" order had been published as required, and that he had had the order in court, and had lost it, and testimony by the county judge that the order which the publisher had had in court was the order required to be published, did not sustain a charge that local option was in force on a given day, as it was for the jury to find the fact of publication.

Appeal from Collin county court; M. G. Abernathy, Judge.

Bob Jones was convicted of violating the local option law. He appeals. Reversed.

Abernathy & Beverly, for appellant. Mamm Trice, for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail; hence this appeal.

Article 3391, Rev. Civ. St. 1895, provides: "The order of court declaring the result and prohibiting the sale of such liquors shall be

published for four successive weeks in some newspaper published in the county wherein such election has been held, which newspaper shall be selected by the county judge for that purpose. If there be no newspaper published in the county, then the county judge shall cause publication to be made by posting copies of said order at three public places within the prescribed limits for the aforesaid length of time," etc. It is clear from this provision that, until the order has been published the length of time required, that prohibition cannot take effect in the county, precinct, etc. It is absolutely necessary, therefore, that the publication of this order in one of the modes prescribed by this article should be proved upon the trial of any person accused of violating the local option law. Said article further provides: "The fact of publication in either mode shall be entered by the county judge on the minutes of the commissioners' court. And entry thus made, or a copy thereof certified under the hand and seal of the clerk of the county court, shall be held sufficient prima facie evidence of such fact of publication." Article 3391, supra. In the case before us no such entry was introduced in evidence. The state, however, proposed to establish the fact of publication as required by law through the parol testimony of the witness John H. Bingham, who testified "that he published for four consecutive weeks an order of the commissioners' court of Collin county in reference to local option in justice precinct No. 8; that he had the orders in court, which were published by him, and that they were lost, and after diligent search he cannot find them." M. G. Abernathy testified that "he was county judge of Collin county, and remembered the copies of the paper testified to by the witness John H. Bingham, and these papers contained copy of the order of the commissioners' court prohibiting the sale of intoxicating liquor in the justice precinct No. 8, Collin county."

The court charged the jury that local option was in force and effect on the 10th day of December, 1896, in Collin county, in justice precinct No. 8 of said county. Appellant excepted to this charge at the time, because it was the province of the jury to find this fact, and not the court. We are of opinion that the exception was well taken. The burden of proof was upon the state to establish the fact that this order had been published as required by law. A prima facie case could have been made by introducing in evidence the entry of the county judge above alluded to, that such order had been published as required by law; and, if this had been done, the burden would have been upon the appellant to establish the fact that the order had not been published as the law required. The state did not do this (and we are not aware whether there was such an entry or not), but failed to introduce this entry; and, as before stated, the burden of proof was upon the state to establish the fact that the order had been published as required by law. The court's charge assumed the credi-

bility of the witnesses, and that Abernathy was absolutely correct when he swore that the orders alluded to by Bingham were those required to be published by law. Bingham says he published some orders relating to local option in justice precinct No. 8, and that they were lost. Abernathy says that these orders were those required by the statute pertaining to this particular election. The charge assumes that neither Bingham nor Abernathy could be mistaken. We are of opinion that the contention of appellant is correct. If, however, the entry above alluded to had been introduced in evidence, and no testimony contesting its correctness, the court would have committed no error in assuming that local option was in force in precinct No. 8. For the error above discussed, the judgment is reversed, and the cause remanded.

#### ESTES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

#### CRIMINAL LAW—JURISDICTION—APPEAL—DISMISSAL.

1. When a verdict has been rendered, a motion for a new trial overruled, and notice of appeal given, the lower court, the term having closed, has lost jurisdiction to enter judgment.

2. Where the record is before the court without a judgment having been entered upon the verdict of the jury in the court below, the appeal will be dismissed.

Appeal from Grayson county court; J. H. Wood, Judge.

John Estes was convicted of false imprisonment, and appeals. Dismissed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of false imprisonment at the September term, 1896, of the county court of Grayson county, Tex. He filed a motion for a new trial, which was overruled, and gave notice of appeal. The judgment was not entered at that term of the court, but was entered nunc pro tunc at the March term, 1897; and the bill of exceptions recites that said entry was made without notice to the defendant. Under this state of case, the court below had lost its authority to enter the judgment at the March term, 1897. When the September term, 1896, closed, the notice of appeal having been given, jurisdiction had attached in this court. The judgment was not a lost or destroyed part of the record, and therefore could not be entered pending the appeal; that court having lost jurisdiction. See *Lewis v. State*, 34 Tex. Cr. R. 128, 29 S. W. 384, 774, and 30 S. W. 231; *Quarles v. State* (Tex. Cr. App.) 39 S. W. 668; *Freshman v. State*, Id. 1118. The record is therefore before us without a judgment entered upon the verdict of the jury in the court below. This being the case, the appeal is dismissed.

#### DARITY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 25, 1898.)

#### ASSAULT WITH INTENT TO MURDER—INTOXICATION—INSTRUCTIONS.

Where defendant was charged with assault with intent to murder, and the evidence showed that he was intoxicated at the time of the alleged assault, a charge by the court, after the giving of the statutory charge on intoxication, that he should be acquitted of assault with intent to murder unless he had a specific intent to kill, and that if he shot with intent to kill any person, and wounded another, the law would presume an intent to kill the latter, and if the jury did not believe that he shot with intent to kill, he should be convicted of an aggravated assault, adequately presented the issues, and was proper.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

George C. Darity was convicted of an assault with intent to murder, and he appeals. Affirmed.

Allen, Hatheway & Allen, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at two years in the penitentiary; hence this appeal.

The only questions necessary to be noticed relate to the charge of the court, which is excepted to in the motion for a new trial. The evidence showed that appellant was very drunk at the time of the alleged assault. Appellant asked a number of charges predicated on the theory that if appellant was so drunk at the time as not to be capable of forming the specific intent to kill he should be acquitted. In the general charge of the court, besides the statutory charge on intoxication produced by the recent use of intoxicating liquors, the court further instructed the jury as follows: "There can be no offense of assault with intent to murder without the specific intent to take life. So, if you should believe that the defendant discharged a gun into T. S. Hill's house, and thereby wounded Bessie Hill, but unless you further believe beyond a reasonable doubt that the defendant intended to kill Bessie Hill, you cannot convict the defendant of assault with intent to murder. But upon this point you are instructed that if the defendant voluntarily discharged his gun into T. S. Hill's house with intent to kill any person who might be in the way of the shot, and that he thereby wounded Bessie Hill, such intent upon the part of the defendant would in law include the intent to kill Bessie Hill." And the court further charged: "If you should believe from the evidence that the defendant intentionally fired his gun into Hill's house, and wounded Bessie Hill, in such manner as to constitute an unlawful assault, as hereinbefore defined and explained, and that said means as used by him was a deadly weapon, and if you do not believe beyond a reasonable doubt that

he had the specific intent to kill, such as to constitute assault with intent to murder, as the matter has hereinbefore been explained, then you will find the defendant guilty of an aggravated assault, and assess his punishment," etc. By this charge the court clearly instructed the jury to acquit the defendant of assault with intent to murder, unless they believed at the time that he had the specific intent to kill; and this, no matter how the want of defendant's specific intent was caused. The charge furthermore told the jury, if they believed he committed an unlawful assault in shooting said Bessie Hill, but did not shoot her with the specific intent to kill her, to find him guilty of an aggravated assault. This accords with our view of the subject. The court furthermore instructed the jury that if they believed defendant accidentally discharged his gun, and so shot Bessie Hill, to acquit him altogether. In our opinion, the charge of the court adequately presented every issue in the case, and sufficiently guarded all of the rights of the defendant, under the testimony; and it was not necessary, even if the requested charges had been properly framed, for the court to give them. The evidence unquestionably, shows that appellant was very much under the influence of liquor at the time he fired the shot that struck Bessie Hill, but it does not show that he was so drunk at the time as not to entertain the specific intent to take life. His acts and conduct just before the shooting indicate that, while he knew what he was about, he was in a reckless and dangerous mood, and was utterly disregarding of the rights of others. In such a mood he recklessly fired into the house of another, and wounded a little girl. Under the circumstances, we think, if by the shooting he had slain Bessie Hill, defendant would have been at least guilty of murder in the second degree, upon implied malice. The judgment is affirmed.

#### WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—APPEAL—RECORD.

In the absence of the statement of facts, it will be presumed on appeal that the evidence was sufficient.

Appeal from Johnson county court; F. E. Adams, Judge.

Charley Williams appeals from a conviction. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Conviction for violating the local option law. There are no assignments of error, bills of exception, or statement of facts in this record. Two grounds are alleged for a new trial,—that the verdict is contrary to the law, and contrary to the evidence. In the ab-

sence of the statement of facts, this court will presume that the evidence was sufficient. The judgment is affirmed.

#### MOSS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—BILL OF EXCEPTIONS—APPROVAL—STATEMENT OF FACTS—FILE MARK.

1. Bills of exceptions not approved by the trial judge cannot be considered.

2. Error in instructions cannot be considered in the absence of a statement of facts.

3. Alleged error in changing a file mark on an information will not be considered where there is no evidence of such change.

Appeal from Johnson county court; F. E. Adams, Judge.

Henry Moss was convicted of violating the local option law, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Conviction for violating the local option law. What purport to be two bills of exception appear in the record, but neither is approved by the trial judge, and therefore they cannot be considered. The statement of facts is not incorporated in the record. In the absence of the statement of facts, the grounds of the motion for a new trial, wherein it is contended that the court erred in his instructions to the jury, cannot be considered. Nor is there any evidence before us that the file mark on the information had been changed from the 5th of February to the 5th of March. It is simply stated as a ground of the motion for a new trial, as well as a ground of the motion to quash. Without the attending circumstances as to the change of the file mark, if such change was made, we cannot undertake to revise the action of the court in that regard; but there is no evidence before us of any such change. No errors appearing, the judgment is affirmed.

#### WILLIAMSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### INTOXICATING LIQUORS—ILLEGAL SALES.

Evidence that a person bought of defendant a bottle of whisky, and also several bottles of "hop ale," which had the appearance, taste and effect of beer, without defendant in any way indicating his protest, or refusing to accept the money, was sufficient to show a sale of intoxicating liquors.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Fayette Williamson was convicted of violating the local option law, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Conviction for violating the local option law; the punishment being as-

essed at a fine of \$25, and 20 days' imprisonment in the county jail. No bills of exception were reserved during the trial, and the only error relied upon is the supposed insufficiency of the evidence to support the conviction. The evidence for the state shows that the purchaser bought of the defendant several bottles of "hop ale," which had the appearance, taste, and effect of beer, and the further fact that he purchased a bottle of whisky. The purchaser went to the place where these articles were kept, and took them, leaving the money upon the counter. The defendant was present at the time, having opened up his house for this purpose. The appellant denies his assent to this manner of buying his goods, and asserts that he opened the house for the purpose of permitting the purchaser and the friends who accompanied him to purchase some cigarettes. He does not deny, however, that these goods were purchased, in the manner indicated, against his protest, nor does he deny that he accepted the money. We think the evidence is sufficient to show the sale, and that the liquor was intoxicating. The judgment is affirmed.

#### BARTMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1898.)

##### INTOXICATING LIQUORS—SALES TO MINORS.

A seller of a glass of intoxicating liquor, delivering it to a minor at the purchaser's request, is not guilty of selling or giving it to the minor.

Appeal from Ellis county court; J. C. Smith, Judge.

Sam Bartman was convicted of selling and giving intoxicating liquors to a minor, and he appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of selling and giving, and caused to be sold and given, intoxicating liquors to Ed Bisland, who was then and there a minor, and without the written consent of the parties named in the statute. The evidence is uncontroverted that Ed Bisland, Will Branson, George Bartlett, and Will Pippin went into the saloon of the defendant; that they were minors; that Will Branson bought and paid for all the intoxicating liquors drank upon the occasion; that he invited the other boys to visit the saloon for the purpose of treating them; that appellant did not in person sell or give away any intoxicants; that the sale was made by his employé, the defendant being in or about the premises. It is an uncontroverted fact that Ed Bisland did not buy or pay for any of the beer drank on the occasion. Without discussing appellant's liability for the sale if the sale had been made to Bisland by appellant's employé, we believe that the testimony ex-

cludes a sale to Bisland by the employé. The fact that he visited the saloon with Branson, who purchased the intoxicants, and participated in the drinking at Branson's request, would not make Bisland a purchaser. It may be that the jury convicted appellant because his employé, in response to Branson's request, set out the glass of beer to Bisland, believing this to be a gift by the employé to Bisland. If this was the theory upon which the conviction is predicated, it cannot be sustained. If there was a gift at all, it was from Branson to Bisland, and not from the employé. This was no more a gift to Bisland than it was to Branson. Branson paid for the drinks, and caused the beer to be given to Bisland. As the evidence presents this case to us, there was neither a sale nor a gift by appellant or his employé to Bisland of the intoxicants, as alleged in the information. Under the view we take of the case, it is not necessary to discuss the various other questions suggested by appellant for our consideration. Because the evidence does not show a sale or gift by appellant as alleged in the information, the judgment is reversed and the cause remanded.

#### BOLTON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—WITNESSES—COMPETENCY—MISDEMEANOR—PRINCIPAL AND ACCOMPLICE—CORROBORATION OF TESTIMONY.

1. One indicted for a misdemeanor is a competent witness for the state in the prosecution of another indicted for the same offense.

2. The fact that defendant, who was accused of violating the local option law, was the renter of the property in which the business was conducted, and owned the goods therein, is sufficient corroboration of the testimony of one jointly indicted that the business was conducted for defendant, to justify a conviction.

3. In cases of misdemeanor, there are no accomplices, since all are principals.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Bob Bolton was convicted for violation of the local option law, and appeals. Affirmed.

Mann Trice, for the State.

HURT, P. J. Conviction for violating the local option law. There was no error in the action of the court permitting Rukin Polk to testify, for, if he had been indicted or charged with this particular offense, the prosecution had been nol pros'd; and, whether it had or had not, he was a witness for the state. The court instructed the jury in regard to the necessity of corroborating the testimony of an accomplice. We are of opinion that he was corroborated, as Rukin Polk was not the owner of the establishment and the goods therein contained. Appellant had rented the property from T. E. Bird, and was the owner of the goods in the house. The negro Polk swore



that he was employed by appellant "to tend the bar, wait on customers, etc.; that he sold apple jack (which means apple brandy), received the money, placed it in the drawer, and the defendant would get the money out of the drawer," etc. Counsel for appellant requested the court to instruct the jury in regard to the distinction between an accomplice and a principal. As the proof showed that Polk sold the brandy, and not in the presence of the appellant, it was insisted that appellant was not a principal or an accomplice. This contention is without authority of law, for in cases of misdemeanor all are principals. The evidence amply supports the verdict, and the judgment is affirmed.

#### WARD v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CRIMINAL LAW — APPEAL FROM JUSTICE COURT — FILING BOND.

It is no excuse for failing, on appeal from justice's court to county court, to file, within the prescribed time, bond in double the amount of fine and costs, as prescribed by Code Cr. Proc. 1895, arts. 889, 890, that defendant did not have a lawyer, but relied on the constable and justice of the peace to perfect his appeal.

Appeal from Navarro county court; J. F. Stout, Judge.

H. Ward appeals from a judgment dismissing his appeal to the county court from a conviction in justice court. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted in the justice court, and prosecuted an appeal to the county court. The appeal was there dismissed on account of the bond not being in double the amount of the fine and costs. Appellant prayed the right to give a new bond, and proffered a new bond, in double the amount of fine and costs, in resistance to the motion to dismiss his appeal. The appeal, however, was dismissed, and he prosecutes an appeal to this court.

He assigns as error the action of the court below in dismissing his appeal. We think the action of the court in dismissing said appeal was in conformity with the statute on the subject, authorizing appeals from the justice to the county court. See Code Cr. Proc. 1895, arts. 889, 890. Said articles require that bond shall be given with security in double the amount of the fine and costs; the same to be filed and approved by the justice within 10 days after the judgment of the court refusing a new trial has been rendered, and not afterwards. Miller v. State, 21 Tex. App. 275, 17 S. W. 429. In that case appellant offered to file a good and sufficient bond in double the amount, which was refused; and it was there held that the action of the court was correct. If an excuse could be offered for failure to file such bond, it has not been done in this case. Appellant insists that

he did not have a lawyer, but relied on the constable and the justice of the peace to perfect his appeal. This affords no excuse. The law requires and places the obligation on him to perfect his appeal; and if he had procured a lawyer, and his own lawyer had made the same mistake, it could not avail him anything. The judgment is affirmed.

#### GLASSCOCK v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CRIMINAL LAW — APPEAL — NEW TRIAL — BILL OF EXCEPTIONS — STATEMENT OF FACTS — APPROVAL.

1. Bills of exceptions not bearing the approval of the trial judge cannot be considered.

2. The statement of facts cannot be considered where it was filed on the day court adjourned, but was approved nine days thereafter without an order for that purpose.

3. Grounds for a new trial cannot be considered without a bill of exceptions, or statement of facts in the record.

Appeal from Johnson county court; F. E. Adams, Judge.

Walter Glasscock was convicted of violating the local option law, and appeals. Affirmed.

Mann Trice, for the State.

HURT, P. J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' imprisonment in the county jail.

The attorneys for appellant prepared eight bills of exception, which are found filed in this record, but they do not bear the approval of the trial judge thereto. This was necessary for this court to revise the matters contained in said bills. The statement of facts was approved on September 13th. Court adjourned September 4th, and the clerk seems to have filed this statement of facts back, so as to show that it was filed on the day on which the court adjourned. One of two propositions is clear,—either that the clerk filed it back so as to make it appear that it was filed on the 4th, or that the court approved the statement of facts nine days after the court adjourned, without an order for that purpose. In either event this statement of facts cannot be considered. There being neither bills of exception nor statement of facts in the record, the grounds of the motion for a new trial cannot be considered. The judgment is affirmed.

#### WAKEFIELD v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CRIMINAL LAW — APPEAL — NEW TRIAL — INSUFFICIENCY OF RECORD.

The overruling of a motion for new trial for insufficiency of evidence, and the application of the law thereto, cannot be considered where there are no bills of exception or statement of facts in the record.

Appeal from Hill county court; W. C. Morrow, Judge.

C. J. Wakefield was convicted of violating the local option law, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of selling intoxicating liquors in violation of the local option law, and his punishment assessed at a fine of \$25 and 30 days imprisonment in the county jail; hence this appeal. There are no bills of exception or statement of facts in the record. Therefore the action of the court in overruling the motion for a new trial cannot be revised, the grounds contained in the motion referring alone to the sufficiency of the evidence and the application of the law to the evidence as given in the charge of the court. The judgment is affirmed.

#### BROWN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 5, 1898.)

CRIMINAL LAW—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—SWINDLING—INDICTMENT.

1. Defendant obtained money by representing directly to a bank that he had a deposit in another bank, drawing his check for the amount against such deposit. This representation was shown to be false by the testimony of the latter bank's clerk. Defendant testified that he believed at the time that he had the amount claimed on deposit. *Held*, that a special charge on circumstantial evidence was unnecessary.

2. A person may be guilty of swindling by the use of a fictitious name instead of his real name.

3. An instruction that, in order to convict, the jury must believe that defendant procured money on the faith of his representation that he had money in a certain bank, which representation was the one charged in the indictment, excludes the idea that they could convict if he obtained the money on any other representation.

4. The omission to instruct with reference to the purpose for which certain evidence was admitted was not ground for reversal, where no prejudice was shown.

5. An indictment which charges that defendant obtained money from one bank by falsely representing that he had money in another bank is not defective in failing to allege that the latter was incorporated.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

J. W. Brown was convicted of swindling, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of swindling, and his punishment assessed at imprisonment in the penitentiary for a term of six years; hence this appeal. Appellant reserved an exception to the failure of the court to give the special charge requested by him on circumstantial evidence. We have examined the record carefully, and, in our opinion, this is not a case depending wholly on circumstantial evidence. The offense here charged is swindling by obtaining \$200 from

the First National Bank of Ft. Worth on the false representation that appellant then had \$5,225 in the Missouri National Bank of Kansas City, Mo., or that he had credit to that amount in said bank, and was authorized to draw against it. The proof shows that he made these representations directly to the Ft. Worth bank, and that he drew his check in favor of said bank against the Missouri bank for said amount; and on this representation, which was shown, by the testimony of an employé of said bank, to be false, he obtained said \$200 from the Ft. Worth bank; and, besides this, the defense set up by appellant, and predicated on his testimony, was a positive claim by him that he believed he had at the time more than that amount of money in the Missouri National Bank. There was no occasion for the court to give the requested charge.

Appellant in his motion for a new trial complains that the court refused to give his charges numbered 1, 2, 3, 5, and 6. The first requested charge appears to be based on the idea that if J. W. Brown was a fictitious name, and not the real name of the appellant, he could not be convicted of swindling by the use of such fictitious name instead of his real name. This view is too absurd for discussion.

The second and third requested instructions involve the idea that if the obtention of the money was procured on a draft of \$15,000, drawn by said Brown as secretary and treasurer of the Flury Cattle Company, and deposited with the Ft. Worth bank at the same time that said \$200 was procured, and that said money was paid out by said bank on the faith and credit of said \$15,000 draft, and not on the faith of the \$5,225 draft, then the jury should acquit the defendant. The charge of the court, which instructed the jury that, before they could convict the defendant, they must believe that he procured said \$200 on the faith of his representations that he had \$5,225 in the Missouri National Bank, was sufficient on this subject, and it clearly excluded the idea that they could convict him if he obtained the money on any other representation than that contained in the charge given by the court and presented in the indictment. The defense set up, as we understand from the record, was based on the idea that the defendant believed he had in the Missouri National Bank at least the amount of money drawn for by him; and the court gave a full and liberal charge to the jury presenting this defense, and this was all that was required.

Appellant in his motion for a new trial also complains because the court failed to properly instruct the jury with reference to the purpose for which the Mitchell matter was introduced in evidence, and also as to the failure of the court to limit the testimony with regard to the Washer Bros.' drafts. This evidence was admitted for the purpose of showing the intent of appellant as to the transac-

tion under investigation. It is not at all probable that the jury convicted the defendant of any of these transactions. The jury had the right to look to these transactions in determining the intent of appellant in obtaining the money alleged in the indictment. The law with regard to charging the jury has been changed, and it must appear to this court that the omission in the charge was calculated to injure the rights of the accused. We are of opinion, however, that under the statement of facts in this case, when the charge is looked to as a whole, the omission complained of was not calculated to injure the accused.

Appellant also further complains that the indictment is defective because it does not allege that the Missouri National Bank was incorporated. In reply to this it is sufficient to say that the Missouri National Bank was not the party alleged to have been injured in the swindling, and the contention does not come within the rule laid down in *White v. State*, 24 Tex. App. 231, 5 S. W. 857, and *Nasets v. State* (Tex. Cr. App.) 32 S. W. 698. The judgment is affirmed.

DAVIDSON, J., absent.

#### McNAIR v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—APPEAL—REVIEW.

In the absence of a statement of facts, the action of the court refusing to give appellant's requested instructions cannot be revised.

Appeal from Hill county court; W. C. Morrow, Judge.

W. T. McNair was convicted of violating the local option law, and he appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Conviction for violating the local option law, the punishment being assessed at a fine of \$25, and 20 days' imprisonment in the county jail. There are no bills of exception or statement of facts in the record. We find the judgment of the court overruling the motion for a new trial, but the motion itself is not contained in the record. In the absence of the statement of facts, the action of the court refusing to give appellant's requested instructions cannot be revised. The judgment is affirmed.

#### WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### GAMING—BETTING AT CRAPS.

Under an indictment for betting at craps, it is immaterial whether it was a banking game, or a game played between individuals.

Appeal from Limestone county court; A. J. Harper, Judge.

Archie Williams was convicted of betting at craps, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of betting at a game played with dice, commonly called "craps," not at a private residence, and his punishment assessed at a fine of \$15; hence this appeal. Appellant asked several charges in effect instructing the jury that if they believed the game bet at by appellant was a banking game to acquit him, it being contended that he was not charged with betting at a banking game. These charges were refused by the court. The proof showed that the game defendant bet at was a banking game, called "craps." We have heretofore held that, under an indictment of this character, it is immaterial whether it was a banking game or a game played merely between individuals; that it was equally a betting at a game of craps. See *Thompson v. State* (Tex. Cr. App.) 38 S. W. 785; *Id.*, 39 S. W. 298. The judgment is affirmed.

#### BARTON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—FORMER ACQUITTAL—PLEA.

1. A plea of former acquittal should be interposed in bar together with the plea of not guilty, or it may be relied on alone.

2. A plea of former acquittal cannot be considered when interposed after verdict.

Appeal from Hill county court; W. C. Morrow, Judge.

G. E. Barton was convicted of violating the local option law, and appeals. Affirmed.

Mann Trice, for the State.

HURT, P. J. Conviction for selling intoxicating liquors in violation of the local option law. No bills of exception appear in the record, and no motion for a new trial. We have in the record, however, what is termed by appellant "a special plea in bar of this prosecution." This plea was filed and presented after conviction and judgment. It begins as if it was intended as a plea of former acquittal or conviction, setting out that he had been placed upon trial in this same case of the same offense, and the jury were duly sworn and impaneled, and that the evidence was heard on that trial. It then proceeds to set out all the evidence received on that trial, and closes by asking the court "to dismiss his said case, and let him go forthwith." On the margin of the record this is called a "motion for a new trial." It is so treated in the judgment of the court overruling the same, but it is not a motion for a new trial. If this plea of former acquittal had been in proper form, it came too late, and should have been interposed in bar of the prosecution, and along with the plea of not

guilty, or it could have been relied on alone, without a plea, but it cannot be heard after verdict. We find nothing in the record, as presented to us, that would authorize this court to reverse the judgment, and it is therefore affirmed.

### CUNNINGHAM v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

#### CRIMINAL APPEAL—INSTRUCTIONS—HARMLESS ERROR—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. An instruction to find accused guilty if he stole three hogs, "or either of them," was harmless, though the evidence showed that, if he was guilty at all, he was guilty of stealing all of them.

2. An accused convicted of stealing hogs is not entitled to a new trial on the ground of alleged newly-discovered evidence that a witness would testify that the hogs the prosecutor owned were of a different kind than those alleged to be stolen for want of diligence, where the witness had testified at the trial on accused's behalf.

Appeal from district court, Frio county; M. F. Lowe, Judge.

Ben Cunningham was convicted of theft, and appeals. Affirmed.

Geo. C. Herman, I. N. Spann, and F. H. Burmeister, for appellant. Mann Trice, for the State.

**HENDERSON, J.** Appellant was convicted of theft of hogs, and his punishment assessed at three years' confinement in the penitentiary; hence this appeal.

Appellant complains of the charge of the court, because it instructed the jury that if the defendant committed the theft of said three hogs, as charged in the indictment, or either of them, to find him guilty; his contention being that, if the evidence showed theft at all, it was theft of all of said hogs, and not of any one of them. We concede the truth of this observation, yet we utterly fail to see how such a charge could injure appellant; and as the law now is, the charge must not only be excepted to, but it must appear to be both erroneous, and calculated to injure the rights of appellant.

Appellant insists that a new trial should have been granted him on account of newly-discovered evidence, to wit, he claims that he has, since the trial, discovered that Lease Oden would testify that the hogs appellant is charged with having stolen, and the hogs claimed by the prosecutor, Riley, were razor-back hogs, and were not Berkshire and Poland China mixed, as testified to by Riley. In reply to this it is sufficient to say that the witness Lease Oden was on the stand on behalf of appellant. The state, in its original testimony, had proved by Riley and others the kind of hogs he owned, and which he claimed had been stolen, and that they were Poland China and Berkshire mixed,—better than the

ordinary breeds of hogs in that portion of the country. Defendant's witness Oden was placed on the stand afterwards, and testified about these hogs. Certainly the least diligence on the part of appellant would have ascertained from said witness what he knew about the kind of hogs owned by Riley.

The charge of the court sufficiently instructed the jury with regard to the difference between theft and trespass, and fully and fairly submitted appellant's defense; that is, the jury were told that if they believed from the evidence—or if they had a reasonable doubt—that defendant, if he took the hogs, honestly believed at the time that they were his (defendant's) own hogs, then to acquit him. This was all that the court was required to do. We do not believe that the conviction in this case is unsupported by the testimony. In our opinion, it is a clear case of theft, and the jury were fully authorized to find as they did. The judgment is affirmed.

### DROAK v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1898.)

#### CRIMINAL LAW—INSTRUCTIONS—EVIDENCE.

1. Where the party robbed testifies directly to the facts, and positively identifies defendant as the one who robbed him, the jury need not be instructed on circumstantial evidence.

2. Where the evidence will sustain a verdict of guilty, the jury may disregard alibi testimony, though the latter is complete, and covers the whole time during which the alleged offense was committed.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Jack Droak was convicted of robbery, and appeals. Affirmed.

Moseley & Smith, for appellant. Mann Trice, for the State.

**DAVIDSON, J.** Appellant was convicted of robbery, and his punishment assessed at five years in the penitentiary; hence this appeal.

Appellant complains of the failure of the court to charge the jury on circumstantial evidence. This is not a case dependent on circumstantial evidence. The evidence is of a positive character. O. L. Carter, the party robbed, testified directly to the facts, and positively identified the defendant as the person who robbed him.

There is nothing in appellant's suggestion contained in his bill of exceptions with reference to the argument used by the prosecution. The argument, though not warranted by the evidence, was not of a nature calculated to injure the appellant, nor was any instruction presented by counsel to the court for the jury to disregard said argument. We have examined the record carefully, and, in our opinion, the evidence amply sustains the verdict. The fact that appellant produced alibi testimony, even though it had been complete, and covered the whole time during which the alleged rob-

bery was committed, yet it was competent for the jury to disregard the same if they saw fit. The judgment is affirmed.

### GLASSCOCK v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### LOCAL OPTION LAW—VIOLATION—EVIDENCE.

Several witnesses testified that accused sold a beverage resembling beer in taste and smell. Large quantities of the beverage were shipped to him, under the name of "hop ale," from a certain brewery. A witness testified that he knew what beer was, and that a bottle of "hop ale" of the character accused sold was beer. Held sufficient to show that accused had violated the local option law.

Appeal from Johnson county court; F. H. Adams, Judge.

Walter Glasscock was convicted of violating the local option law, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$50 and 25 days' imprisonment in the county jail.

The only question presented is as to the sufficiency of the proof to sustain the verdict of the jury. We have examined the record carefully, and, in our opinion, the proof is amply sufficient. All of the witnesses describe the beverage as resembling beer in taste and smell; and it is further shown that said beer was shipped in large quantities from the Ft. Worth Brewery, under the name of "hop ale." One of the witnesses, indeed, states that he drank a considerable quantity of it, and it did not intoxicate; but he also stated that the same quantity of beer would have produced no effect on him. Dink Reddell, however, by his evidence, clinches the case against appellant. He stated that he knew what beer was, and that he had drunk beer made by the Ft. Worth Brewery, and that the bottle of "hop ale," so called, which was handed him by the attorney, and which was shown to be of the same character as that sold, was beer. He stated that he knew it was beer by its smell and taste, and that it tasted and looked like the beer of the Ft. Worth Brewery; that he had bought two bottles labeled "hop ale" from the defendant Glasscock; and that it was beer. There is no question, in our opinion, as to the sufficiency of the proof to sustain the conviction, and the judgment is affirmed.

### ROBERSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

#### LIVE STOCK—REGULATION—MOVEMENT OF CATTLE.

1. Under Rev. St. 1895, art. 5043k, providing that the quarantine line, as fixed by the live-

stock sanitary commission, shall not apply from the 1st day of November to the 15th day of May of each year, an order of the commission prohibiting the moving of cattle across a certain line from February 15th to November 15th was void.

2. The further provision of said section that the quarantine line must conform with the federal line has nothing to do with the question of the time cattle may be moved within the state.

Appeal from Foard county court; Robert Cole, Judge.

Mart Roberson was convicted of driving cattle across the quarantine line established by the live-stock sanitary commission of the state, and he appeals. Reversed.

F. E. Dycus, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of driving cattle across the quarantine line established by the live-stock sanitary commission of the state of Texas, and fined \$250; hence this appeal.

In driving the cattle, he evidently violated the order of the commission. The question before us is whether the commission had a right to fix the time (as was done in this case) for the driving of cattle. The commission prohibited, by an order, the driving and moving of cattle across a certain line from the 15th day of February, 1896, to the 15th day of November, 1896. The commission had no authority to make any such order. In doing so they violated the plain, unequivocal provisions of the statute upon this subject. The statute (Rev. St. 1895) provides as follows: "Art. 5043k. Any quarantine line that may be fixed by the live-stock sanitary commission against Texas or splenic fever, shall be so fixed as to conform to the federal quarantine line established, or that may be established, by the United States department of agriculture; provided, however, that as to the shipment or movement of live-stock within the limits of the state, such quarantine lines, and the regulations in relation thereto, shall not apply from the first day of November to the fifteenth day of May of each year; provided the quarantine line now recognized and established by federal authority within the state of Texas, shall not be changed prior to December 1, 1893, but said line as is now established shall remain in full force until said date." There is no conflict in the evidence as to the following facts: That appellant was on or about April 1, 1896, in the employ of J. F. Wilson, as ranch manager of his cattle, and as such manager, on the 7th day of April, 1896, did drive a herd of cattle belonging to said Wilson, consisting of about 500 head, from Wilbarger and Archer counties into the Wilson pasture in Foard county, Tex., crossing the quarantine line. Appellant had a right to drive the cattle across the line at that time, because the statute expressly provides that, as to the shipment and movement of live stock within the limits of this state, such quaran-

tine lines, and the regulations in regard thereto, shall not apply from the 1st day of November until the 15th day of May of each year. It is insisted by the assistant attorney general that the quarantine line established must conform with that established by the federal authorities. This position is correct, but it has nothing whatever to do with the question as to when the cattle can or cannot be moved within this state. We deem it unnecessary to discuss the question as to whether the legislature could confer the powers which have been conferred upon the live-stock sanitary commission. When necessary, we will discuss that question. The indictment charges no offense against the laws of this state, and should have been quashed upon motion of appellant. The judgment is reversed, and the prosecution ordered dismissed.

#### KEARLY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—APPEAL—RECORD—REVIEW—NEW TRIAL.

1. Where there are no bills of exception or statement of facts in the record, a refusal to give certain instructions cannot be reviewed.

2. Objection on a motion for a new trial to testimony cannot be determined in the absence of a bill of exceptions.

Appeal from Johnson county court; F. E. Adams, Judge.

Thornton Kearly was convicted of violating the local option law, and appealed. Judgment affirmed.

Mann Trice, for the State.

DAVIDSON, J. Conviction for violating the local option law. There are no bills of exception or statement of facts in the record. Special charge No. 1 requested by appellant has reference to the testimony of the witness Long as to the purchase of the United States internal revenue license by one Bob Coulter, and by the firm of Newbury & Chapman, as testing the credibility of the appellant, etc. In the absence of the statement of facts, we do not know that this charge was called for. The same observations apply with reference to requested charge No. 2. We desire to distinctly state that the court must charge the law applicable to the evidence and the indictment; and we cannot determine whether such a charge is required, unless we have the evidence before us.

In the motion for a new trial, appellant complains of the action of the court in permitting the witness Long to testify to certain matters. This matter cannot be reached in the motion for a new trial, in the absence of a bill of exceptions. Appellant also complains that the evidence upon which the conviction was obtained is not the best evidence, etc. The evidence is not before us, and therefore we cannot consider this objection. A

great many matters are complained of in the motion, which cannot be revised in the absence of the statement of facts. In some cases the court would have the right to instruct the jury that local option was in force, and we cannot pass upon this objection without a statement of the facts. No errors appearing in the record, the judgment is affirmed.

#### WADE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—APPEAL—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Where there is a conflict in the testimony, a conviction will not be disturbed.

2. It is not error to refuse a new trial on the ground of newly-discovered evidence which is to be adduced by a witness whom defendant testified at the trial was present at the commission of the offense.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Cullus Wade was convicted of violating the local option law, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' imprisonment in the county jail; hence this appeal.

There was a conflict in the testimony. The witness Neal testified in behalf of the state "that in Ney Wade's saloon, at Quinlan, Tex., he called for a pint of whisky. Ney Wade and the defendant were both behind the bar. When I asked for the whisky, Ney Wade set a pint of whisky on the bar. Witness put the money on the bar, and the defendant picked up the money and put it in the cash drawer. I had no prescription," etc. He says that there was no one in the room except Ney Wade, the defendant, and witness. Ney Wade was permitted to testify (though previously convicted for this same offense), in behalf of defendant, "that he was in his place of business all of the day on which Neal testified this transaction occurred; and when Neal called for the whisky he was filling up some bottles, and put a bottle on the counter. Charley Hart being at the time present; that he never noticed who took the money; that this defendant had no interest in the business, and the witness did have the defendant employed; that they were brothers; he did not have Charley Hart employed to conduct the business." The defendant testified "that he did not sell any whisky; that he was not behind the bar; was out of reach of it, and was sitting over in one corner of the room, not far from the bar, but out of reach of it." Neal was recalled, and testified in rebuttal that the defendant was not sitting down in the corner of the room when he bought the whisky, but was behind the bar, leaning up against it,

facing the witness. The conflict in the testimony was decided by the jury against the defendant, and in favor of the state, and, the jury being the exclusive judges of the credibility of the witnesses and the weight to be given their testimony, we are not authorized to disturb their finding.

Nor was there any error in the refusal of the court to grant a new trial on the alleged newly-discovered testimony of Charley Hart. If Charley Hart was in the saloon at the time, as contended by defendant, and as testified to by Ney Wade, his evidence was not newly-discovered, for, if he was in the saloon, the defendant knew that fact; and the attorney for appellant testified in the case "that, prior to this trial, he had talked with the witness Neal with reference to this very matter, and he states that Neal told him that when he got the whisky both Charley Hart and defendant were behind the bar, and one of them got the money, and he thought it was Charley Hart." We do not understand how this could be newly-discovered testimony. The judgment is affirmed.

#### SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CRIMINAL LAW—APPEAL—RECORD—BILL OF EXCEPTIONS—SALE OF LIQUOR.

1. Where there is no bill of exceptions in the record, the action of the trial court in overruling an application for continuance will not be reviewed on appeal.

2. A conviction on conflicting evidence will not be disturbed.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Crouch Smith was convicted of violating the local option law, and appealed. Judgment affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$100 and 60 days' imprisonment in the county jail; hence this appeal.

There are no bills of exception in the record, and therefore the action of the court overruling the application for a continuance will not be considered. It is also contended that the evidence does not support the conviction. There was some conflict in the evidence. The evidence for the defendant is of rather a negative than of a positive character in regard to the transaction. The state's evidence discloses that the witness George bought from the defendant a half pint of whisky, paying him 25 cents for it. At the time he bought it, defendant was in the room fitted up with saloon fixtures, and was behind the bar. Directly after the purchase, the witness George, in an intoxicated condition, was taken by the sheriff to the county attorney's office, and there made the complaint against defendant.

The defendant was sent for, and came into the county attorney's office at the time, and was then and there identified by the witness George as the man who sold him the whisky. So far as the record shows, he did not deny this. Concede that there was a conflict in the testimony, still the evidence is sufficient to support the judgment of conviction. The jury believed the evidence introduced for the state, and we are not authorized to set aside the conviction on the ground that they could not have so believed. If the witness George told the truth, the defendant was certainly guilty. The judgment is affirmed.

#### WARTELSKY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CRIMINAL LAW—APPEAL.

1. When the record does not contain the evidence, the court's refusal to give certain instructions cannot be considered on appeal.

2. When the record contains no bill of exceptions, the rulings of the court cannot be considered on appeal.

Appeal from Hill county court; W. C. Morrow, Judge.

Joe Wartelsky was convicted of illegally selling liquor, and appeals. Affirmed.

Mann Trice, for the state.

DAVIDSON, J. Appellant was convicted of selling intoxicating liquors in a local option precinct in Hill county, and appeals.

The evidence is not before us, nor does the record contain any bills of exception. The grounds of the motion for a new trial relate—First, to certain rulings of the court; and, second, to the court's refusal to give certain requested instructions. In the absence of bills of exceptions, the action of the court complained of in the first ground cannot be considered; and, in the absence of the testimony, the other ground cannot be considered. The judgment is affirmed.

#### CASTLEMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CRIMINAL LAW—APPEAL—STATEMENT OF FACTS.

A statement of facts not approved by the trial judge cannot be considered.

Appeal from Johnson county court; F. E. Adams, Judge.

Ben Castleman was convicted of violating the local option law, and appeals. Affirmed.

Plummer & Green, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was charged by information with a violation of the local option law. He was convicted, and his punishment assessed at a fine of \$50 and imprisonment in the county jail for a term of 30

days. A motion was made to quash the affidavit and information. We have examined the grounds of the motion, and find they are not sustained by the record. The affidavit and information are in good form, and properly set out the offense sought to be charged. The statement of facts cannot be considered, because not approved by the trial judge. The judgment is affirmed.

#### HURLOCK v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—APPEAL—NOTICE.

The court of criminal appeals has no jurisdiction where no notice of appeal was given and entered of record in the court below.

Appeal from Ellis county court; J. C. Smith, Judge.

Joel Hurlock was convicted of an aggravated assault, and appeals. Dismissed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and fined \$25. His recognizance appears in the record, but there was no notice of appeal given and entered of record in the court below. Because this was not done, the jurisdiction of this court does not attach, and the appeal is dismissed. But, if the appeal had been properly consummated, there is nothing in the record authorizing a reversal of the judgment, because it contained neither a bill of exceptions nor a statement of facts, and no error is complained of in the record. For the reason indicated, the appeal herein is dismissed.

#### HURLOCK v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—APPEAL—FAILURE TO GIVE NOTICE.

An appeal will be dismissed where accused failed to give notice, and have the same entered of record in the court below.

Appeal from Ellis county court; J. C. Smith, Judge.

Joel Hurlock was convicted of disturbing an assembly of people, and appeals. Dismissed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of disturbing an assembly of people by using loud, vociferous, vulgar, obscene, and indecent language, and by yelling and shrieking in a manner calculated to disturb the inhabitants of the public place mentioned. Appellant entered into a recognizance to abide the result of his appeal to this court, but failed to give notice of appeal and have the same entered of record in the court below. For this reason

this appeal will be dismissed. But, if the jurisdiction of this court had attached, there is nothing presented by the record that would require a reversal of the judgment, as no statement of facts or bills of exception appear in the record. For the reason indicated above, the appeal is dismissed.

#### BUTLER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—APPEAL—STATEMENT OF FACTS—TIME OF FILING—INDICTMENT—VALIDITY OF COUNTS—TRIAL.

1. A statement of facts filed out of term, and without an order entered for that purpose, cannot be considered.

2. Where the first count of an indictment is defective, but the second count is valid, there is no error, where the court in his charge submits the second count alone to the jury.

Appeal from Johnson county court; F. E. Adams, Judge.

J. A. Butler was convicted of permitting gaming on premises under his control, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of permitting gaming on premises under his control, and his punishment assessed at a fine of \$25; hence this appeal.

The statement of facts cannot be considered, because filed out of term time, and without an order entered for that purpose. A motion was made to quash the indictment. If it be conceded that the first count in the indictment was defective, and should have been quashed, the second count is a valid one, and this count alone was submitted to the jury in the charge of the court. No error appearing in the record, the judgment is affirmed.

#### ZOLLIFFER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CARRYING WEAPONS—INSTRUCTIONS—EVIDENCE.

1. Where defendant was seen carrying his pistol in a direction exactly opposite to that from the place where he expected to sell it, to his home, an instruction that, in going and returning from such place, defendant should have taken the most direct route, is not prejudicially erroneous.

2. Testimony that defendant was seen carrying a pistol in January, 1897, is not sufficient to show that the offense was committed some time before January 26, 1897, when the indictment was filed and presented, charging the offense to have been committed on or about January 11, 1897.

Appeal from Ellis county court; J. C. Smith, Judge.

Lee Zollicoffer was convicted of carrying a pistol, and appeals. Reversed.

Mann Trice, for the State.



HENDERSON, J. Appellant was convicted of carrying a pistol, and his punishment assessed at 10 days' imprisonment in the county jail; hence this appeal.

Appellant insists that the court erred in his charge to the jury, in stating "that, in going to and returning from the place where he intended to sell the pistol, defendant should have taken the most direct route." We do not think this charge erroneous. At least, it is not of that character calculated to injure the rights of appellant. There is no question (looking at the testimony) that, at the time appellant was seen carrying the pistol, he was not then en route from the place where he expected to sell his pistol to his home. He was in exactly the opposite direction. We have heretofore held that it would be legitimate for a party to carry a pistol to a point where he expected to sell and deliver it, but that this did not authorize him to carry the pistol promiscuously at other points, and that it was his duty on such occasion to carry it directly to the point of sale, and, if he did not then sell it, to carry it home. See *Snider v. State* (Tex. Cr. App.) 43 S. W. 84.

Appellant also contends that it is not proved that the pistol was carried prior to the filing and presentment of the indictment. The indictment was presented on the 26th day of January, 1897, and charged that defendant did carry a pistol on or about the 11th day of January, 1897. The witnesses only state, as to time, "in January, 1897," they saw appellant carrying a pistol. The time is not more definitely stated by any of them. It occurs to us that this is fatal to the conviction. The burden was on the state to show some definite time anterior to the filing and presentment of the indictment. "In January, 1897," simply, is not enough. As we are not authorized to indulge presumptions against the defendant, the transaction may have occurred after the 26th of January, and still have been in the month of January. The indictment charges that the offense occurred on the 11th of January, and, no doubt, with more care on the part of the prosecution, the state might have proved that it was on the 11th day of January, or on some day anterior to the 26th of January; but, presumably on account of negligence on the part of the prosecution, this proof was not made. For the error discussed the judgment is reversed and the cause remanded.

#### STILES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### INTOXICATING LIQUORS—EVIDENCE OF SALE.

Two witnesses testified that they purchased whisky at a place where defendant ran a cold-storage business,—the transaction being carried on with a negro,—and that defendant was present during the conversation, and said nothing to them, but said something to the negro. De-

fendant denied ever having seen, or sold whisky to, the witnesses. *Held*, that the evidence was sufficient to show a sale of liquor by defendant.

Appeal from Fannin county court; James Q. Chenoweth, Judge.

H. P. Stiles was convicted of illegally selling liquor, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' imprisonment in the county jail; hence this appeal.

The only assignment of error in the record is based upon the alleged insufficiency of the evidence to support the conviction. Morehead testified for the state: "That on October 12, 1896, in the town of Ladonia, in Fannin county, Texas, in a house where cold storage was run, and was supposed to be kept by the defendant, he got a quart of liquor. That when he went into the house he called a negro from behind the counter to one side, and told him that he wanted a quart of liquor. The negro told him, 'All right.' Whereupon he pulled out seventy-five cents in money, and handed it to the negro, and was informed by the negro that it was not sufficient; and Mr. N. M. Autry, who had gone into the saloon with the witness, pulled out twenty-five cents, making the balance of the dollar, and gave it to the negro. During all this time the defendant was behind the bar, and there were no other persons, except the defendant and the negro, behind the bar. The negro went behind the bar after getting the money, stooped down, rattled some bottles, raised up, pulled the drawer in the bar back a little, and moved some bottles around which were in it. We had told him that we wanted the whisky in two bottles. The negro approached near where the defendant was standing, and said something to him, not understood by the witness. The defendant stood there a short while, and then moved a little one way, to the end of the bar, reached up on the back bar or shelf, took down a quart bottle of whisky, set it underneath the bar, stood there a few seconds, looked towards us and the crowd, and gave his head a kind of a side nod. At this time there were a great many persons in the house, standing about promiscuously; and the defendant was at the opposite end of the room from us, behind the bar. At the time, or just after he nodded, there was a man, with whom I was not acquainted, stepped to the end of the bar nearest to us, reached down behind the bar, picked up a quart of whisky, and left the house. I then stepped to the same place, got a quart bottle of whisky, which was the only bottle of whisky then there. Defendant saw me, but made no objection. I raised up, and slipped it down in my trousers. I had no conversation with the defendant while I was in the house, and none about the liquor which I got." On cross-examination he said that he carried on all the conversation with the negro,

and the transaction was with the negro. The witness Donaldson testified for the state "that he lived in Ladonia; that the house referred to by witnesses was a place under the control of the defendant, and where he run a cold-storage business during and about the time of the transaction referred to by said witnesses." The defendant testified in his own behalf that he had no recollection of ever having seen Morehead or Autry at any time prior to his arrest, and that he never sold Morehead or Autry any whisky at any time. This is, in substance, the testimony adduced on the trial. The whisky was purchased at the defendant's place of business, which was run by himself as a cold storage. This negro was evidently in the employ and under control of appellant. There is nothing indicating the contrary, and defendant was present, and saw the sale in his place of business, in violation of law. We think the judgment is sufficient, imposing both the fine and imprisonment against defendant. No error appearing, the judgment is affirmed.

#### HODGE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—LOCAL OPTION LAW—SUFFICIENCY OF EVIDENCE—MOTION FOR NEW TRIAL.

1. On a trial for violation of the local option law, testimony that at or about the time of the alleged sale defendant was working at a certain gin, and was not engaged in the business of selling whisky, did not preclude the idea that he sold whisky as alleged, where the alleged purchaser testified to such fact of sale.

2. It was not error to overrule a motion for a new trial on the ground of the newly-discovered testimony of a witness who knew that defendant was working at such gin at the time in question, as it would not follow that, because defendant was so working, he did not sell the whisky as stated, of which alleged fact there was evidence.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Sam Hodge was convicted for a violation of the local option law, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. This is a conviction for a violation of the local option law, the punishment being assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

The action of the court in overruling the motion for a continuance will not be considered, because a bill of exceptions was not reserved to such ruling. It is also contended that the evidence is not sufficient to support the judgment. The witness Fred Yeager testified that "about the 1st of November, or early in November, he bought a pint of whisky from the defendant, and paid him fifty cents for it. Defendant called it 'ginger ale', but whisky in Hunt county is commonly called ginger ale; and that which he bought was whisky." This was denied by defendant, who relied mainly upon his own testimony, showing that, at the

time, he was working at Murray's gin and was not engaged in the business of selling whisky. He introduced several witnesses tending to show that he was working at Murray's gin about the time that Yeager says he bought the whisky from him. These witnesses were not very definite as to the time when defendant worked at said gin. But, even if he was working at said gin, it would not preclude the idea that he did sell the whisky to Yeager.

Nor did the court err in overruling the motion for a new trial, on the ground of the alleged newly-discovered testimony of B. S. Polly, who states that he knew that the defendant was working at Murray's gin on the 3d of November, because on that day he bought meal at said gin, there being a mill run in connection with the gin, and that the defendant was working at said mill on that day, and that the defendant worked at said mill for some time after this, but he did not know how long. This might have been true, and yet it does not militate against the state's case. It would not follow that, because the defendant was working at the mill and gin he did not sell the whisky as stated. In this connection it will be noted that the defendant did not place upon the stand as a witness or as witnesses the proprietor or proprietors of said gin and mill. If defendant worked continuously at said gin and mill, the proprietor or proprietors would perhaps have had better opportunities of knowing his movements during such time from the fact that he or they were the employers of defendant. The witness Deaton, who testified for the defendant, shows that the defendant, Yeager, and the witness, drank together about the time testified to by Yeager, and that the defendant had a bottle of whisky, and treated witness and Yeager, and that Yeager did not at that time pay anything for it, nor did the witness; that the defendant did not ask any pay. Yeager denied the presence of the witness Deaton at the time and place he bought the whisky from the defendant, and testified that no one else was present at the time. The court did not err in overruling said motion for a new trial upon any of the grounds mentioned. The judgment is affirmed.

#### CASTLEMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

##### CRIMINAL LAW—FILING OF COMPLAINT—INFORMATION—APPEAL—RECORD—REVIEW—PRESUMPTIONS.

1. The refusal to quash an information on the ground that the complaint was filed in justice court, instead of the county court, will be sustained where the record does not show that the complaint was filed in the justice court.

2. The refusal to quash an information on the ground that there was nothing in the case to show that any complaint was filed against defendant at the filing of the information will be sustained, where the complaint was filed on the day of trial by order of the court, and, for aught that appears, it was among the papers of the

case, and was perhaps attached to the information.

3. Where the complaint is attached to the information, the filing of the information renders untenable an objection that no complaint was filed when the information was filed.

4. It is not necessary to pass on the admissibility of testimony where a statement of the facts is not in the record, so as to enable the court to say whether the admission of the testimony was prejudicial.

Appeal from Johnson county court; F. E. Adams, Judge.

Beh Castleman was convicted of violating the local option law, and he appeals. Affirmed.

Plummer & Green, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted under an information charging him with violating the local option law in said county, and his punishment assessed at a fine of \$75 and imprisonment in the county jail for 40 days; hence this appeal.

Appellant made a motion to quash the information, among other things, on the ground that the affidavit or complaint shows that said county attorney filed the same in the justice court, instead of the county court; whereupon defendant says that said complaint could not be transferred to the county court by said justice of the peace, to be made the basis of this prosecution. In answer to this, it is sufficient to say that there is nothing in the record showing that said complaint was ever filed in the justice court. As a further ground of his motion, appellant moved to quash said information, "because it does not show, and neither does any paper in the case show, that any complaint was filed against defendant in the county court at the time said information was filed against him." There is no proper bill of exceptions bringing this matter before us. If we recur to the complaint, we find that the same was sworn to on the 24th day of May, 1897, and that the information was filed on the 3d of July, 1897. Attached to the complaint is the following indorsement: "Filed by order of court July 10, 1897,"—which is signed by the clerk of the county court of Johnson county. The trial was on July 10, 1897. For aught that appears, said complaint was among the papers of the cause, and, on the presentation of the motion, it would seem that the court then ordered the complaint filed. Under the circumstances of this case, we will presume that it was among the papers of the cause, and may have been attached to the information. If such was the case, the filing of the information would be sufficient, as it would include the filing of both. See *Stinson v. State*, 5 Tex. App. 31; *State v. Elliott*, 41 Tex. 224.

Appellant reserved a bill of exceptions to the action of the court in admitting an exemplified copy from one of the books of the internal revenue collector's office of the

Fourth district, at Dallas. This exemplified copy was a memorandum copy from said books, showing that appellant had taken out an internal revenue license as a liquor dealer in Johnson county. It is not necessary for us to pass on the admissibility of this testimony, inasmuch as the statement of the facts proven on the trial of this case are not incorporated in the record, and we are unable to tell, even if it be conceded that said testimony was not admissible, whether or not it was injurious to appellant. The testimony may have been otherwise overwhelming to the effect that he had sold liquor in Johnson county, as charged. No errors appearing in the record, the judgment is affirmed.

#### WADE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

In a prosecution for violating the local option law, evidence is sufficient to support a conviction which shows that the purchaser went into defendant's saloon, and called for a pint of whisky; that defendant put the bottle of whisky on the bar, and the purchaser placed 50 cents on the same bar, which was put in the cash drawer by defendant's brother, defendant standing near by.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Ney Wade was convicted of violating the local option law, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail. The motion for a new trial suggests the insufficiency of the evidence to support the conviction. The evidence shows that the purchaser went into the saloon of the defendant, in a local option territory, and called for a pint of whisky. Defendant put the bottle of whisky on the bar. The purchaser placed 50 cents on the same bar, and the defendant's brother took the money, and put it in the cash drawer, the defendant at the time standing near by. We think this testimony is sufficient. We could not well imagine a case more clearly proved. The judgment is affirmed.

#### WILEY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

INDICTMENT FOR ROBBERY—SUFFICIENCY.

An indictment charged that defendant "in and upon N. did make an assault, and did then and there, by the said assault, and by violence to the said N., fraudulently and without the consent of said N., take from the person and possession of him, the said N., one watch, and also said [defendant] did then and there, fraud-

uently and without the consent of the said N., take from the person and possession of him, the said N., seven silver dollars," etc. The court submitted to the jury only the taking of the silver dollars. *Held*, that the indictment sufficiently charged the taking thereof by means of assault and violence.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Oscar Wiley was convicted of robbery, and appeals. Affirmed.

Cunningham & Cunningham, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of robbery, and his punishment assessed at five years in the penitentiary; hence this appeal.

The only question presented for our consideration, worthy of notice, is the validity of the indictment, in connection with the charge of the court. The charging part of the indictment is as follows: "Oscar Wiley, on the 21st day of August, 1897, in the county aforesaid, in and upon W. N. Naler did make an assault, and did then and there, by the said assault, and by violence to the said W. N. Naler, fraudulently and without the consent of said W. N. Naler, take from the person and possession of him, the said W. N. Naler, one watch, and also said Oscar Wiley did then and there, fraudulently and without the consent of the said W. N. Naler, take from the person and possession of him, the said W. N. Naler, seven silver dollars, current coin of the United States,—the same being the property of the said W. N. Naler,—with the intent to deprive the said W. N. Naler of the same, and to appropriate the same to his, the said Oscar Wiley's, own use," etc. The court submitted to the jury only the taking of the seven silver dollars, charged in the latter part of said indictment; and it is contended that this is not a sufficient charge of robbery, inasmuch as it merely alleges the fraudulent taking of said money, etc., and does not allege the taking of same by means of an assault, or by violence, etc. We deem this contention hypercritical. This is not a separate and distinct count, but part of the original charge, and coupled with the assault. The indictment, properly construed, charges the assault, and then charges the fraudulent taking, by means of the assault, etc., of the watch, and also of the money. The latter follows the former, and is coupled with the allegation "then and there." It is not a distinct count, but is a part and parcel of the only count in the indictment. The judgment is affirmed.

#### WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

DEFECTIVE RECOGNIZANCE—DISMISSAL OF APPEAL.

An appeal will be dismissed where the recognizance recites that defendant was con-

victed of a certain offense, but does not recite the offense with which defendant was charged, as provided by Rev. Cr. Code 1895, art. 887.

Appeal from Limestone county court; A. J. Harper, Judge.

Archie Williams was convicted of keeping a gaming house, and appeals. Appeal dismissed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted for permitting a game at cards to be played upon his premises, and upon premises under his control, said premises being then and there a public place, to wit, a gaming house, used for the purpose of gaming. The recognizance recites the fact that "said Archie Williams has been convicted in this cause of a misdemeanor, to wit, permitting gaming upon his premises, in that said Archie Williams, on or about November 20, 1896, in Limestone county, Tex., did unlawfully permit a game at cards to be played upon his premises, and upon premises under his control, the said premises being then and there a public place, to wit, a gaming house, used for the purpose of gaming." This recognizance was entered into on March 20, 1897, and was therefore given under the law in force prior to the late statute, changing the form of recognizances required to be given in misdemeanor appeal cases. The statute in force at the time this recognizance was given requires that said recognizance should recite the offense with which the defendant was charged in the trial court, as well as the fact that he had been convicted of said offense. See Rev. Cr. Code 1895, art. 887. And, for collated authorities, see Willson's Tex. Cr. St. (2d Ed.) art. 888, note 1. Because the recognizance is insufficient in not reciting the offense with which appellant was charged, the appeal herein is dismissed.

#### CARTER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 5, 1898.)

#### PERJURY—EVIDENCE.

It being necessary, to sustain a conviction for perjury, to prove by two credible witnesses, or by one credible witness strongly corroborated, that the statement was false, defendant cannot be convicted of perjury in testifying on the trial of E. to facts making the killing of N. by E. a case of self-defense,—to wit, that, at the time of the killing, N. was advancing on E., in the attitude as if about to draw a weapon,—where but one witness for the state saw the beginning of the difficulty, and the others were first attracted by hearing the pistol fired; and this, though the latter witnesses state that they did not see defendant when the difficulty occurred, since he may have gone into the building immediately at hand.

Appeal from district court, Titus county; J. M. Talbot, Judge.

Alex Carter appeals from a conviction. Reversed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of perjury, and his punishment assessed at two years in the penitentiary; hence this appeal.

It appears from the record that one John Evans was on trial before the district court of Titus county on a charge of murdering one Oscar Neal; that the appellant (Alex Carter) was a witness for Evans on that trial, and swore that Oscar Neal was sitting on a truck on the east side of the platform at the railroad depot in Mt. Pleasant; that he (appellant) and the said John Evans walked together from the east side of said depot, going north along said platform, towards where the said Oscar Neal was sitting; that they stopped before they got to said Oscar Neal, and that he (appellant) sat down on the east side of a small platform, in front of the east door of the freight room of said depot, and that John Evans leaned against said platform; that Oscar Neal was a little way from them to the north, sitting on said trucks; and that he (Oscar Neal) got up, and advanced towards Evans, saying, "I didn't get you this morning, but I will get you now," at the same time running his hand in his bosom, as though he was going to draw a weapon, whereupon said John Evans drew his pistol, and shot Oscar Neal. The perjury is assigned upon the statement that "Neal got up, and advanced towards Evans, saying, 'I didn't get you this morning, but I will get you now,' running his hand in his bosom, as though he was going to draw a weapon." If this statement was false, appellant committed perjury, because the record shows that it was made willfully and deliberately.

To sustain a conviction for perjury, the state is required to prove by two credible witnesses, or one credible witness strongly corroborated, that the statement was false. The serious question before us is: Has such proof been made? Does such proof appear in this record? If one witness had sworn that he was present and saw all that occurred between Evans and the deceased, and heard all that was said by either of them before the shooting commenced, proof from other witnesses tending to show that appellant was not present, and could not have seen and heard what he swore he did, would have been strong corroborative proof of the one credible witness. But have we such a case as that? We think not. But one witness swears to these facts. Pat Roan, for the state, testified that he saw the beginning of the difficulty, and he relates what occurred. Taking his testimony alone, the killing could not have occurred as the defendant (Carter) says that it did. But, when we look to the testimony of all the other

witnesses for the state, it could not have occurred as related by this witness Roan. All of the witnesses who testify on the point (except Roan) speak of John Evans (the defendant in the murder case) going from the south end of the depot platform, and walking north, and shooting the deceased, Oscar Neal, who at the time was sitting north of the door of the freight depot, on a pair of trucks; whereas this witness Roan saw the parties, John Evans and the deceased, Oscar Neal, walking together down the platform from the north. And, moreover, as we read the record, this witness Roan is the only witness who states that he saw the beginning of the difficulty. All of the other state's witnesses state that they were first attracted to the difficulty by hearing the pistol fired, and then they related what they saw after this. None of them state how the difficulty began. Of course, they state that they did not see the defendant, Alex Carter, when the difficulty occurred on the platform, on the east side of the depot, after their attention was attracted to the difficulty. This all might be true, and yet Alex Carter may have been present at the beginning of the difficulty, and not within their view after they were attracted by the firing, as he may have either dodged into the depot at some of the doors, or around the corner. Looking through the whole record, we do not believe that the case of perjury is made as required by the statute; that is, the gist of the perjury as charged against defendant was that he testified on the trial of John Evans to certain facts which made the killing of Oscar Neal a case of self-defense, to wit, that, at the time of the homicide, Oscar Neal was advancing on said John Evans in the attitude as if about to draw a weapon. Now, in order for the state to maintain its case, it was incumbent on it to show by the testimony of two credible witnesses, or by one credible witness strongly corroborated by other evidence, that the homicide did not occur as testified to by the witness Carter. Under the allegations of the indictment, it was not sufficient merely to show that the witness Carter was not present, but it was incumbent on the state to show that the killing did not occur as he stated that it did. This proof was not made by the state as required by the statute; and because, in our opinion, the evidence is not sufficient to sustain this conviction, the judgment is reversed, and the cause remanded.

DAVIDSON, J., absent.

#### WOLFE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### INTOXICATING LIQUOR—ILLEGAL SALE.

1. In a prosecution for violating the local option law, two state's witnesses testified that

they went into a barroom, and bought and paid for beer sold by a negro; that accused refused to allow their companion to enter, because he had "been giving people away." Accused testified that he was only employed to keep watch of the business; never sold intoxicating liquors; that he had no interest in the business; and admitted that he refused state's witness admittance to the barroom. Held sufficient to support the conviction of accused as principal.

2. Where the evidence on the trial of one accused of violating the local option law shows that accused refused one admittance to the barroom, and stood in the door to keep him out, a charge submitting the law of principals in regard to keeping watch, is proper.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Charley Wolfe was convicted of violating the local option law, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$100 and 60 days' confinement in the county jail. The judgment of conviction was entered March 3, 1897.

It is contended that the evidence does not support the conviction. We are of opinion that it does. The witnesses Fisk and Aaron testify that they and one M. D. Abbott went into a place in the rear of a restaurant, where Aaron purchased beer, and treated the crowd. The witness Aaron testified: "When we got to the door entering the barroom from the restaurant, the defendant met us, and, pointing to M. D. Abbott, said, 'That man can't come in here.' All of us went in, except Abbott. I bought the beer, and treated the crowd." Cross-examined, he said: "A negro waited on us. I paid the negro for the beer. Never noticed the defendant while we were at the bar, drinking. He may have stepped out into the restaurant." Fisk testified: "Jim Aaron treated me and others. It was beer, and was intoxicating. The room where we got the beer had a bar, and was fitted up with saloon fixtures. When we started to enter the room, the defendant said, 'That man can't come in here.' I looked to see whom he meant, and saw that Abbott had stopped outside the barroom in the restaurant." He testified, as did Aaron, that they were waited on by the negro. Abbott testified "that he went with the parties on the invitation of Aaron to get a drink. As we approached from the restaurant to the little room, defendant met us, and remarked, 'That man can't come in here. He has been giving people away.' I took these remarks to be directed to myself, as I was the only one he was looking at, and he stopped in the door ahead of me. I stepped back, towards the front of the restaurant, and sat down.

Defendant stood about the door entering the barroom. The door was standing about half open. Some time before this, I had been subpoenaed before the grand jury, and questioned under oath with reference to violations of the local option law. I had been forced in this way to give some parties away." On cross-examination he said: "I think the defendant stepped in the little room after the other parties went in. I know he lingered around the door, and could see the bar. He could see me from where he stood. After I sat down, I could not see the bar." The defendant testified in his own behalf as to these parties going to the place mentioned, but denied selling them anything, and further denied having any interest in the business. He testified: "I saw Abbot there. I told him he could not come in; didn't want him in there. I was employed to stay there by Joe Kirby, the owner of the business. I was not employed to sell anything. Don't know who did the selling; never asked their names. I worked there about 2 months. Several parties were there making sales while I was employed. They were all negroes. I never hired them. My duties were to keep a check on the sales. I didn't pay any attention to what the negroes sold. Only counted the money in the cash drawer at night. I generally got there about 7 or 8 o'clock in the morning, and stayed until the house was closed at night. They kept ginger ale and cider for sale there. Kept whisky to sell on prescription. Did not keep beer. The cider looked like beer. I stayed around there, and read, etc., during the day."

That the sale was made is shown by the state's testimony beyond any controversy. It is not denied that it was beer, as testified by all the witnesses, except the defendant's statement that beer was not kept there. He seems to have had control of the business. If beer was sold as testified by the state's witnesses, then it was an illegal sale. Under the facts of this case, the defendant would be a principal. In the motion for a new trial, the charge of the court is criticised, because it submits the law of principals in regard to keeping watch, sales by aiding and encouraging the parties actually selling, etc.; the portion criticised being that with reference to keeping watch, etc. If there had been an exception reserved to the action of the court in giving this charge, we would still sustain the action of the court, because, under the testimony of Abbott and the defendant, he prohibited Abbott from going in, because he had been giving them away in regard to sales, and then stood in the door, so as to prevent Abbott entering the place where the liquor was sold. No errors appearing, the judgment is affirmed.

## HAILE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1898.)

DISPOSING OF MORTGAGED CHATTELS—INDICTMENT  
—EVIDENCE—CONTINUANCE.

1. An order denying a continuance on the ground of the absence of witnesses out of the state will be sustained, where no effort was made to procure their depositions.

2. The fact that defendant's father wrote prosecutor, some time after his son had sold property covered by a mortgage, that he would pay for it, is immaterial, on a prosecution for disposing of the property.

3. A charge, in an indictment for disposing of mortgaged property, that defendant "having theretofore, to wit, June 22, 1895, executed and delivered to the said R. a valid mortgage, in writing," is a sufficient allegation that defendant executed and delivered a valid mortgage to R. previous to the alleged disposition.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

A. H. Haile was convicted of the fraudulent disposition of two certain mules under a written mortgage, and he appeals. Affirmed.

Walter Vinson, Wood & Holt, and J. P. Cox, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the fraudulent disposition of two certain mules, under a written mortgage, and his punishment assessed at two years in the penitentiary; hence this appeal.

Appellant made a motion for a continuance on account of the absence of his wife, Maggie Haile, and his father, G. W. Haile. Both of these witnesses live in the Indian Territory, and, although no process would have reached them, yet proper diligence would have suggested some effort on the part of appellant to procure their depositions. He was arrested some three weeks before the trial, and it is not shown that he made any effort whatever to procure their testimony. Defendant's counsel, on his behalf, says that he was forced to trial in the absence of his regularly employed lawyer, and that he was forced to trial at night, when he was not expecting his case to be called, and would excuse his want of diligence by the laches of his attorney. In answer to this it is sufficient to say that this matter is not presented to us by bill of exceptions, or in such shape as we can take cognizance of it. It is not made to appear that his trial was in any wise precipitated or unfair; and, as far as counsel are concerned, he appears to have had a great number, both on his trial in the court below and in this court,—at least four lawyers representing him. Furthermore, as to this motion for a continuance, it does not appear that if his father, G. W. Haile, had been present, he would have been of any benefit to appel-

lant. The fact that he may have written the prosecutor, Richardson, some time after his son had sold the mules, that he would pay for them, would be immaterial. As to the testimony of Maggie Haile, we cannot consider, in the face of the appellant's own testimony, that her evidence, as stated in the motion for a continuance, was probably true. He states in his motion for a continuance that he expected to prove by her that a few days after the execution of the mortgage from the defendant to Charley Richardson, at the defendant's house, in Grayson county, Tex., and when the defendant and his family were preparing to move to Oklahoma territory, she heard a conversation between the defendant and said Richardson in regard to the mortgaged mules; that she heard said Richardson tell the defendant that he could take the mules wherever he pleased, that he could trade or sell them, and that all he wanted was his money when the note was due. Now, in his own testimony delivered on the trial he says that: "A few days after we made the trade, I asked Richardson if I might sell or trade these mules; and he said that all he wanted was his money, and that I might do either. This conversation occurred near Patton's store, at Tioga. No one was present except Richardson and myself." This testimony is not at all in accord with the statement contained in his motion for a continuance, as to what he expected to prove about this same transaction by his wife. He states in his evidence that no one was present, and puts it at a different place from that stated in his motion for a continuance. So it is not probable, had his wife been present, according to his statement, that she would have testified as set out in the motion.

There is nothing in appellant's contention with reference to the indictment. The same is in accord with the approved forms. It was not necessary for the state to allege in a more formal manner than was done that appellant, previous to the alleged disposition of the mortgaged property, did execute and deliver to the said Charley Richardson a valid mortgage, etc. The charge that the said "A. H. Haile having theretofore, to wit, on June 22, 1895, executed and delivered to the said Charley Richardson a valid mortgage, in writing," etc., is sufficient. The making of the mortgage is not the offense. That is mere inducement. The offense is the sale or disposition of the property after the person has mortgaged it. If a motion to quash the indictment had been made, there would have been no error if the court had promptly overruled it. Nor are the other contentions of appellant with reference to the indictment worthy of any consideration.

We have examined the charge carefully, and find it correct. The judgment is affirmed.

**Ex parte SMITH.**

(Court of Criminal Appeals of Texas. Jan. 19, 1896.)

**DISORDERLY HOUSE—PENALTY—JURISDICTION OF DISTRICT COURT.**

1. Pen. Code 1895, arts. 359, 361, provides that each day a disorderly house is kept shall be a separate offense, and for a penalty for each day; and, where a conviction is had for each separate day on which an indictment distinctly charges such a house was kept, the penalty must be assessed for each day separately, and not aggregated.

2. An indictment for keeping a disorderly house, under Pen. Code, arts. 359, 361, being an offense over which a justice of the peace had jurisdiction, was not a case of which the criminal district court of Galveston and Harris counties had original jurisdiction.

Application By Lilly Smith for a writ of habeas corpus. Granted.

Byron Johnson, for applicant.

**HURT, P. J.** This is an original application to this court for a writ of habeas corpus. The only question presented for our consideration is, did the criminal district court of Galveston and Harris counties have original jurisdiction to try this offense? The agreed statement of facts shows that appellant was convicted in said criminal district court of keeping a disorderly house, under articles 359 and 361 of the Penal Code of 1895. The punishment for said offense is by a fine of \$200 for each day such person shall keep, or be concerned in keeping, a disorderly house, etc. The punishment inflicted here is a fine of \$400; and we take it that, under the procedure and instruction of the trial judge, the jury must have convicted appellant for the keeping of said house for two distinct days, and aggregated or combined the punishment for such two days at \$400; otherwise, we fail to see how they arrived at this amount. By the statute each day is made a distinct offense, and the fine imposed for such offense is no more and no less than \$200. While, under distinct counts in an indictment, a conviction might be had for a number of separate days, yet distinct penalties should be assessed for each day, and these amounts should not be aggregated. In *Davis v. State*, 32 Tex. Cr. R. 382, 23 S. W. 892, a case somewhat similar to this, came before this court; and we there held that an indictment under the before-mentioned articles was an offense over which a justice of the peace had jurisdiction, and that it was not such a case as the criminal district court of Galveston and Harris counties had original jurisdiction of. In our view, the holding in that case is decisive of the question involved in this case. We hold that the criminal district court of Galveston and Harris counties did not have jurisdiction of this offense, and that the conviction of applicant in said court was without authority of law, and void. The applicant, Lilly Smith, is ordered discharged. The costs of the officers of this court are adjudged against said applicant.

**TIPPENS v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 19, 1896.)

**CRIMINAL LAW—SLANDER—IMPUTATION OF UNCHASTITY—EVIDENCE—INSTRUCTIONS—PRIVILEGED COMMUNICATIONS.**

1. Proof that defendant said that prosecutrix "is not a decent lady" was no proof that he stated that she was a whore.

2. In a criminal prosecution for slander by imputing to prosecutrix a want of chastity, evidence that defendant had said of a certain other female that "she had been pregnant a time or two" was inadmissible.

3. On trial on an indictment charging defendant with having slandered prosecutrix in the presence of B. and other persons, an instruction that the jury might convict him if he made such statements to other persons besides B. and others was erroneous.

4. Testimony by a witness, in a criminal prosecution for slander, that he had traced the reports which he had heard concerning prosecutrix to defendant, was objectionable, as hearsay, where he had obtained his information from some one other than defendant.

5. Where defendant, on trial on indictment for slander, requested an instruction that, if the statements charged were made by defendant, yet if the jury should have a reasonable doubt as to whether they were made maliciously or wantonly, they should acquit, such charge should have been given; it having appeared that the statement in question was made by defendant to a person who had been sent to see him by the pastor of a church of which all parties concerned were members, and that under the circumstances it was the duty of defendant to speak.

6. The proceedings in an alleged church trial which resulted in the expulsion of defendant from the church, were inadmissible in a criminal prosecution against him for slander.

Appeal from Tarrant county court; George W. Armstrong, Judge.

W. A. Tippens was convicted of slander, and appeals. Reversed.

W. R. Parker, for appellant. Mann Trice, for the State.

**HENDERSON, J.** Appellant was convicted of slander, and his punishment assessed at a fine of \$100, and prosecutes this appeal.

The indictment alleged that: "W. A. Tippens \* \* \* did orally, falsely, and maliciously, and wantonly, impute to a female in this state, to wit, Mary L. Rice, a want of chastity, to wit, the said W. A. Tippens did then and there, in the presence and hearing of J. F. Bowman and divers other persons, falsely, maliciously, and wantonly say, of and concerning the said Mary L. Rice, that she (meaning the said Mary L. Rice) was not a decent lady (meaning thereby that the said Mary L. Rice was not a virtuous lady); that she (meaning the said Mary L. Rice) was a whore,—contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state." The state introduced J. F. Bowman, and proved by him that appellant said that "Mary L. Rice is not a decent lady." Appellant said nothing to this witness in regard to Mrs. Rice being a whore. The indictment does not allege that he stated that Mrs. Rice was a whore, but, by way of innuendo, this was al-



leged as a conclusion from what he said. Be this as it may, there is no proof that appellant stated to Bowman that Mrs. Rice was a whore.

Upon the trial, over the objections of the defendant, the state proved by B. F. Nelson that appellant "said, of and concerning Ivy Rice, that she had been pregnant a time or two." This evidence was admitted by the court to show animus on the part of the defendant towards Mary L. Rice. Evidence was introduced, over the objections of the defendant, that Ivy Rice bore a good reputation for chastity. The evidence as to what appellant may have said about Ivy Rice, and that in regard to her good character, was clearly inadmissible, and ought not to have been admitted.

The court instructed the jury: "If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, W. A. Tippens, did, in the county of Tarrant and state of Texas, at any time within two years next preceding the filing of the indictment herein (which was on June 17, 1896), in the presence and hearing of J. F. Bowman, or in the presence and hearing of other persons, orally, falsely, and maliciously, or orally, falsely, and wantonly, impute to Mary L. Rice, a female, a want of chastity by saying, of and concerning said Mary L. Rice, that 'she (meaning said Mary L. Rice) was not a decent lady,' meaning thereby that the said Mary L. Rice was not a virtuous lady, then you will find the defendant guilty as charged," etc. These instructions were excepted to at the time and a bill of exceptions was reserved to the giving of the same. The appellant had been informed by the indictment that he had slandered Mrs. Mary L. Rice by imputing to her a want of chastity, in saying, in the presence of J. F. Bowman and divers other persons, that she was not a decent lady. Being thus notified, it was his duty to prepare to meet this particular charge, and no other. He had a right, if he could do so, to show the circumstances attending the making of the statement assigned for slander. He may have been prepared to show that this statement was not made maliciously or wantonly, but under circumstances which would negative malice or wantonness. But he was not informed of any other statement assigned as slander. Now, while it is true, in passing upon whether the charge made by him against Mrs. Mary L. Rice was made maliciously or wantonly, other statements might be looked to, yet the court had no right to instruct the jury to convict him if they believed that he had made the statement to other persons besides Bowman and others. This charge was erroneous, and calculated to injure the rights of the defendant, and, being excepted to at the time, is reversible error.

Upon the cross-examination of Dr. Robert Smith by appellant, it was proved that he had heard reports imputing a want of chastity to Mrs. Mary L. Rice, but that they did not affect her standing, as nobody believed them. The state then proved, over the objections of the defendant, that the witness (Dr. Smith) traced the

reports concerning Mrs. Rice and Ivy Rice to defendant. Smith, upon being recross-examined by the defendant, stated that defendant made no statement to him at all about the Rices; that he obtained his information from the preacher, Stephens. This testimony was objected to at the time, and was clearly hearsay. This witness stated that he had traced the reports to the defendant; but, when questioned about it, it develops that the preacher had told him that defendant was the author of the reports. This preacher, Stephens, was a witness; and, if in fact appellant was the author of the reports, it is probable that this proof would have been made by him. The state certainly has no right to make the proof by Dr. Smith, because he knew nothing about it, except what the preacher told him.

Appellant requested the court to instruct the jury as follows: "You are instructed, gentlemen of the jury, that, if you believe from the evidence that the statements charged in the indictment were made by the defendant, yet, if you have a reasonable doubt from the evidence as to whether they were made maliciously or wantonly, you will find the defendant not guilty." This instruction was refused, and a bill of exceptions reserved. The charge should have been given. There was no question on this trial but that appellant stated that Mrs. Mary L. Rice was not a decent lady. This statement, however, was made under such circumstances as presented the issue whether it was made maliciously or wantonly. W. A. Stephens was the pastor of a church at Promised Land. Mrs. Mary L. Rice was a member of that church. Bowman was also a member thereof, and the superintendent of the Sunday school. Appellant was a member of that church, and was one of its stewards. Bowman was sent by Stephens (who had such authority) to see appellant in regard to this matter. A church investigation was discussed. When the subject was mentioned by Bowman to appellant, he stated to him that Mrs. Rice was not a decent lady. Bowman served a written notice on him to appear at a church trial at Promised Land, to answer charges preferred against him in the church. The charge was, "Lying on Mrs. Mary L. Rice." It was Bowman's business to do this at the time referred to. The defendant was afterwards tried at the Promised Land church. The trial resulted in expelling him from the church. Under this state of case, it is very doubtful whether appellant could be convicted of slander. He was called upon to speak, it was his duty to speak, and the parties had the right to demand of him that he speak. When he said that she was not a decent lady, he did so for the purpose that an investigation might be had, and that, if found unworthy, Mrs. Rice should be expelled from the church. We have alluded to these facts for the purpose of demonstrating the importance of giving the charge requested by appellant.

This church trial was a very remarkable one. It seems that Bowman had been as-

signed as prosecutor by Brother Stephens, the preacher in charge, and on the trial Bowman represented the prosecution. Appellant appears not to have been ready, and asked for a postponement, so that he might prepare his defense. This was promptly overruled by the preacher, Stephens, who presided at the trial. When the jury retired to consider of their verdict, they went out a short distance from the church. Brother Stephens and Bowman also went with them. They were with the jury when they were considering of their verdict, and when they voted on the same, and were with them when they returned their verdict. Germane to this subject, appellant objected to the introduction in evidence of this trial, and its result, to wit, that he was expelled from the church. This was a sound objection, as said trial had nothing to do with this case, and the testimony should have been excluded by the court.

A number of other errors are assigned, but it is not necessary to consider all of them; but, for the errors pointed out, the judgment is reversed and the cause remanded.

#### HARRISON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

CRIMINAL LAW—CHANGE OF VENUE—JURY—OATH—EVIDENCE—CONFESSIONS—APPEAL—REVIEW OF VERDICT.

1. The fact that the sheriff was apprehensive that one accused of murder might be mobbed, and called for troops, which were present at the trial, is not alone sufficient to show that prejudice against accused was so general as to require a change of venue.

2. But little weight should be given to the mere opinion of a witness that an accused cannot have an impartial trial in the county of the prosecution.

3. Where the record of a criminal case shows that a jury "were duly selected, impaneled, and sworn," the presumption is that a jury was properly sworn to try the case in which the entry was made.

4. It is not necessary to lay a predicate for the introduction of evidence of a confession made by an accused before he was arrested, where it is not shown that he was improperly induced to confess.

5. Where, in a criminal case, there is evidence to sustain a verdict of guilty, it will not be disturbed on appeal.

Appeal from district court, Tyler county; Stephen P. West, Judge.

George Harrison was convicted of murder in the first degree, and he appeals. Affirmed.

T. D. Scott and B. E. Moore, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of murder in the first degree of Lee Anderson, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

When the case was called for trial appellant filed a motion to change the venue, setting forth both statutory grounds,—a combination of influential citizens against the accused, and

prejudice against defendant in the county. The state filed a controverting affidavit, denying the means of knowledge of appellant's compurgators. The issue being thus formed, evidence was heard upon the motion, and the same was overruled. It is contended by counsel for appellant that the controverting affidavit was not sufficient to raise the issue between appellant and the state on the motion to change the venue. We have examined this affidavit, and believe it to be amply sufficient.

It is also insisted by counsel for appellant that the venue should have been changed upon the evidence adduced. We have read the testimony bearing upon this question, and are of opinion that there was no error in the action of the court refusing to change the venue. It is true the sheriff was apprehensive that appellant might be mobbed, called for troops, and the governor responded, and troops were at court when the trial occurred. This alone is not sufficient cause for a change of venue. If the sheriff had been thoroughly examined, it might have been shown by him, his deputies, or others that prejudice pervaded the whole county to such an extent as to render it probable that some illegal juror might serve in the case; but this was not shown, and we cannot hold that, because the sheriff was apprehensive that appellant was in danger, therefore the prejudice was so general as to require a change of venue. A number of witnesses sworn testified to some prejudice, but the evidence falls far short of showing it to be so general as to require the motion to be granted. We attribute but little weight to the opinion of a witness that an impartial trial can or cannot be had in the county of the prosecution. These opinions are to be weighed and considered in proportion to the information of the witness bearing upon the subject. No such combination of influential people was shown as to require a change of venue on this ground.

Appellant contends that the special charge requested by him in regard to the confessions of the defendant should have been given. The special charge is improper, was a charge upon the weight of the testimony, and the court acted properly in refusing to give the same.

It is insisted that the jury were not properly sworn. The record shows that "thereupon a jury, to wit, R. J. Hicks and eleven others, was duly selected, impaneled, and sworn," etc. We presume that they were sworn to try this case, and that the oath was properly administered.

Appellant assigns as error the action of the court in permitting Martha Hadnot to testify in regard to conversations with appellant on the night of the 18th of June, because no predicate was laid for the introduction of this evidence. We cannot imagine what predicate was necessary to be laid. The conversations took place between appellant and Martha Hadnot at or near her house, and at the time

appellant was evidently not under arrest, and there is nothing in the record showing that he was improperly induced to make any confessions to Martha Hadnot.

It is contended that the testimony is insufficient to support the conviction. If the evidence of Lucius Lacy, Martha Hadnot, Bronson Barlow, and Gage is worthy of belief, there is no question as to the guilt of the appellant. The credibility of the witnesses was submitted to the jury. The jury believed the witnesses for the state, and we are not authorized to disturb their finding. Finding no error in the record, the judgment is affirmed.

### GREEN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CRIMINAL LAW—APPEAL—STATEMENT OF FACTS—BILL OF EXCEPTIONS.

1. A statement of facts, not approved by the trial judge, cannot be considered on appeal.

2. A bill of exceptions, assigning as error the action of the trial court in overruling defendant's objection to a witness testifying as to certain matters, is insufficient when it fails to state that he did so testify or what he testified to.

3. A bill of exceptions shows no error, which complains of the action of the trial court in overruling defendant's motion to continue the case to meet the testimony of a witness, where such evidence is not before the court, and the bill of exceptions does not show that defendant was misled thereby.

Appeal from Ellis county court; J. C. Smith, Judge.

Fort Green was convicted of betting at craps, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted for betting at craps, a game played with dice. His punishment was assessed at a fine of \$10, and he appeals.

The statement of facts will not be considered, because not approved by the trial judge. The first bill of exceptions complains of the action of the court in overruling appellant's objection to the testimony of the witness Evans. Said bill recites "that the witness Evans was introduced by the state to prove a different offense, at a different time and place, other than the one testified to by Gober Shaw." The bill does not state that he so testified, or to what he did in fact testify, if anything. It is therefore insufficient.

The second bill of exceptions shows that the state placed upon the stand the prosecuting witness to prove the offense as set out in the information, and did so prove the offense. The state then introduced Evans, who testified that he did not see betting, as testified by the former witness, but did see the defendant play at a game with dice on Saturday night, in an outhouse. The first witness proved that the game he saw played was in Williams' pasture. The defendant then proposed to withdraw his announcement of ready, and con-

tinue the case to meet the testimony of the witness Evans, which motion was overruled by the court. The evidence is not before us, and the bill of exceptions does not show that appellant was misled by the evidence of the witness as to the transaction the state would rely upon, and the evidence may have been absolutely conclusive as to the fact that the defendant did bet at the game played in Williams' pasture. As thus presented, the bill shows no error. The judgment is affirmed.

### HOSKINS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CRIMINAL LAW—APPEAL—THEFT—EVIDENCE.

1. A bill of exceptions will not be considered which does not disclose the testimony excepted to.

2. In a prosecution for theft, although the prosecuting witness did not, in positive terms, state the want of consent to the taking of the property, yet it was shown where prosecuting witness was asleep when the property was taken, and as soon as he missed the property he accused defendant of stealing it, and an officer searched defendant, and the stolen goods were found on his person, and thereupon the prosecuting witness immediately had defendant arrested, and placed in jail.

3. A verdict of guilty of theft will not be reversed because the want of consent to the taking of the property was not proved by positive testimony of the owner, although a witness in the case, where the evidence, though circumstantial, shows an absolute want of consent.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

De Hoskins was convicted of theft, and appeals. Affirmed.

Mann Trice, for the State.

HURT, P. J. Appellant was convicted of theft from the person, and his punishment assessed at two years' confinement in the penitentiary, and he prosecutes this appeal.

During the trial, appellant reserved a bill of exceptions in the following language: "Be it remembered that upon the trial of this case that the state offered to prove by J. E. Jones that the defendant made certain statements to him which had been denied by the defendant on the witness stand; to which said statements defendant objected, for the reason that it was not in rebuttal of anything brought out by the defendant, or was brought out on cross-examination by the state, nor were brought out on inquiry by the defendant, and that the state was concluded by the answers of the defendant, and defendant could not be impeached in this way by the state,—which objection was overruled by the court, and the defendant excepted." This bill of exceptions presents nothing for this court to decide. It does not set out any of the testimony, either of Jones or the defendant. It does not undertake to inform us what were the statements therein mentioned. The bill is too indefinite and too uncertain to be considered.

The defendant, by special charges, and in the motion for a new trial, asks a reversal of the judgment because the want of consent of the injured party was not proved on the trial. The court, in the general charge, submitted the question of the want of consent of the owner to the jury; and in the following paragraph instructed them that, if they did not so believe, to find him not guilty, but did not specifically call the attention of the jury to the want of consent, otherwise than mentioned. The defendant, in his two special charges, asked the court to submit this issue specially. These charges were refused. The prosecutor did not, in direct, positive terms, state his want of consent to the taking of the property by the defendant, but his testimony does show that, as soon as he missed his property, he accused the defendant of stealing it; that he secured an officer, and sought out the defendant, and the defendant denied the theft, whereupon the officer searched him, and took the stolen goods from his person; that defendant immediately preferred the charge of theft against the accused, and had him arrested, and placed in jail. It was also proved by the injured party that the property was taken from him while he was asleep. We think the circumstances and action of the parties show sufficiently the want of consent of the owner to the taking of the property. There was no issue on this question, and the defendant did not claim to take the property with the consent of the defendant. We hold that, where the evidence, though circumstantial, shows an absolute want of consent to the taking, it will not be cause for reversal (though the want of consent was not proved by the direct and positive testimony of the owner), although he may have been a witness in the case; and any former intimations to the contrary are hereby expressly overruled. The judgment is affirmed.

#### ROSS et al. v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

#### HOMICIDE—EVIDENCE—INSTRUCTIONS.

1. On a trial for murder it was error to admit evidence concerning an altercation between witness and deceased, not connected with defendants.

2. It was error to admit evidence of an altercation had the night previous to the night on which the homicide was committed, it not being connected with the murder in any way.

3. It was error to admit testimony of what a third person had said in witness' presence in reference to one of the defendants promising to attend a meeting to bring on a difficulty with deceased.

4. On a joint indictment for murder it was error for the court, in instructing the jury, not to do so on the defense as suggested in the testimony of each defendant, where the evidence shows they had distinct and separate defenses.

Appeal from district court, Ruak county; W. J. Graham, Judge.

Lewis Ross and George Austin were convicted of murder in the second degree, and appeal. Reversed.

Moore & Strong and N. B. Morris, for appellants. Mann Trice, for the State.

HURT, P. J. Appellants were convicted of murder in the second degree, and the punishment of each assessed at a term of seven years in the penitentiary; hence this appeal.

On the trial of the case, Marvin Boger, a witness for the state, testified concerning the difficulty between said witness and Jim Taylor at Nacogdoches, and also concerning the throwing of brickbats at negroes in Henderson on the night previous to the night on which the homicide was committed. Defendants objected to this testimony on the ground that it was impertinent and irrelevant, and was in no wise connected with this case. On objection by the defendant, the district attorney stated that he would subsequently connect this testimony with the case against the defendants. At the conclusion of the testimony, counsel for defendants moved to strike out said evidence, on the ground that the state had failed to connect said testimony as it had promised to do. This the court refused to strike out, and defendants reserved their exceptions. The court also permitted the witness "Ives Peak to testify, over the objections of said defendants, that on the evening before the night on which the killing was done he saw and heard John Penn say to other negroes at the baseball game that they were going to have something 'on ice' at the colored folks' ice cream parlor that night; that the Nacogdoches boys had whipped Jim Taylor, and that they and the white boys were going to try it again that night, and wanted the colored boys to come to the ice cream parlor; that they invited Lewis Ross, and that Ross said that he would be there. The defendant Austin objected to this testimony, because it was hearsay, and made in his absence. The defendant Ross objected because immaterial and irrelevant. The court overruled the objections, and defendants took their bill of exceptions," etc. We have grouped the testimony involved in these two bills of exception because they relate to the same matter. It was evidently the object of the state, in introducing this testimony, to establish the fact that the appellants, after one of them had armed himself, went out in town that night with the view of meeting some of the Nacogdoches boys, who were in town, and that their purpose was to bring on a difficulty; that the difficulty which did occur was in pursuance of their conspiracy. The establishment of these facts would be strong corroborative evidence that the appellants provoked the difficulty, and were the aggressors; and strong corroborative evidence in support of the testimony of some of the state's witnesses; for instance, the dying declaration, and other circumstances. The testimony of Boger and

Peak was evidently hearsay, irrelevant, and calculated to injure the rights of both defendants. The court permitted Peak to relate what one Penn said about this matter; among other things, that one of the appellants had been invited to attend the meeting, and had promised to do so. We cannot imagine a stronger case of the introduction of hearsay testimony than this, and that, too, in regard to an important factor of the state's case. We have read the charge of the court with great care, and with but one exception we think it an admirable one, when viewed in the light of the facts. The charge connects both defendants with links of steel, and there is no difference in it as applied to the one or the other. In this there was error. Lewis Ross shot and killed the deceased. The proof on the part of the defendant tends strongly to show that at that time Austin was not present, and had no connection with the shooting. The court instructs the jury, in substance, that if the parties provoked the difficulty, and had abandoned the same, they would be restored to their right of self-defense. This is correct. It is questionable whether Ross had abandoned the difficulty, but there is no question, if the theory of the defendant Austin be true, but that he had abandoned the difficulty; hence the necessity of presenting the defense of each separately. It may be true that there is a phase of the case as presented by the state in which the charge of the court is correct, but unquestionably the evidence introduced by the defendants showed that they had distinct and separate defenses, and obviously the court, in presenting the matter to the jury, should have instructed them upon the defense as suggested in the testimony of each. Evidently, the jury must have understood from the charge of the court that each was responsible for the acts of the other, because it so presented their defense. It may be that they both are equally guilty, and in the same degree, but there is a phase of the testimony which placed defendant George Austin in a much more favorable light than his co-defendant, Ross; and the jury should have been so instructed upon this phase of the case. It is not necessary to discuss the other assignments of error, as they will not likely arise upon another trial; but for the errors above discussed the judgment is reversed, and the cause remanded.

#### GREEN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CRIMINAL LAW—APPEAL—STATEMENT OF FACTS—BILL OF EXCEPTIONS.

1. A statement of facts not agreed to by counsel or approved by the trial judge cannot be considered.

2. A bill of exceptions not approved by the trial judge cannot be considered.

3. An order overruling a motion for a new trial, based on the insufficiency of the testi-

mony to support a conviction, cannot be reviewed on appeal, in the absence of a statement of facts.

Appeal from Johnson county court; F. E. Adams, Judge.

Guy A. Green was convicted of keeping and exhibiting a gaming table and bank, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was charged by information with keeping and exhibiting a gaming table and bank for the purpose of gaming, was convicted, and his punishment assessed at a fine of \$25 and 10 days' imprisonment in the county jail. What purports to be a statement of facts is in the record, but is not agreed to by counsel, nor approved by the trial judge, and therefore cannot be considered. What purports to be a bill of exceptions was not approved by the trial judge. The three grounds of the motion for a new trial are based upon the supposed insufficiency of the testimony to support the conviction. In the absence of the statement of facts, these matters cannot be considered. The information and complaint are in good form, and appropriately charge the offense of unlawfully keeping and exhibiting a gaming table and bank for the purpose of gaming. The judgment is affirmed.

#### STEVENS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS.

1. On a prosecution for assault with intent to murder, defendant testified that, when the parties met, the prosecutor threw a stick of wood at and struck defendant on the head; that defendant then reached for his gun; that the prosecutor then fled, and he fired at, but missed, him; that he did not shoot with intent to kill him. The only issue was whether the blow was struck after or before defendant got his gun. *Held*, that it was error to fail to charge with reference to that phase of defendant's intent which became an issue,—that, although he might have fired with the intent of killing, yet, if it was done after the blow was struck, it might be an aggravated assault only.

2. One who calls another a liar, and picks up his gun, is not conclusively guilty of an assault with intent to murder.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Joe Stevens was convicted of an assault with intent to murder, and appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of an assault with intent to murder, and given two years in the penitentiary; hence this appeal.

The court correctly submitted the question of assault with intent to murder under the state's view of the case. He submitted the issue of an aggravated assault upon the theory that defendant fired at the alleged injured

party with no intent to kill, but to alarm and frighten. He also submitted the issue of self-defense. These charges were correct, and should have been given. Appellant excepted, and reserved his bill of exceptions, because the court did not charge the second theory of aggravated assault. The facts introduced by defendant in this connection, were substantially as follows: When the parties met, and the altercation came up, the defendant testified that the alleged assaulted party threw a stick of wood at and struck him on the head, which caused blood to flow; that defendant then reached for and secured his gun; that the injured party fled, and he fired at, but missed, him; that he did not intend to kill him, and did not fire or shoot with such intent. As before stated, the court instructed the jury with reference to that phase of the testimony which called in question the specific intent to kill when the shot was fired, but failed to charge the jury with reference to that phase of it which became an issue in the case,—that, although he might have fired with the intent and for the purpose of killing, yet, under that state of case, it still might be an aggravated assault; for this testimony proves (if it proves anything) the adequate cause, and, if the jury believed that he shot for this reason, and that the blow produced such anger, rage, sudden resentment or terror as rendered his mind incapable of cool reflection, he would only be guilty of an aggravated assault,—death not ensuing. In order to produce an assault with intent to murder, the killing, if it had occurred, would be murder in the first or second degree. If the killing would have been reduced to manslaughter, or the testimony raised that issue, then, the homicide not occurring, the question of aggravated assault is raised by the evidence, and should be submitted. That the blow was inflicted by the alleged assaulted party upon the defendant is placed beyond any question. All the testimony proves that fact. The disputed issue in this connection arises from the discrepancy in the testimony as to whether the blow was inflicted before the defendant secured his gun or subsequently. The state showed that the blow was inflicted upon the defendant after he had secured the gun; that for the defendant, that it was inflicted before the defendant procured his gun, and that it was the moving cause for defendant's getting his gun. We think the charge should have been given. We find attached to the bill of exceptions the reason of the trial judge for the failure to submit the charge on this particular subject to the jury. Condensed, the reason is that, when the appellant called the prosecutor a liar, and picked up his gun, he was guilty of an assault with intent to murder. The court conclusively makes this assumption,—assuming not only an assault, but that it was with the specific intent to kill and murder the prosecutor. If this be correct, the shooting at prosecutor by appellant would cut no figure, except to throw light on the animus of the de-

fendant, for an assault with intent to kill and murder had already been committed. Now, we cannot agree to the proposition that the evidence shows beyond any controversy that by calling the prosecutor a liar, and picking up his gun, appellant committed an assault with the specific intent to kill and murder. If he was not guilty of an assault with intent to commit murder when the appellant struck him with the stick, producing pain and bloodshed, then there arose a provocation amply sufficient to produce such passion as would reduce the homicide, had it occurred, to manslaughter; but, death not ensuing, it would be an aggravated assault. Again, the court assumes, from the conduct of the appellant, that there was no passion aroused. There was a cause for passion and legal provocation, and certainly the jury ought to have been permitted to pass upon whether, in fact, appellant was acting under a passion aroused as before stated. For the error discussed above, the judgment is reversed, and the cause remanded.

#### SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 28, 1898.)

#### CRIMINAL LAW—APPEAL—RECORD—ABSENCE OF STATEMENT OF FACTS.

1. Where there is no statement of facts in the record, whether the verdict is contrary to the law cannot be reviewed.
2. Where there is no statement of facts on appeal from a conviction, the court cannot review the sufficiency of the evidence.
3. The court cannot consider the correctness of the admission of evidence in the absence of a statement of facts.

Appeal from Johnson county court; F. E. Adams, Judge.

Tom Smith was convicted of selling liquors in violation of law, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Conviction for selling intoxicating liquors in a local option precinct in violation of law. The information is sufficient. There is no statement of the facts contained in the record, and we cannot determine whether the verdict of the jury is contrary to the law and evidence, as contended by appellant. In the motion for a new trial it is urged that the evidence does not support the verdict in regard to whether or not a sale was made. In the absence of the statement of facts, we cannot consider this matter. The same is true with reference to permitting the memorandum of the deputy, taken from the office of the internal revenue collector's office at Dallas. The sale of intoxicating liquors may have been established beyond all question without this evidence. Exhibits A, B, and C, attached to the motion for a new trial, stand out in space, without touching anything in this record. Finding no error in the record, the judgment is affirmed.

**BIVENS v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 19, 1898.)

**INTOXICATING LIQUORS—SALES TO MINORS—SUFFICIENCY OF EVIDENCE.**

On a prosecution for selling liquor to a minor, he and two other witnesses testified that when he bought the liquor there were two other minors with him, one only 16 years old, and that all of them drank at the bar, and were waited on by defendant. *Held*, that the evidence showed that defendant knew that the minor was such when he sold liquor to him.

Appeal from Cooke county court; J. P. Hall, Judge.

Bob Bivens was convicted of selling liquor to a minor, and he appeals. *Affirmed*.

Green & Hayworth, for appellant. Mann Trice, for the State.

**DAVIDSON, J.** Appellant was convicted of selling liquor to a minor, and his punishment assessed at a fine of \$25; hence this appeal.

There are no bills of exception contained in the record. The court's charge was clear, and covered every possible issue in the case. The court properly submitted to the jury that, before they could convict the defendant, they must find that he sold liquor to Williams; that Williams was a minor at the time, and that appellant knew he was a minor; and the only question raised by the assignment of errors is whether or not the evidence sufficiently showed that appellant knew that Williams was a minor at the time he sold him the liquor. In our opinion, the evidence is sufficient in this connection. At the time Williams bought the liquor, according to his testimony and two other state's witnesses (who were his companions) there were two other minors with him, one only 16 years old, all of them drank at the bar, and were waited upon by appellant. He denies this transaction in toto, and says that he would not have sold to the parties, because he knew one of them was a minor. He further says: "I remember well I did not sell any whisky to these boys, because the grand jury was in session at the time, and Swartz charged me to be particular at all times not to sell to minors; and another is, that I knew Tom Flowers [Tom being one of the three], and had known him nearly all his life. I knew him when he was a little boy, living at the cross timbers, and knew him ever since. I know I never sold any whisky when Tom was present, and would not do so, because I knew he was a minor." If the transaction occurred as stated by the state's witnesses, he was put upon notice at the time that prosecutor and his companions were minors. While he denies this transaction, yet it was a question for the jury. They have decided against him, and we see no reason for disturbing their finding. The judgment is affirmed.

**JOHNSON v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

**THEFT—EVIDENCE—CRIMINAL LAW—APPEAL—STATEMENT OF FACTS.**

1. Failure of the court to charge on issue which appellant contends was made by certain testimony recited in the bill of exceptions, cannot be considered where what purports to be a statement of facts is not approved by the trial judge.

2. On a prosecution for theft it was not error to refuse to permit defendant to introduce three indictments against a certain other person pending in the same county, for the purpose of raising a probability that such other person, and not defendant, was the guilty party, and to corroborate defendant's testimony that he was the innocent agent of such person, under whose direction he acted.

Appeal from Navarro county court; J. F. Stout, Judge.

J. H. Johnson was convicted of theft, and appeals. *Affirmed*.

Gore & Gore, for appellant. Mann Trice, for the State.

**DAVIDSON, J.** Appellant was charged with the theft of one head of cattle, was convicted, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

There are two bills of exception in the record. The first was reserved to the failure of the court to charge upon an issue which defendant contends was raised by the testimony, to wit: "That the offense was not theft, but driving cattle from their accustomed range." This supposed omission of the charge cannot be considered, because what purports to be a statement of the facts incorporated in the record is not approved by the trial judge. There is nothing, therefore, before us to indicate that the testimony suggested such an issue. The second bill of exceptions was reserved to the action of the court refusing to permit the defendant to introduce three indictments against Ollie Woodward or Oliver Woodward, then pending in the district court of Navarro county, for the purpose of "raising a probability that Oliver Woodward, and not defendant, was the actual guilty party; and to corroborate the testimony of the defendant that he was the innocent agent of said Woodward, under whose direction and supposed authority he [defendant] acted." As the bill is presented to us, we see no error. The simple fact that three indictments were pending against Oliver Woodward in the district court of Navarro county does not tend in any way to show the innocence of the defendant in stealing the one head of cattle. How the evidence that three indictments were preferred by the grand jury against Woodward would tend to prove the innocence of the defendant is not attempted to be set out in the bill of exceptions; nor can we well apprehend how said indictments could have had such

effect. The testimony not being before us, as before stated, we are unable to revise the charges of the court. The charge as given is applicable to a state of facts provable under the allegations of the indictment. The judgment is affirmed.

### LIVINGSTON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1898.)

#### THEFT—INSTRUCTIONS.

On a prosecution for theft, the evidence showed that the property stolen was tools belonging to one J., and used in his barber shop. Defendant and M. were J.'s employes. When J. was temporarily absent from the shop, either M. or defendant was left in charge. While J. was so absent, defendant took said property. Held, that it was not error to refuse to charge on the theory that defendant was in possession of the property at the time it was taken, and could not be guilty of theft, though he testified that he had charge of the shop, and had possession of the shop and tools.

Appeal from Dallas county court; Kenneth Foree, Judge.

O. Livingston was convicted of theft, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of personal property under the value of \$50, and his punishment assessed at 10 days' imprisonment in the county jail; hence this appeal.

What appear to be bills of exception were filed long after the adjournment of the term of court at which said case was tried, and no excuse is shown for the failure to file them within the time authorized by law. However, nearly all of said bills relate to the charge of the court, and the failure of the court to give certain special instructions requested, and these matters are brought forward in a motion for a new trial. We therefore, under the rule heretofore laid down, have to consider said refused charges. The charges refused relate to the question of possession; it being contended by appellant that the proof shows that at the time of the alleged theft he (appellant) was in possession of the property charged to have been stolen, and therefore, under this indictment, could not be convicted of theft. At any rate, it is contended, the proof of possession in him (appellant) was such as to require the court to give the charges requested on the subject, this being a misdemeanor case. It is true that the appellant, in his testimony, says: "I had charge of the shop while Jones and Myers were gone. I had full control, care, and possession of the shop, and all the goods, implements, and furniture in the shop. I had full control, care, and possession of the razor and pair of clippers in question." But this tes-

timony is to be taken in connection with the other evidence bearing upon this point. The testimony on the part of the state shows that the property stolen was a razor and a pair of clippers,—tools used in the barber shop. The shop in question was owned by E. M. Jones, and appellant and one Myers were his employes. All the property in the shop, so far as the record discloses, belonged to Jones. When Jones was temporarily absent from the shop (which sometimes occurred), either Myers or appellant (whichever happened to be present) was left in charge of the shop, but had no particular charge, except a mere custody such as pertains to an employé or servant, and had no power to sell or dispose of the goods. Technically, the evidence for the state makes it clear (and this is not gainsaid by any testimony for the defense) that he was not in possession of the goods, but simply in temporary custody as an employé or servant. It is well settled that a clerk in a store, with power to sell goods, can be guilty of the theft of the goods. In law, he is not held to be in possession of the goods, except as a servant, the possession being in his employer. Applying that rule to this case, we simply find that, when the whole record is looked to, appellant was employed to work for Jones; that Jones was absent about two hours and a half, and, while gone, appellant took the goods charged to have been stolen. Now, if, while appellant was there, in the absence of the owner, some third party had committed a theft of the articles in question, the indictment need only have alleged the possession in the owner, Jones,—ignoring the employé entirely. See White's Pen. Code, art. 858, note 4, and authorities there cited. Testing this matter by another provision of the Code, could it be said that appellant at the time of the alleged theft, under the proof, was in any sense a bailee of the property? If he was, then it might be insisted that he should have been indicted under article 877 of the Penal Code, and not under article 858, with reference to theft generally; and, if such be the case, then the requested charge should have been given. In our opinion, he was in no sense a bailee, and an indictment charging him with theft as a bailee could not have been sustained. See *Mals v. State* (Tex. Cr. App.) 37 S. W. 748. While it is true that appellant testified that he was in possession of the shop and the articles therein, when viewed in the light of all the testimony in the case he evidently meant that he simply had the custody thereof. In his testimony, defendant refers to no contract, agreement, or arrangement between himself and the owner which would place him in the legal possession and control of the goods as a bailee. We are of opinion that appellant was in no wise injured by the refusal of the court to give the special instructions requested, and the court acted properly in refusing to give the same. The judgment is affirmed.



## FOSTER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

## JURY—SPECIAL VENIRE—SERVICE OF LIST ON ACCUSED.

Code Cr. Proc. 1895, art. 654, provides that "no defendant in a capital case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special venire facias, except where he waives the right or is on bail." Id. art. 677, provides that, in selecting the jury, they shall be called in the order in which they appear on the list furnished defendant. Defendant, indicted for murder, who was in jail, was served with two copies of a venire, one containing 60, and the other 52, different names. Defendant moved to quash the special venire for said cause, which was denied. *Held* error for which the cause would be remanded for a new trial.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

J. W. Foster was convicted of murder in the second degree, and appealed. Judgment reversed.

Hudgins & Estes and Dan T. Leary, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the second degree, and given 15 years in the penitentiary; hence this appeal.

When the case was called for trial, appellant moved to quash the special venire because he had not been served with a copy of said venire one day before trial; that two copies of a venire, on the 12th of October, 1897, were delivered to him by the sheriff of Bowie county, in one of which the names of the jurors were numbered consecutively from 1 to 60, and in the other from 1 to 52, both of which said copies were certified by the clerk to be correct; and both are attached to, and made a part of, the bill of exceptions. An examination of the bill shows these statements to be correct. Article 654, Code Cr. Proc. 1895, provides: "No defendant in a capital case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special venire facias, except where he waives the right or is on bail; and when such defendant is on bail he shall not be brought to trial until after one day from the time the list of persons so summoned shall have been returned to the clerk of the court in which said prosecution is pending; but the clerk shall furnish the defendant, or his counsel, a list of the persons so summoned, upon their application therefor." Under this article the accused is entitled to a copy of the names of persons summoned, not those drawn. This statute provides that the accused shall have the one day's service mentioned therein of a copy of all the names of persons summoned under the special venire facias, except where he waives the right or is on bail. In this case the defendant was in jail, and waived nothing. The bill of exceptions shows that he was served with two copies, one containing 60,

and the other 52, names. Article 677 provides: "In selecting the jury from the persons summoned, the names of such persons shall be called in the order in which they appear upon the list furnished the defendant, and each juror shall be tried and passed upon separately, and a person who has been summoned, but who is not present, may, upon his appearance before the jury is completed, be tried as to his qualifications and impaneled as a juror, unless challenged; but no cause shall be unreasonably delayed on account of the absence of such person." Under this article, the names of the persons summoned as jurors shall be called in the order in which they appear on the list furnished the accused, and must be called one at a time as they so appear, and be tested and passed upon first by the state, and then by the defendant. The first article quoted only provides for one list of the jurors summoned under the special venire to be served upon the accused party. This statute is mandatory, and must be pursued, unless in some way waived by the accused. In the case before us we have two lists. The names of the jurors in one are entirely different from those in the other. Under this state of case, the defendant was furnished with two lists, when the statute prescribes only one; and, when the motion was made to quash the service on this ground, it should have been sustained. Again, in calling the names of the jurors, there would be two lists from which to call, each entirely different from the other. These lists are furnished the defendant for the purpose of preparing himself for trial; and where two lists, containing entirely different names, are furnished (in addition to being in violation of the statute), a defendant would not be apprised of the list from which he would be required to select the jury. When the motion was made to quash, it should have been sustained, and a proper list made out, containing the names of those actually summoned by the sheriff, and served upon the defendant one day before his trial. As presented to us, the action of the court was a plain violation of the statutes; and the defendant saw proper to take advantage of it, and his motion should have been sustained. The law does not authorize the selection of two special venires in the same case at the same time. If in fact there were 112 men served by the sheriff as a special venire, they should have been properly placed in the list served upon defendant, and should not have been divided into two or more special venires, and thus served upon him. He has the right to know the order in which they are to be called, and they should be numbered from 1 to the last number, and thus served upon him; so that he might view the list as a whole, and determine therefrom as to his challenges for cause, as well as to his peremptory challenges.

As the case is presented, we deem it unnecessary to discuss the other assignment of error presented. Because the court refused

to quash the service of the special venire had upon defendant, the judgment is reversed and the cause remanded.

### BOLTON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### CONTINUANCE—ABSENT WITNESSES.

On a prosecution for illegal sale of liquor, it was not error to refuse a continuance on account of the absence of witnesses by whom defendant expected to prove that prosecutor stated that he did not buy liquor from defendant, where prosecutor, as a witness, admitted that he had so stated, and explained why he did so, and several of said witnesses were present at the trial, but defendant refused to put them on the stand.

Appeal from Hunt county court; W. H. Ragsdale, Judge.

Bob Bolton was convicted of selling liquor in violation of the local option law, and he appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was charged by information with selling intoxicating liquors in violation of the local option law. When the case was called for trial, appellant filed an application to postpone the case for the want of certain witnesses, by whom he expected to prove that the prosecuting witness stated to said absent witnesses, in substance, that he did not buy the intoxicating liquor from the defendant, but from a negro. The application shows that there were two cases filed against this defendant, the complaint having been made in both cases by the same prosecuting witness. The court qualifies the bill of exceptions reserved to his action in refusing to grant a postponement, among other things, by stating "that these witnesses were all subpoenaed in the companion case, and that several of them, for whom this postponement was sought, were present in court on the trial, but the defendant did not place them on the stand. The prosecuting witness admitted on the trial in his testimony that he did make the statement set out in the bill of exceptions, but that he was not under oath, and that he made it to them, as he made it to others, for the purpose of screening the defendant [his friend], but that, when they placed him upon oath, he told the truth." Viewing this action of the court from the standpoint of the motion for a new trial, we find no such error as requires a reversal. Several of these witnesses were present, but the defendant refused to place them on the stand to testify; but, even if they had been placed on the stand, and had testified as set forth by the appellant, we hardly believe this action of the court would require a reversal of this case. The prosecuting witness admitted that he did make the statements, and gave a reason which seems to have been satisfactory to the ju-

ry; and the proposed testimony could only be used to impeach him.

It is contended that the evidence does not support the judgment of conviction. If the witness Lytton told the truth, he bought a glass of lager beer from the defendant, and paid him for it. It was intoxicating liquor. The local option law was in force at the time. The jury believed the testimony of the state. We think it was sufficient, and the judgment is affirmed.

### McMURTRY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

#### PERJURY—INDICTMENT—MOTION TO QUASH.

1. An indictment charging defendant with perjury, in giving false testimony before the grand jury, in that he "did willfully and deliberately testify that the said M. [defendant] did not, \* \* \* in the fall of 1896, or at any time from the 1st day of September, 1896, to the 15th day of March, 1897, play at a game with cards; that he did not see any person play at a game with cards,"—is insufficient, as not alleging more definitely some time at which the alleged card playing took place, and some person, other than defendant, who played at such game.

2. An indictment charging perjury, in giving false testimony before a grand jury, alleged that it was "a material inquiry before said grand jury," etc., "whether one M. \* \* \* played at a game of cards, in a room over B's saloon," *held* insufficient, under the language of the statute, providing "if any person shall play at a game with cards, at any house for retailing spirituous liquors," etc., as not showing that said room was attached to a place for retailing spirituous liquors.

3. The general rule that, when there are a number of counts in an indictment, some good and some bad, after verdict the conviction will be applied to any good count which is supported by the evidence, does not apply where a preliminary motion made to quash the indictment is overruled, and certain counts are defective.

4. An indictment for perjury, which does not allege that the false testimony of defendant upon the points at issue was material, is defective.

Appeal from district court, Clay county; George E. Miller, Judge.

W. A. McMurtry was convicted of perjury, and appealed. Judgment reversed.

L. C. Barrett and Stine, Chesnutt & Hurt, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

As appellant made a motion to quash the indictment, we will set out such parts thereof as are necessary to a discussion of the questions raised on said motion. The perjury, as set out in the indictment, is predicated upon the alleged false testimony of W. A. McMurtry before the grand jury of Clay county, Tex., at its March term, 1897. The indictment charges that J. D. Stine was the foreman of said grand jury, and administered the oath to said witness; and that it then and there became and was a material inquiry

before said grand jury, etc., whether one McMurtry, in the city of Henrietta, Clay county, Tex., at any time during the fall (meaning the months of September, October, and November) of 1896, or at any time from the 1st day of December, 1896, to the 15th day of March, 1897, played at a game with cards in a room over Bud Benson's Saloon, in the said city of Henrietta, Clay county, Tex.; and whether the said McMurtry, at the time and place aforesaid, saw any person play at a game with cards; and whether said McMurtry, at the time and place aforesaid, played and wagered at a gaming table and bank, then and there kept and exhibited for the purpose of gaming; and whether the said McMurtry, at the time and place aforesaid, kept and exhibited, for the purpose of gaming, a gaming table and bank; and whether the said McMurtry, at the time and place aforesaid, sold any chips to any person for the purpose of betting and wagering at a gaming table and bank; and whether the said McMurtry, at the time and place aforesaid, saw any person bet and wager at a gaming table and bank, then and there kept and exhibited for the purpose of gaming, said room being a public place, to wit, a place where people commonly resort for the purpose of gaming. Under these assignments follows the allegation that said witness "did willfully and deliberately testify that the said McMurtry did not, in the city of Henrietta, Clay county, Tex., in the fall of 1896, or at any time from the 1st day of September, 1896, to the 15th day of March, 1897, play at a game with cards; that he did not see any person play at a game with cards; that he did not bet and wager at a gaming table and bank then and there kept and exhibited for the purpose of gaming; that he did not keep and exhibit, for the purpose of gaming, a gaming table and bank; that he did not see any person bet and wager at a gaming table and bank then and there kept and exhibited for the purpose of gaming; that he did not sell any chips to any person for the purpose of betting and wagering at a gaming table and bank in said room as aforesaid." Then follows a traverse of each of said allegations, and that appellant's testimony was false, and that he knew it to be false at the time he so testified.

Among other objections urged in the motion to quash the indictment, appellant presented the following grounds: "Because no specific time is alleged when defendant bet, wagered, or played at a game with cards, sold chips, or exhibited a gaming table or banking game, or did any of the acts mentioned in said indictment; and said indictment is so vague and uncertain in its allegations and indefinite that this defendant has not been able to prepare his defense herein; and because it is not alleged in said indictment that he [defendant] played at any game, or to whom he had sold chips, or whom he saw play cards, bet, or wager, or with whom they played, bet, or wagered, or with whom he

[defendant] bet or wagered, at said gaming table." This motion was overruled, and appellant excepted.

It will be observed that the indictment lays no particular date when said offense was committed about which the witness was being interrogated before the grand jury, save and except that it was some day in the fall of 1896,—that is, in September, October, or November of said year,—or at some time from the 1st day of December, 1896, to the 15th day of March, 1897; that is, as we understand it, the defendant, McMurtry, who was a witness before the grand jury, was interrogated generally about unlawful card playing at the place mentioned, between the 1st of September, 1896, and the 15th of March, 1897. It is insisted by the assistant attorney general that this exact question was decided in *Fry v. State* (Tex. Cr. App.) 37 S. W. 741. By reference to that case, it will be seen that the allegation of time was equally as general there as here. However, that question was not raised in the *Fry Case*, nor was the attention of the court in any wise called to it. The decision was based on entirely different grounds. In *Meeks v. State*, 32 Tex. Cr. R. 420, 24 S. W. 98, this question appears to have been directly before the court; and the court there held the rule to be that the question put to a witness before the grand jury should direct his attention to some particular transaction, and the time and place, and sufficient of the circumstances to call the attention of the person to the transaction under investigation should be stated, so that the witness might know of what he was to testify. It was further stated, if the answers to such question could not constitute a predicate for impeachment of the witness, it ought not to be sufficient to constitute a basis for his conviction for perjury.

The rule laid down by the text-books with reference to the necessary question to lay a predicate for the impeachment of a witness requires that the time, place, and persons involved in the proposed contradiction be stated to the witness, so that his attention may be called directly to the matter in issue. In this case the witness, in order to answer the question, so far as the allegations in the indictment are concerned, was left to wander over a space of six or seven months of time; and, besides this, the indictment does not suggest the name of any person involved in the supposed unlawful card playing, except the defendant himself. In our opinion, the indictment should have shown more definitely some time at which the alleged unlawful card playing took place, and some person in the assignments (other than that charging appellant with playing the game) who played at such game. In addition to this, we would observe, with reference to the first two assignments in the indictment, that it is proposed by them to show that the playing of cards was at a place inhibited by the statute. The allegation is that said games were played "in a

room over Bud Benson's Saloon, in said city of Henrietta." The language of the statute, in order to constitute the playing at a public place, in this regard is: "If any person shall play at a game with cards, at any house for retailing spirituous liquors," etc. Pen. Code, art. 379. There is no allegation in terms charging that the room where the game of cards was played was at a place for retailing spirituous liquors, unless it be conceded that the use of the language "Bud Benson's Saloon" is tantamount to an allegation that it was a place for retailing spirituous liquors. The word "saloon" has a varied meaning. It may be applied to a place for retailing spirituous liquors, or to many other kinds of places. We do not believe that the allegation in this respect is sufficient. And, moreover, we do not believe that these assignments show that said room was attached to or so connected with said saloon, even if it be held that the word "saloon" is synonymous with a place for retailing spirituous liquors. The language in the assignments is, "in a room over Bud Benson's saloon." So far as the language here used informs us, there was no contingency or connection between said two places. We think the indictment should have more clearly shown that said room was attached to a place for retailing spirituous liquors. See *O'Brien v. State*, 10 Tex. App. 544; *Early v. State*, 23 Tex. App. 364, 5 S. W. 122. The objections last mentioned would eliminate the first two assignments in the indictment, even if the date of said offense had been more definitely stated.

In this connection, appellant insists that the court erred in its charge in submitting all of the assignments to the jury when some of the assignments were unquestionably bad. The general rule is that, when there are a number of counts in an indictment (and the same rule we take it would apply to assignments in cases of perjury), some good and some bad, after verdict the conviction will be applied to any good count which is supported by the evidence. See *Southern v. State*, 34 Tex. Cr. R. 144, 29 S. W. 780. This is so where the question is presented for the first time on a motion in arrest of judgment, or the question is raised for the first time after verdict. See *Shuman v. State*, 34 Tex. Cr. R. 60, 29 S. W. 160, and *Fry v. State* (Tex. Cr. App.) 37 S. W. 741. But this is not the rule where a preliminary motion is made to quash the indictment, and certain counts of the indictment are defective, and should have been quashed. The propriety of this rule is illustrated in this very case. If we refer to the evidence, there is no testimony in the record which would sustain either of the last four assignments in the indictment. No witness testifies that a gaming table or bank was ever kept or exhibited in said room, or that any person ever bet at any gaming table or bank in said room; the only evidence on the subject of card playing being that said room was used as a poker room, and that games of poker were played there. Now, if

the court, on the motion to quash, should have held, as he was bound to do, the first two assignments invalid, then the case would have proceeded to trial on the last four assignments; and, as there was no evidence to support either of said assignments, the defendant would have been entitled to an acquittal. So, unquestionably, he must have been convicted under the first two assignments in the indictment. Said two assignments were defective, as we have seen, for other reasons than those applicable to the last four assignments. But, inasmuch as we have heretofore held that all said assignments were bad, it is useless to further discuss this matter.

In addition to the objections heretofore stated with regard to the indictment, appellant claims that said indictment is defective because it does not allege that the testimony of appellant upon the points in issue was material; and he insists that the allegation in the indictment "that it became and was a material matter of inquiry before said grand jury whether, at the time and place laid in the indictment, appellant played at a game with cards," etc., is not sufficient; that the indictment should have further alleged that the testimony given by appellant on said issues was material. This contention seems to be correct. See *Buller v. State* (Tex. Cr. App.) 28 S. W. 465; *Weaver v. State*, 34 Tex. Cr. R. 554, 31 S. W. 400. For the errors above discussed the judgment is reversed, and the prosecution ordered dismissed.

### HIGGINS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1896.)

#### PERJURY—INDICTMENT—INSTRUCTIONS.

1. An indictment for perjury, which alleged that it was a material inquiry by the grand jury whether defendant had seen "a game played with cards in a certain outhouse situated in the town of Q., in H. county, Tex., on or about the 3d day of October, 1896, when people did then and there resort," was bad for uncertainty in not defining the outhouse, nor giving the names of the persons.

2. Where the evidence that the house where defendant saw a game played was one where people resorted was very meager, even if it was sufficient to show that it was a place where people resorted, so as to make it a public place, it was error to refuse to charge that, in order to convict, the evidence must show that the matter about which defendant testified was a violation of the law, and therefore the jury must be satisfied that the place was an outhouse where people commonly resorted for the purpose of gaming or for some other specific purpose.

Appeal from district court, Hunt county: Howard Templeton, Judge.

John Higgins was convicted of perjury, and appeals. Reversed, and cause dismissed.

J. G. Matthews, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of perjury, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

The indictment contains a number of assignments, but, inasmuch as the prosecution proceeded upon one assignment of perjury, it is not necessary to notice the others. This assignment is in these words: "It became and was a material inquiry whether the said John Higgins had seen a game played with cards in a certain outhouse situated in the town of Quinlan, in Hunt county, Tex., on or about the 3d day of October, 1896, where people did then and there resort." It was proved by one witness that appellant was asked the question before the grand jury if he had seen any card playing about the 3d of October, 1896, at any outhouse where people resorted, in the town of Quinlan, Hunt county, and he answered that he had not. By two or three witnesses it was proved that they saw defendant playing a game with cards in an outhouse in Quinlan, Hunt county; that the outhouse was in the outskirts of the town, and was an old, unoccupied dwelling house, belonging to J. H. Cook. The record does not disclose any other game of cards played at said house, except the one in question. It was shown that during that fall said house was vacant during most of the time. The only testimony tending to show that it was a house where people resorted was the game in question, and by one witness, who lived near there, it was proved that he saw lights and heard people talking inside said house several times during that fall, while it was vacant, but he did not know what they were doing there. By another witness it was proved that when he would be passing there during that fall he had heard people talking there in the night. On this state of facts appellant requested the court to give the following instruction: "In order to convict this defendant, the evidence must show that the matter about which he testified was a violation of the law. Therefore, before you could convict this defendant for perjury, you must be satisfied, from the evidence in this case, that the place mentioned in the indictment was an outhouse, where people commonly resorted for the purpose of gaming or for some other specific purpose." If it be conceded that the evidence was sufficient to show that said house was a place where people resorted for the purpose of gaming, or for other purposes, so as to make a public place, certainly the charge in question should have been given. To say the most of it, the testimony indicating that it was a house where people resorted was exceedingly meager, and it was a material issue in this case for the jury to find; and, as stated before, the requested charge on this subject, or one covering this phase of the case, should have been given by the court.

Furthermore, we would observe, with re-

gard to this assignment for perjury, that it does not seem to us to come within the rule heretofore laid down by this court. See *McMurtry v. State* (decided at the present term) 43 S. W. 1010. The question as presented in the indictment, which was propounded by the grand jury to the defendant, does not contain the essential elements which, under a similar state of case, would constitute a predicate for the impeachment of a witness. The particular outhouse is not stated in the indictment. True, it was proved that it was Cook's outhouse about which the witness was questioned. This matter seems to have been known to the grand jury, and should have been embraced in the assignment. Moreover, the assignment should have stated at least some of the persons involved in the supposed game of cards inquired about,—enough to identify the transaction, and apprise the witness of the particular occasion inquired about. When the attention of the witness was thus challenged, he might very readily remember and recall the transaction; whereas, if he was inquired of generally with reference to a game of cards on the 3d of October, at an outhouse in Quinlan, Hunt county, his attention might not be challenged. There may have been a number of outhouses in said town, and, the witness' attention not having been called to any particular one, he might not remember the game. In our opinion, the assignment on which the conviction was had in this case did not charge an offense, and the judgment is reversed, and the cause dismissed.

#### THOMASON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### ASSAULT BY TEACHER UPON SCHOLAR—EVIDENCE —INSTRUCTIONS.

1. In a prosecution against a school teacher for assaulting one of his scholars, a conviction cannot be sustained where it appeared that prosecutor was 18 years old, and large for his age, and had a bad reputation for disobedience; that he had defied the authority of a previous teacher, and had been expelled by another for carrying brass knucks; that he refused to either write upon a topic when requested by the teacher, or go home when desired; and was not struck by defendant until he was in the act of making an assault on him with a plank, and, after prosecutor went outside, he got a stick, and was only prevented from returning to the school by the other boys.

2. In a prosecution against a school teacher for assaulting a scholar, defendant is entitled to have the jury instructed that it was a reasonable regulation to require pupils to perform their duties in the school, and if prosecutor refused to recite his lesson, and gave no explanation therefor, in order to preserve discipline the teacher could require him to go home and learn his lesson, and, on his refusing to do so, might inflict corporal punishment to enforce a compliance.

Appeal from Navarro county court; J. F. Stout, Judge.

G. J. Thomason was convicted of simple assault, and he appeals. Reversed.

Gore & Gore and G. W. Thomason, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of a simple assault, and his punishment assessed at a fine of \$8.50, and prosecutes this appeal.

The facts show that appellant was a school teacher in Navarro county, and that the prosecutor, Jim Hagle, was a pupil at said school; that he was 18 years old, and large for his age, weighing 164 pounds. On the occasion in question it appears that appellant requested a number of scholars to write on certain topics in history, indicated by himself, on the blackboard. All of the scholars so called on responded, and wrote upon the topics suggested, except the prosecutor, Hagle. He stood at the blackboard, without writing, for some time. Appellant asked him if he could not write on the subject, and he made no reply. After some little time, prosecutor having not written anything, appellant again spoke to him, and asked if he could not write on the subject. He made no reply. Appellant then told him, if he could not write on the subject, to go home until he could get his lessons. The prosecutor, Hagle, replied that he would not go home until evening. Appellant told him again to go home. Hagle said, "We will see about it." Appellant then went back to his desk and got a stick, described as a willow stick about three feet long and a half inch thick. He again told him to go home. Hagle in the meantime had gotten the water bucket and the dipper, and confronted appellant. As appellant came up with the stick, he put the bucket and dipper down, and grabbed a plank about two feet long, four inches wide, and an inch thick. As he did so, and just as he was raising up with the plank, appellant struck him several blows about the head, Hagle simultaneously striking him with the plank on the arm. Appellant's stick was bent or broken by the blows given. Hagle immediately started out, going in the vicinity of a poker at the stove; but appellant beat him to the poker, and got it. Hagle then went outside of the school room, got a stick, and started back. The boys in the meantime had been requested by the teacher not to let him come back, and they kept him out. He then threw that stick down, grabbed another, and remarked that he would not be run over by any such a damn man. The boys again caught him, and prevented him from going into the house. The wounds inflicted on Hagle were evidently of a slight character. It was in evidence that the scholar Hagle bore a bad reputation for disobedience as a scholar. He had defied the authority of a previous teacher, when requested to go home for disobedience, and had been expelled by another for carrying brass knucks. It was also in evidence that some little time before the altercation, when the scholars were studying their lessons, appellant told Hagle to

get his lesson, and as he turned his back on him, Hagle shook his fist at appellant, though this was not observed by appellant. The evidence further showed that the trustees authorized the teacher to expel those who were over the scholastic age who did not obey and became unruly, and that the teacher was instructed by the trustees to make larger students "toe the mark," as well as the smaller ones.

This is a misdemeanor case, and the court, on the subject of the authority of the teacher to punish scholars, only gave in charge the following: "Violence used to the person does not amount to an assault or battery in the following cases: In the exercise of the right of moderate restraint or correction given by law to the teacher over the scholar." And: "The defendant, G. J. Thomason, being a teacher of a public free school, had the legal right to govern his scholars, and to use such force as was necessary to enforce all reasonable rules and regulations of his school." Appellant requested the following instruction: "The court instructs the jury, at the request of the defendant, that if they believe from the evidence that the defendant, G. J. Thomason, requested or commanded Jim Hagle, his pupil, to leave the school room, on account of disobedience, and the said Hagle refused to leave, then the said Thomason had the right to use such force as was necessary to eject said Hagle from the building." This was refused by the court, and appellant reserved his bill of exceptions thereto. While the charge in question may not have been comprehensive enough, yet, in the view we take of this case, the court's attention having been directed to the subject-matter, a charge covering that phase of the case should have been given; that is, the jury should have been informed that it was a reasonable regulation to require of pupils to perform their duties in the school, and if Hagle refused to recite his lesson, and gave no excuse or explanation therefor, in order to preserve discipline the teacher could require him to go home and learn his lesson, or, under the circumstances, might inflict corporal punishment in order to enforce his compliance. It is evident to our minds that the prosecutor had determined to persist in his disobedience, and to refuse to comply with the orders of the teacher, and had determined, if he attempted to enforce such orders, that he would resist the same. If the charge in question had been given, the jury would likely have acquitted appellant.

We would remark, in regard to this case, that it appears to us from the testimony that, in order to preserve his discipline, the teacher had a right to require appellant, under the circumstances, to either write upon the topic, or go home, as he required him, and, on refusal, to use such reasonable means as would compel his compliance. It does not appear that he intended to strike Hagle with the stick until the measure of his resistance became of such a character as to authorize him to use the stick; and, when he struck him, evidently Hagle was in the act of making an assault on him with

the plank, for, as the teacher approached, he again requested him to go home and learn his lesson. Hagle in the meantime had prepared to resist the authority of the teacher, and had armed himself with the water bucket; and as the latter approached he put the bucket down, and grabbed a more formidable weapon, and was then in the act of assaulting the teacher, when he struck him with the willow stick. It appears to us very clearly that Hagle had entered upon a determined course of insubordination, and that the teacher had no alternative except to do as he did, or, by the want of discipline, lose all authority in the school. The judgment is reversed, and the cause remanded.

### MILLSAPS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

#### FORGERY—INDICTMENT—VARIANCE—INSTRUCTIONS—WEIGHT OF EVIDENCE.

1. It is a fatal variance, between the purport and tenor clauses of an indictment for forgery, to set forth in the former that the instrument was the purported act of a corporation, and in the latter that it was signed by the president and secretary of the corporation as such officers.

2. A charge that where an instrument is shown to be a forgery, and in the possession of some one other than the person whose act it purports to be, such possession, standing alone, is sufficient to warrant a conviction for the execution of the instrument, is on the weight of evidence.

Appeal from district court, McLennan county; Samuel R. Scott, Judge.

E. F. Millsaps was convicted of forgery, and he appeals. Reversed.

Cunningham, Cunningham & McCollum, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of 2½ years; hence this appeal.

No statement of the facts appears in the record. The only questions raised are as to the sufficiency of the indictment and the charge of the court. The charging part of the indictment is as follows:

"One E. F. Millsaps, without lawful authority, and with intent to injure and defraud, did willfully and fraudulently make a false instrument in writing, which said false instrument is to the tenor following:

Incorporated under the Laws of the State of Texas.

Number.	Shares.
00. Waco Hardware Company, Waco, Texas.	Ten.

This certifies that E. F. Millsaps is the owner of ten shares, of one hundred dollars each, of the capital stock of Waco Hardware Company, full paid and non-assessable, transferable on the books of the corporation, in person or by attorney, on surrender of this certificate.

In witness whereof, the duly authorized officers of this corporation have hereto subscribed their names, and caused the corporate seal to be hereto affixed, Waco, Texas, this first day of Oct., A. D. 1893.

C. H. Storey, Secretary. Ed Strauss, President.

Shares,  
100  
Each.

—"And which said false instrument, as herein and heretofore set out, purports to be the act of the 'Waco Hardware Company, Waco, Texas,' being then and there a corporation, against the peace and dignity of the state."

On the trial, appellant objected to the introduction of the forged instrument, on the ground that there was a variance between the instrument offered in evidence and the purport clause of the indictment, and, in the motion for a new trial and in arrest of judgment, set up the fact that there was a fatal variance between the purport and tenor clauses of the indictment, in this: "The tenor clause sets out an instrument signed 'C. H. Storey, Secy.," and "Ed Strauss, President," and the indictment alleges that the forged instrument purports to be the act of "Waco Hardware Co., Waco, Texas." Referring back to the indictment, it will be seen that his contention in this respect is correct. No doubt, the idea of the pleader was that, inasmuch as the corporation acted by its officers, it was proper simply to allege that it purported to be the act of the corporation, whereas in truth and in fact it simply purported to be the act of C. H. Storey, secretary, and Ed Strauss, president. In connection with their signatures in the execution of the instrument, it is not even alleged that they were the authorized officers of the corporation. In a civil case, good pleading would require, in order to charge a corporation with liability, an allegation that these parties were the authorized officers of said corporation, and that the corporation acted by them; and it is believed the rule is more stringent in this regard in criminal cases than in civil. At any rate, this court has followed the current of authority on this subject, and by a number of decisions the rule has been laid down that there must be a conformity and an accuracy between the purport and tenor clauses of an indictment which charges forgery. See *Campbell v. State* (Tex. Cr. App.) 32 S. W. 389; *Stephens v. State* (Tex. Cr. App.) 37 S. W. 425; and *Thulemeyer v. State* (Tex. Cr. App.) 43 S. W. 83. We hold that the pleader, if he felt himself bound to set out the purport of said instrument in the indictment (which he was not required to do), he should have done so accurately, and should have alleged that it purported to be the act of "C. H. Storey, Secretary, and Ed Strauss, President," with the allegation that they were, respectively, secretary and president of said corporation.

Appellant also reserved a bill of exceptions to the following charge of the court: "And in this connection you are also charged that when an instrument is showed to be a forgery under the rules of law as herein stated, and shown to be in the possession of some one (other than the person whose act it purports to be), such possession, standing alone, is sufficient to warrant a conviction for the execution of the same." As stated before, there is no statement of the facts in this record, and we have endeavored to conceive if any state-

ment of facts would authorize the giving of this charge, which instructs the jury that if the instrument is shown to be forged, and the possession thereof is shown to be in some one other than the person whose act it purports to be, this, standing alone, would be sufficient to warrant a conviction for the execution of the same. This would be, in effect, telling the jury that if the evidence shows that the instrument was not the authorized act of the Waco Hardware Company, and it was found that the instrument purported to be the act of the Waco Hardware Company, by its officers, and was not authorized by it, but if it was found in the possession of the appellant, this circumstance alone would authorize the jury to convict the defendant. This charge is unquestionably on the weight of the testimony, and no statement of facts would authorize the court to give such a charge. The judgment is reversed, and the cause dismissed.

#### GUTGESELL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 5, 1898.)

#### ARSON — INDICTMENT — OWNERSHIP — EVIDENCE — GRAND JURY — SECRECY AS TO PROCEEDINGS.

1. An indictment for arson may charge the ownership of the building to be in the owner of the fee, where defendant was occupying the building when it was burned.

2. In a prosecution for arson, testimony that witness had told defendant that it was the opinion of the people of the town that he had burned the house, is inadmissible, even if, in connection therewith, defendant made statements in the nature of confessions that were admissible against him.

3. Code Cr. Proc. 1895, arts. 404, 406, 427, requiring an oath of secrecy to be taken by grand jurors, bailiffs, and witnesses before the grand jury, and Pen. Code 1895, art. 213, prescribing the punishment of grand jurors and witnesses who shall divulge any of the proceedings of the jury, show it to be the policy of the law to make secret all such proceedings, except as provided in Code Cr. Proc. 1895, art. 404, permitting a disclosure of such proceedings when the truth of evidence given in the grand-jury room is under investigation; and hence testimony as to what defendant testified to before the grand jury while it was investigating his case, defendant not having testified in the case, is not admissible.

Appeal from district court, Collin county; J. G. Russell, Judge.

Frank Gutgesell was convicted of arson, and he appealed. Reversed.

G. R. Smith, Abernathy & Beverly, and Garrett, Jones & Merritt, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of arson, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

The indictment alleges that appellant "did unlawfully and willfully set fire to and burn the house of Elizabeth F. Gullett," etc. The proof shows that the fee in the lot, and consequently the house situated thereon, was in

Mrs. Elizabeth F. Gullett. However, it is further shown that at the time the house was burned appellant and one Asbury were in possession of different apartments of the house burned. Appellant contends that, inasmuch as the proof shows that he was the occupant of the house burned, and in possession thereof, there was a variance between the allegations of the indictment and the proof, because the indictment alleged that Mrs. Gullett was the owner. As we understand it, his contention is that ownership, under our statute in arson cases, must be charged in the occupant or person in possession of the house. We do not agree with this contention. The allegation in the indictment here is that Elizabeth F. Gullett was the owner; and the proof showed that the fee of the property was in her, and that appellant was her tenant. At common law, the offense of arson is defined to be "the malicious burning of the house of another." Under our statute, it is "the willful burning of a house," and the owner is not guilty of the crime if he burn his own house, except under certain circumstances provided by our statutes. Ordinarily, in cases of arson, the offense is committed by some one other than the occupant of the house; and in such cases it would ordinarily be sufficient to charge the ownership in the occupant. In this case, however, the occupant or tenant of the premises is the party charged with the burning; and we hold, under our statute, that in all such cases it is sufficient to charge the ownership of the premises to be in the person owning the fee. The state had the right to prove that the accused had been charged with the crime; and that he was suspected of committing the crime; and in this connection proof that the accused stood mute, and made evasive answers, etc., would be admissible. This character of testimony is treated in the nature of confessions. But the state had no right to prove by the witnesses H. A. Finch, Williams Warden, J. W. Asbury, and Henry Herndon that they each told the appellant that it was the opinion of the people of McKinney that he had burned said house. Appellant had denied on each occasion most emphatically any connection with the burning of the house. There was no equivocation, but positive denials in each instance. Now, this procedure placed before the jury, through the mouths of these witnesses, the opinion of the people of McKinney that appellant was guilty. It served no legal purpose. The statement that the people believed that appellant was guilty elicited nothing that was admissible on the trial. Hence we have these statements in regard to the opinion of the people of McKinney standing out alone, and clearly inadmissible, and calculated to injure the rights of the accused. And, even if it be conceded that, in connection with the statements by the witnesses to him that the people of McKinney believed that he had set fire to and burned said house,



he made statements in connection therewith that was legitimate testimony against him in the nature of confessions; yet these circumstances did not render admissible the illegal testimony adduced against him in regard to what the people of McKinney believed about appellant burning the house. This character of testimony, coming from four different witnesses, in our opinion was calculated to greatly injure appellant. On the trial of the case, the state introduced as a witness one T. J. Cloyd, who testified that defendant was summoned before the grand jury, and was examined as a witness; that he there stated that the value of the property which he lost in the fire was \$500; that he was at home at 10 o'clock, and not down in town until after 6 o'clock the next morning; that he stated that he had no knowledge as to how the fire originated; that he further stated that he walked down to the blacksmith shop the next morning, and saw that the house had been burned. Appellant objected to this testimony, "because it was irrelevant, and incompetent; and because contrary to law and public policy to allow the members of the grand jury to detail what occurred in the grand-jury room, unless the truth of the matter inquired about was in issue; that the defendant had not been sworn, and was not offering any evidence denying any statements so proposed to be proved by said witness; that the grand jury had no right under the law to have the defendant before it, and to have him to testify when it was investigating a charge against him." That part of article 404, Code Cr. Proc. 1895, which prescribes the oath to be taken by grand jurors, and bearing on this question, is as follows: "The state's counsel, your fellows', and your own, you shall keep secret, unless you are required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given in the grand-jury room in a criminal case shall be under investigation." Article 406, Code Cr. Proc. 1895, which prescribes the oath to be taken by bailiffs, also requires them to keep the proceedings of the grand jury secret. Article 427, prescribing the form of oath to be taken by witnesses before the grand jury, requires them also to keep all proceedings of the grand jury had in their presence secret. Article 218 of the Penal Code of 1895 prescribes that "any grand-juror, or any person who shall appear before any grand-jury in this state, and who after being sworn according to law as a witness before said grand-jury, shall afterwards divulge any of the proceedings thereof, shall be guilty of a misdemeanor, and subject to a fine," etc. So it would appear to be the declared policy of our law to make secret all of the proceedings before the grand jury, except as provided in said article 404, Code Cr. Proc. 1895, which authorizes a disclosure of such proceedings whenever the truth or falsity of evidence given in the grand-jury room in a criminal case shall be under investigation.

This is the only exception that we are aware of. Since the decision in *Clanton v. State*, 13 Tex. App. 139, which construed said article, it has been permissible in impeachment of a witness to show that such witness made statements before the grand jury in the particular case different from his evidence on the trial. See *Scott v. State*, 23 Tex. App. 521, 5 S. W. 142; *Rippey v. State*, 29 Tex. App. 37, 14 S. W. 448; *Hines v. State* (Tex. Cr. App.) 39 S. W. 935. We are aware of no case in which the rule has been extended beyond this. In the case at bar appellant was not a witness. The object of the introduction of what he may have stated before the grand jury could, therefore, not have been in impeachment of him. Indeed, the bill shows that it was adduced as original evidence against the appellant. The truth or falsity of the defendant's testimony or statement before the grand jury (under the broadest latitude of construction which has been given by this court to article 404, Code Cr. Proc. 1895) was in no sense the subject-matter of investigation, and we hold that the testimony was not admissible. The judgment is reversed, and the cause remanded.

DAVIDSON, J., absent.

#### GREGORY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

#### CRIMINAL LAW—APPEAL—STATEMENT OF FACTS—HOMICIDE—EVIDENCE.

1. A statement of facts filed 10 days after the trial court adjourned cannot be considered where the record does not show that 10 days were allowed for filing it.
2. It is not error, in a prosecution for murder, to permit the state to introduce in evidence the clothes worn by deceased at the time of the homicide.
3. Evidence that four years before the killing deceased said to one accused of murdering him that "there were several persons he would like to put out of the way" is too general to be admissible, and, moreover, the threat, if it was one, is not shown to have been directed against accused.
4. No error can be predicated upon the refusal of the court to admit testimony where the objection to it is withdrawn, and the testimony given.
5. Where the court states for what reason, within his judicial knowledge, a witness is incompetent, the party who insisted on the statement cannot urge error in making it in the presence of the jury, where he did not request that they retire pending the discussion.
6. Bills of exception reserved to the action of the court in regard to instructions cannot be reviewed in the absence of a statement of facts.

Appeal from district court, Hunt county; E. W. Terhune, Judge.

John H. Gregory was convicted of murder in the second degree, and he appeals. Affirmed.

Neyland & Stinson, Perkins, Gilbert & Perkins, and Evans & Garrett, for appellant. M. M. Brooks and Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 25 years' imprisonment in the state penitentiary; hence this appeal.

What purports to be a statement of facts appears to have been filed on the 20th of February, 1896. The record shows that court adjourned finally on the 22d day of February, 1896, and we have searched the record in vain for any motion for or order allowing 10 days after the adjournment of court within which to prepare and file such statement. We therefore cannot consider for any purpose what purports to be a statement of facts as found in the record. This disposes, in effect, of many of the bills of exception taken during the trial, as without a statement of facts we cannot tell whether or not any error was committed as presented in said bills. This disposes of all the bills of exception incorporated in the record, except those numbered 2, 10, 11, 17, and 18. Bill of exceptions No. 2 was reserved to the action of the court in permitting the state to introduce in evidence the clothes worn by the deceased at the time of the homicide. This testimony was clearly admissible. See *Hart v. State*, 15 Tex. App. 202, which case has been followed in all subsequent decisions by this court. By bill of exceptions No. 10, appellant proposed to prove by one Paris that he had had a conversation with the deceased, Rowsey, in which Rowsey said "there were several persons he would like to put out of the way." The court stated to counsel, "If they would say on their professional honor that the answer had reference to Rowsey, I would admit it; and counsel refused to state as required." This conversation is alleged to have occurred in 1891, and the killing in this case is alleged to have occurred on the 17th day of April, 1896. This testimony, if it can be considered as a threat, is not shown to have been directed against the defendant, and was too general in its nature to be used in this case as testimony. See *Strange v. State* (Tex. Cr. App.) 42 S. W. 551, and *Godwin v. State* (decided at Tyler term, 1897) 43 S. W. 336. Bill of exceptions No. 11 was reserved to the action of the court in regard to his refusal to admit the written testimony of one Perry taken on a previous trial of this case. The bill shows that Perry was indicted for some offense subsequently to the testimony given on the former trial; and because he was indicted, the court sustained the state's objection. Subsequently, however, this objection was withdrawn, and the testimony read to the jury. There could have been no error arising on this phase of the bill. During the argument of this objection, the state's counsel, among other things, stated as an objection a certain matter which the trial court judicially knew,—which judicial reason the defendant's counsel insisted they should know; and, upon being pressed by said counsel, the court informed them of the fact that an indictment against Perry had been at that term of the court returned into court by the grand

jury. If it is intended to urge error upon this statement before the jury, we would reply that the statement was made at the suggestion and on the demand of appellant's counsel; and, if they did not desire the jury to hear said statement of the court, they should have requested the court to retire the jury pending the argument and discussion. This was not done. They are in no condition, therefore, to claim error in this respect. Bills of exceptions Nos. 17 and 18 were reserved to the action of the court in regard to his charge to the jury, and the omissions therein. In the absence of a statement of facts, these exceptions cannot be revised. No errors appearing in the record, the judgment is affirmed.

### HOWERTON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

AGGRAVATED ASSAULT—EVIDENCE—SUFFICIENCY—CRIMINAL LAW—APPEAL—REVIEW—OBJECTIONS WAIVED—BILLS OF EXCEPTIONS.

1. Bills of exceptions to rulings admitting certain evidence stated that the "county attorney offered to prove" certain facts by certain witnesses, "to which defendant objected, and the court overruled the objection, and he excepted"; but it was nowhere stated in the bills that such facts were proved. *Held*, that such bills could not be considered.

2. The court of criminal appeals cannot aid bills of exceptions by reference to the statement of facts.

3. On the prosecution of a school teacher for aggravated assault on a pupil, defendant may not prove by himself that the chastisement inflicted was not more than necessary under the circumstances.

4. An objection that an information is duplicitous and ambiguous is in the nature of a motion in arrest of judgment, and cannot be made for the first time on appeal.

5. On the prosecution of a teacher for aggravated assault on a pupil, a witness testified that she examined the girl after school, and that there was a bruised place on her shoulder that she could not cover with her hand. Others testified to seeing marks of switching on the day it happened, and for several days thereafter. The court required the jury to find that the punishment was excessive, or acquit. *Held*, that a verdict of guilty would not be disturbed.

Appeal from Collin county court; M. G. Abernathy, Judge.

William Howerton was convicted of an aggravated assault and battery, and appeals. Affirmed.

Mann Trice, for the State.

HURT, P. J. Appellant was convicted of an aggravated assault and battery, and his punishment assessed at a fine of \$50; hence this appeal.

Appellant was a school teacher, and the prosecutrix, Mandy Jordan, was his pupil. For some misconduct or disobedience, appellant whipped her with a rattan switch. This prosecution and conviction were based upon the theory that the whipping was excessive. No complaint is made of the charge of the court.

Appellant reserved bills of exceptions to the

rulings of the court in regard to the admission of certain testimony. These bills cannot be considered, because it is not shown by the bills that the witnesses swore to any facts. The bills state that the "county attorney offered to prove" certain facts by certain witnesses, "to which the defendant objected, and the court overruled the objection, and he excepted." It is nowhere stated in the bills that such facts were proved. We cannot aid the bills by reference to the statement of facts. We wish to emphasize this proposition. These observations apply to bills Nos. 2 and 3.

By bill of exceptions No. 4, it appears that appellant proposed to prove by himself that the chastisement inflicted on the child was not more than necessary under the circumstances. Counsel for appellant insists that defendant, being a teacher, was an expert on this matter, and had a right to give his opinion as to the quantum of punishment necessary to command obedience. We do not agree with this contention. We have held, and still hold, that the teacher has the right to inflict moderate corporal punishment on the pupil, for sufficient cause, and that his intent and purpose in inflicting such punishment were material, and could be admitted in evidence. See *Kinnard v. State* (Tex. Cr. App.) 33 S. W. 234. But that question is not involved in this case. Defendant was permitted to swear to his intent, but he further proposed to testify as an expert as to the consequences of the punishment, etc. This is not a matter about which an expert can testify.

In the motion for a new trial, appellant urges that the "information does not charge defendant with any offense known to the laws of the state of Texas, or with any offense described in the Penal Code of the state." The information does charge the defendant, in unequivocal terms, with the commission of an offense known to the laws of this state.

"Said information is duplicitous and ambiguous, in this: that in one count it charges defendant with committing an aggravated assault on one Mandy Jordan, and in the other count charges defendant with making an aggravated assault on Mandy Johnson." This is in the nature of a motion in arrest of judgment, and comes too late. The first count of the information is amply sufficient to charge appellant with an aggravated assault and battery upon Mandy Jordan. Appellant could have moved to strike out the second count because not supported by the complaint. Again, if, upon the trial, proof had been offered by the state of an assault upon Mandy Johnson, the information charging an assault on Mandy Jordan, such proof would have been clearly inadmissible; and if it had been admitted, with or without objection, a conviction for an assault on Mandy Johnson, owing to the variance in the information, should have been set aside by the court below, and, if not, would have been reversed in this court for the want of proper pleading. But, when we examine the record in this case, we find that this conviction was obtained for an

assault upon Mandy Jordan. There was no evidence introduced upon the trial as to an assault upon Mandy Johnson. Appellant was called upon to meet the charge of aggravated assault upon Mandy Jordan, and has no right to complain at this stage of the case of the other count in the information. The conviction will be referred to the count supporting it.

If the testimony of Mrs. McGee, who examined the girl a few days after the whipping, be true, we do not feel that we would be warranted in setting aside the verdict of the jury in this case. She says that she examined the child Tuesday afternoon, after school, and that there was a bruised place on her shoulder that she could not cover with her hand. Other witnesses testify to seeing marks of switching, both on the day it happened, and for several days thereafter. The charge of the court required the jury to believe that the punishment was excessive, before they could convict defendant. As above stated, we do not feel that we are authorized to set aside the verdict of the jury. We have found no error in this record, and the judgment is accordingly affirmed.

#### TAYLOR v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1898.)

HOMICIDE—JUSTIFICATION—DYING DECLARATIONS—CONSTITUTIONAL LAW—TRIAL—INSTRUCTIONS—WITNESSES—IMPEACHMENT—MISCONDUCT OF JURY.

1. Dying declarations are admissible, though deceased was unconscious some of the time, and had to be aroused while making them.

2. Bill of Rights, § 10, requiring that an accused be confronted with the witnesses against him, does not prohibit the admission of dying declarations.

3. Where a witness narrated what occurred shortly after defendant had fatally wounded deceased in a fight, but did not testify that she was present at the fight, her declaration that deceased was the aggressor was inadmissible to impeach her.

4. A witness testifying to criminating facts cannot be impeached by her declaration that she believed defendant not guilty.

5. Where accused contended that certain dying declarations were not made under the safeguards required by law, he cannot complain of the submission of the question to the jury, as giving undue prominence to the declarations.

6. Dying declarations are admissible, though questions were asked directing deceased's mind to the subject upon which they were made.

7. Where deceased's dying declarations were that defendant used an opprobrious epithet, and stabbed him in the abdomen, and then deceased clinched him, it was proper to charge that, if defendant provoked the contest with apparent intention of doing deceased great bodily harm, he would be guilty of murder, though the killing was done without deliberation, to save his own life.

8. One is not justified in slaying an assailant, not intending to inflict serious bodily injury, without first resorting to all other means, besides retreating.

9. The fact that a juror, while seen or accompanied by an officer, separated a short time from the other jurors, while they were considering the verdict, is not a ground for new trial.

Appeal from district court, Mitchell county; R. A. Ragland, Special Judge.

E. P. Taylor was convicted of murder in the second degree, and he appeals. Affirmed.

F. G. Thurmond and J. F. Eidson, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 10 years' confinement in the state penitentiary, and prosecutes this appeal.

Appellant contends that the court committed an error in admitting the dying declarations of the deceased, W. H. Flowers. The first objection urged is that said dying declarations as contained in the written statement were not admissible, because a sufficient predicate had not been laid for their introduction. In this we disagree with counsel for appellant. We think the testimony shows conclusively that deceased was then conscious of approaching death, and had no hope of recovery. And we further disagree with counsel that the same was induced by leading questions calculated to elicit the desired answers. It is true that deceased was at the time partially under the influence of opiates, and had to be aroused from time to time in order to continue his statement. But it does not appear that any statement made was elicited by a question calculated to induce the answer given; and although, during some of the time, he was unconscious, and had to be aroused to continue his statement, yet the same appears to be an intelligent, continuous, and logical statement of how the killing occurred. Appellant further contends that said statement is not admissible as evidence, because it was violative of the constitutional guaranty requiring appellant to be confronted with the witnesses against him, and he refers us to the majority opinion of the court in Cline's Case, 36 Tex. Cr. R. 320, 36 S. W. 1009, and 37 S. W. 722, and, in connection therewith, to the dissenting opinion of Henderson, J., in that case. This question has long been settled in this state against the contention of appellant. See Burrell v. State, 18 Tex. 718, and authorities there cited. And see, also, Campbell v. State, 11 Ga. 353. In a case of dying declaration the witness does confront the appellant at the trial. It is true, the witness states the declaration of the decedent as to the cause and manner of his death. This declaration is itself, under the authorities, made original testimony; and it is considered as original evidence, and not hearsay, when given by any witness who may have heard such declaration when made under the circumstances required by law,—that is, that the declarant must be conscious at the time of approaching death, and believe that there was no hope of recovery, and that such declaration was voluntarily made, and not through the persuasion of any person, and that the same was not made in answer to in-

terrogatories calculated to lead the deceased to make any particular statement, and that such declarant was at the time of sound mind.

Appellant assigns as error the action of the court in refusing to permit him to impeach Mrs. Bessie Flowers by the testimony of H. D. Gunnels. Said assignment is based upon the following bill of exceptions: "Be it remembered that upon the trial of this cause Mrs. Bessie Flowers, wife of the deceased, W. H. Flowers, a state witness, who testified for the state upon the trial of this cause: That her husband, W. H. Flowers, was cut and stabbed with a knife, as alleged in the indictment in this cause; and that she was present when he was cut and stabbed, and that her husband (the deceased) never drew his knife, and did not have any knife open or in his hands during the difficulty in which he was killed, until after the difficulty was over, and he had been taken into the main court room, at Sweetwater, Texas, and then she saw him take it out of his pocket, and open it; and that deceased's brother, Granvill Flowers, had no knife seen by her, and that she did not see Granvill Flowers during the difficulty; and that her husband was not fighting, and she did not see the defendant, E. P. Taylor, during the difficulty. The following questions were propounded to her by the defendant's counsel, to wit: 'Didn't you tell H. D. Gunnels, the assistant city marshal of Ft. Worth, Texas, about the last of February or first of March, 1897, in the court house at Ft. Worth, Texas, just north across the hall from the district clerk's office in said court house, that Vat Taylor (E. P. Taylor, the defendant) had this fight in self-defense, and ought to be acquitted, and that you had sworn lies enough for the Flowers against Vat Taylor, or sworn lies enough against Vat Taylor; and that they, Granvill Flowers and deceased, Will Flowers, both jumped on defendant, and what he did was in self-defense; and that you knew enough to acquit him, and was going to swear it on the next trial, and what he did he had it to do?' That said witness Mrs. Bessie Flowers, the wife of deceased, denied talking to said H. D. Gunnels about the defendant's case at all, and absolutely denied that she made any such statements to said witness H. D. Gunnels, but stated she did have a talk with him about that time and place mentioned. Whereupon the defendant put said witness H. D. Gunnels upon the witness stand, and asked him the same questions propounded to said witness Mrs. Bessie Flowers. Said witness answered she made a part of such statements. The jury was withdrawn from the court room, and the witness Gunnels made the following statement to the court, to wit: 'On or about the latter part of February, 1897, or some time in March of the same year, Mrs. Bessie Flowers sent for me to meet her at the district clerk's office in the court house in Tarrant county, Texas. I met her there at said office, went across the hall, north of dis-

strict clerk's office, and she told me as follows: First, she asked me if I had heard of old man Flowers talking about her. I told her I had not. She said she had been told that he had been talking about her, and that she wanted me to try to find out, if possible, all that he had said. Said she was tired of being bulldozed, and she was not going back to the trial unless they sent her a ticket; and that, if she did go back, she was going to turn Vat Taylor loose; that he should be turned loose; that he only done what he had to do; that Will Flowers and Granvill Flowers were both on him when he cut Will Flowers, and that her testimony on next trial would turn him loose.' After the above testimony of the said witness H. D. Gunnels was related to the court in the absence of the jury, the state's counsel objected to said testimony going or being introduced before the jury, because it was conclusions of the witness Mrs. Bessie Flowers, and not material, and was collateral issues, and did not contradict any statement of Mrs. Bessie Flowers. The court sustained said objections, and refused to allow the said testimony to go before the jury, to which ruling of the court defendant then and there excepted. And then defendant offered to put said interrogatories to said witness Gunnels separately, and asks the court to allow him to do that, as some of said answers of said witness were admissible. The court refused to allow defendant to do that, and then defendant offered to put the said witness Mrs. Bessie Flowers on the witness stand, and ask her the exact questions testified to by said H. D. Gunnels, and the court refused to allow defendant to do that; said it was not material, and did not contradict any testimony of witness Mrs. Bessie Flowers, and he would rule it all out; and said witness had already been on the stand twice,—once by the state, and once by the defendant,—and the court would not allow her to be recalled. Whereupon the defendant excepted to the ruling of the court, and tenders this, his bill, and asks it to be allowed and ordered filed," etc. Now, if it was competent for appellant to impeach Mrs. Flowers, and the proper predicate had not previously been laid, then we think the court should have permitted the reintroduction of Mrs. Flowers, in order to lay the proper predicate after it was ascertained exactly what H. D. Gunnels would testify as to her statements to him. But, if it was not competent to impeach Mrs. Flowers upon the points stated by H. D. Gunnels, then no error was committed by the court in refusing to permit Mrs. Flowers to be introduced for the purpose of laying a proper predicate. So this brings us to the question as to whether Mrs. Flowers could be impeached.

The bill in question is adroitly drawn, and the reading of the first part of the bill would indicate that Mrs. Flowers had testified that she was present when her husband was cut and stabbed, and that her husband never drew his knife, and did not have any

knife open or in his hand during the difficulty in which he was killed, until after the difficulty was over; and that he only drew it after he was removed from the room in which the difficulty occurred; and also that Granvill Flowers had no knife during the difficulty; and that her husband was not fighting, and that she did not see the defendant, E. P. Taylor, during the difficulty. This is stated in such a way at the outset of the bill as to make it appear, as stated above, that she was present during the difficulty, and witnessed it. While it is true that the mere statement by her to Flowers that she was tired of being bulldozed, that if she went back to the trial they would have to send her a ticket, and that she was going back to turn Vat Taylor (the defendant) loose, and that he should be turned loose, and that he only did what he had to do,—not being the relation of any fact in contravention of her assumed testimony, but being merely the expression of an opinion by her, would not be competent. Yet the statements by her to Gunnels that Will Flowers and Granvill Flowers were both on him (meaning defendant) when he cut Will Flowers, would be the statement of a fact, and would certainly be competent evidence to impeach her, if the bill shows that she was present at the difficulty, and stated that she witnessed it, and that Will Flowers and Granvill Flowers were not on defendant when he cut W. H. Flowers; or if she stated that she was present at the difficulty, and gave an account of how it happened, and that such account was inculpatory of defendant, and antagonistic or in contravention of the idea that W. H. Flowers and Granvill Flowers were on top of defendant when he cut deceased,—then the impeaching testimony would be admissible. The court, however, certifies as one of the reasons for his refusal to permit the impeaching testimony that it was not in contradiction of any testimony given in by Mrs. Flowers,—that is, the bill is self-contradictory,—and the court's explanation is not reconcilable with the statement in the beginning of the bill as to what Mrs. Flowers had testified to on the trial, and what it was proposed to be proved by Gunnels she had stated to him in the court house at Ft. Worth. If we consider that the judge's explanation or modification of the bill has a controlling influence, then this would dispose of the bill. If we recur to the statement of facts, we find that his explanation is eminently correct; that is, Mrs. Flowers did not testify that she was present during the difficulty, and witnessed it, nor did she state how it occurred. On the contrary, her testimony showed that she was not present. She did not see or know how the cutting occurred, nor did she pretend to state the particulars of the transaction. According to her testimony, she only entered the room after her husband had been cut, and was being taken into an adjoining room, and she did not see the defendant at all. True, she narrates that, after her

husband was taken into the other room, he handed his open knife to her; but two other witnesses testify as to appellant getting his knife out of his pocket, and opening it, and handing it to his wife, after he was taken into the other room, and laid upon the table. This is not gainsaid by any evidence. Mr. Wharton lays down the rule as follows: "A witness called by the opposing party can be discredited by proving that on a former occasion he made a statement inconsistent with his statement on the trial, provided such statement be material to the issue; though a witness, after testifying to criminating facts, cannot be asked whether he has not previously said that in his opinion the defendant was not guilty. The statement which it is intended to contradict must involve facts in evidence. If confined to opinion, when opinion is not at issue, or to other irrelevant matters, the cross-examining party is bound by the answer. \* \* \* A witness may also be contradicted by proof of prior contradictory statements before the grand jury, or by proof that he now states facts which, on a former trial, he omitted to state; and generally, whenever on a former occasion it was the duty of the witness to state the whole truth, it is admissible to show that a witness in his statement admitted facts sworn to by him at the trial." See Whart. Cr. Ev. § 482. This rule has been followed by our court in a number of decisions. It apprehends that the witness has testified to some material fact about which it is proposed to contradict him; and it presupposes that, if the witness has not testified to the fact, there is no basis for the contradictory evidence. Applying this rule to the testimony of Mrs. Flowers, we find that she did not state a single fact with reference to the fight which resulted in the death of her husband, that she was not present at the time it occurred, and knew nothing as to how it did occur. So there was nothing upon which to contradict her, and the statement proposed to be proved by Gunnels that she theretofore told him at Ft. Worth that when defendant cut her husband, that her husband and Granvill Flowers were on top of him, not being in contradiction of any testimony given by her on the trial, was not legitimate evidence in impeachment of her; and the court did not err in excluding it.

Appellant contends that the charge given by the court with reference to dying declarations of the deceased, W. H. Flowers, was improper, as being a charge upon the weight of the evidence and giving undue prominence to said witness' testimony. We have examined said charge, and, in our opinion, it was merely an instruction to the jury with reference to a rule of law under which they were to determine whether or not they should consider said dying declarations at all. Inasmuch as some controversy was made by appellant as to whether said declarations were freely and voluntarily made, and that the deceased was of sane mind at the time, and conscious of

approaching death, the court instructed them that, if said declarations were not made under the safeguards required by law, not to consider same. The charge in question was as follows: "You will not consider the dying declarations of the deceased, W. H. Flowers, unless you believe from the evidence that at the time the said declarations were made that the deceased was of sane mind, conscious of approaching death, and that said statement was made voluntarily, and not in response to interrogatories calculated to lead deceased to make any particular statement. But in this connection I charge you that it would be no legal objection to said declaration that questions were asked him directing his mind to the subject, or part of the subject, upon which said declaration was made. Nor do such questions take from such declaration its voluntary character." We understand the last portion of said charge as particularly objected to. In our opinion, it embodies a correct rule on the subject, and was applicable to the testimony.

Appellant also objected to the following charge: "You are instructed that, if the defendant provoked the contest with the deceased, W. H. Flowers, with the apparent intention of killing him or doing him serious bodily harm or injury, he would be guilty of murder, although he might have done the act of killing suddenly, without deliberation, and in order to save his own life. The law allows no justification in such cases, and no reduction of the grade of homicide below murder. But, if the defendant provoked the contest, without any intention to kill deceased, or to inflict serious bodily harm or injury upon him, and suddenly, without deliberation, stabbed, cut, and killed him, he would be guilty of manslaughter." The contention of appellant is that there was no testimony authorizing this charge. We would remark in this connection that a full and clear charge on self-defense was given, which, in our opinion, adequately guarded the rights of the defendant; and said charge was not trammelled by the charge on provocation being connected therewith. It does not appear from the testimony that any witness except the deceased made any statement as to the circumstances immediately attending the stabbing with the knife. If the dying declarations be true, appellant not only sought and provoked the difficulty, but himself attacked deceased. This declaration first tells about an altercation that had occurred between him and deceased in the room where they were dancing. Some considerable lapse of time after this—an hour or more—deceased walked from the supper room into the corridor. "There," he says, "I stepped in the door of the court room, and saw Vat Taylor in the corridor in the corner next to the ladder. I had my back to him, and he said, 'I think you acted' [and used a very opprobrious epithet towards him], and then stabbed me in the belly with his knife. He made all the wounds in my abdomen before I clinched with him. I think he cut me on the shirt

sleeve after we clinched. I never had my knife out at all in the corridor, or while we were scuffling. I got it out after we separated, and came into the court room." Now, this testimony not only justified the court in giving a charge on provoking the difficulty, but would deprive the defendant of self-defense altogether. Nor, in our opinion, does the testimony of any of the other witnesses in the case militate against this evidence. True, two of the witnesses, who were in the court room, stated they were sitting on a railing in front of the judge's stand, and looking through the door into the corridor. "Saw deceased come from towards the grand-jury room, and lean up against the door facing. Defendant was at that time leaning against the door facing on the north side of the door. They stood there and talked, facing each other, for a minute or two; and then defendant started to walk off towards the head of the stairway. Saw deceased's arm go out in front of him, and in the direction of the defendant." One of these witnesses merely says, "Deceased's arm went out in the direction of defendant," and the other says, "I think he struck at defendant; they seemed to clinch then, and I saw no more, as the crowd rushed up." Taking the testimony of these witnesses, in connection with the testimony of the deceased, showing what this conversation was, and the opprobrious epithets applied to him (deceased) by defendant, if, according to these witnesses, defendant, in response to this insulting language, struck at or struck defendant according to said witnesses, then the court's charge on provoking the difficulty was certainly rendered pertinent. Moreover, in our view, there was no danger of the jury applying the charge of the court to the altercation that occurred in the dance room some hours previous.

Appellant, in this connection, claims that the court, having given a charge on provocation, should have given an alternative charge. The charge given by the court on self-defense we think fairly embodied all of appellant's rights under the testimony in the case. Said charge fully authorized the jury to acquit the defendant if he was first attacked by either deceased or his brother, Granvill Flowers, in such manner as to cause him to apprehend danger to his life, or serious bodily injury. To our minds, indeed, there is very little testimony in the case calling for a charge on self-defense at all, although Duke Taylor, the brother of the defendant, was a witness on his behalf. He does not state the beginning of this difficulty in such form as to make clear to our minds the appellant's right of self-defense. He says: "When the fight was up, I was walking from the railing over towards the door of the court room, and had stopped some eight or ten feet from the door, right opposite to it. The first thing that drew my attention was the motion of the deceased's arm. He struck out in front of him. I did not see his hand, and did

not know whether he had anything in it or not. I saw my brother there at the time, and I rushed to the door," etc. Now, he does not state the origin of this difficulty in the corridor, and, according to deceased's version, which is not contradicted by any witness, defendant was the aggressor; brought it on; and if it be conceded that defendant struck him after he had denounced him, he evidently did so for the purpose of bringing on the difficulty, and then cutting him with his knife, for all of the testimony shows that he immediately began to cut him. The testimony further shows that after the altercation in the dance room he must have premeditated this assault, and laid in wait for the deceased some time in the corridor, before he found occasion to attack him, because the brother of the defendant says that he saw his brother out in the hall several minutes before the fight occurred; and other witnesses show that he must have been there, and, as soon as deceased appeared, he denounced him in a violent manner; and whether he or deceased struck the first blow, to our minds, is absolutely immaterial.

There was no error in the court's additional charge to the jury that, if the deceased made any other attack on the defendant than one with intent to kill him or inflict serious bodily injury, before he was authorized to slay deceased he must have resorted to all the other means besides retreating. If he made any attack on him at all, it was an attack less than one to murder or inflict upon him serious bodily injury. Nor did the court commit any error in refusing to give appellant's requested instruction embodying self-defense, predicated on the idea that there was a conspiracy between deceased and others to make an attack on defendant. The testimony utterly fails to show any such conspiracy.

Appellant insists that he should have had a new trial on account of the separation of the jury while they were considering their verdict, and that the case should be reversed on account of the refusal of the court to grant such new trial. We have examined the record carefully in this respect, and, while it appears that members of the jury on two occasions were absent from the main body, it appears that during such separation one of the jurors merely went into the hotel with an officer to register off his name, which was only a short distance from where the main body of the jury was, and that he was only absent from them a very short time; that in the meantime the judge, and perhaps another officer, were with the jury. Another one of the jurors left the main body at one time to go to a buggy, in which were his sister and two other young ladies, in order to send a message to his wife. He was then in view of the officer all of the time, and it does not appear that there was any such separation as in any wise would prejudice the rights of the appellant. No error appearing in the record, the judgment is affirmed.

## ARBUTHNOT v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

## CRIMINAL LAW—COSTS ON APPEAL—FEE OF ATTORNEY GENERAL.

1. Code Cr. Proc. 1895, c. 4, art. 1119, provides for a fee of \$10 to the attorney general where a conviction of misdemeanor is affirmed. Article 1121 authorizes such fee to be taxed against defendant, and collected as in other cases. *Held*, that such fee is costs to be taxed, within article 1071, providing that only costs authorized by law shall be taxed in criminal proceedings.

2. The fact that Code Cr. Proc. 1895, c. 4, art. 1122, only provides for collecting the clerk's costs by execution against defendant and his sureties, where a conviction for a misdemeanor is affirmed on appeal, does not by inference prevent the fee allowed the attorney general in such cases (article 1119), which is authorized (article 1121) to be taxed against defendant and collected as in other cases, from being taxed in the appellate court, and collected by execution issued against the defendant and his sureties on appeal, together with costs of the writ.

Motion by defendant to retax costs. Overruled.

For former report, see 34 S. W. 269.

HENDERSON, J. This is a motion to retax the costs in said case, which was appealed from Montague county, and affirmed at a former term of this court, and, as ancillary to this motion, there is also an injunction granted by the district judge of the Sixteenth judicial district. The items of cost are clerk's fee, in this court, \$10; attorney general's fee, \$10; issuing writ of execution, \$1; and the return thereon, \$1,—making, in all, \$22. The clerk of this court issued an execution for said costs, \$10 was paid to the sheriff of Montague county as the costs of the clerk of this court, and the balance of \$12 the appellant and his sureties refused to pay, claiming that the same was not legitimate costs, for which appellant and his sureties were bound on the recognizance executed in the court below. Appellant insists, in this connection, that article 1071 of the Code of Criminal Procedure of 1895 only authorized costs which are expressly provided for by law, and that the attorney general's fee of \$10, and the cost of issuing the execution and return thereon (\$2), are not provided for by any statutory law; at least, that there is no provision making the sureties on appellant's recognizance liable for such costs. By reference to article 1119, c. 4, Code Cr. Proc. 1895 (which chapter has reference to costs to be paid by defendant), it will be seen that the attorney general, in every case of misdemeanor in which the judgment of the court below is affirmed by the court of criminal appeals, is allowed the sum of \$10. Article 1120 authorizes the clerk also to receive a fee of \$10, which is couched in similar language as the preceding article. Article 1121 authorizes the fees named in the preceding sections to be taxed against the defendant and collected as in other cases. Article 1122 specially provides that, when the judgment of the court below is

affirmed against a defendant, the fees of the clerk of said court shall be adjudged against the defendant and his sureties on his recognizance, for which execution shall issue, as in other cases of appeal to the court of criminal appeals. It is contended that, because this article provides as to how the fees of the clerk shall be taxed and collected, it excludes the idea that the fee of the attorney general can be taxed and collected in the same manner; and, if the fee of the attorney general is collectible at all, it must be collected from the defendant by proceedings in the court below, as provided for in the collection of costs in said court, and that the defendant alone is responsible for such costs. We do not so understand this matter. The fee of the attorney general is as much the costs accruing in the court of criminal appeals as the clerk's fees, and is expressly provided for by the statute above quoted. It is costs accruing solely in the court of criminal appeals, and depends upon one of two propositions,—either that the judgment is affirmed or appeal is dismissed. As said before, article 1121 provides for taxing of costs of the attorney general and of the clerk against the defendant, and for their collection as in other cases. These costs pertain to no other court but this, and we know of no other place where they can be taxed, and no other tribunal authorized to collect such costs. The recognizance given on appeal to this court expressly provides that the defendant shall abide by the judgment of the court of criminal appeals. We hold that the fee of the attorney general, as well as the fee of the clerk, is a legitimate item of costs against the appellant and the sureties on his recognizance. We further hold that, to enforce the collection of these items of costs, the clerk of this court is authorized to issue an execution, and that he is entitled to the same fee therefor, as well as the return thereon, as is provided in civil cases. We accordingly overrule the motion to retax the costs, and authorize the clerk of this court to issue an execution for the amount of the costs uncollected.

## PILOT v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1898.)

## CRIMINAL LAW—CONTINUANCE—REBUTTING EVIDENCE—APPEAL—HARMLESS ERROR—BURGLARY—NEW TRIAL—MISCONDUCT OF JURY—EVIDENCE OF INTENT—INSTRUCTIONS.

1. On a prosecution for burglary, there was evidence that defendant was seen in the act of burglary, and that defendant had a shotgun, and snapped it at the witnesses. *Held*, that defendant was not entitled to a continuance on account of the absence of a witness who would testify that defendant had his rifle repaired a few days before the burglary, such evidence being immaterial.

2. Defendant was not entitled to a continuance because of the absence of his son as a witness, where the application merely stated, in general terms, that the son was home on the night of the burglary, which was committed about four miles from defendant's house.



3. It is not error to admit in rebuttal original evidence which rebuts defendant's theory and evidence of an alibi.

4. On a trial for burglary, a physician testified that, on the next morning after the killing of P., defendant's brother, he saw his body, and examined the wounds thereon. The dead body was found about 18 feet in the rear of the store, in a gully. *Held*, that evidence by such physician that it was possible for P. to have been shot in the house, as related, and to have gotten to such gully, without having any sign of blood along the route, was admissible as expert testimony.

5. Even if not within the rule of expert testimony, such evidence was harmless, the evidence as to where he was when shot and when he was found being positive and uncontradicted.

6. Evidence of prior burglaries of the same house was admitted, without objection, to explain the presence of prosecutor and one J. in the house at the time of the burglary charged, and such evidence did not tend in any degree to implicate any one. *Held*, that the omission to charge with reference to the purpose for which the jury could consider such evidence was not error.

7. On a prosecution for burglary of a store, there was evidence that defendant and his brother were prowling around the store, and that such brother carried with him a pillowslip, which was found in the building after he was shot, and fled with defendant. *Held*, that whether defendant committed the burglary for the purpose of theft, or of an assault with intent to commit murder, was not rendered uncertain because defendant, as soon as he was detected, attempted to shoot the persons who were lying in wait in the store.

8. The court properly refused to set aside a verdict of guilty because one of the jurors made an affidavit that he did not believe the defendant guilty, but assented to the verdict, because 11 of said jurors stated that they believed defendant was guilty, and their conduct was such "that I believed, unless I assented to the verdict which was returned, I would be grossly insulted by them, and that I only assented thereto by reason of the influence of this fear."

Appeal from district court, Shelby county; Tom C. Davis, Judge.

Henry Pilot was convicted of burglary, and appeals. Affirmed.

D. M. Short & Sons, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at two years in the penitentiary; hence this appeal.

Appellant complains of the action of the court in overruling his motion for a continuance on account of the absence of two witnesses, Grant Pilot and one Amey, both of whom, he says, had been subpoenaed as witnesses for him in the case. By the witness Amey he proposed to prove that, a few days before the alleged burglary, said Amey who was a gunsmith, had repaired the gun of appellant. It was insisted that this testimony was material in rebuttal of the state's proof that, in connection with the two parties (defendant being one of them) who were seen by the two state's witnesses in the act of burglarizing the house, defendant had a shotgun, and snapped it at the state's witnesses. Now, in response to this position, it is only necessary to state that the proof

offered by the state did not show that it was the shotgun of the defendant which was used. Indeed, when we recur to the testimony on the part of the state, the witness states he was not certain whether it was a shotgun or not. So far as the state's case is concerned, if appellant had a shotgun it is not claimed that it was his own shotgun, and we fail to see how the bare circumstance that he had his rifle repaired a few days before by the gunsmith would have had any material bearing on the case. As to the witness Grant Pilot, the application states, in general terms, that Grant, the son of appellant, was at home on the night the burglary was committed. The circumstances attending this alibi testimony are not stated. The burglary occurred about 12 o'clock at night, at a little town about four miles from the defendant's house. How many rooms were in said house, whether Grant slept in the same room with appellant, or whether it is pretended that he was awake during the night, and knew that appellant was at home, is not stated. This application is not such a definite statement of facts as would authorize us to entertain the motion in this regard. The motion for a continuance, as well as the motion for a new trial, predicated on the action of the court in overruling the same, was properly overruled.

It is claimed by appellant that the court erred in permitting the state to introduce C. L. Johnson, after the defendant had closed his testimony, in rebuttal; the insistence being that the testimony of the said Johnson was original testimony, and not in rebuttal of anything that defendant proved, and should have been introduced originally by the state. It is true the testimony of Johnson was original testimony, and might very properly have been introduced by the state originally, but it was also directly in rebuttal of the defendant's theory of an alibi. His testimony tended to show that he was at another and different place at the time of the burglary. This was testimony directly in rebuttal of the fact that he was not at the place of the burglary, and, even if it had not been, under the circumstance of this case, its admission would not have been reversible error.

Appellant's third assignment of error is based on the action of the court in allowing Dr. H. M. Reeves to state that he was a physician, etc., and that on the next morning after the killing of Handy Pilot, the brother of the defendant, he saw his dead body, and found a wound on the left side of his leg, just below the knee, the result of a gun shot. The bones had been fractured in three places, and the muscles and artery had been severed. This leg was covered by heavy drawers and pants, and the sock was drawn up over the drawers. The testimony, in connection with this, showed that said Handy Pilot was shot in the burglarized house about 12 o'clock, and that his dead

body was found the next morning about 18 feet in the rear of the store, in a gully. Dr. Reeves was permitted to testify, on these facts, that it was possible for the deceased to have been shot in the house as related, and to have gotten to the gully, 18 feet in the rear of the store, and left no sign of blood along the route. We think this testimony comes within the rule of expert testimony. But, if it be conceded that it does not, we fail to see how it could have affected appellant. The witnesses for the state swear positively to the shooting of Handy Pilot in the house, and all the testimony shows that he was found about 18 feet in the rear of the house, in a gully, on the next morning. And this evidence is not gainsaid by any testimony for the defendant. However, whether he spilled any blood along the route we think is immaterial. The testimony tended to show that no blood was found along the route, and we are not informed as to the nature of the ground or what had been done to obliterate appearances. His clothes in the interim may have absorbed the blood. At any rate, it was competent to show that in his condition, as testified to by the surgeon, it was not an impossible feat for him to travel that distance without having left any trace of blood.

The fourth assignment of error relates to the charge of the court; and it is insisted that the court, in its charge as to how the jury were to weigh the testimony and reconcile any conflicts in the testimony of the witnesses, failed to obliterate the words, "interest in the case," in the printed charge, which has heretofore been held to be a charge upon the weight of testimony. An examination of the charge, however, shows that this clause was effectually eliminated.

Appellant insists that the court should have instructed the jury with reference to certain portions of the testimony relating to former burglaries of the house, introduced by the state; that is, that the jury should have been instructed with reference to the purpose for which they could consider such testimony. This charge was not excepted to at the time. The evidence in regard to other burglaries having been committed in the same house, prior to this instance, was admitted for the purpose of explaining the presence of prosecutor and Johnson in the house that night; that is, that they were there watching for the burglars. The evidence in regard to the other burglaries did not tend in the remotest degree to implicate any particular person. It was not objected to at the time. Under this state of facts, the only objection that appellant could urge would be that the jury may have convicted him of the other burglaries. This was not at all probable, because, as aforesaid, the evidence pointed to no particular individual. Again, it could not have prejudiced appel-

lant, because the punishment was the lowest fixed by law.

There is nothing in appellant's contention that proof as to the intent with which the burglary may have been committed was wanting,—that is, that it was rendered uncertain whether, in making the entry, appellant and his confederate did so for the purpose of theft or of an assault with intent to murder; and it is urged that because appellant, as soon as detected, attempted to shoot the parties who were lying in wait in the store, is strong evidence that the entry was for that purpose. The evidence presents no pretext that these parties knew that the prosecutor and the witness Johnson were in the store at that time, or that they had any malice or grudge against them. The evidence, however, does strongly tend to show that the entry was made for the purpose of theft. Handy Pilot, brother of appellant, carried with him a pillowslip, which was found in the house after he was shot, and fled with his co-defendant, appellant. They were prowling around the store, and could have had no other purpose, as indicated by the testimony in this case, than to steal from said store.

It is also insisted that a new trial should have been granted because of the misconduct of the jury. The juror Allen Alford makes an affidavit in which he states that he did not believe the defendant guilty, "but assented to the verdict in the case because eleven of said jurors stated to me that they believed the defendant was guilty, and when I stated to them that I did not believe, from the evidence, that he was guilty, their conduct was such towards me that I believed unless I assented to the verdict which was returned I would be grossly insulted by them, and that I only assented thereto by reason of the influence of this fear." This is the language of the juror. No authority can be found for setting aside a verdict on the ground here urged. If appellant had moved to set aside the verdict on the ground that one of the jurors was not competent, for the want of capacity to serve as such, and in support of this motion introduced this affidavit, the question would have demanded more consideration. However, we would state that no fact of coercion or undue influence is stated to have been used against said juror, and the contention of appellant is without any merit.

Appellant insists that, in the face of his alibi testimony, in connection with the weakness of the state's case, he ought to have a new trial, and that this case should be reversed. We have examined the record carefully, and it occurs to us that the state's case is directly supported by the positive testimony of two eyewitnesses, and the surrounding facts strongly corroborate their evidence. The judgment is affirmed.

**HARRIS v. KELLUM & ROTAN INV. CO.**  
(Court of Civil Appeals of Texas. Jan. 28, 1898.)

**JURY TRIAL—WAIVER—NEGLIGENCE.**

1. Where one who demands a jury trial voluntarily withdraws the jury fee deposited by him as required by law, he cannot complain that the case was not tried by a jury.

2. One who was negligent, in not being present in person or by attorney at the trial of a case, cannot complain that it was not retained on the jury docket, and tried by a jury.

(Syllabus by the Court.)

Appeal from McLennan county court; J. N. Gallagher, Judge.

Action by the Kellum & Rotan Investment Company against S. B. Harris. From a judgment in favor of the plaintiff, defendant brings error. Affirmed.

Thos. C. Smith, H. O. Lindsey, and C. P. Albee, for appellant. A. C. Prendergast, for appellee.

**FISHER, C. J.** We have examined the assignments of errors presented in the brief of appellant, and they present no grounds for the reversal of the judgment of the court below. Under the facts as stated in the record, the case was properly on the nonjury docket, as the withdrawal of the jury fee by the appellant had the effect of depriving him of the right of a trial by jury, which he had previously demanded. Depositing the jury fee is one of the requirements of the law, and where it has been voluntarily withdrawn the party cannot complain that his case has not been tried by a jury, because his conduct in withdrawing the jury fee deprived him of that right. The facts further show that if he desired the case retained on the jury docket, and his defense presented to and passed upon by a jury, he was negligent, in not either being present himself, or having an attorney there, at the trial of the case, to represent him. The facts further show that the attorney, who he claims should have represented him, and whom he relied upon to be present at the trial, was not employed for that purpose; and it is clear from the case, as made, that if his interests were not represented in the trial court, and he was deprived of a trial by jury, this was all attributable to his own conduct. We find no error in the record, and the judgment is affirmed. Affirmed.

**PENA v. PENA.**

(Court of Civil Appeals of Texas. Jan. 12, 1898.)

**JUDGMENTS BY DEFAULT—SERVICE OF PROCESS—AMENDED PETITION.**

It is error to enter a judgment by default upon an amended petition, where the defendant, although a citation issued upon the original petition had been served on him, was not cited to answer the amended petition, and did not waive citation, accept service, nor enter his

appearance in the cause, and neither appeared nor answered at any time or in any manner in the suit.

Appeal from Duval county court; C. L. Coyner, Judge.

Action by Bernardo Pena against Lazaro Pena. From a judgment entered on plaintiff's amended petition, and from the order overruling defendant's motion for a new trial, defendant appeals. Reversed.

S. H. Woods and Geo. B. Hufford, for appellant.

**NEILL, J.** On June 15, 1897, the appellee filed his original petition in the county court of Duval county, Tex., against appellant, wherein he sued the latter for the purchase price of certain horses and mules alleged to have been sold and delivered by him to the appellant at an agreed price. He also sued for the purchase price of improvements on a certain tract of land, consisting of fences, slaughter pen, slaughter house, water tank, etc., and other property connected therewith, which he alleged he sold and delivered to appellant, for a certain price alleged, on the 15th day of May, 1896. On the 31st day of May, 1897, citation was issued upon this petition, and duly served on appellant on the 11th day of June, 1897, requiring him to appear and answer on the first Monday in July of that year. On July 27, 1897, appellee filed his first amended original petition, alleging substantially the same cause of action as alleged in the original. On August 6, 1897, appellee filed his second amended original petition, in which he reiterated his allegations contained in the preceding ones for the purchase price of the improvements of land, etc., but omitted entirely the allegations upon which he based his action for the purchase price for the horses and mules alleged to have been sold by him to appellant. He alleged, however, in this amendment, that appellant had, without his knowledge or consent, on the 15th day of September, 1895, taken from appellee's possession, in Starr county, Tex., 25 head of horses and 12 mares, reasonably worth in the aggregate the sum of \$372, and appropriated them to his use and benefit, to his damage, etc. He also alleged in his second amended original petition that on the 12th day of October, 1895, he was in possession, in Starr county, of 7 mules, 4 colts, 2 horses, and 6 mares, aggregating in value \$213; which animals, on said day, appellant, without the knowledge or consent of appellee, took from the latter's possession, and converted them to his (appellant's) own use and benefit, to appellee's damage in the sum of \$213. The appellant neither appeared nor answered at any time or in any manner in this suit. He was not cited to answer the second amended original petition, nor did he waive citation, accept service, or enter his appearance in the cause after it was filed. On the 7th day of August, 1897, judgment by default was en-

tered against appellant (appellee's demands as set out in his second amended original petition having then been proven up) for the sum of \$767.70. On the same day appellant filed his motion for a new trial, which being overruled, he appealed to this court.

It is unnecessary for us to consider any of appellant's assignments of error, except the one which complains of the court's refusal to grant him a new trial upon the ground set up in his motion, that the court erred in rendering judgment against him on appellee's second amended original petition; appellant having never been cited to answer it, waived nor accepted service thereon, nor answered or in any manner appeared in the case. That a judgment rendered in the manner complained of in appellant's motion for a new trial, stated in the assignment, is erroneous, if not absolutely void, is too clear for discussion. *Morrison v. Walker*, 22 Tex. 20; *McRee v. Brown*, 45 Tex. 507; *Erskine v. Wilson*, 27 Tex. 118; *Stewart v. Anderson*, 70 Tex. 589, 8 S. W. 295; *Pendleton v. Colville*, 49 Tex. 525. For reason of the error stated, the judgment of the county court is reversed and the cause remanded.

**HOUSTON CITY ST. RY. CO. et al. v.  
MEDLENKA.<sup>1</sup>**

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

**RAILROADS—PERSONAL INJURIES—NEGLIGENCE—  
DEFECTIVE CONDITION OF TRACK—DAMAGES—  
CONDUCT OF JURY—CONTRIBUTORY NEGLIGENCE—  
RAILWAY IN COUNTY ROAD—NEW TRIAL—EVI-  
DENCE—QUESTIONS FOR JURY—INSTRUCTIONS.**

1. Where plaintiff, who was a printer, 42 years of age, earning regularly \$60 to \$125 per month, was rendered unable to pursue his trade by reason of permanent injuries received through defendant's negligence, without fault on his part, a recovery in the sum of \$9,000 was not excessive.

2. Where the evidence, in an action for personal injury, was not such as made plaintiff clearly and unmistakably guilty of contributory negligence, it was proper to submit such question to the jury.

3. Neither the fact that the line of railway on which plaintiff was injured was outside of any city, on a county road, under authority of the commissioners' court, nor the fact that defendant was not then operating such railway, but that the cars thereon were being operated by another company, absolved defendant, as the owner thereof, from maintaining its track in a condition of safety for those using such highway.

4. The fact that, when the charge was read to the jury, a bystander, who was as near the judge as the jury was, and whose hearing was good, did not understand from such reading all the contents thereof, was insufficient ground for a new trial.

5. In an action for personal injury, where it appeared that plaintiff was injured through the breaking of a wheel of his vehicle, in crossing defendant's railway track, by reason of the protrusion of the rails above the surface of the highway, and the absence of guard rails, evidence of the condition of the track at such point, and other points immediately connected

therewith, was admissible on the issue of negligence on the part of defendant in keeping its road in such condition.

6. Whether or not plaintiff was negligent in attempting to drive across defendant's railway track, with knowledge of the fact that the rails protruded above the surface to an extent rendering it unsafe, was a proper inquiry, where there was testimony that he did so in order to avoid a water hole in front of him, not knowing its depth or condition.

7. Where it appeared that plaintiff was injured while driving across defendant's railway track at a point where the rails protruded above the surface, it was improper to give the jury to understand that no duty devolved on defendant to keep its line safe for the traveling public, if such condition was produced by a depression in the public road, outside of its track, caused by travel by vehicles thereon.

8. A charge, that "by 'ordinary or reasonable care' is meant such care as an ordinarily prudent person would have exercised under the same or similar circumstances," practically expresses the rule as if it had said, "the same or like circumstances."

Appeal from district court, Harris county; John G. Tod, Judge.

Action by Charles P. B. Medlenka against the Houston City Street-Railway Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Lanier, Kirby & Martin, for appellants.  
Ewing & Ring, for appellee.

JAMES, C. J. Action for personal injury alleged to have been caused by negligence of appellant in regard to its roadbed or track on Washington street, or road, near the city of Houston; the negligence alleged being that the rails were permitted to protrude considerably above the level of the street, and that the substructure of said track was allowed to become decayed and wasted into holes, without guard boards or timbers, and that thereby the wheel of plaintiff's vehicle was broken, and he seriously injured as the result thereof. The verdict was for plaintiff for \$15,000, which was reduced by remittitur in the district court to \$9,000. The evidence warranted the finding that defendant was negligent in reference to its track, in substance as alleged, and that the conduct of plaintiff on the occasion and under the circumstances was consistent with reasonable care. We will proceed to consider the assignments of error.

There was evidence that plaintiff's injuries were permanent, and unusually severe, and that at the time he was 42 years of age, and a printer, and earned regularly from \$40 to \$125 per month, and was totally unable to pursue his trade. The verdict having been reduced by remittitur to \$9,000, this amount, certainly, is not excessive. It is contended by the second assignment that the verdict, being for \$15,000, the amount asked for, shows that the jury were dominated by passion and prejudice, and did not fairly consider and try the issues. The verdict for \$15,000 would probably not have been deemed excessive, in view of testimony in the record, and we cannot say that the verdict for that amount manifests any improper conduct on the part of the jury.

<sup>1</sup> Writ of error denied by supreme court.

There was no error as claimed in the third assignment. The claim is that the testimony was undisputed that the condition of the place was not due to defendant's negligence, and that the hole or washout in which the vehicle was broken was in that portion of the public road owned and controlled by the county. This was not the state of the evidence; hence this assignment, and the twenty-fifth, involving a charge based on the same theory, is not well taken.

The evidence was not such as made the plaintiff clearly and unmistakably guilty of contributory negligence. Therefore the question should have been submitted. This disposes of the matters embraced in the fourth, eighth, and twenty-sixth assignments.

The fact that the line of railway was outside of any city, upon a county road, by authority of the commissioners' court, has no tendency to absolve the company owning such railway from the requirement of reasonable care in maintaining its track in a condition of safety for those using the highway; nor is the company whose track this was so absolved by reason of the fact that it was not then operating the railway, but that the cars were being operated thereon by another street-railway company.

There is no merit whatever in the seventh assignment. One C. B. Martin made an affidavit to the effect that, when the charge was read to the jury, he was as near the judge as the jury was, and, although his hearing was good, he did not understand, from its reading, all the contents of the charge; that after a few moments the jury retired, and in about 10 minutes brought in a verdict; and that in his opinion the jury could not have discussed or considered to any reasonable extent the evidence in connection with the charge, and returned a verdict within such time. The decision of the judge against the sufficiency of this ground for new trial is a sufficient answer thereto.

It appears, from evidence in the case, that the point at which plaintiff undertook to cross this railway was about 150 or 200 feet from the crossing of the Southern Pacific Railroad. The witnesses Muller, Pommer, Schott, and Perkins all testified to the fact that at the point where the occurrence took place the rails of the street-car track were much higher than the roadway, and no guard rails; and some of these witnesses stated the rails were five or six inches higher than the roadway. Not all of the witnesses had seen the accident, and objection was made to the testimony of such as had not, as hearsay. The court allowed the evidence conditionally only, and subject to it being shown that the place claimed by the respective witnesses to have been pointed out as the place of injury, and testified about, was in fact the correct place; and this was shown. These witnesses, or some of them, were allowed, also, to testify to the condition of the track from the Southern Pacific crossing for several hundred feet in the direction of this accident, testifying

that for all, or nearly all, that distance it was very bad, and several inches above the level of the road, which testimony was objected to, on the ground that it was not confined to the locality of the accident, and was immaterial and irrelevant. These witnesses, in this connection, testified that the place where this occurred was as bad as any of the 600 feet east of the crossing, and most of them testified it was in its worst condition at that place. Our opinion is that the evidence of the condition of the track at that point, and immediately connected with it, was proper to be considered on the issue of negligence of the company in keeping its road in condition. Reasonable care in this respect is all that was required of the defendant. In determining whether or not defendant has performed or failed to perform this duty, the opportunity defendant has had to observe or know of the defect complained of is of importance; and the extent of the bad or dangerous condition of its road, in that immediate locality, at least, bears on this question. See *Railway Co. v. Johnson*, 86 Tex. 428, 25 S. W. 417. There is nothing in the tenth assignment.

The thirteenth and nineteenth are that witnesses were allowed to state that there were no guard rails at the place, and that guard rails are to make it easier to drive over the rails; the objection being that it was expert testimony, and an opinion of the witness, who had not qualified as an expert. This was a matter that could be testified about by non-experts. The fourteenth has as little force. Pommer after testifying that "most of the distance, 600 feet, the rails were more or less from three to five inches above the roadway, street in holes, and no guard rails by the rails. I noticed it just nearly opposite the baker shop, and it was in the worst condition." This last sentence does not state an opinion of the witness, but a fact.

The twenty-second assignment is an objection to plaintiff's testimony of what his doctor's and medicine bills were. In this connection we will dispose of the thirtieth assignment, which complains of the charge which allowed the jury to find for the amount of such expenses. The objection is that there is no allegation to support such damage. There is such allegation.

The twenty-fourth refers to the refusal of a charge that, if the jury found the alleged defects to have existed, and the railway constructed as alleged, still, if plaintiff knew or could have known of the condition of the track by the exercise of ordinary care, they should find for defendant. This would have made the court declare as a matter of law that an attempt to cross the track with such knowledge was, under the circumstances of the case, negligence on his part. This would not have been correct. *Lee v. Railway Co.*, 89 Tex. 583, 36 S. W. 63. There was testimony that plaintiff crossed the track to avoid a water hole in front of him, not knowing its depth or condition. Whether or not he act-

ed in this differently from one of ordinary prudence, under the circumstances, was a proper inquiry.

The twenty-fifth relates to a refused charge in substance as follows: "You are instructed that if you believe, from the evidence, that the alleged condition of defendant's street railway was caused by recent heavy rains, causing the ditch in the public road to wash away from the rails, and that such washout was so recent as that defendant, by the exercise of ordinary care, had not and could not have known of same at the time of the alleged injury to plaintiff, or if such depression or sink was in the public road, and was caused by travel by vehicles over said county road outside of the street-railway company's rails, you will find a verdict for the defendant." We think that at least the latter portion of this charge would have been incorrect, in giving the jury to understand that no duty devolved on the company to keep its line safe for the traveling public, if the alleged defect in its track was the result of gradual wearing away of the road by travel.

We need not notice the twenty-seventh assignment. The twenty-eighth, twenty-ninth, and thirty-first will be disposed of together. The court charged that by "ordinary or reasonable care" is meant such care as an ordinarily prudent person would have exercised under the same or similar circumstances. It is claimed that the word "similar" tended to lead the jury to believe that it was not such care as plaintiff should have exercised under the circumstances of this case that should be considered. The rule is generally expressed by use of the words "like circumstances." *City of Austin v. Ritz*, 72 Tex. 402, 9 S. W. 884; *Railway Co. v. Shieder*, 88 Tex. 167, 80 S. W. 902; *Martin v. Railway Co.*, 87 Tex. 120, 26 S. W. 1052; *Railway Co. v. Beatty*, 78 Tex. 596, 11 S. W. 858; *Galloway v. Railway Co. (Iowa)* 54 N. W. 447. As expressed in the charges, the rule is practically as if it had said, "the same or like circumstances." It could not reasonably have been taken to mean that the jury were to refer to what a person of ordinary prudence would have done under circumstances that were in any material respect different from those present in this case, and therefore we do not sustain this attack on the charges mentioned in these assignments. There is nothing in the thirty-second assignment. The judgment is affirmed.

#### MUTUAL BUILDING & LOAN ASS'N v. MCGEE.

(Court of Civil Appeals of Texas. Jan. 12, 1898.)

MECHANICS' LIENS—PRIORITY—FALSE REPRESENTATIONS—CORPORATIONS—OFFICERS.

1. A deed of trust of property does not impair a mechanic's lien which had already attached when the deed was given.

2. An association falsely represented to a lot owner the name of a surety on a building con-

tractors' bond. On default of the contractors, the owner, in order to obtain money to finish the house, executed a deed of trust thereof to the association. *Held* that, assuming that such deed impaired the mechanic's lien assigned to the association by the contractors, and thus released the sureties on the contractors' bond, it did not relieve the association from liability for its false representation.

3. An association is not relieved from liability for a false representation made by its president when acting within the scope of his authority, and in accordance with a custom of dealing of the association, because the president believed such representation to be true.

Appeal from Harris county court; W. H. Wilson, Special Judge.

Action by James McGee against the Mutual Building & Loan Association. From a judgment for plaintiff, defendant appeals. Affirmed.

F. A. Schaefer and W. C. Oliver, for appellant. Ewing & Ring, for appellee.

FLY, J. In 1895 appellee and wife entered into a written contract with Andrew Thompson & Co., whereby the latter, in consideration of the sum of \$6,010, agreed to build three two-story frame dwelling houses in the city of Houston. In connection with that contract an agreement was entered into between appellant and the building contractors, wherein the appellant agreed to advance to the contractors, as the work progressed, the sum of \$5,200, and on its completion the balance was to be paid when the contractors assigned to appellant the mechanic's lien held by them on the property of appellee. The two contracts were filed for record as one instrument. Appellee also transferred to the appellant his 26 shares of stock in the association, as collateral security for the payment of a note for \$5,200, with interest at 10 per cent., given by appellee. A bond for faithful compliance with their contract was given by the contractors to appellee, with M. Weiss and D. W. Brown as sureties. After the bond was signed, in pursuance of a custom of dealing of appellant it was handed to the president of the association, who approved the same. The next day after the bond was given, appellee went to the office of appellant, and asked the president about the bond; and he told appellee that Mark Weiss was on the bond, and that he was good for the amount of the bond. Appellee knew that Mark Weiss was solvent, and was satisfied. The bond was not signed by Mark Weiss, but by one Messina Weiss, who was insolvent, and who would not have been accepted by appellee on the bond. The contractors failed to carry out their contract, and appellee was compelled to finish the job himself,—the bond being worthless,—at an extra cost of the amount for which judgment was rendered. Appellee sued to recover the damages arising from the false representation.

The first, third, fourth, and fifth assignments present as error the action of the court in overruling special exceptions based on the proposition that the petition failed to allege

any authority in the president of the association to make the representations, or that he owed any duty to appellee in the premises. The petition fully alleged every matter necessary to fix the liability of the association, and the exceptions were properly overruled.

After the default of the contractors, appellee and wife,—at the solicitation of the appellant,—in order to obtain money to complete the buildings, executed a deed of trust on the property to appellant; and it is insisted that this impaired the mechanic's lien of the contractors, and thereby released the sureties on the bond. We see no force or reason in such a proposition. The mechanic's lien would take precedence over any lien created by appellee after the contract was made; but, if it had impaired the mechanic's lien, we cannot appreciate the proposition that appellant would have been relieved from its tortious act by conduct induced by it.

The evidence clearly shows that the president of the association was acting within the scope of his powers and duties, and that he misled appellee to his damage; and it was no defense to the action to say that he believed the representation to be true. *Land Co. v. Gardner* (Tex. Civ. App., this branch) 25 S. W. 737; *Hadcock v. Osmer* (N. Y. App.) 47 N. E. 923, where a number of recent authorities on the subject are collated. The president claimed to have actual knowledge, and caused appellee to act upon it, to his damage; and the company must answer for the damages. His intention, however innocent, did not change the result of misrepresentation.

The rules have been ignored in the preparation of the brief, and most of the assignments might, with propriety, have been disregarded. The judgment is affirmed.

#### GRUMBACH et al. v. HIRSCH.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

##### DRAFT—ACCEPTANCE—RESCISSION.

One who accepts, in writing, a draft drawn on him, becomes the principal debtor, and cannot afterwards withdraw his acceptance, on the ground that he accepted the draft by mistake, thinking that the drawer had funds in his hands.

Appeal from Harris county court; W. N. Shaw, Judge.

Action by Lion Grumbach and another against Jules Hirsch on a draft. Judgment for defendant. Plaintiffs appeal. Reversed.

John D. Fearhake, for appellants. Brashear & Dannenbaum, for appellee.

FLY, J. Appellants sued appellee as acceptor of a draft, for \$400, drawn in Sarraquemines, France, by Fleurette Walther, on appellee, in favor of appellants. The case was tried by the court, and judgment was

rendered for appellee. There was no controversy about the facts that appellants, a firm in Sarraquemines, France, had paid the money called for in the draft to the drawer thereof, and that appellee, in Houston, Tex., accepted the same in writing, when it was presented to him by a bank acting for appellants. The only defense was that, shortly after appellee had accepted the draft, he ascertained that the drawer had no money with a certain man with whom she had kept money in Houston, and appellee at once went to the bank that held the draft for collection, and notified it that he was not responsible, and desired to erase his acceptance. This was not permitted by the bank.

When appellee accepted the draft, he became the principal debtor for the amount specified, and his acceptance was an admission that he had funds of the drawer in his hands; and he cannot deny that he had such funds when suit is brought by the holder of the draft. Daniel, Neg. Inst. § 534, and authorities cited; *Clews v. Bank*, 89 N. Y. 423. It is stated by the same author (section 493) that if the acceptor, immediately after his redelivery of the draft, discovers that he was not in funds, as he had supposed, so that his acceptance was made under a mistake, he may recall and revoke it, provided there be yet time for the holder to notify the drawer and indorsers, and save himself from loss. In support of the statement, the case of *Bank v. Wetherald*, 36 N. Y. 335, is cited. It is claimed by appellee that the decision is also indorsed by Tiedeman, Randolph, and Norton. The last two text-books have not been examined by this court, but Tiedeman does not indorse the doctrine of the New York case, but merely states that it has been so held in that case. He does, however, indorse the doctrine that, "when the bill is once accepted and delivered to the holder, it is irrevocable, even with the consent of the holder, since the drawer and indorsers have a vested interest in the acceptance." We have seen no other case holding to the doctrine announced in the New York case, and, on the other hand, there are several decisions holding the contrary doctrine. In the case of *Trent Tile Co. v. Ft. Dearborn Nat. Bank*, 23 Atl. 423, the supreme court of New Jersey held: "An acceptance delivered to the agent of the holder duly authorized to receive it is, in legal effect, and for all purposes, delivery to the holder. When the bill bearing the signature of the acceptor by his act or direction comes into the hands of such agent, the contract becomes eo instante a completed one between the acceptor and the principal owner of the bill. A bill of exchange forwarded to or delivered into the hands of a bank or banking house for the purpose of presentation to the person upon whom the bill is drawn for his acceptance in the usual course of business is a transaction that creates the relation of principal and agent between such holder and the bank, with au-

<sup>1</sup> Rehearing denied.

thority in such agent to receive in the holder's behalf delivery of the acceptance when signed. The Mechanics' National Bank of Trenton was therefore the agent of the plaintiff to procure in the plaintiff's name acceptance of the bill in question. The bill was presented to the defendant in due course, and regularly accepted by its authorized officer, and delivered to such agent of the plaintiff. There would thus appear a finished transaction of legally binding force, vesting rights in the plaintiff, which could not thereafter be divested without its consent. The defendant, however, claim that it had the right to, and did, revoke its acceptance. \* \* \* For such a right neither dictum nor authority has been found in any reported case determined upon principles of the common law." In the case of *Hoffman v. Bank*, 12 Wall. 181, it is said: "Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration; but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument." We think the true doctrine, as applicable to this case, is stated in the foregoing extracts. When appellee signed the acceptance, he became the principal debtor, and he would have no more right to rescind this contract on the ground of mistake as to having funds of the drawer on hand than he would to rescind a contract because he had no funds of his own to pay what he had promised. The judgment of the county court will be reversed, and the judgment here rendered in favor of appellants for the amount of their claim.

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LEVINSON et al. v. TEXAS & N. O. RY. CO.  
(Court of Civil Appeals of Texas. Jan. 12, 1898.)

CARRIERS—NONTRANSFERABLE TICKETS.—FORFEITURE.

Where a carrier sells a ticket at a reduced rate, under an agreement that the same should not be transferred, it has the right to take the ticket up when presented by one to whom it had been assigned.

Appeal from Harris county court; John G. Tod, Judge.

Action by L. M. Levinson & Co. against the Texas & New Orleans Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. G. Love, for plaintiffs in error. Baker, Botts, Baker & Lovett, for defendant in error.

JAMES, C. J. One H. Werner purchased, at Nashville, Tenn., from the agent of the Louisville & Nashville Railway Company, a ticket from that point to Dallas, Tex., and return, at an excursion or reduced rate, in consideration whereof he agreed with the said company and its connecting lines that the same was not transferable; that no other person could acquire any property in said ticket, or right thereto; that the parting with the possession thereof in any manner, except to an authorized officer of the company issuing the same, for the purpose of redemption, constituted an abandonment of all future rights thereunder; and that, unless the several conditions upon which the ticket was issued were complied with, the ticket should be void, and, upon presentation, might be taken up, and full fare collected. All these terms, and more, including the usual agreement for identification, appeared upon the face of the ticket, over the signature of the agent and Werner. The facts are that Werner used the ticket as far as New Orleans, where he sold the unused portion to a broker. The part reading to Houston was resold at New Orleans to some person who used it to Houston, and who then sold the remainder of it to said broker's agents at Houston (plaintiffs), who resold it for passage to Dallas, and where the return portion was delivered to the Houston brokers' agent at Dallas, where it was procured to be stamped for return passage. The latter resold the part calling for passage to Houston to one who used it as far as Houston, who then delivered it to plaintiffs. Plaintiffs then sold the portion reading to New Orleans to a man named Patterson, who agreed to deliver the residue to plaintiffs' correspondent at New Orleans; they agreeing to refund him the price he paid in case he was not allowed to ride on it. Patterson not being able to identify himself as the original purchaser, defendant's conductor took up the ticket and refused to surrender it. The suit is brought to recover the alleged value of the portion of the ticket reading from New Orleans to Nashville, on the ground of conversion.

The above facts, in our opinion, required the judgment in favor of the defendant, because it appears that it had been transferred contrary to the condition upon which it had been sold, and had become, under the terms of the contract, abandoned and void, and was, as provided in the contract, subject to be taken up. It is well settled that tickets, with such terms and conditions stated thereon or therein, signed by the purchaser, and issued in consideration of reduced rate of fare, are binding contracts. *Railway Co. v. Daniels* (Tex. Civ. App.) 29 S. W. 427; *Abram v. Railway Co.*, 83 Tex. 61, 18 S. W. 321;



**Drummond v. Southern Pac. Co. (Utah) 25 Pac. 733.** By reason of its very terms, it had, upon being transferred, ceased to be property, was void, and subject to be taken up; consequently, plaintiffs (or Patterson), as holders of such ticket, had no rights in respect thereto, and cannot be allowed damages from defendant for taking it up and retaining it. There was another defense, but as the one mentioned is sufficient, we need not consider it. Affirmed.

### ROSBOROUGH v. PIONON.

(Court of Civil Appeals of Texas. March 26, 1896.)

Motion for rehearing overruled.

For former report, see 34 S. W. 791.

**WILLIAMS, J.** We deem it proper to say that the sixteenth special exception, which directly questions the sufficiency of the averments as to the deficiency of land in the two Hynes grants, should have been sustained. There is a clear attempt to allege such deficiency, and from the allegations an inference of its existence may be drawn. That 1,200 acres embraced within the boundaries are covered by water is specifically averred; but, consistently with that fact, such boundaries (which are set out in the petition) may include the proper quantity of fast land. That they do not is left to inference rather than directly and positively averred. As remarked in the original opinion, the judgment cannot be affirmed on this ground, for the reason there given. If the facts alleged were true, there was no necessity to tender the expenses of the trustee incurred in the effort to sell. While the holders of the notes had the right to cause a sale to be made for the balance admitted to be due, they did not have the right to sell for more than was due. Had the sale not been prevented by injunction, it is true that the legal title would have passed to a purchaser. The trustee had the power to sell, and hence could, by an actual sale, pass title, so long as any part of the debt remained unpaid, as was held in *Groesbeeck v. Crow*, 85 Tex. 200, 20 S. W. 49. But it is none the less true that his act in attempting to sell for more than was due would be wrongful as against the debtor, and the latter would not be bound to reward him for it, or to reimburse him for his expenses. Motion overruled.

### WESTERN UNION TEL. CO. v. BURGESS.

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

INTERSTATE COMMERCE—TELEGRAPHS—LIMITING LIABILITY BY AGREEMENT—NEGLIGENCE—EVIDENCE—INSUFFICIENCY.

1. Rev. St. 1895, arts. 3378, 3379, making invalid a stipulation with a telegraph company that it shall not be liable for a failure to deliver a message, unless notified of the claim for

damages within 60 days, is void, under the United States constitution, giving congress power to regulate commerce, in so far as it applies to messages sent from another state.

2. In the morning of the day an important telegraph message was received, the operator and messenger inquired of numerous prominent persons in various parts of the city of 10,000 inhabitants as to the addressee's whereabouts. They put the telegram in his mail box, and he received it next day. He had lived in the city a year, and other prominent citizens were acquainted with him. The addressee testified that the operator told him, as an excuse for delay, that the number of messages received was large, and he was allowed but one messenger. This statement was denied. *Held*, that the telegraph company used due diligence in delivering the message.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Action by Sallie Burgess against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

Norman G. Kittrell, for appellant. Votaw, Chester & Dies, for appellee.

**PLEASANTS, J.** The nature and result of this suit are thus given by appellant: Appellee filed her petition September 8, 1896, claiming damages in the sum of \$1,900 for the alleged negligence of appellant's agents and servants in the matter of the transmission and delivery of a certain telegram alleged to have been sent by her on June 30, 1896, from New Orleans, La., as follows (omitting the printed part): "To J. T. Hufham, Beaumont, Texas: Lost money. Wire agent. Furnish ticket Beaumont to-night. [Signed] Sallie Burgess." She alleged that said Hufham was her uncle, and, if he had received her message, would promptly have sent her the ticket by wire, but that, not having received it, she was left in New Orleans, without money, and without any place to stay, and no friends or acquaintances, and was obliged to wander in the streets of New Orleans, exposed to danger, and in great mental fear, pain, and anguish, from July 1st to July 5th, when her uncle came to her rescue. She further alleges that she sent another telegram, or caused it to be sent, on July 3d, reading as follows: "To J. T. Hufham, Post-Office Box 64, Beaumont, Texas: Ticket not received. Telegraph me ticket at once, care of Southern Pacific Ferry Landing. [Signed] Sallie Burgess." She alleges further that appellant's agents at New Orleans were careless of her comfort and accommodation, and negligent in not delivering certain messages sent her by said Hufham, by reason whereof she was damaged; and for all her damages she prayed as above stated. Defendant answers that the said contract of transmission was made in the state of Louisiana, and provided that, as a condition precedent to suit, written claim for damages must be made within 60 days, and that no such notice of claim for damages was given, and further pleaded general demurrer and general denial. Jury was waived.

ed, and cause submitted to the court, and judgment rendered against defendant, November 30, 1896, for \$1,500; to which judgment appellant excepted, and gave notice of appeal. Afterwards, time being tacitly waived, appellant filed motion for new trial, on the filing by the court of its conclusions of fact and law, which motion was duly overruled, and exception taken, and notice of appeal given. This statement is accepted by appellee as substantially correct. It will be seen from the answer of defendant that one ground of defense was that, by the terms of the contract, as a condition precedent to a suit for recovery of damages by plaintiff a written claim for damages must be presented to the company or its agent within sixty days after the message is filed with the company for transmission; and it is averred in the answer that such notice was not given, and the answer is sworn to as required by the statute. The statement of facts discloses no evidence that such notice was given. The telegram from plaintiff to her uncle was sent from the office of the defendant company in New Orleans to Beaumont on the 30th day of June, 1896, and was received in the office at Beaumont on the night of that day, and on the next day, between 5 and 7 o'clock p. m., was placed in the post office at Beaumont by the operator at that town, addressed to Hufham, the plaintiff's uncle, and by him was not received until about 7 o'clock p. m. on the 2d of July. The evidence is conflicting as to whether the telegram was put into the post office under instructions from the plaintiff to do so, or not. The testimony of the employees of defendant in the office from which the telegram was sent is that upon their exhibiting to plaintiff the telegram from the operator at Beaumont, that Hufham could not be found, and asking for further information as to his residence, she exhibited to them an envelope on which was printed the number of a mail box in the Beaumont post office, and instructed them to have the letter placed in that box, and in compliance with plaintiff's instruction the operator at New Orleans immediately wired the operator at Beaumont to place the telegram in said box. The plaintiff denies that she gave such instructions. She admits that she exhibited such an envelope, but says that it was exhibited to the operators because she thought they doubted whether she had an uncle in Beaumont. The evidence on behalf of the defendant showed that both the operator and his messenger endeavored to find the addressee of the telegram. Each of them, in the forenoon of the day on which the message was received at Beaumont, inquired at various places, and of numerous persons, as to the residence and whereabouts of the addressee; but none of the persons of whom inquiry was made knew any one, with the name of the addressee, residing in Beaumont. The persons of whom inquiry was made were mostly well-known and prominent citizens of the town. The plaintiff, on the other hand,

showed by quite as many citizens that they were acquainted with the addressee, and, had they been inquired of, they could have informed the defendant's employees as to his residence. The addressee was employed at the time in one of the lumber factories of the town. He had resided in the town something over a year, his family had resided there some two or three years, and they owned their residence. There are several lumber factories in the town, and the aggregate number of persons in their employment is perhaps four or five hundred. The defendant allowed but one messenger to the operator at the time the message was received in Beaumont, the population of the town being nine or ten thousand. And Hufham, the addressee, testified that when he received the message, on the evening of the 2d of July, he inquired of the operator why the message was not delivered to him promptly on the day it reached Beaumont, and the excuse given by the operator for not delivering the message was that the number of messages received at the office was large, and that he was allowed but one messenger. The operator denies that he made any such statement, and he is corroborated in this by the testimony of a merchant in the town who was present in the office of the operator when Hufham says that the conversation between him and the operator occurred. This witness is positive that no such statement was made by the operator to Hufham as testified to by the latter. The evidence is undisputed that, if Hufham had received the telegram promptly, he would have provided the plaintiff with a ticket in time for her to have come to Beaumont by the train leaving New Orleans on the evening of the 1st of July; that she was in New Orleans, a stranger, without money or friends; and that, for the want of money to pay her board, she was refused shelter, and in consequence was compelled to spend one night in the streets.

The first assignment of error is that the court erred in not sustaining defendant's defense to the suit based on the ground that plaintiff failed to give notice of claim for damages within 60 days after breach of contract by defendant as she had stipulated in the contract with defendant for the transmission and delivery of her message to do. Stipulations such as the one here relied on have been held valid and binding by the supreme court of the state. Vide *Telegraph Co. v. Rains*, 63 Tex. 27. But it is insisted by appellee that since the addition of articles 3378, 3379, Rev. St. 1895, such a stipulation is no longer valid in this state, and cannot be enforced. But this court is of the opinion that articles 3378 and 3379 have no application to this case, since the contract sued on is one for the transmission and delivery of an interstate telegram. The word "commerce," as the term is used in the federal constitution, is held by the decisions of the supreme court of the United States to

include the transmission of telegrams from one state into another state; and, the regulation of interstate commerce having been committed by the constitution to congress, its control over the subject is exclusive of all state legislation which is designed to, and does, affect such commerce. One great object of delegating to the federal government the exclusive power over the subject was that the rules and regulations established by law for the government and control of those engaged in commerce between the states should be uniform. This object would be defeated if each state were permitted by legislation to prescribe what stipulations may, or what may not, be entered into, for their protection against litigation, by those employed in carrying passengers or freight between the states, and those engaged in transmitting messages by telegraph from one state to another. Such legislation, in the opinion of this court, imposes restrictions and burdens upon interstate commerce in conflict with the federal constitution, and must therefore be held to be void, so far as it applies to messages sent into, and received from, another state. *Vide* *Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126. The trial court therefore erred in rendering judgment for the plaintiff notwithstanding notice was not given by her of her claim for damages prior to the institution of this suit, as by the contract with defendant she was bound to do.

This court is further of the opinion that the evidence does not sustain the finding of the court that the defendant was guilty of negligence in not delivering the message on the 1st of July. The evidence, we think, on the part of the defendant, shows that it used reasonable diligence to promptly discover the addressee of the message, and deliver the same to him. And this evidence was not rebutted by that offered by the plaintiff, even when we give full credit, as we do, to the testimony of the plaintiff's witnesses. The fact that the defendant was unable to discover, by inquiries made of various persons, and in various parts of the city, the addressee, and that, if it had inquired of certain other persons in the city, it would have discovered him, do not prove negligence. For the reasons intimated the judgment is reversed, and judgment is here rendered for the defendant. Reversed and rendered.

#### GLOVER v. STORRIE.<sup>1</sup>

(Court of Civil Appeals of Texas. Jan. 6, 1898.)

#### LIMITATION OF ACTIONS—IMPROVEMENT CERTIFICATE.

An improvement certificate, given by a city, under its charter, to a sewer contractor for work done, and which is a lien on the property within the district, and a personal charge

against the owners thereof, is not founded on the written contract between the city and the contractor; and hence an action on the certificate is barred under the two-years statute of limitations as for a debt.

Appeal from district court, Harris county; John G. Tod, Judge.

Action by R. C. Storrie against Frank S. Glover. From a judgment for the plaintiff, defendant appeals. Reversed.

Frank S. Burke and S. E. Tracy, for appellant. Ewing & Ring, for appellee.

GARRETT, C. J. This action was brought January 27, 1897, by the appellee, R. C. Storrie, against Frank S. Glover, to recover upon a certain improvement certificate, issued by the city of Houston, under authority of its charter, for work done by Storrie as contractor in the construction of a sewer in a certain sewerage district within the city. The petition alleged compliance by the city with all the requirements of the charter necessary to authorize the work, and that Storrie had entered into a contract therefor with the city on December 17, 1892, and had faithfully performed the work in accordance with the terms of the contract; that, pursuant to the proceedings had, there had been issued to him, by the city, the improvement certificate sued upon, which bore date and became due and payable on April 14, 1894; and that by the contract, which was in writing, Storrie agreed to do the work for a specified price, which, pursuant to its charter, the city agreed should be a lien upon the property within the district, and a personal charge against the owners thereof, and to issue street-improvement certificates for the amounts to become due for the work. The petition prayed for a personal recovery against the defendant, as also for a foreclosure of the lien upon a certain lot therein described, owned by the defendant, and made liable for the amount in the suit by the assessment against it. The appellant excepted to the petition on the ground that the cause of action accrued more than two years before the commencement of the suit, and was barred by the statute of limitations. This defense was also presented by a special plea in bar. The cause was submitted to the court without a jury as an agreed case, presenting the sole question of limitation, and the court held that the cause of action was not barred by limitation, and rendered judgment in favor of the appellee for the amount of the certificate, with interest, and with a foreclosure of the lien upon the lot of land.

Was the cause of action barred by the two-years statute of limitation? In the case of *O'Connor v. Koch*, 29 S. W. 400, this court held that the two-years statute applied to an improvement certificate of the character here sued upon. The appellee contends, however, that the cause of action is not based or founded upon the certificate, but is founded upon a contract in writing,—the one entered into be-

<sup>1</sup> Writ of error denied by supreme court.

tween Storrie and the city of Houston for the construction of the sewer; or, if this be not the case, then the demand sued upon is not a debt, within the meaning of the statute, and that the general statute of four-years limitation should apply. The contract between Storrie and the city of Houston was only one of the requirements made necessary by the charter of Houston in order to fix a personal liability against the appellant for a proportionate share of the cost of the construction of the sewer, and a lien upon his lot for the amount assessed against it; and the action for the amount for which the appellant and his lot are liable can no more be said to be founded upon the contract than upon any other requirement of the charter necessary to authorize the assessment. Neither the contract under which the work was done, nor the certificate showing the amount assessed against appellant's lot, is the contract of the appellant. His liability is created by the action of the city under its charter. The contract in writing, mentioned in the statute, is a contract between the parties. Although, in the opinion in the case of *O'Connor v. Koch*, no notice was taken of the contract between the city and the contractor, we see no reason for changing the conclusion then reached by us, since the contract can be no more the foundation of the action than the certificate. We are also still of the opinion that the assessment comes within the decision of the case of *Mellinger v. City of Houston*, 68 Tex. 37, 3 S. W. 249, and that the two-years statute should apply to the action, as for debt, rather than the general four-years statute. It is a tax, although it may not be such a tax as to make it a lien upon the homestead, as held in the case of *Higgins v. Bordages*, 88 Tex. 458, 31 S. W. 52, 803. A discussion of the cases cited by the counsel for the appellee is deemed unnecessary. We adhere to our decision in the case of *O'Connor v. Koch*, which we think is decisive of this, and reverse the judgment of the court below. Judgment will be here rendered, in favor of the appellant, that the appellee take nothing by his suit. Reversed and rendered.

**BEAN v. CITY OF BROWNWOOD et al.**  
(Court of Civil Appeals of Texas. Jan. 19, 1898.)

**TAX LIENS—FORECLOSURE—HOMESTEAD—INTEREST OF WIFE—PRESUMPTIONS—COSTS OF SALE—JUDGMENT—COLLATERAL ATTACK—EXECUTION—FAILURE TO GIVE NOTICE—SALE OF FRACTIONAL PORTION—MISAPPROPRIATION BY OFFICER—CLERICAL ERRORS—NUMBER OF ORDERS OF SALE—INADEQUACY OF PRICE—MISCONDUCT OF OWNER—APPEAL—FAILURE TO OBJECT.**

1. In an action to foreclose a tax lien on a homestead, it is unnecessary to make a wife a party, as it is presumed that she has no interest in it, separate from that of her husband, other than her homestead right.

2. One cannot, on a motion to set aside an execution sale for taxes, impeach the judgment by showing that it was larger than authorized by the delinquent tax record.

3. It was not error to refuse to find that an owner of a homestead sold at an execution sale for taxes would have designated a fractional part for sale if he had been served with notice of the sale, though he testified to such effect, where he was present at the sale, and could have made such a designation shortly before the sale, but did not do so.

4. The failure of the sheriff to serve, upon the owner of a homestead, notice of an intended execution sale thereof for taxes, was harmless, where he was present at the sale.

5. Rev. St. 1896, art. 517, providing that a portion on the east side of land subject to execution for taxes should be first offered for sale, need not be followed, where such portion could not be so separated without material injury to the remainder.

6. The power to charge the costs of selling a homestead under execution for taxes is incident to the power granted by the constitution to sell it for taxes.

7. An execution sale of land for taxes will not be set aside because the officer misappropriated a portion of the price.

8. The fact that certain printed words of an order of sale were covered by a paper pasted over them was immaterial.

9. Where the same judgment forecloses tax liens against a homestead and other property, it is proper to have separate orders of sale issue at the same time, that the homestead may be sold separately.

10. An execution sale will not be set aside on a ground not appearing in the motion therefor.

11. Irregularities in connection with inadequacy of price will not justify setting aside an execution sale, unless the irregularities contributed to such inadequacy.

12. An owner of land sold upon execution cannot complain of an inadequacy of price to which his conduct contributed.

Appeal from district court, Brown county; J. O. Woodward, Judge.

Action by the city of Brownwood against Charles Bean and others to recover taxes due on certain real estate belonging to defendant Bean, and to foreclose the lien therefor. There was a judgment and decree for plaintiff, under which a part of the property was sold and conveyed by the sheriff to Mrs. Bettie L. Taber. Defendant Bean instituted proceedings in the nature of a motion to quash the execution, set aside the sale, and cancel the sheriff's deed. From a judgment denying the motion, he appeals. Affirmed.

Goodwin & Grinnan, for appellant. T. C. Wilkinson and J. J. Rice, for appellee Bettie L. Taber.

**Statement of the Case.**

**FISHER, C. J.** This was a proceeding in the nature of a motion filed in the court below by appellant, Bean, to quash an execution, and to set aside a sale and cancel deed of sheriff made thereunder. It appears from the averments contained in this motion that the city of Brownwood, on June 8, 1896, recovered a judgment by default against appellant, Charles Bean, in the sum of \$298.86, with interest and costs for the taxes due by him to the city. \$136.20 of this amount is alleged to have been adjudged as taxes due upon block 35 of Rankin's addition to the city of Brownwood, which is alleged to have been at that time, and is now, the homestead of the appellant and his wife; and upon this

property, for the amount of taxes due thereon, the judgment foreclosed the tax lien in favor of the city, and ordered the sale thereof, and at the same time decreed that an order of sale also issue, commanding the sheriff to sell the other property mentioned in the judgment for the remaining taxes due by Bean. The property in controversy is block 35, the homestead of the appellant.

It is alleged that the sheriff, under the order of sale issued on this judgment, sold the property in controversy to Mrs. Bettie L. Taber, she becoming the purchaser thereof at the execution sale. The grounds alleged for quashing the execution, and for setting aside the sale, are: First. That the clerk had no authority to issue a second order of sale upon the same judgment at the same time,—one commanding the sheriff to sell certain property, and the other commanding the sheriff to sell different property; that it was an irregularity to issue two orders of sale at the same time, and thereby charge the appellant with this additional cost, when the judgment could have been enforced and the sale made under one order. Second. That the order of sale under which the property in controversy was sold did not command the sheriff to sell block 35, and from the face of the order it cannot be determined what property was commanded to be sold, nor can it be determined the amount of money for which said order of sale was issued; and that the order of sale, by reason of certain words being omitted therefrom, is wholly unintelligible, and therefore irregular and void; and that the judgment, upon which the order was issued, is not therein described, but is misdescribed in material parts. Third. It is charged that the writ or the order of sale was never levied upon block 35 any time prior to the time of sale, and that the appellant believes and charges that the officer did not, prior to the time of the pretended sale, indorse any levy on the writ, but made the indorsement thereon after the sale of said property. Fourth. "Defendant alleges that the judgment upon which said orders of sale are based adjudicates the fact that block No. 35 is, and was when the taxes thereon recovered were levied, the homestead of defendant, and therefore only liable for taxes due thereon; yet judgment was rendered charging said homestead with interest on taxes, said interest aggregating at least \$15.49, which was included in the judgment, and of which Mrs. Bettie L. Taber had notice; that Mrs. Charles Bean was not a party to said suit and foreclosure. He further alleges that his said homestead was sold under said order to satisfy not only the \$136.70 adjudged to be a lien on it for taxes, but also to satisfy interest on said \$136.70 at the rate of 6 per cent. per annum from June 8, 1896, to date of sale, to wit, August 4, 1896, and also to satisfy the following fee and commissions, to wit: Commission of sheriff on amount realized, \$5.50; levy of writ, \$1.50; posting notices, \$4; returning order of sale, 75 cents;

deed, \$2,—all of which fees were and are illegal, because plaintiff had no right, by suing out two writs, to double the costs of levy, advertisement, and return of writ, and make the same as charges on his homestead, and because the charge of \$4 for posting notices is illegal, in that the law does not allow sheriffs such fees, but only allows therefor \$1, and for which illegal costs his homestead was sold." Fifth. "He further alleges that said block No. 35 was on August 4, 1896, with improvements thereon, of the value of \$3,500; that said block was 200x200 feet square, and faced Fisk street 200 feet, and faced another street 200 feet; that his dwelling and outhouses are all situated on N. E. half of said block 35, with a front of 100 feet on Fisk street; that the S. W. half of said block, with a front of 100 feet on Fisk street, had little, if any, improvements, except a fence and fruit trees thereon, and could be separated from the remainder of said block without interfering materially with his dwelling and outhouses; and that said portion of said block was on August 4, 1896, of the reasonable value of \$750, and would have sold for enough to have paid the entire demand of plaintiff for taxes on said block No. 35; that plaintiff, disregarding the above facts and the interest of defendant, sold said entire block as a whole, when a part only would have satisfied its demand, and sold the same for \$151, when it was reasonably worth \$3,500. He alleges that, under the law, he had the right to designate a portion of said property for sale, and the order in which same should be sold, and that under the law, he being a resident citizen of Brown Co., Texas, at and for ten years prior to sale, and without any attorney in said cause, he was entitled to be personally served with a copy of the notice of the sale of said property, that this and other valuable rights might be secured to him; that he was not served with notice of sale of said block No. 35 by the officer executing said writ, or by any other person, and that he knew nothing of said sale until said property was offered for sale, on August 4, 1896; that, had he received notice of said sale, he would have designated portions of said block for sale, less than the whole, and thus have saved a part, at least, of the homestead. He alleges that Wilkinson & Rice were attorneys for plaintiff in the above cause, and are chargeable with notice of the irregularities herein complained of, and of all the facts charged; that they were also agents and attorneys for Mrs. Bettie L. Taber in her purchase of said block No. 35. He alleges that he has offered to refund Mrs. Taber the amount of money paid by her, with 6% interest from August 4, 1896, and she refuses to accept the same, and he now tenders her said sum, viz. \$151, with 6% interest from August 4th, 1896, and pays same into court for her."

It is unnecessary to specially state the facts in the answer of appellee Mrs. Bettie Taber to this motion, except that she gen-

erally denied the charges therein made, and stated that she was a purchaser, for a valuable consideration, of the property in controversy at the sheriff's sale, without notice of any vice in the judgment under which she purchased, or of any irregularity in the sale or any of the steps leading thereto; and that, if the property sold for an inadequate price, it was on account of the conduct of the appellant at the sheriff's sale, by reason of certain statements of his, relative to his supposed rights, which had the effect of deterring bidders; and that, if there was any inadequacy, it is attributable to the appellant's conduct.

#### Conclusions of Fact.

The court below found the following conclusions of fact and law:

"I find as follows: First. That there was a judgment rendered by default against Charles Bean, the Fort Worth & Rio Grande R. R. Co., and Annie Metinger, in the district court of Brown county, on the 8th day of June, 1896, which is as follows to wit: \* \* \* Second. That two orders of sale were issued to sell the land upon which the tax lien was foreclosed in said judgment, on the 13th day of July, 1896, which are as follows, to wit: \* \* \* Third. That the sheriff properly advertised block No. 35 of Rankin addition to Brownwood, under the above set out order of sale, commanding the sheriff to sell said last above described block of land, with the sole exception that he did not deliver to defendant Bean a copy of the notice to sell said last above described land. Fourth. That defendant Bean was duly served with notice, as the law directs, to sell the lands described in the other one of the above set out orders of sale, and that all the lands described in said judgment were advertised to be sold at the same time and place, to wit, on the 4th day of August, 1896. Fifth. That defendant Bean was present at the said sale, and was standing around the place of sale at the court-house door, about one hour before the said sale was made. Sixth. That defendant Bean gave the following notice, publicly, at the time and place when and where said block was by the sheriff offered for sale, to wit: 'Whoever buys this land will buy a lawsuit. It is my homestead. This sale will be void, because the board of equalization of the city of Brownwood raised the valuation of my homestead from the value I placed upon it when I gave it in to the assessor for taxes, without giving me any notice of its intention to do so.' I further find that the above is all he said concerning the sale, or in any way of public notice at the sale. Seventh. That said block No. 35 of Rankin addition was the homestead of defendant Bean at the time the said taxes against him were assessed for the several years, and was so at the time of the date of the above set out judgment and the said sale; that he was a married man, had a

family; and that he, with his family, has resided on said land as their home, for sixteen years next preceding the date of this finding. Eighth. That Mrs. Bettie L. Taber purchased said homestead property at said sale, for the sum of one hundred and fifty one dollars, and that she paid the sheriff the cash in said sum, and received a deed to said land. Ninth. That Mrs. Bettie L. Taber was in no way a party to the record in the suit in which said judgment was rendered, and that she had no notice, either actual or constructive, of the failure of the sheriff to serve defendant Bean personally with the notice of sale of said land, or of any other irregularity, if any, antedating the sale. Tenth. That said homestead property was at the time of the said sale worth \$2,500. And, eleventh, that the failure of the sheriff to serve defendant Bean personally with the notice of said sale did not, in my opinion, contribute to the inadequacy of price, but that, in all probabilities, the low price for which said land sold was contributed to by the said notice given at the sale by defendant Bean. There was no other reason apparent for causing the land to sell for less than a fair price.

"No. —. I find that block No. 35 of Rankin's addition is 200 by 200 feet square; that it fronts Fisk street 200 feet, and fronts Brown street 200 feet; that the N. W. half of said block is improved, having the dwelling and outhouses used in connection therewith on that part of said block. I find that the S. W. half of said block is separated from the other portion of said block by a fence, and that it is used for a garden and orchard by Bean. I find that this S. W. half has a front of 100 feet on Fisk street, and a depth of 200 feet, and that it was on August 4, 1896, of the value of \$700, and that this portion could have been segregated from the remainder of said block, and could have been separately sold without injury to either portion of said block. I find that the entire block, with improvements thereon, was worth on August 4, 1896, \$2,500. I find that said block No. 35 was and is residence property, and that the S. W. half of said block is suitable for residence property. I find that Charles Bean was not served with a copy of the notice of sale of said block No. 35, Rankin's addition to Brownwood, though he, at the time of the levy of the order of sale, resided in Brown county, Texas, and had resided in said county for more than ten years continuously next preceding said levy and sale. I also find that said Bean had no actual notice of the levy of said order of sale on said block No. 35, and that he did not know that it would be sold until the sheriff, on the day of sale, offered it for sale in his presence.

"No. —. I find that on the 13th of July, A. D. 1896, the clerk of this court issued, on the original judgment in this cause, two orders of sale, both issued to Brown county,

and placed in the hands of the sheriff of Brown county at the same time, and both levied by said sheriff on the same day, one on said block 35, Rankin's addition, and the other levied on the other property described in said decree upon which said orders were based, and that the property levied upon by each writ sold on the same day, and by the same officer.

"No. —. I find that the sheriff of Brown county levied the order of sale issued to him, and commanding the sale of block No. 35, Rankin's addition, in the city of Brownwood, on said block, and on the 4th day of August, 1896, sold said block to satisfy the principal sum of \$136.70, mentioned in said writ, with six per cent. interest on the same from June 8th, 1896, and his fees and commissions for executing said writ; and the sheriff taxed and allowed the sum of \$1.50 for levying said writ; posting notices, \$4; commissions, \$5.50; returning order of sale, \$.75; making deed to purchaser, \$2,—as his fees and commissions under said writ.

"No. —. I find that the sheriff did not indorse his levy and return on the order of sale commanding the sale of said block No. 35 until after the sale, and after the purchase of said block by Mrs. Taber.

"No. —. I find that Mrs. Bean, wife of defendant Charles Bean, was not a party to the original suit, in which the city of Brownwood foreclosed its tax lien on said block No. 35.

#### "Findings of law:

"First. That the judgment under which said land (block 35) was sold was valid, and provided for the issuance of the two orders of sale.

"Second. That the order of sale under which said homestead property of defendant Bean was sold was valid, and not voidable, for any defect upon its face; that the fact that certain printed words of same were covered by paper pasted over them was immaterial, and did not render same unintelligible; that the said order of sale contained all the essential elements of an execution or order of sale, and the fact that two orders of sale were issued at the same time to carry into effect the said judgment is immaterial. Said order of sale does not require or command the officer to apply any part of the proceeds of said homestead to the payment of the court costs incurred in the trial of the cause in which said judgment was rendered, but only the expenses of said sale.

"Third. That for the reason that the irregularity in the sheriff's failing to serve defendant Bean with a copy of the notice of sale not having, in my opinion, contributed to the inadequacy of price, and the probability of its having been contributed to by the notice given by Bean, I find that the sale is not voidable.

"Fourth. That the failure of the sheriff to deliver defendant Bean in person a copy of the notice of said sale is only an irregularity in the proceedings of the sheriff, in discharge

of a duty which he had a right to perform; did not affect the purchase of Mrs. Taber, she being a stranger to the record and an innocent purchaser for value, without notice of such irregularity in advertising, and her not having been a party thereto."

In addition to these findings, we further find that the city of Brownwood, at the May term, 1896, by its petition, filed in the district court of Brown county, Tex., brought suit against appellant, Charles Bean, Annie Metlinger, and the Ft. Worth & Rio Grande Railway Company. These two last-named parties were joined simply for the purpose of concluding them by the judgment foreclosing the lien against Bean. No personal judgment was asked against them for the taxes due by Bean. The purpose of the suit was to recover from Bean taxes due by him to the city for the years 1891, 1892, 1893, and 1894. The petition alleged the value of his property during those years, which included and described the land in controversy, but did not allege that it was then occupied by Bean as a homestead; and it stated the taxes due by Bean for each of these years, and asked for a personal judgment for the total amount of taxes due for those years, and asked that the lien of the city be foreclosed on the property in controversy, as well as on the other property of Bean, described and mentioned in the petition. On June 8, 1896, judgment by default was rendered against the appellant, Charles Bean, and the judgment recites: "And the court, after hearing the evidence, is of the opinion that the cause of action set out in plaintiff's petition is true, and is established, it is ordered, adjudged, and decreed by the court that the plaintiff, the city of Brownwood, do have and recover of and from the defendant Charles Bean the sum of \$248.85, together with interest thereon from the date of this judgment at the rate of 6% per annum, and all costs in this behalf incurred, including \$9 to be taxed as attorney's fees for the city. It further appears to the court that a part of the above-named amount, to wit, \$136.70, recovered by plaintiff against the defendant Bean herein, was and is for taxes due plaintiff by defendant Charles Bean on his homestead, to wit, block No. 35 of Rankin's addition to Brownwood, for the years 1891, 1892, 1893, and 1894, and that a lien exists on the same in favor of plaintiff for the taxes on same, as recited above. It is therefore ordered and decreed that the said lien on block No. 35 be, and the same is hereby, foreclosed, and that the clerk issue an order for the sale of the same, and that the proceeds be applied to the payment of so much of this judgment as is rendered for taxes on the same, to wit \$136.70; and, if it should sell for more than enough to pay said amount, then the excess shall be retained by the clerk, subject to the order of this court. It further appears to the court that the amount recovered herein, less amount named as taxes for the homestead, to wit, \$162.15, is for taxes due plaintiff by de-

fendant Charles Bean for the years 1891, 1892, 1893, and 1894, and that a lien exists in plaintiff's favor for said last-stated amount on the following land: [The judgment here goes on and describes other land, and forecloses a lien thereon, and orders a sale thereof.]

On July 13, 1896, an order of sale was issued on the judgment rendered against Bean for taxes, wherein the sheriff is required to make the amount of \$162.15, together with interest and the total costs of the suit, by levying upon and seizing the property described in the judgment, other than the homestead,—that in controversy. To this order of sale was attached the cost bill, including all the costs incurred in the court below. The sheriff's return on said order of sale shows that, on the day the property was to be sold (the first Tuesday in August, 1896), the appellant, Bean, paid off and satisfied fully that part of the judgment requiring the sale of all the property other than that in controversy, by paying the amount mentioned in this order of sale, to wit, \$162.15, together with interest and all costs and expenses of suit. On the 13th of July, 1896, another order of sale was issued, wherein the sheriff was commanded to make the sum of \$136.70, as taxes due on the homestead property of defendant Bean (which is the property in controversy), with interest thereon from the date of said judgment at 6 per cent. per annum, by selling the property in controversy. The return shows that this order of sale was received by the sheriff on the 13th day of July, 1896, and that he levied upon the property in controversy, and that on said day he publicly advertised said land for sale at the court house of Brown county, Tex., on the first Tuesday in August, 1896, the same being the 4th day of said month, for 20 days successively next before the day of said sale, by posting up written and printed notices thereof, of the time and place and terms of sale, at three public places in Brown county, one of which was at the door of the court house of said county, and by delivering to said defendants, in the order of sale, each one a copy of said notice of sale; and further recites that on said first Tuesday in August, 1896, before the court-house door of said county, between the hours of 10 a. m. and 4 p. m., the land, at public outcry, was sold and struck off to Mrs. Bettie Taber, for the sum of \$150, that being the highest and best bid therefor. And it appears that besides the amount for which this property was ordered to be sold by the judgment of the court, decreed as the taxes against the homestead, there were charged, as costs of sale, the following sums: Commissions on the sale, \$5.50; levying on the property, \$1.50; posting notices, \$4; returning order of sale, 75 cents; deed, \$2,—total, \$13.75. It does not appear from the record that the property in controversy was sold for any of the costs of the suit by the city against Bean and others in foreclosing its lien for the taxes.

We adopt the conclusions of fact found by

the trial court, together with what is in addition here stated, as the facts in the case.

#### Opinion.

Appellant's first assignment of error is as follows: "The court erred, as will more fully appear from the bill of exception No. 1, in refusing to permit defendant to show that the amount of taxes due the city of Brownwood on block No. 35, Rankin's addition to the city of Brownwood, for the year 1891, was \$20.71; for the year 1892, \$31.50; for 1893, \$36; and for 1894, \$31.50, and costs, \$1.50,—aggregating for said years, \$121.21; and in refusing to permit the defendant, in connection with the above evidence, to show that the 'delinquent tax record,' published by the city of Brownwood, showed the taxes on said block for each of said years to be as above stated; because, Charles Bean being a married man, and the head of a family, and actually residing upon and using block No. 35, Rankin's addition to Brownwood, as his homestead, at the time the taxes sued for were cast, and at the time of the sale of said block, and the homestead question not having been adjudicated in the original suit, and Mrs. Charles Bean not having been a party to the original suit, he had a right in this action to show that his homestead was subjected to sale for a demand that was not a lien thereon, and also to show the amount of taxes claimed to be due by the city of Brownwood in the delinquent tax record published by it, the city having no right to sue for or claim a greater amount than that published in its 'delinquent tax record,' as published under section 5, c. 42, Acts Tex. 24th Leg."

Mrs. Bean is not a party to this suit, nor does the appellant pray for or ask for any relief in her favor on account of her homestead interest in the property in controversy. He does allege in his motion that the property was the homestead of himself and his wife, but she is not made a party, and all the relief that he asks in that respect seems to be on his own account. But even if the wife had joined in this motion to set aside the sale, on the ground that she was not a party to the judgment that foreclosed a lien against her homestead, we would hold that she was not a necessary party to that suit. The presumption is that the property in controversy was the community property of Bean and his wife, and that she had no interest in it, separate from that of her husband, other than her homestead right. The constitution makes the homestead subject to the taxes due against it; and, for the taxes so due, the homestead would be liable, and the city could foreclose its lien therein for the amount due. In order to foreclose this lien, the wife, who asserts simply the homestead right, would not be a necessary party. The homestead could not be urged as a defense against this lien. It is only in cases where the homestead right could be urged, in order to defeat a charge attempted to be made against it,



that the wife would be a necessary party. In a suit to foreclose a lien for the purchase money due upon the homestead, or to foreclose a valid mechanic's lien thereon, the wife would not be a necessary party, because, as to this character of claims, the homestead right could not be interposed as a defense, and the lien for the taxes due upon the homestead stands upon the same footing. So far as it was sought to prove that the judgment foreclosed a lien on the property for a greater amount than the taxes due thereon, it is sufficient to say that there is no pleading by the appellant upon which this testimony could be based. He does not make this a ground for setting aside the sale. The judgment rendered in this case is entitled to the same consideration that is given to judgments rendered in actions generally between individuals. The attack sought to be made upon this judgment, by showing that it was rendered for amounts not due, or that it was not based upon the delinquent tax record, would not be permitted in a case where Bean had been sued upon an ordinary debt, with the foreclosure of lien upon this property, and judgment thereon rendered against it. The absolute verity in favor of the judgment in a case of that character should be given to the judgment rendered in this case. The same principle that applies to the one would apply to the other.

The petition filed in the case was good against a general demurrer, and stated substantially a cause of action against the appellant, Bean, and asked a personal judgment against him for the taxes due, and for a foreclosure of the lien of the city upon the property in controversy, together with other property. The judgment of the court is substantially in accord with the averments of the petition. It finds the amount of taxes due by Bean, and that a lien exists upon the property described in that judgment in favor of the city; and the judgment upon its face, declares that the court heard evidence bearing upon the liability of Bean, and the liability of the property for the taxes due upon it, and declared by the judgment that the property in controversy was the homestead of Bean, and declared the amount of taxes charged against it, and foreclosed the lien therefor. Now, there is nothing upon the face of either the petition filed in that case, or the judgment therein rendered, that discloses the fact that the court did not have jurisdiction over Bean or the subject-matter of the suit, but the contrary expressly appears. Nor does it appear from any of the proceedings in that case that the court rendered its judgment upon other than legal testimony. In considering this judgment, we must credit it with the absolute verity that is given to domestic judgments generally. A judgment rendered in this kind of case is no more subject to collateral attack than a judgment rendered on any other demand. We do not know, nor is there any method of as-

certaining, upon what facts the court rendered this judgment; and, in the absence of information to the contrary, we must conclusively assume that all the proceedings anterior to this judgment were legal, and that it was rendered upon evidence that would support every fact found and determined by the judgment.

The second assignment of error complains of the refusal of the court, on motion of appellant, to file a conclusion of fact as to whether or not, had the appellant been served with a copy of the notice of sale, he would have designated a portion or portions of block 35 less than the whole for sale. The evidence bearing upon that question, as testified to by the appellant, was that if he had received the notice of the intended sale, which he complains of not having received, he could and would have designated a smaller portion, less than the whole of the property in controversy, for sale. This testimony was admitted without objection to so much of it as indicates the intention of appellant as to what he would have done. We doubt its admissibility; and, notwithstanding that he did testify that he would have pointed out for sale a less portion than the whole of the land in controversy, we cannot say that that fact was established in such a way as to convince the court below of its truth, and thereby require it to base a conclusion upon it. But, independent of this, we do not think that, under the facts of this case, any harm or injury resulted to the appellant by reason of the failure of the officer to serve him with a copy of the notice of the intended sale, for it appears from the evidence, that he was actually present at the sale, and knew that the property in controversy would be sold. It appears from the objection to the sale by him made at the time that he did not then regard the want of notice as a matter of importance, but he urged objections to the sale on entirely different grounds; and it appears that while he may not have, previous to the day of sale, known that the intention was to sell this property, it clearly appears that he could, before the sale was actually made, have designated a less portion of the property in controversy for sale, and requested the sheriff to sell it. The opportunity to do this was not denied him by any one, and he could have accomplished his intention and purpose in this respect as effectually after he did obtain knowledge that the property would be sold as he could if he had received notice earlier. He knew the condition and situation of his property, and the findings of fact show that a portion of it, if he had so desired, could have been segregated and set apart from the entire tract, without the necessity of delaying the sale, in order to establish lines cutting off a portion of the property; and it is clear that he had it in his power, before and when the property was put up for sale, to then and there have designated a portion less than the whole for sale, and

have requested the officer to sell it. This he did not do, but being present at the sale, and having the opportunity to accomplish this purpose, we cannot well see now how he is in a condition to complain of the failure to receive the notice. One of the benefits and the purpose of the notice, and the only one which he alleges he was deprived of, was to notify him; so that he would have the opportunity to appear at the sale, and protect his property from sacrifice. The absence of notice did not, in this case, deprive him of this right, because, under the facts of the case, it appears that he had the opportunity to avail himself of it, notwithstanding he may not have received the formal notice required.

In response to the third assignment of error, it is sufficient to say that the petition substantially alleged a cause of action against Bean, and was sufficient, when tested by a general demurrer; and, as the judgment fully protected him in his homestead interest from other taxes that were not due upon it, he has no grounds of complaint. The averments of the petition were sufficient, we think, to let in proof upon that question.

It is also contended that the sale should be set aside, because the officer making the sale did not sell that part of the land in controversy on the east side of the tract. This view is urged under article 517 of the Revised Statutes of 1895. In view of chapter 42 of the Acts of 1895, we seriously doubt whether article 517 has application, and, among the duties imposed upon the officer making the sale under chapter 42 of the Acts of 1895, this is not required. This act upon its face says that the towns and cities shall be entitled to the benefits of the act; but, whether we are correct in this view or not, it is not shown that the eastern part of the tract could have been cut off and divided from the balance of the tract; and, if this could have been done, the appellant, who was present at the sale, made no request that it should be done. While it does appear from the findings of the court that one part of the homestead could have been segregated from the other part, it does not appear that it was so situated that the portion lying upon the east could have been separated from the balance, so as not to materially interfere with its use as a homestead. This statute, and statutes of that character, which require certain designated portions of a tract of land to be sold, is not an absolute and indispensable requirement of law, that cannot be dispensed with in any case, but, when it should be applied and enforced, depends upon the character and situation of the property and the uses to which it is put. It may be in this instance, as well as in many others, that the eastern part of the tract, owing to its configuration, or owing to its use, could not, without material injury to the balance of the tract, be segregated and separated therefrom; and in many cases it might result in more injury to the defendant in the execution to ar-

bitrarily cut off the eastern portion, and sell that, than it would to sell some other portion of the tract. We cannot say, from the facts in this case, that the appellant has suffered any injury by the failure of the officer to sell the eastern portion of the land in controversy.

The fifth assignment of error attacks the sale upon the ground that, in addition to the amount of taxes due upon the homestead, it was made for the interest due thereon, and for the costs and commissions due the sheriff making the sale and levy. The judgment of the court found that the taxes due on this property were \$136.70. We do not understand that this included any interest due on the taxes, nor does the return of the sheriff show that it was sold for an amount including interest due on the taxes. The costs and commissions for making the sale, we think, are proper items to charge, as they necessarily follow from the right given by the court to foreclose the lien, and require the property to be sold. The constitution, it is true, only authorizes the homestead to be sold for the taxes due upon it; but, in the pursuit of this remedy, we think it clearly follows, as one of the incidents thereto, that the power exists to charge the costs of the proceeding against the property. This is necessarily an incident of the main right. There could be no homestead right asserted against the lien for the taxes due upon it; nor could there be a homestead right asserted against a material man's lien, acquired in the manner prescribed by law, nor against a vendor's lien; and, in controversies where such liens have been foreclosed, it has been the usual practice, where it was necessary to be done, to charge against the property the costs of the litigation; and the power of the court in those cases to charge, against the amount for which the property was sold under the order of sale issued in that class of cases, the costs of the litigation, has never been questioned; and clearly, in that class of cases, as well as this, the costs resulting from the foreclosure proceeding are an incident of the debt, and are as much a charge against the property as the original lien. But, notwithstanding this, we do not think the appellees can be held responsible, and the sale set aside, because the officer who made it appropriated to his own use, from the amount for which the land was sold, commissions on the sale and the costs of making the sale. If we could concede that these items were not a proper charge against the land, still the fact that the officer appropriated a part of the proceeds of the sale to the payment of these items would not affect the interest or the rights of a purchaser at the sale. The defendant in the writ could have his remedy in such a case, if the charges were illegal, against the officer. It does not appear that the sale was made for the purpose of making these amounts, but was made for the purpose of realizing the amount rendered in the judgment of foreclosure; but after the sale, and after this amount, and more than that sum.

was realized, the officer that made the sale, it seems, appropriated a part of the proceeds of the sale to the payment of his commission, and the costs of the levy, and the posting of notices, and the return of the order of sale, and the cost of executing the deed. If these charges were not legal, it could not affect the rights of the appellee Mrs. Bettie Taber as a purchaser at the execution sale, but the defendant would have his remedy against the officer to recover these amounts. If the officer had wrongfully appropriated and used all of the money for which the land was sold, under the pretense that he was entitled to it by reason of some expenses or costs incurred by him in making the sale, this would not affect the rights of the purchaser at the sale. If it had appeared that the property was sold for such an illegal purpose, then a different case might arise; but such is not the case here. The sale, it seems, was made for a legal purpose; and, if it could be held that the funds arising therefrom were appropriated to the payment of charges made by the officer that were illegal, this would not affect the rights of a purchaser who was not connected therewith, or received any benefit from such an illegal appropriation. A purchaser at an execution sale is not chargeable with the subsequent illegal conduct of the officer, with which he is not connected.

In response to the sixth assignment of error and the propositions thereunder, we agree with the findings of the court, and believe that the orders of sale are sufficiently intelligible, and that they sufficiently describe the judgment and the property to be sold, and give correctly the amount for which it should be sold.

We know of no law that prohibits two orders of sale to be issued at the same time upon the same judgment, and in this case we think that it was proper to pursue this course. There were two distinct features of the judgment, determining different rights, so far as concerned the property upon which the lien was foreclosed, and it was proper, in enforcing that judgment, to have the homestead sold separately from the other property.

What we have previously said disposes of the eighth assignment of error.

The ninth assignment is not presented in such a way that we feel called upon to notice it. No statement is made under it; no proposition is made under it; and the reason there given why the sale should be set aside is not made a ground in the motion or petition of the appellant.

There is no assignment of error in the record asking that the sale be set aside on the ground of inadequacy of price for which the land was sold, and we do not consider that this question is raised; but, if the land was sold at the sheriff's sale for an inadequate price, it is apparent from the facts in the record that the failure to serve the notice upon appellant of the time and place of sale, and the other irregularities complained of, in no

wise contributed to the inadequacy of the consideration for which the land was sold. It is clear that such inadequacy was occasioned by the statement made by the appellant at the time and before the sale was made, to the effect that "whoever buys this land will buy a lawsuit. It is my homestead. This sale will be void, because the board of equalization of the city of Brownwood raised the valuation of my homestead from the value that I placed upon it when I gave it to the assessor for taxes, without giving me any notice of its intention to do so." It will be noticed that the raising of the value of the property by the board of equalization is not made a ground for setting aside the sale. The rule is that inadequacy of consideration alone is not a sufficient ground for setting aside an execution sale, and, where irregularities in connection therewith are relied upon, it must appear that they in some manner contributed towards the inadequacy; and it is also a rule of law that if it appears that the conduct of the defendant, who desires to set aside the sale, contributed to and brought about the inadequacy of consideration in the sale of the property, he cannot complain. We find no error in the record, and the judgment is affirmed. Affirmed.

#### CITY OF MARSHALL v. McALLISTER.

(Court of Civil Appeals of Texas. Jan. 8, 1898.)

ABATEMENT—ACTION FOR PERSONAL INJURIES—MUNICIPAL CORPORATIONS—BRIDGES—CONSTITUTIONAL LAW—PLEADING—SPECIFIC ALLEGATIONS—QUALIFICATION OF JURORS—HARMLESS ERROR—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. Under Rev. St. 1895, art. 3353a, providing that actions pending for personal injuries not resulting in death should survive, an action founded on an injury occurring before the enactment of said law did not abate by the death of the injured person after its enactment.

2. Rev. St. 1895, art. 3353a, providing that actions pending or thereafter brought for personal injuries not resulting in death should survive to the heirs and legal representatives of the injured person, is not retroactive and unconstitutional.

3. In an action against a city for personal injuries, allegations that plaintiff was "badly and painfully injured, \* \* \* that he was confined to his bed three days, \* \* \* that he endured the greatest pain and suffering," and that "he received a serious and painful injury," are not sufficiently specific as to the manner, place, and extent of the injuries.

4. Taxpayers of a city are not for that reason disqualified to sit as jurors in a case where the city is sued for damages.

5. In an action against a city a judgment will not be reversed for error in discharging jurors because they were taxpayers of the city, unless it appears that by this action the city suffered an injury.

6. The fact that one injured while crossing a bridge was driving at an unlawful speed will not preclude a recovery, unless such violation of the law contributed thereto.

7. Where the court, in an action against a city for personal injuries, had set forth in the main charge the duty of the city to exercise

ordinary diligence to see that its bridges were reasonably safe for travel, it was not error, in the absence of any special reason why the same should be given, to refuse to give a special charge instructing that the city is not a guardian of the safety of persons traveling over its bridges, and is only required to provide against such things as might be reasonably expected to occur.

Appeal from district court, Harrison county, W. J. Graham, Judge.

Action by Mrs. Kate McAllister against the city of Marshall to recover damages for personal injuries received by her husband. From a judgment for plaintiff, defendant appeals. Reversed.

Arthur H. Cooper, for appellant. T. P. Young, for appellee.

RAINEY, J. This suit was brought by L. G. McAllister against the city of Marshall to recover damages for personal injuries received by him by being thrown from his buggy while crossing a bridge within said city limits. It was alleged by plaintiff that the bridge was defective, which caused the injury, and that the city was negligent in not keeping the bridge in repair. Before the trial, L. G. McAllister died; and, upon the suggestion of his death, his representative, Mrs. Kate McAllister, was made party plaintiff, who prosecuted the suit to judgment. The city pleaded in abatement that the suit abated upon the death of said L. G. McAllister, and prayed that it be dismissed. Judgment was rendered against the city, from which this appeal is taken.

It appears that after the injuries were alleged to have been received, and before said L. G. McAllister's death, the legislature of Texas passed an act (article 3353a, Rev. St. 1896) providing that actions pending or thereafter brought for personal injuries not resulting in death should survive to, and in favor of, the heirs and legal representatives of the party injured, upon his death. It is insisted by counsel for the city that the said act is retroactive and unconstitutional, and that its provisions should not govern in this case. This precise point was raised in the case of *Railway Co. v. Rogers* (Tex. Civ. App.) 39 S. W. 1112, and we there held that the action would survive. The question was fully considered when that case was under consideration, and we now see no reason for changing the views there expressed.

2. The defendant specially excepted to plaintiff's petition on the ground, among others, that it did not state "how or where he was injured, nor the character of injuries complained of." The allegations of the petition were that plaintiff was "badly and painfully injured, \* \* \* that he was confined to his bed three days, \* \* \* that he endured the greatest pain and suffering," and that "he received a serious and painful injury." There were no specific allegations as to the character of the injuries received. It was the right of defendant to require plain-

tiff to set forth specifically in his petition what injuries he had received, and it was error in the court to overrule defendant's exception. For this error the judgment of the court below will be reversed.

3. Taxpayers of a city are not for that reason disqualified to sit as jurors in a case where the city is sued for damages. *Railway Co. v. Bishop* (Tex. Civ. App.) 24 S. W. 323; *City of Dallas v. Peacock*, 69 Tex. 58, 33 S. W. 220. The court, therefore, erred in discharging jurors for that reason. While it is not clear that defendant suffered injury from this action of the court, and we would not reverse the judgment on this point under the conditions shown by the record, yet, in view of another trial, it is well to call the attention of the court thereto, that it may not be repeated.

4. The court charged the jury, in effect, that the driving over a bridge, in a gait faster than a walk,—such being unlawful,—would not bar plaintiff's right to recover, unless such driving contributed proximately to his injury. Appellant insists that this is error; and contends that the mere fact of driving over a bridge, being unlawful, precludes a recovery by plaintiff. A statute of this state makes it a penal offense to drive over a bridge in a gait faster than a walk, but this would not preclude a recovery by plaintiff if the jury believed that McAllister, at the time he was injured, was driving faster than a walk, unless such driving contributed to his injury. The violation of a statute is not material, where such violation did not contribute to the injury. 1 Shear. & R. Neg. § 98, notes 2, 8.

5. The following charge was requested by appellant, and refused, viz.: "The defendant in such a case as the one alleged in plaintiff's petition is not an insurer or guardian of the safety of a person traveling over its streets and bridges, and is not required to provide against everything that might happen to persons passing over them, but only such things as might reasonably be expected to occur." The measure of the city's duty in regard to the safety of bridges within its limits is to "exercise ordinary care and diligence to see that they are reasonably safe for travel." 1 Shear. & R. Neg. § 289. This duty was clearly set forth in the main charge, and, while the requested charge is correct as a proposition of law, we think the main charge was sufficient to inform the jury as to the liability of the city under the circumstances. We see no special reason why the special charge should have been given. If the city exercised ordinary care to keep the bridge in a reasonably safe condition, it was not guilty of negligence, and therefore not liable.

There are other assignments of error, but they are not well taken, and there is no need to discuss them. For the error above stated the judgment is reversed and the cause remanded.

## SPARKS v. McHUGH et al.

(Court of Civil Appeals of Texas. Jan. 8, 1896.)

PLEADING—MISJOINDER OF DEFENDANTS—ABATEMENT—EXECUTION—RANGE LEVY—SUFFICIENCY.

1. Misjoinder of defendants must be pleaded, and it is error for the judge, on his own motion, to abate a suit therefor after the cause was submitted on its merits.

2. A levy upon certain cattle "running at large on the range in M. county" is presumed to be sufficient as a range levy, under Rev. St. art. 2298, where it is not shown that defendant's range extended beyond M. county.

Appeal from Motley county court; A. R. Anderson, Judge.

Suit by W. T. Sparks against Pat McHugh and another. Judgment for defendants, and plaintiff appeals. Reversed.

H. Snodgrass, for appellant. W. M. Smith, for appellees.

STEPHENS, J. Appellant sued the appellees in sequestration to recover 31 cattle which were jointly replevied by them. They also filed a joint answer. On the trial of the case the judge (to whom it had been submitted on its merits), of his own motion, abated the suit as to appellee Mackay on the ground of misjoinder, and permitted appellee McHugh to amend the joint pleadings by substituting therefor his separate answer, limiting his claim to 25 of the cattle. Appellant was denied any recovery, and hence appeals. The error assigned to the court's action in abating the suit as to Mackay is fatal to the judgment. Misjoinder of defendants is a defense which must be pleaded in some form or other, and at the proper time, and may be, as was evidently done in this case, waived. *Killfoil v. Moore* (Tex. Civ. App.) 39 S. W. 646. No right was shown in the appellees, jointly or severally, to six of the cattle replevied by them. We find no merit in any of the other assignments.

The objections to the justice court judgment, under which McHugh deraigned his title, through a range levy, to 25 of the cattle in controversy, all seem to be sufficiently covered by the opinion of Justice Hunter in *McHugh v. Sparks* (Tex. Civ. App.) 38 S. W. 537, unless it be the one urging that that judgment was not final, because the motion for new trial had never been acted on, which is covered by our opinion in *Railway Co. v. Gill* (Tex. Civ. App.) 28 S. W. 911, or, rather, by the cases there cited. The range levy is assailed on the authority of *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848, because it recites that "this levy is made on said cattle running at large on the range in Motley county, Texas." No proof was offered to show that the range of appellant's cattle extended beyond the limits of Motley county. We are therefore of opinion that the case does not come within the ruling made in *Gunter v. Cobb*, and that the levy was presumptively sufficient. If the range of the cattle did not in fact extend beyond Motley county, the sheriff could not truthfully have

described the levy as made on cattle ranging in adjoining counties. See *Davis v. Bank*, 7 Tex. Civ. App. 41, 26 S. W. 222, and *Brown v. Hudson* (Tex. Civ. App.) 38 S. W. 653. But, on account of the error in abating the suit as to Mackay, the judgment is reversed, and the cause remanded for a new trial.

## CONSTANTINE v. FRESCHE (LONE STAR BREWING CO., Intervener).

(Court of Civil Appeals of Texas. Dec. 23, 1897.)

APPEAL—SEPARATE JUDGMENTS—LANDLORD AND TENANT—STATUTORY LIENS—PLEADING—SUFFICIENCY.

1. Where a landlord obtained a judgment fixing a lien upon certain chattels, and an intervener obtained a judgment foreclosing a mortgage on the same chattels, defendant may appeal from one judgment without appealing from the other.

2. A landlord suing under Rev. St. 1895, art. 3251, giving a lien upon his tenant's property in a leased building must allege the leasing of the building, and it is not sufficient to describe the lot upon which the building was situated, and to allege that defendant had in the premises certain chattels used in operating an hotel.

Appeal from Nueces county court; W. B. Hopkins, Judge.

Suit by August Fresche against Nic Constantine. The Lone Star Brewing Company intervened. From a judgment for plaintiff, defendant appeals. Reversed.

Marshall Rogers, for appellant.

WILLIAMS, J. Appellee brought this suit against appellant for the recovery of rent of lots 11 and 12 in block 12, on the beach portion of the city of Corpus Christi. The petition did not allege that there was any building of any character upon the lots. It did allege "that defendant had in said premises, during said time, certain household and kitchen furniture, such as is usual and customary in running and operating an hotel, consisting of about twenty bedroom sets and bedding for each bed, fifty chairs, twelve dining-room tables, a heating stove, counter, safe, kitchen stove and utensils; that plaintiff has a landlord's lien on all of said furniture to secure the payment of said rent." The Lone Star Brewing Company of San Antonio, Tex., intervened, seeking to recover of defendant a debt, and to foreclose its chattel mortgage on certain enumerated furniture alleged to be contained in an hotel and warehouse on lots 11 and 12 in block 12. The defendant did not contest the claim of intervener, but admitted it, and judgment was rendered in its favor by consent. The defendant answered the plaintiff's petition by general demurrer and general denial. Upon the trial the plaintiff was allowed to prove, over defendant's objection, that there were a brick hotel and a frame residence upon the two lots, and that in them there was furniture. Judgments having been rendered in favor of plaintiff, as well as in-

tervener, foreclosing both liens upon the furniture, the defendant has appealed from the judgment in favor of the plaintiff, making his bond payable to him alone, and assigning errors against him only. The appellee has moved to dismiss the appeal, because the appeal bond is not payable also to the intervener. We think the two judgments are distinct and several, and that the defendant had the right to appeal, as he has done, from that in favor of plaintiff, without disturbing that in favor of intervener, and that the motion to dismiss should be overruled. We are further of the opinion that the judgment in favor of plaintiff is not warranted by his petition. By article 3235, Rev. St. 1895, a lien is given to all persons leasing or renting lands or tenements to secure the payment of the rent, but this lien applies only to animals, tools, and other property furnished by the landlord to the tenant, and to crops raised on the rented premises. It is plain that plaintiff's petition shows no lien upon the furniture under this article. By article 3251, it is provided that "all persons leasing or renting any residence, storehouse or building, shall have a preference lien upon all the property of the tenant in such residence, storehouse or other building." A comparison of these two articles makes it evident that, in order to secure a lien upon property other than that mentioned in article 3235, the landlord must have rented to the tenant a building of some character, and hence, for the pleading to show a landlord's lien, it must allege the renting of property of the character mentioned in the statute. This the petition in this case failed to do, and the consequence is that the plaintiff, by his pleadings, does not state any facts which entitle him to a lien upon the property mentioned in the petition. The fact stated that the property was such as is usual and customary in running and operating an hotel does not necessarily imply that there was an hotel or other building located upon these lots, and that the property was contained therein. Inasmuch as the petition failed to state any facts showing the plaintiff had a lien upon the property, evidence to prove such facts was not admissible, and the court erred in receiving it, and for this error the judgment must be reversed, and the cause remanded. Reversed and remanded.

#### PARIS, M. & S. P. R. CO. v. KILLINGSWORTH.

(Court of Civil Appeals of Texas. Jan. 15, 1898.)

#### APPEAL.—FAILURE TO FILE BRIEF.—DISMISSAL.

Under Rev. St. 1895, art. 1417, and rule 102, 20 S. W. xviii., 84 Tex. 722, providing, respectively, that a copy of appellant's brief shall be filed with the clerk below not less than five days before the time of filing the transcript in the appellate court, and that the clerk shall, upon request, deliver a certified copy thereof to counsel, when appellant has not filed his brief as required, and opposing counsel has not been

furnished with a copy, the appeal will be dismissed.

Appeal from Harrison county court; J. W. Pope, Judge.

Action between the Paris, Marshall & Sabine Pass Railway Company and H. N. Killingsworth. From a judgment for the latter, the former appeals. Dismissed.

Turner & Harrison, for appellant. Scott & Jones, for appellee.

FINLEY, C. J. This cause was set down for submission on December 18, 1897. On that day the case was called for submission, and there were no briefs on file for appellant, and no counsel present representing appellant. An order was then entered upon the docket dismissing the cause for want of prosecution. A few minutes after the entry of this order one of the counsel for appellant appeared in court, and stated to the court that he was not aware that there was no brief filed; that he was satisfied there was a mistake, and that it could be satisfactorily explained if time was given to investigate the matter. The morning was very cold and disagreeable, and it was shown that counsel had appeared in court as early as practicable that morning. Under the conditions named, the court set aside the order entered on the docket, and entered a further order passing the case to January 8, 1898, for submission. Upon the last-named date the case was again called for submission, and there were still no briefs filed for appellant. At this time another one of the counsel for appellant appeared, and asked that leave be given appellant to file its briefs. The court declined to give the leave at that time, but took submission of the motion, and refused to receive a submission of the case. The motion to file the briefs merely stated that counsel, in some unaccountable way, made a mistake as to the time he was required to file briefs.

It is not shown that the brief was filed in the court below, nor that a copy had been furnished opposing counsel. On the other hand, it appears from the motion of appellee filed on January 6, 1898, and which was on file at the time the motion to file briefs was filed and presented, that appellant had filed no brief in the court below, and had not furnished counsel for appellee with a copy of any brief. Under such conditions, we cannot receive and consider appellant's brief. The statute requires that a copy of appellant's brief shall be filed with the clerk of the court below not less than five days before the time of filing the transcript in this court. Rev. St. 1895, art. 1417. See, also, rule 102, 84 Tex. 722, 20 S. W. xviii. This requirement of the statute must be complied with, and this court should not and will not disregard it. As the cause has not been properly prepared for submission, we feel it our duty to dismiss the appeal; and it is so ordered. Appeal dismissed.

## DEWARE et al. v. WICHITA VAL. MILL &amp; ELEVATOR CO. et al.

(Court of Civil Appeals of Texas. Nov. 27, 1897.)

## APPEAL—ASSIGNMENTS OF ERROR—ATTACHMENT—LEVY—VALIDITY—PRESUMPTION—COLLATERAL ATTACK—CLAIMS—BOND—ESTOPPEL.

1. An assignment of error that "the court erred in its charge to the jury on the law of the case" is too general to be considered on appeal, under Ct. Civ. App. Rule 26 (20 S. W. viii.).

2. A sheriff, in possession of property as trustee for creditors, levied writs of attachment for other creditors, and then executed an affidavit and claimant's bond, as trustee, which he approved as sheriff, and returned to the court which issued the writs. The affidavit and bond recited the levy, which the sheriff admitted. The attachment liens were foreclosed, subject to the claimant's suit. *Held*, that levy would be presumed to be legal, and in compliance with the statute.

3. An attachment levy cannot be attacked in a collateral proceeding, unless it is void.

4. An attachment levy is not void because made by a sheriff on property in his possession as trustee for other creditors of the attachment debtor.

5. Where a sheriff levied on property in his possession as trustee, and gave a claimant's bond, which he filed in a court which dismissed the claimant's suit for want of jurisdiction, it was his duty, as officer and claimant, to see that the papers were filed in the proper court, and his failure to do so, for two successive terms of the proper court, should be treated as an abandonment of the claimant's suit.

6. Where the attorneys for both parties declared, at the dismissal of a claimant's suit for want of jurisdiction, that they intended to do nothing further, the attaching creditor is not estopped from prosecuting a suit on claimant's bond, on the ground that the declaration of his attorney led the claimant to believe that litigation was ended.

Appeal from district court, Marion county; J. M. Talbot, Judge.

Action by the Wichita Valley Mill & Elevator Company and others against J. M. Deware, trustee, and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This suit was brought by the appellees, the Wichita Valley Mill & Elevator Company, Slayden Kirksey Woolen Mills, Sanders Duck & Rubber Company, Wyland, Ackerland & Co., R. Douglass Crockery Company, H. R. Krite & Co., Fink & Nasse, and William A. Orr Shoe Company, against the appellants, on a claim bond executed by appellant J. M. Deware, as trustee, as principal, and the appellants T. J. Rogers and B. F. Rogers, as sureties, on said claim bond, on December 22, 1894. On September 18, 1895, appellees filed their petition in the district court of Marion county, Tex., alleging, in substance, that the appellees were each and all judgment creditors of one Max Simmons, and that they had all secured attachment liens upon the property of said Max Simmons of the aggregate value, as assessed by the sheriff, of the sum of \$1,627.66; that said liens were foreclosed, subject to the trial of the right of property voluntarily made and tendered by appellant J. M. Deware, trustee, who made, executed, and

delivered the claim bond sued on, with the appellants T. J. Rogers and B. F. Rogers as sureties on the same, in the sum of \$3,300; that the claim of said J. M. Deware, trustee, was never established, and no effort was ever made in any court of competent jurisdiction to establish the same, but said claims were docketed in courts having no jurisdiction, and subsequently dismissed by consent, and at cost of claimant, and said claim has long since been waived and abandoned by appellants, and said bond breached, and a cause of action accrued thereon. On December 16, 1896, appellants answered by motion to quash citation, exceptions, etc., and on December 28, 1896, by amended answer containing general denial, and special answer setting up the fact that they did execute the bond sued on in the manner as charged in appellants' petition, but that the levies charged to have been made, and which are the foundation of said bond, were illegal and void, and of no force and effect; that said levies did not disturb the possession of said claimant, J. M. Deware, who was at the time of said levies sheriff of Marion county, Tex.; that said levies were made by said J. M. Deware, sheriff of said county, upon property in his possession, and which he was holding under a deed of trust executed by Max Simmons to secure various and divers bona fide creditors of the said Max Simmons; that on December 13, 1894, the said Max Simmons, for the purpose of securing various and divers bona fide creditors of the said Max Simmons,—and among the number were the defendants T. J. Rogers and T. J. Rogers & Son,—the said Max Simmons made, executed, and delivered to the defendant J. M. Deware his certain deed of trust, wherein he conveyed to said J. M. Deware all the said property charged to have been levied upon in plaintiffs' petition; that the said J. M. Deware immediately took actual possession of all of said property under the terms of said deed of trust, and the said J. M. Deware was in actual possession of all of said property at and before the time of said illegal and void levy; that, after said illegal and void levy, the said J. M. Deware executed said bond sued upon, and made his affidavit claiming said property, as trustee, and immediately filed said bond and affidavit in the proper courts having jurisdiction thereof, for the trial of the right of property; that the said J. M. Deware has always been, and was then, ready and willing to fully establish his right and claim to said property, as trustee, under said deed of trust; that the said Deware has done no act evidencing any intention whatever on his part not to prosecute his said right and claim to said property under said deed of trust; that there has never been any issue made and trial had upon the merits of said claim bond and affidavit that would render the said defendants liable upon said bond; that the failure to get a trial upon the merits of said claim case was not caused by any fault on the part of defendants, but was caused wholly by the

statements and representations by the plaintiffs, acting by and through their attorney, George T. Todd, to the effect that said plaintiffs had abandoned said claim suit, and that said plaintiffs recognized and admitted the right and title of the claimant, J. M. Deware, to said property, as being superior to the said right of plaintiffs arising from their attachment lien, and with that understanding with the said Todd, attorney for plaintiffs, and R. R. Taylor, attorney for defendants, said claim suit was dismissed voluntarily by the said Todd, representing the said plaintiffs in said claim suit; and further prayed that defendants be allowed to establish the right and claim of the said J. M. Deware, trustee, to said property, and that they have judgment accordingly. December 30, 1896, the cause was tried before a jury, and resulted in a verdict and judgment for plaintiffs for the aggregate sum of \$1,113.77, with 6 per cent. interest from December 22, 1894, and all costs of suit. Appellants filed motion for new trial, which being overruled, they excepted, and have duly perfected this appeal.

R. R. Taylor, for appellants. Geo. T. Todd, L. S. Schluter, and J. H. Culbertson, for appellees.

BOOKHOUT, J. (after stating the facts). Appellants' first assignment of error is too general to be considered. It is that the court "erred in its charge to the jury on the law of the case." The rules governing this court prohibit us from considering such an assignment. Rule 26, 20 S. W. viii.

Appellants' second assignment of error, and proposition thereunder, challenge the legality of the levy of the several writs of attachment; said levies having been made by J. M. Deware, sheriff of Marion county, Tex., on property in his own possession, as trustee, in a chattel mortgage executed to him by Max Simmons to secure certain creditors therein named. The defendants plead that these levies, which were the foundation of plaintiff's suit, were illegal, and did not disturb the trustee's possession of said property. The question arises, how far can defendant go in attacking the levy of these writs of attachment in this suit? The writs of attachment were sued out in the several cases of the respective plaintiffs in suits against Max Simmons, and placed in the hands of Sheriff Deware. He levied the writs, and thereupon made an affidavit, as trustee, claiming the property, executed a claimant's bond, and approved the same as sheriff, and returned the same to the justice's court from which the writs had issued. The attachment suits were prosecuted to judgment, and the attachment lien foreclosed, subject to the decision of the court in the suit to try the right of property. The affidavit and bond upon which the property was released each stated that a levy had been made on the property. The sheriff testified on the trial that he levied the writs of

attachment upon the property mentioned in the affidavit and bond. From these facts it will be presumed that the levy made was a legal levy, and complied with the statute. *Betterton v. Echols*, 85 Tex. 212, 20 S. W. 63; *Sayles' Civ. St. art. 2349*.

Is the levy, in other respects legal, made illegal by reason of its having been made by J. M. Deware, sheriff, on property which he had in his possession as trustee in a chattel mortgage executed to him by the defendant in the attachment suits to secure certain creditors? In this suit the sufficiency of the levies is raised in a collateral proceeding. *Jacobs v. Daugherty*, 78 Tex. 635, 15 S. W. 160. Unless the levies were actually void, they will be held sufficient in this suit. *Bennett v. Gamble*, 1 Tex. 124; *Earle v. Thomas*, 14 Tex. 583. In the case of *Hamilton v. Ward*, 4 Tex. 356, it was held that where the sheriff has one execution in favor of, and another against, the same person, he may apply the money collected upon one to the satisfaction of the other. To the same effect is *Walton v. Compton*, 28 Tex. 575. We do not think the levy of the several writs of attachment was void; and, not being so, the defendant cannot shield himself behind any irregularity in the same.

Appellants' third assignment of error, and proposition thereunder, maintain that it was the duty of the officer taking the affidavit and claim bond to return the papers into the proper court, and if the officer fails in this respect, unless the claimant has done some act evidencing his intention not to prosecute his claim, an action cannot be maintained on the claimant's bond. The affidavit and bond of the claimant were returned into the justice's court. The sheriff fixed the value of the property at the time of the levy at \$1,627.66, and the bond was made in the sum of \$3,300. The justice's court had no jurisdiction of the matter. The court dismissed the causes for want of jurisdiction. No further action was taken. Whose duty was it to see that the affidavit and bond were filed in the proper court? Appellants insist that it was the duty of the sheriff. But the sheriff was also the claimant. It is insisted that the defendant claimant did nothing to evince an intention not to prosecute the suit of the trial of the right of property. It may also be said he evinced no desire to prosecute the suit. The bond was conditioned: "In case he fails to establish his right to such property, he shall return the same to the officer making such levy." It would seem, from the terms of the bond, that his contract to establish his right to the property or return the same placed the laboring oar upon him. In the case of *Zurcher v. Krohne*, 63 Tex. 122, Judge Stayton, speaking for the court in a case similar to this one, uses the following language: "We are of the opinion that it was his [the claimant's] duty, if the papers were returned to a court which had no jurisdiction, to have them sent to a court



which had; and that when he had the cause dismissed in the county court, if that court had no jurisdiction, it was his duty, without unnecessary delay, to have caused the papers to be filed in a justice's court, after which, if he did not appear, he might have been cited in accordance with the statute; but there was no obligation on the part of the appellees to see that the papers were thus filed, nor to have him cited to appear until the papers were in the possession of a justice's court." See, also, *Denson v. Horn*, 4 Willson, Civ. Cas. Ct. App. §§ 226, 227, 16 S. W. 182. It is true the statute places the burden of proof upon the plaintiff where the property is taken from the possession of the claimant. Rev. St. 1895, art. 5302. But this does not relieve the officer and claimant from causing the affidavit and bond to be filed in the proper court. We think it was the duty of the claimant, who was the sheriff making the levy, to see that the papers were returned and filed in the proper court. His failure to do so, during either the first or second term of the court having jurisdiction of the matter, should be treated as an abandonment of the prosecution of the claimant's suit. But it is claimed that the plaintiffs are estopped from prosecuting this suit upon the bond, because at the time the claimant suits were dismissed in the justice's court the attorney for the plaintiffs led the defendants to believe that the litigation was at an end. The record shows that at the time the suits were dismissed the attorney for the claimant asked the attorney for the plaintiffs what he was going to do, to which he replied, "Nothing." Plaintiffs' attorney then asked the attorney for claimant what he was going to do, and he replied, "Nothing." There is nothing in the record that could be construed as in any way estopping plaintiffs from suing on the bond. We find no error in the record, and the judgment of the court below is affirmed.

feet to the track. Held, that it was error to instruct that if the plaintiff's injuries resulted from the negligence of the railroad company or its employes, or the negligence of the lessee, or the negligence of both, the jury should find against the railroad company.

3. The error was not cured by a special charge instructing the jury that, before they could find against defendant railroad company, they must find that it was guilty of negligence, and that the negligence was the proximate cause of the injury, and that the company could not be held liable for the negligence of the lessee.

4. Where there was no evidence as to the expense incurred for medicine or medical attention by plaintiff in an action for personal injuries, it is error to instruct that, if the jury find for plaintiff, they shall allow fair compensation for expenses incurred in procuring medical attention.

5. This error is not cured by another charge instructing the jury not to find for any amount for doctor's bill or medicine.

6. Where there is no evidence that the car in which plaintiff was injured by being struck by a door was not properly constructed, it is error to submit to the jury the question as to the proper construction of the car.

7. It was the duty of the employes of a railroad company to have avoided an injury caused by an obstruction in a right of way, where they had knowledge of the obstruction, and to have removed said obstruction, if ordinary care required them so to do; and the company is liable, where the obstruction was the proximate cause of the injury, if by ordinary care it could have been discovered prior to the injury.

8. It is proper, where matters amounting to a waiver of a stipulation in a lease have been pleaded, and there is evidence to support this plea, to submit the question of waiver to the jury.

9. Where the plaintiff in an action for personal injuries was warned that the car which he was unloading was about to be moved, the company is entitled to an instruction submitting to the jury the question as to whether the plaintiff, by remaining in the car, and by his subsequent actions, was guilty of contributory negligence.

10. It is error, in a charge, to assume trespass, where lessees had pleaded a waiver of the clause relied upon by the lessor to constitute trespass, and there was evidence tending to show that such clause had been waived.

Appeal from district court, Limestone county; John J. McClellan, Special Judge.

Action by R. G. Kimbell against the Houston & Texas Central Railroad Company and others for damages for personal injuries. From the action of the court in overruling a motion for a new trial, and from a judgment against the railroad company, it appeals. Reversed.

The following is the instruction upon which the first assignment of error is based: "You are instructed that the plaintiff had the right, for the purposes of unloading said car, to enter said car. The defendant railroad company also had the right to couple an engine to said car, and move it up and down its track. But it was the duty of the said railroad, in so moving its said car up its track, to do so in a careful and prudent manner, so as to avoid injury to persons in and about said car. You are instructed that it was the duty of the said railroad company to make use of such diligence and care as reasonably prudent and careful persons gen-

HOUSTON & T. C. R. CO. v. KIMBELL et al.  
(Court of Civil Appeals of Texas. Jan. 8, 1898.)

RAILROADS—OBSTRUCTIONS ON RIGHT OF WAY—  
NEGLECT—PERSONAL INJURIES—TRIAL—CON-  
FLICTING INSTRUCTIONS—FAULTY AND ER-  
RONEOUS INSTRUCTIONS.

1. In an action for personal injuries caused by a car door being struck by an obstruction on the right of way, a charge that it was the duty of the railroad, in moving its car up the track, to do so in a careful and prudent manner, so as to avoid injury to persons in and about said car, and that it was the duty of the company to use such diligence as reasonably careful persons generally use under the same circumstances, does not impose a higher degree than ordinary care.

2. Plaintiff, while unloading a car, was struck by the car door, which was pushed shut by coming in contact with a scantling sticking out of a pile of lumber on the right of way. The lumber belonged to a lessee of the railroad company, who was joined with the company as a defendant, and who had an agreement with the company to pile no lumber nearer than 10

erally use under the same circumstances to prevent injury."

This suit was instituted in the district court of Limestone county, Tex., by R. G. Kimbell, plaintiff, to recover of the defendant the Houston & Texas Central Railroad Company damages for injuries alleged to have been negligently inflicted upon the plaintiff by the defendant railroad company, and charging the negligence to consist in the moving of a refrigerator car, with an outside swinging door, so that it came in contact with a piece of lumber upon the right of way of defendant, and that it suddenly flew back with great force and struck the plaintiff, and injured him. The railroad company pleaded a general demurrer and general denial, and specially pleaded contributory negligence on the part of the plaintiff. Defendant also impleaded S. S. Walker & Son, charging that, if the plaintiff was injured through the negligence of any one, the negligence was that of Walker & Son, and not of defendant; stating as inducement a lease contract by which said Walker & Son were authorized to occupy a portion of the defendant's right of way in the town of Groesbeeck, but were prohibited from placing their lumber nearer than 10 feet of the rail, and obligating themselves to keep the right of way clear within 10 feet of the rail, and clear from all obstructions. Walker & Son answered by general denial, and special plea setting up a waiver on the part of the railroad company of the clause in the lease contract prohibiting them from placing their lumber nearer than 10 feet of the rail, and obligating them to keep the right of way clear within 10 feet of the rail, and other pleas unnecessary to here set out. A trial of the cause resulted in a judgment against the Houston & Texas Central Railroad Company for \$1,500, in favor of plaintiff. No recovery was had against Walker & Son. Motion for new trial was duly made and overruled, exceptions taken, notice of appeal given, and appeal duly perfected to this court.

Frank Andrews and C. S. Bradley, for appellant. Kimbell Bros. & Blackmon and Jackson & Hayes, for appellees.

BOOKHOUT, J. (after stating the facts). Appellant, by its first assignment of error, complains that the court erred in instructing the jury as to the degree of care imposed by law upon defendant, and insists that the charge given imposed a higher degree of care than ordinary care. While the charge is not free from criticism, we think that it is not erroneous. The facts, however, called for a clear statement of the duty that the railroad company owed to the plaintiff, and the degree of care which it should have used in moving its trains over its track while plaintiff was unloading the car.

Appellant's second assignment of error

reads as follows: "The court erred in that paragraph of its general charge to the jury which reads as follows: 'If you believe from the evidence in this case that the plaintiff sustained the injuries complained of in his petition, and that said injuries resulted to said plaintiff by the negligence of the defendant or its employes, or the negligence of the said Walker & Son, or the negligence of both the said railroad company and the said Walker & Son, and you should believe the said plaintiff himself was not guilty of contributory negligence, then you should find for the plaintiff, as against the railroad company, such damages as you may think him entitled to, and such as would, in your opinion, be fair compensation to him for the time lost, if any, and expenses incurred by him in procuring medical aid and attention, if any, and what would be fair compensation to him for the physical and mental suffering endured by him, if any.'" The injury to plaintiff occurred while he was engaged in unloading a car of bacon standing on the track of the railroad company. Plaintiff was in the float business, and had been engaged by the consignees of the bacon to unload it. While he was unloading the car a brakeman of defendant passed and hailed him, telling him to look out; they were going to jolt him up a little. The railroad company frequently moved cars that were being unloaded. The plaintiff understood from the warning that the car was to be moved. The car was a refrigerator car, with folding doors six or eight inches thick. When the doors were shut, their inside surfaces were on the same plane as the ceiling of the car. The train moved down, and hooked on the car that plaintiff was unloading, and started same off north. The plaintiff was standing near the door, holding onto a crosspiece on the top of the car with his right hand. Both doors were swinging backward and forward, and, as the north door closed, plaintiff put out his left hand to open the door; it being very close in the car. As he pushed the door open, it swung out, and the moving car caused it to come in contact with a scantling extending from a pile of lumber on the right of way. The door was suddenly shut, and in doing so struck the plaintiff, producing the injuries complained of. The lumber belonged to Walker & Son. There were several piles of lumber along the right of way. Walker & Son had leased from the railroad company a space 90 feet wide by 420 feet long, along the right of way, for a lumber yard; the contract stipulating that no buildings or obstructions should be placed within 10 feet of the track rails. The evidence showed that lumber was piled within 10 feet of the track. The scantling extended out from the pile of lumber to within about 5 or 5½ feet from the rail. There was evidence that the lumber had been piled closer than 10 feet of the rails for years, and that the section boss of the railroad company

knew it. The railroad company and Walker & Son were both parties defendant to the suit. The charge complained of in appellant's second assignment of error instructs the jury that if they find the plaintiff's injuries resulted from the negligence of the railroad company or its employes, or the negligence of Walker & Son, or the negligence of both the railroad company and Walker & Son, then they should find against the railroad company. This charge was error. The railroad company would not be liable unless the injury resulted from the negligence of the railroad company, its officers or agents. If the injury resulted from the negligence of Walker & Son, and the railroad company or its employes were not guilty of negligence, then the company would not be liable. But it is contended by appellee that, even if this is error in the main charge, it is not ground for reversing the judgment, because the plaintiff requested, and the court gave, a special charge to the jury, that before they can find against defendant railroad company, and for plaintiff, they must find that said company was guilty of negligence, and that its negligence was the proximate cause of the injury, if any injury was sustained by plaintiff, and, if the defendant company was not guilty of negligence that caused the injury, it could not be held liable for the fault or negligence of Walker & Son. Appellee contends that it is clear, from the pleadings and the verdict of the jury, that the jury followed the special charge and not the main charge. We cannot say that it does clearly appear that the jury followed the special charge. The rule is that when contradictory charges are given, which may be material, the judgment will be reversed, unless it is clear that no prejudice resulted therefrom. *Railway Co. v. Robinson*, 73 Tex. 284, 11 S. W. 327; *Belt v. Raguet*, 27 Tex. 481.

Appellant further complains of that part of the main charge which tells the jury that, if they find for plaintiff, they should find such damages as they may think him entitled to, and such as would, in their opinion, be fair compensation to him for the time lost, if any, and expenses incurred by him in procuring medical aid and attention, if any, and what would be fair compensation to him for the physical and mental suffering endured by him, if any. There was no evidence as to the expense incurred by appellee for medicine or medical attention. The above charge was erroneous. *Telegraph Co. v. Kendzora*, 77 Tex. 258, 13 S. W. 986; *Railway Co. v. Simcock*, 81 Tex. 504, 17 S. W. 47. The plaintiff requested a special charge (which the court gave) that they will not find for any amount for doctor's bill or medicine. This special charge conflicted with the main charge, and we cannot say that the jury were governed by it, rather than the main charge.

Appellant's third assignment of error complains of the definition of negligence given in

the main charge. The definition given is subject to criticism, but we are not clear that the jury could have been misled thereby. We do not think this assignment presents reversible error.

Appellant's fifth assignment of error is: "The court erred in that paragraph of its general charge to the jury which reads as follows: 'If you believe from the evidence that the defendant railroad company was not guilty of "negligence," as that term is above explained to you, and you further believe that Walker & Son were not guilty of negligence in placing their lumber and timber necessary to the operation of their lumber yard dangerously near the track of the defendant company, then you will find for the defendant railroad company, unless you should conclude that it was negligence of the defendant railroad to use the character of car that the accident occurred on; and on this point you are charged that it is the duty of the defendant railroad company to provide and use such cars, and so constructed, that they would ordinarily be deemed safe for the purpose for which they are used, and the railroad company is required to use ordinary diligence and care to provide such cars. Now, if you believe the car in which the injury was received was a reasonably safe car, and so constructed that it would be deemed safe for the purposes for which it was used, then you will find for defendant. Or, if you believe that said car was not so constructed that it would ordinarily be considered safe, and yet you believe from the evidence that plaintiff knew that said car was not so constructed as to be safe, and that to stand up in said car, and stand in close proximity to the door of said car, and place himself in such position that the door of said car might be thrown against him, whereby he might be injured, if you believe that plaintiff did do these acts, and that such acts on his part did contribute to his injury, and you further believe that an ordinarily prudent man, under the same circumstances, would have acted differently, you will find for the defendant railroad company.'" It is contended that this charge assumes that Walker & Son placed their lumber yard dangerously near the track of the railroad company, and that in this respect the charge is erroneous. The charge is not free from criticism in this respect. As the judgment will be reversed on other grounds, we will not further notice this contention. It is also contended that this charge is erroneous in submitting to the jury the question of the proper construction and safety of the refrigerator car on which the accident occurred. There is no evidence in the record tending to show that the car was not properly constructed, or that it was an unsafe car. There is no evidence to authorize the submission of this issue to the jury, and the above charge is error. *Railway Co. v. Simcock*, supra; *Telegraph Co. v. Kendzora*, supra.

Appellant's sixth assignment of error is: "The court erred in that paragraph of its general charge to the jury which reads as fol-

lows: 'You are further instructed that if you believe from the evidence that the proximate or immediate cause of the injury, if any, was an obstruction, such as lumber or timber, placed in close proximity to defendant railroad company's track by defendants Walker & Son, their agents or employes, and you believe that the defendant railroad company knew of said obstruction, or that by the use of ordinary care and diligence on the part of the defendant railroad company, or those of its agents and employes whose duty it was to look after the right of way of defendants, and keep the same in safe condition, the fact that such obstruction was there could have been known, in law said defendant railroad company will be held to have known of said obstruction; and said railroad company would be held liable for such injury as may have been caused by said obstruction, under the same circumstances, as though it had been placed on said right of way by itself, or under its direction.' The principle stated in the charge is correct, but the language in which it is expressed is objectionable. If the employes of the railroad company had knowledge of the obstructions upon the right of way, and of the danger in operating its trains with the obstructions upon its right of way, then it was their duty to use ordinary care to avoid the injury; and if ordinary care required them to remove the obstructions, and they failed to do so, the company was guilty of negligence. If the railroad company did not authorize the placing of the lumber upon its right of way, and its employes had no knowledge that the obstruction was there, then it should have used ordinary care to discover the obstruction prior to the injury; and if they failed to do so, and the obstruction was the proximate and direct cause of the injury, then the railroad company would be liable.

Appellant's seventh assignment of error complains of the charge of the court which submitted to the jury the question of the waiver of the stipulation in the lease contract between Walker & Son and the railroad company to the effect that Walker & Son should at all times keep a space within 10 feet of defendant's track free from all obstructions. Walker & Son pleaded matters amounting to a waiver of this stipulation in the lease contract. There was evidence tending to support this plea. The court did not err in submitting the matter to the jury.

The defendant railroad company requested a number of special instructions which were refused by the court, and each is made the ground of a separate assignment of error. We do not think that the questions raised in these several assignments are likely to arise upon another trial. We will only notice those that in our opinion may become necessary upon another trial.

Appellant's fifteenth assignment of error complains of the refusal of the court to give special charge No. 11 requested by it, which reads as follows: "The uncontradicted evidence in this case shows that the plaintiff was

warned that the car which he was unloading was going to be moved, before the same was moved; and if you believe from the evidence that, if he had acted as an ordinarily prudent man would act under the same circumstances, he would have gotten out of said car, and remained out while it was being switched, and you believe that remaining in the same, and placing himself in a position to be injured by the swinging door, was negligence on his part, as that term has been defined to you, then he is not entitled to recover, and you will return your verdict for defendant railroad company." The substance of this charge should have been given. It was proven that the plaintiff was warned that the car which he was unloading was about to be moved. It was a proper matter to be passed upon by the jury, whether plaintiff should have gotten out of the car before it was switched, and whether his remaining in the car, and his acts while in the car, was negligence which proximately contributed to cause the injury. The charge requested was not a fair statement of the law, but was sufficient to require the court to submit a charge embracing the principle announced.

We do not think the court erred in refusing appellant's sixteenth special charge, complained of in its eighteenth assignment of error. It assumes that Walker & Son were trespassers in placing their lumber within 10 feet of the railroad track. There was evidence tending to show that this clause in the lease contract had been waived by the railroad company. Walker & Son had pleaded a waiver of the clause. For the errors above pointed out, the judgment is reversed and the cause remanded.

#### BEMUS v. DONNIGAN.<sup>1</sup>

(Court of Civil Appeals of Texas. Jan. 5, 1893.)  
RECONVENTION—JUDGMENT FOR PLAINTIFF—*RES JUDICATA*.

Where there has been a plea in reconvention, and testimony thereon introduced, a verdict for the plaintiff, and judgment thereon, finally disposes of the matters in issue between the parties.

Error from Waller county court; A. G. Lipcomb, Judge.

Action by V. M. Donnigan against T. M. Bemus. Judgment for plaintiff, and defendant brings error. Affirmed.

W. J. Poole, for plaintiff in error. J. D. Harvey, for defendant in error.

FLY, J. This suit was filed by appellee in the justice court on an account for \$171.19. Appellant pleaded in reconvention the sum of \$200, for damages sustained by the issuance of a writ of attachment in the case. The transcript from the justice's docket shows that the cause was tried by jury, and the following verdict was returned: "We, the jury, decide in favor of the plaintiff, V. M. Donnigan, for the

<sup>1</sup> Rehearing denied.

amount sued for, and for cost." Upon that verdict the judgment of the justice court was rendered in favor of appellee for the amount of his account. The cause was appealed to the county court, where the cause was tried by jury, and resulted in verdict and judgment for appellee. Appellant moved in arrest of judgment, assigning, as reasons, that there was no final judgment in the justice court, nor in the county court, because the plea in set-off had not been disposed of either in verdict or judgment. It has heretofore been held by this court that a judgment for the plaintiff, in a case where there has been a plea in reconvention, and testimony thereon introduced, finally disposed of the matters in issue between the parties. *Hoefling v. Dobbin* (Tex. Civ. App.) 40 S. W. 58; *Lewis v. Smith* (decision rendered December 15, 1897) 43 S. W. 294. While the decision in the case first cited was reversed by the supreme court, yet it was on another and different point from the one now before us, and all other portions of the opinion were approved. Our attention has been directed to the cases of *Railway Co. v. Stephenson*, 26 S. W. 236, and *Clopton v. Herring*, Id. 1104, decided by Austin court of civil appeals, where a contrary doctrine has been held; but no authority is cited by the judge rendering those opinions in support thereof, and we know of no authority that upholds them. The opinions of this court are fortified by Freeman in his work on Judgments. He says (section 279): "There is no doubt that if a set-off is presented by defendant in his pleadings, and attempted to be supported by evidence to the jury, it will, whether allowed or disallowed, become *res judicata*. It is settled by the judgment as conclusively, when it does not appear to have been allowed, as though there were an express finding against it." Among other decisions cited in support of the text is the case of *Green v. Sanborn*, 150 Mass. 454, 23 N. E. 224, in which the facts were similar to those in this case, and the court held that a verdict for the plaintiff and judgment thereon was conclusive of the matter pleaded in reconvention. The case of *Rackley v. Fowlkes* (Tex. Sup.) 36 S. W. 77, while not directly in point, tends towards the same doctrine above stated, and holds that the presumption obtains that the court disposed of every issue presented by the pleadings. The recitals in the two judgments show that they were based upon verdicts rendered upon a full hearing of all the issues presented by the pleadings, and meant, as distinctly as though stated in terms therein, that the claim in reconvention had been held to be without merit. None of the other assignments of error requires discussion. Several of them cannot be considered, because referring to matters growing out of the facts, and there is no statement of facts in the record. This court is unable to determine, in the absence of a statement of facts, whether the charge complained of was probably injurious to appellant or not. However erroneous it may be, in the light of the facts it may have been

perfectly innocuous. Appellant was not damaged by the judgment against Carson, Sewell & Co. as sureties on the replevy bond, and has no ground of complaint. The judgment will be affirmed.

# ROBINSON v. WESTERN UNION TEL. CO.

(Court of Civil Appeals of Texas. Jan. 12, 1898.)

## TELEGRAPHS—DAMAGES FOR FAILURE TO DELIVER MESSAGE—CONTRACT—PAROL EVIDENCE TO VARY—INSTRUCTIONS.

1. Where a telegraph company received a message to transmit at night, and made repeated efforts to call up its operator at the place to which the message was to be transmitted, but, owing to the fact that its office at that place was only open in the daytime, was unable to transmit the message until 8 o'clock the next morning, the telegraph company is not liable for damages to the person sending the message, there being no special agreement in regard to the message.

2. The testimony of a witness, as to the terms and agreement, made at the time of the receipt of a telegraphic message for transmission by a telegraph company, the message being the only written evidence offered, is not testimony tending to vary the terms of a written contract.

3. An error of omission in the charge is cured by appellant's failure to request a special charge upon the point omitted.

Appeal from Smith county court; George W. Cross, Judge.

Action by Silas Robinson against the Western Union Telegraph Company to recover damages for failure to deliver a telegram. Judgment for defendant. Plaintiff appeals. Affirmed.

N. A. Gentry, for appellant. Geo. H. Fearons and A. H. Field, for appellee.

NEILL, J. The appellant sued appellee for \$900, damages alleged to have been occasioned by the negligence of the company in failing to promptly transmit and deliver the following dispatch: "Tyler, Texas, July 27, 1896. To Solon King, Kilgore, Texas: Dig grave for boy three feet long by Tom Robinson's grave at Pentown. Meet me with two wagons at ten to-morrow. [Signed] Silas Robinson." The message was not transmitted nor delivered until 8 o'clock in the morning of the day after its date. The reason for this is that appellee's office at Kilgore is only open in the daytime, and the telegram, having been delivered at night after said office was closed, could not be transmitted to the company's agent until the next day. However, appellee's agent at Tyler, upon receipt of the message, made repeated efforts to call up its operator at Kilgore for the purpose of sending the dispatch that night. The contention of appellant is that the contract of appellee was to transmit the telegram as a day message, which required its transmission and delivery within a reasonable time on the day it was accepted. On the other hand, the insistence of appellee is that there was no special agreement or undertaking in

regard to the message. The court instructed the jury that the appellee had the right to establish reasonable office hours in which to transact its business, and was not obliged, at an office where it had fixed such hours, to transact business there at any other time; but that if appellee, through its agent who received the message for transmission, agreed with appellant to transmit and deliver it to the person to whom it was directed, on the day it was received, and the company, for any reason, failed to comply with such contract, it would be liable for such damages as might flow from the breach of its contract. It is thus seen that the issue between the parties is distinctly recognized and clearly presented by the charge to the jury. To have gone beyond this, and instructed the jury, as requested by appellant, that if the company received the message charged, and collected a day rate for it, the contract was for immediate delivery, from which the company would not be relieved of liability by reason of its office at Kilgore being closed, would have been error. *Telegraph Co. v. Neel*, 86 Tex. 368, 25 S. W. 15. The evidence of the witness Ponder did not tend to vary the terms of a written contract, but, the message being the only written evidence offered, was to show the terms and agreement made at the time of accepting the dispatch for transmission. If appellant desired the issue of appellee's liability because of the change of the message submitted to the jury, he should have requested a special charge upon that point, and, having failed to ask the court to submit the matter to the jury, he cannot now complain. It was simply an error of omission in the charge of the court. There is no error in the judgment, and it is affirmed.

**THORNBURGH v. CITY OF TYLER.**<sup>1</sup>  
(Court of Civil Appeals of Texas. June 10, 1897.)

**JUDGES—DISQUALIFICATION—CITIES—BONDS IN AID OF RAILROAD—AUTHORITY TO ISSUE—LEVY OF TAX—PLEADING AND PROOF—LIMITATIONS.**

1. A district judge who is a taxpayer in a city is not so interested in an action to recover a judgment upon the obligations of the city as to disqualify him on the trial of the case.

2. A city has no power to issue bonds in aid of a railroad unless such power has been expressly conferred by its charter.

3. The power to issue bonds in aid of a railroad may be granted a city, in its charter, without its being necessary to express it in the title.

4. A power given a city by charter to aid railroads by the issuance of bonds does not exempt such city from a compliance with the general law relating thereto existing when the charter took effect.

5. A finding that a tax was not levied until after the bonds were issued is not supported by the testimony, where one witness testifies that it was levied at or about the time the bonds were issued, and the other, that it was levied about the same time, but he thought it was after, but was not sure, and the bonds recite that they were, and all circumstances show that they must have been, issued after the tax was levied.

6. Under Laws 1871, p. 20, authorizing the issuance of bonds by cities in aid of railroads, and providing that no such bonds should be issued until an annual tax should have been levied to pay the interest and 2 per cent. of the principal, bonds issued before the tax was levied are not invalid.

7. In an action to recover on bonds, a variance between those described in the petition and those offered in evidence is harmless, where the defendant was not misled or surprised thereby.

8. Where city bonds are shown to have been issued under an order of the board of aldermen, the failure to attach the seal does not render them invalid.

9. Under a statute authorizing the issuance of city bonds to aid railroad companies, and providing for the levy of an annual tax to pay the interest and 2 per cent. of the principal annually, in an action to recover the amount of such bonds plaintiff was barred by limitations from recovering the 2 per cent. installments maturing more than four years before the commencement of the action, when the money collected by tax to meet such installments was disbursed by the assessor and collector of taxes, under the direction of the city council, in retiring whole bonds, instead of paying installments on them all.

Appeal from district court, Smith county; Felix J. McCord, Judge.

Action by William H. Thornburgh against the city of Tyler. From a judgment for defendant, plaintiff appeals. Reversed.

T. K. Skinker, for appellant. H. O. & Cone Johnson and Jas. M. Edwards, for appellee.

GARRETT, O. J. This was an action brought by William H. Thornburgh to recover of the city of Tyler upon 250 bonds, of the value of \$100 each, issued in aid of the Houston & Great Northern Railroad. The case was tried below before the Honorable Felix J. McCord, the district judge, without a jury, and judgment was rendered in favor of the city (that plaintiff take nothing), holding the bonds invalid. Plaintiff objected to a trial before Judge McCord, because he was a taxpayer in the city of Tyler, and for that reason disqualified to sit in the trial of the case; but the objection was overruled, and the ruling has been assigned and presented to this court as erroneous. It appears from the decision of the supreme court in the case of *City of Dallas v. Peacock*, 33 S. W. 220, that there is no disposition to extend the disqualification of a judge beyond the rule announced in *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 968, 969. There is a distinction between the latter case which holds the judge disqualified and the one now before the court. The Nalle Case directly involved the levy of a tax, and the legality of bonds supported by a tax already levied, and was to prevent the issuance of bonds for the payment of which it would have been necessary to levy a tax before they could have been issued. So in that case tax levies were directly involved, while in this case the suit is a simple suit for the recovery of a money judgment upon the obligations of the city. This is nearer like the Peacock Case than the Nalle Case. We hold, therefore, that Judge McCord was not disqualified.

<sup>1</sup> Writ of error denied by supreme court.

The bonds sued on were in form as follows: "No. ——. \$100. United States of America, The City of Tyler, State of Texas. The city of Tyler, in the county of Smith, in the state of Texas, a body politic and corporate by the general law of the state, hereby acknowledges that, for value received, it is indebted and bound, and hereby promises to pay unto the Houston & Great Northern Railroad Company, or their assigns, at the office of the treasurer of the state of Texas, at the expiration of twenty years from the date hereof, the sum of one hundred dollars, in lawful money of the United States of America, or so much thereof as may then remain unpaid (that is to say, one hundred dollars, less the annual installments of two per cent. which are to be paid annually, commencing on the first day of January, A. D. 1874), and also that it is bound and will pay interest on said sum of one hundred dollars, or so much thereof as may be unpaid, at the rate eight per centum per annum, on the first day of January, A. D. 1874, and on the first day of January of each year thereafter, to and including the first day of January, A. D. 1893, to the bearer, according to the respective coupons therefor hereto annexed, for eight dollars each, signed by the mayor, and attested by the secretary of the board of aldermen, of said city of Tyler, upon presentation thereof at the office aforesaid, and warrant therefor of the comptroller of the state; and so much of the said eight dollars as is not required to pay the interest due at the time of said payment shall be applied in payment of the principal of this bond. This bond is authorized by a vote of two-thirds of the qualified electors of said city at an election held in pursuance of an order of the board of aldermen of said city and the general law of the state on the 31st day of July, and the 1st, 2d, and 3rd days of August, 1872, to take the opinion of the electors of said city on a proposition to donate to the Houston & Great Northern Railroad Company, on certain conditions therein expressed, fifty thousand dollars in bonds of said city, which proposition was accepted, and all of said conditions fully performed and complied with by said Houston & Great Northern Railroad Company, as by the records of said city fully appears, and by order of said board of aldermen requiring the issue of this series of bonds in accordance with said proposition. This bond is one of a series of five hundred of like tenor and effect, and is secured by a decree of the board of aldermen of said city, and the general law of the state requiring and levying an annual tax upon all the real and personal estate in said city of Tyler, to raise an annual fund sufficient to pay the said interest and two per cent. annually on the fifty thousand dollars, as hereinbefore stipulated, and further by the constitution of the state, providing that the law levying said tax is irrepealable until the principal and interest shall be fully paid. In witness whereof, the mayor of the said city of Tyler hereto signs his name, and the

secretary of said board of aldermen attests, at Tyler, in said county, the 30th day of April, A. D. 1873. J. M. Hockersmith, Mayor. Attest: W. G. Cain, Secretary." Attached to each of the bonds were 20 coupons, numbered from 1 to 20 inclusive. Coupon No. 1 was for \$5.33. Coupons Nos. 2 to 20, inclusive, were for \$8 each. Coupons Nos. 2 to 20, inclusive, were in words and figures following, *mutatis mutandis*, to wit: "No. 20. On the first day of January, 1893, at the office of the treasurer of the state of Texas, for value received, the city of Tyler, in said state, will pay to the bearer eight dollars on city bond No. —, issued to the Houston & Great Northern Railroad Company on 30th April, 1873, which amount is to be indorsed in payment of the interest and principal of said bond. J. M. Hockersmith, Mayor. Attest: W. G. Cain, Secretary of Board of Aldermen."

As appears from the recitals in the bonds, they were voted by the qualified electors of the city of Tyler as a donation to the Houston & Great Northern Railroad. The condition upon which the donation was voted was that the railroad company should build and complete a railroad, and the same should be operated through the city of Tyler. The railroad company complied with the condition, and the bonds were issued; but the court below held that they were invalid, because no tax was levied by the board of aldermen before they were issued, to pay the annual interest, and not less than 2 per cent. annually of the principal, besides the expenses of assessing and collecting the tax. It appeared that a tax was levied for the purpose, but it does not appear whether or not it was sufficient, and the court found that it was levied after the bonds had been issued. Appellant contends that the finding of the court is against the evidence, but, also, that the validity of the bonds does not depend upon the levy of the tax prior to, or simultaneously with, their issuance,—whether the bonds were issued in accordance with the city charter authorizing them, or under the general statute. The position of appellant is, in other words, that it was not necessary to levy the tax prior to, or at the time of, the issuance of the bonds, because the charter of the city conferred the power upon the board of aldermen to issue the bonds under such regulations as they might adopt, without reference to the general law on the subject, further than that they should be consistent therewith, but that, even if it should be held that it was necessary to the validity of the bonds that they should have been issued in accordance with the requirements of the general law, they were still valid, because, in the first place, the tax had been levied, and, in the second place, the levy of the tax was not essential to their validity. Appellee combats these positions with the contention that the charter of the city of Tyler was unconstitutional in so far as it undertook to authorize the issuance of the bonds, because the power to do so was an object not expressed in the

title of the act constituting the charter, and that they were invalid because not issued in compliance with the general law, by first levying a tax as therein provided, without which there was no power in the board of aldermen to issue them.

The city of Tyler was incorporated by a special act of the legislature approved April 26, 1871 (Sp. Laws, p. 200). The title of the act is, "An act to incorporate the city of Tyler, and to provide for the administration of its municipal affairs." The power to extend aid to railroads, and to issue bonds for that purpose, is expressly conferred in sections 16, 17, and 18 of the act, as follows:

"Sec. 16. That the board of aldermen shall have the right, if they deem it to be for the interest of the city, to extend such aid to railroads approaching said city, and for other works of internal improvement as they in their sound discretion may think judicious and proper.

"Sec. 17. That for the purpose of meeting any liability that may be incurred under the provisions of the last preceding section, said board of aldermen may, under such regulations as they may adopt, issue the bonds of said city, not to exceed one million dollars.

"Sec. 18. That for the payment of the interest on the said bonds as well as for their ultimate redemption, said board of aldermen is hereby authorized to make such provisions, consistent with the constitution and laws of the state, as to them may seem right and proper."

There is no doubt that a city does not have the power to issue bonds in aid of a railroad, without its having been expressly conferred upon it by its charter. *Bank v. Terrell*, 78 Tex. 450, 14 S. W. 1003. But it is nevertheless a power that may be conferred, and may be properly enumerated among the powers granted, without its being necessary to express it in the title of the charter. 1 Dill. Mun. Corp. §§ 153-158, and other authorities cited in the brief of appellant. The case of *Giddings v. City of San Antonio*, 47 Tex. 548, was a case in which the legislature, in granting a charter to a railroad, undertook to empower the city of San Antonio to subscribe to its capital stock, and is not applicable to the question here. But it appears from the record that the board of aldermen of Tyler undertook to do so if they did not follow the general law (Laws 1871, p. 29) in the issuance of the bonds, and the provisions of the general law were, no doubt, the regulations adopted by the city council for their issuance. Be this as it may, the charter became a law after the general law; and we do not think there is anything in the charter to exempt the city of Tyler from a compliance with the general law on the subject, although it may have been unnecessary to include the power in the charter, since such power could have been exercised under the statute already enacted. It is our conclusion that the provision in the charter conferring the power to extend aid to

railroads was not invalid, because not expressed in the title of the act, but that the power given in the charter did not exempt the city from a compliance with the requirements of the general law in the extension of aid and the issuance of the bonds. It is not disputed that every requirement of the general law authorizing the issuance of the bonds had been complied with except as to the levy of the tax as required in section 6 of the act. The minutes of the board of aldermen and the assessment rolls of the city had been lost, and were not produced at the trial below; and secondary evidence was resorted to in order to make proof of the issuance of the bonds, the levy of the tax, and the assessed value of property subject to taxation in the city. The railroad company had completed the road prior to April 30, 1873, and was entitled to have the bonds issued and delivered to it. *Morrill v. Smith Co.* (Tex. Sup.) 86 S. W. 56. The bonds were actually issued and delivered some time between the 2d and 9th of October, 1873, but they bore date as of April 30, 1873. They were issued in compliance with an order of the board of aldermen directing the mayor and city secretary to sign up and deliver them. A tax was levied about the time the bonds were issued, to provide for the interest, and 2 per cent. thereof as a sinking fund. The court found, inferentially, that this tax had not been levied until after the bonds had been issued, and held the bonds invalid for that reason. We think that this finding is against the evidence, which shows that a tax was levied about the time that the bonds were issued, and annually thereafter. Only two witnesses testified as to the levy of the tax. Spain, whose duty it was, as city marshal, to make the assessment, said that the tax was levied, and that "it was levied at or about the time the bonds were issued." Hockersmith, who was mayor at the time, testified that tax was levied about the time the bonds were issued; thought it was after, but could not state positively either way. It appears from the evidence that the board of aldermen and mayor were endeavoring to issue the bonds in compliance with the state laws, and that they were familiar with the action of the county court, which was issuing, on the part of the county, at about the same time, a similar lot of bonds for the same purpose; and the order of the county court was put in evidence, which provided for a tax levy in the order directing the issuance. The order of the board of aldermen directing the issuance of the city bonds was shown to have been made before the bonds were issued. Every circumstance shown with respect to the issuance of the bonds shows that they must have been issued after the tax levy. The fact that they were issued about the same time is uncontroverted. They recited that the tax had been levied, and for more than 20 years their validity has been recognized by the city authorities.



But we are further of the opinion that the validity of the bonds does not depend upon the levy of the tax prior to or at the time they were issued. The opinion of the supreme court in *Morrill v. Smith Co.* does not go so far, but we think the conclusion announced is a logical deduction from the language of the opinion in that case. The court said (Chief Justice Gaines delivering the opinion): "The power to issue the bonds was made dependent upon a compliance on part of the company with the terms of the propositions submitted by the county court, and approved by the vote of the people. When the work was completed a debt was created, and it became the imperative duty of the county court (or the "police court," as it was then called) to issue the bonds or make the donation, as the case might be. The statute had limited the amount of the indebtedness. It had also fixed a limit to the tax to be levied, and had provided for the levy of a tax to pay the annual interest and installments upon the bonds. Under such circumstances, it is unreasonable to presume that the legislature intended to make the validity of the bonds dependent upon the sufficiency of the tax levied for the payment of the annual interest and installments, or, in other words, to provide that in case the court should, either intentionally or through error of judgment, make an insufficient levy, the bonds should be absolutely void. It is true that the words, 'no such bonds shall be issued, until the court shall have first levied an annual tax,' etc., make it the imperative duty of the court to levy what they should deem a tax sufficient in amount for the purpose. They are words of command, and, in a sense, mandatory. But they are not necessarily mandatory in the sense that the bonds should be void in the event the tax, for any reason, should not be sufficient." The above reasoning does not stick in the sufficiency of a levy, but extends to the conclusion that the bonds would not have been invalid if the county court had in fact issued them without having first levied any tax at all. The language quoted from the act is mandatory, in the sense that it was the imperative duty of the court to levy the tax before the bonds should be issued, but not in a sense to render the bonds invalid which it was the imperative duty of the court to issue. Of course, we are aware that this conclusion is the reverse of that reached by this court in *Morrill v. Smith Co.*, 33 S. W. 907, and that the decision of the supreme court in reversing the judgment of this court in that case did so upon facts that showed an attempted compliance with the law by the levy of a tax that was insufficient in amount. But we do not see how the construction placed by us on the decision can be avoided, and this court should, in the discharge of its duty to follow the decisions of the supreme court, do so ungrudgingly.

The remaining assignments of error we shall notice more briefly. The decision of the su-

preme court in the *Morrill Case* disposes of the question of limitation as to installments due for more than four years when the suit was brought. This holding is in deference to what we believe to have been the decision of the supreme court in the *Morrill Case*. The evidence shows that the officers of the city took up the coupons in collecting the taxes, and received credit for them with the comptroller in settling with him upon the delivery of them, instead of the money, and that under the direction of the board of aldermen the city collector of taxes paid the bonds that were taken up by the city, and that the comptroller allowed credit therefor in settlement with the collector. The money credited upon the tax levy was not in fact paid to the comptroller, but the action of the several boards of aldermen and tax collectors was, in effect, under his direction, as appeared from a long course of dealing in the matter. So it must be held that the money was collected and paid to the comptroller, and misapplied by that officer and the treasurer in the redemption of bonds, instead of the payment of 2 per cent. installments thereon, and (following the rule prescribed in the *Morrill Case*) that the appellant should be subrogated to a remedy on the bonds taken up with the money that should have been applied to the installments on his bonds. No installments were ever, in fact, paid or demanded. But the appellee says no such relief is prayed for. The judgment of the court below must be reversed for the reasons stated above, and, as it must be reversed, the cause will be remanded to enable the appellant to amend his pleadings so that he may recover for the installments paid to the comptroller, and used in the redemption of other bonds. It is proper, we think, to remand the cause, and give him an opportunity to amend and settle the entire controversy in this suit, although it might be that, if we were to render judgment upon the case before us, he might not be cut off from recovering in another suit. As held in *Morrill v. Smith Co.*, there is no question of limitation in the case.

Upon the cross assignments of error, we hold that there was no such variance between the bonds described in the petition and those introduced in evidence as should have misled or surprised the defendant. Whatever variance there may have been was not fatal. It was shown by the evidence that the city of Tyler had a seal, but none was used in the execution of the bonds. The failure to use the seal did not render the bonds invalid. It was shown that they were issued in obedience to an order of the board of aldermen. Reversed and remanded.

On Motion for Rehearing.

(Nov. 11, 1897.)

After a full consideration of the appellee's motion for a rehearing, we have concluded that its plea of limitation to the installments on the bonds sued on that accrued more than four years before the institution of the suit should have been sustained. There is a mark-

ed distinction between this case and the Morrill Case (Tex. Sup.) 36 S. W. 56; Id. (Tex. Civ. App.) 33 S. W. 907,—in the facts with regard to the payment of money collected from the tax. In the Morrill Case, it appeared that the money was collected by the assessor and collector, and paid over to the comptroller, and that the comptroller used it for the purpose of paying up and retiring certain bonds, instead of paying the installments on all of them, as he should have done; and for that reason it was held by the supreme court that he was the trustee of the fund for the bondholders, and that the county had discharged the installments by the payment of the money to him. In this case, as found by this court in its conclusions of fact, no money was ever paid to the comptroller; and it could not be said that he acted with respect to it, in any sense, as a trustee, or invested it, or caused it to be invested, in the purchase of the bonds taken up by the assessor and collector of the city of Tyler, at the instruction of the city council; and there is no principle on which the money could be followed into the bonds so taken up. Again, we are of the opinion that, even if the use of the money that should have been paid upon the installments could be followed into the bonds that were paid, any action upon them would now be barred by the statute of limitations, because they fell due more than four years ago.

In our conclusions of fact, the conclusions with regard to the manner of collection of the tax, and the payment thereof to the comptroller, were briefly stated; and, as they have been objected to, we will state them more at length: The evidence shows that the money collected on the tax for payment to the comptroller as a fund to meet the interest coupons and 2 per cent. annual installments upon the bonds was disbursed by the city assessor and collector of taxes under the direction of the city council. He collected the money, and paid the coupons as they matured, in accordance with the instructions of that body. From time to time, when there would be a surplus of the bond-tax fund on hand, the city council would, by an order entered on its minutes, direct an advertisement to be made for offers to sell bonds to the city, and, after the offers were in, would accept the lowest, to the extent of the amount of money on hand, and direct the assessor and collector to pay the money and take them up. They were then paid by the assessor and collector with the money in his hands. All bonds and coupons, when paid, were canceled by him; and all money arising from the bond tax, and collected by him was retained by him in his own hands. It was never paid over by him to either the city treasurer or to the comptroller or treasurer of the state. In making his settlements with the comptroller, instead of paying the money to him the assessor and collector presented or sent to that officer the canceled coupons and bonds, and obtained credit therefor on his tax account. They were afterwards returned and destroyed. These conclusions are reached from the testimony of the

witnesses Jessup and Duke, the proceedings of the city council, and the statement from the comptroller's books. While Jessup and Duke were not in office more than about seven years of the period embracing these transactions, yet the items of the statement of the comptroller are consistent with the course of the transaction shown by the witnesses, and the minutes of the city council show the manner in which the bonds were taken up. The bonds sued upon matured on the 30th day of April, 1893. This suit was instituted on December 31, 1895. Consequently 18 of the installments due on said bonds were barred by statute of limitations when the suit was filed. The motion for a rehearing will be granted, and the plea of limitation to these installments will be sustained, and judgment here rendered in favor of the appellant for the amount of the bonds sued on, less 36 per cent. thereof, together with the interest thereon at the rate of 8 per cent. per annum from the 1st day of January, 1893.

#### GILMER v. WELLS et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 16, 1897.)

**MECHANIC'S LIEN — SUBCONTRACTOR — FILING NOTICE—RELEASE OF HOMESTEAD—CONSTRUCTION OF STATUTES.**

1. A subcontractor cannot hold the owner of property personally liable for material furnished if the owner has paid the contractor to whom the material was sold and delivered, when he has not complied with the provisions of Rev. St. 1895, art. 3296, by filing an itemized account of his claim with the county clerk.

2. Rev. St. 1895, art. 3296, requires the filing of an itemized account of claim with the county clerk within 90 days after the debt has accrued. Article 3304 requires that there be a written contract between the one furnishing the material and the property holder and wife before a mechanic's lien can attach to a homestead. *Held*, that these articles must be construed together, and that a subcontractor could acquire no lien on a homestead, unless he had complied with article 3296, notwithstanding the fact that the contractor had a written release of the homestead, under article 3304.

Appeal from district court, Victoria county; S. F. Grimes, Judge.

Action by A. Gilmer against W. C. Wells, A. S. Thurmond, and others to recover for material furnished for a house, and to have the claim declared a lien. From a judgment, as to Thurmond, for defendant, plaintiff appeals. Affirmed.

A. B. & W. M. Peticolos, for appellants.  
Proctors and A. S. Thurmond, for appellees.

**PLEASANTS, J.** The appellant instituted this suit for the recovery of \$735.42, the value of lumber furnished by him in the construction of a dwelling built by appellee Wells, under a contract between him and the appellees Thurmond and wife, upon their homestead. The plaintiff prayed judgment against Wells and against the appellee A. &

<sup>1</sup> Writ of error denied by supreme court.

Thurmond, and for a decree declaring and foreclosing a material man's lien upon the homestead of Thurmond and wife. The petition alleged that a contract was made between Wells and the appellees Thurmond and wife for the erection of a dwelling house, to be occupied by them, when completed, as their residence, said building to be erected upon the lot which Thurmond and his wife then occupied as their homestead; and that said contract provided, among other things, that a certain portion of the price of the building was to be paid in cash, and that 50 per centum of the cost of all material was to be paid in cash at the end of each month; that the total amount due plaintiff was \$735.42, with interest, and that \$468.39 of this amount should have been paid to plaintiff according to the terms of the contract, but that the same had been paid by Thurmond to Wells, and not to plaintiff. The petition further averred that the lumber was sold to Wells and Thurmond, and that at the end of each month an itemized account of the lumber delivered to Wells for the building was presented to Thurmond by plaintiff's agent; and it was further alleged that the contract between Thurmond and wife and Wells expressly gave a lien to Wells upon the homestead, and that said contract was duly recorded; and the plaintiff prayed, in the alternative, that if the court should hold that he was not entitled to recover of Thurmond more than the sums which, under the terms of the contract, should have been paid him at the expiration of each month in which the lumber was delivered to Wells, he have judgment against Thurmond for this amount, and that said judgment be decreed a lien on the homestead of Thurmond and wife. The plaintiff averred, also, that, at the time of the execution of the contract between Thurmond and wife and Wells, the latter executed a bond payable to Thurmond in the sum of \$2,000, conditioned that he should build the house contracted for in accordance with the terms and specifications of contract; and that he would pay off all material men and all mechanics and laborers furnishing material and performing work or labor in the construction of the house; and that the appellees Welsenger, Heath, Leuschner, and Keeran were the sureties of the said Wells upon said bond, and the bond was made a part of the petition; and plaintiff prayed judgment against the said sureties for the full amount which might be adjudged to be due plaintiff. The defendants Welsenger, Keeran, and Leuschner, sureties on the bond given by Wells to Thurmond, answered by special demurrers, and among these are the following: First, that the bond and contract sued on created no beneficial interest in favor of plaintiff; and, second, that the petition was insufficient, inasmuch as it contained no averment that plaintiff caused to be filed in the county clerk's office, and recorded in a book there

kept for that purpose, an itemized account of his claim. Thurmond and wife answered by adopting all of the exceptions of the sureties save the first above given, and by general denial. The exceptions of the sureties were sustained, as was also the exception of Thurmond that the petition was bad because it did not show that the claim of plaintiff was recorded in the county clerk's office, as by law required, to all of which the plaintiff excepted, and, he declining to amend, the sureties on the bond were dismissed, and the cause was tried upon the facts between plaintiff and Thurmond and wife and defendant Wells, by the judge without a jury, and judgment was rendered for plaintiff for the full amount of his claim against Wells, but judgment was refused the plaintiff against Thurmond and the sureties of Wells, and his claim of lien upon the property was denied him, and he appealed from the judgment to this court. The record does not disclose whether the contract between Thurmond and wife was or was not recorded, but it matters not which may be the fact, from the view we take of the case; and we will assume, in accordance with the contention of the appellant, that the contract was duly recorded in the county clerk's office. The fact is that this contract was one between Thurmond and wife and the contractor Wells alone. It gave by express stipulation a lien in favor of Wells upon the homestead, and Wells contracted for the construction of the building and for furnishing the necessary materials; and it appears from the uncontradicted testimony of plaintiff's business man, Heath, who testified for the plaintiff, that he furnished Thurmond with an itemized statement each month of all the lumber delivered during the month to Wells; that none of the lumber was sold to Thurmond, but that it was contracted for by Wells, and delivered to him; and it is conceded that the plaintiff did not record his claim in the county clerk's office in accordance with the provisions of article 3296, Rev. St. 1895. It is further conceded that Thurmond had paid the entire price of the improvements to Wells. Under these facts, we are of opinion that Thurmond was not personally liable to the plaintiff for the lumber, and that plaintiff acquired no lien on the property. Appellant's contention that article 3304, Id., fixes the lien claimed by plaintiff, is not tenable. These two articles must be construed together, to determine the rights and the liberties of the owners of a homestead, and those furnishing material for the construction of improvements thereon. The first article (3296) expressly requires, in order to fix and secure a lien in favor of those who may furnish material to a contractor or subcontractor of a building, that they shall furnish an itemized account, to the owner of the property, of the material as the same is delivered, and shall show to the owner the amount due and un-

paid, and shall, within 90 days after the indebtedness shall have accrued, file, in the county clerk's office of the county in which the property is situated, an itemized account of his claim. Article 3304 declares that when material is furnished upon a homestead, if the owner thereof is a married man, to fix and secure a lien upon the same it shall be necessary for those furnishing the material, before doing so, to enter into a written contract with the owner and his wife, and which must be privily acknowledged by the wife as is required in the sale of a homestead, and the same shall be recorded in the county of the homestead; provided that when such contract is made between the husband and the wife and the contractor or builder, and is recorded as heretofore provided, the same shall inure to the benefit of all who may furnish material to such contractor or builder. From these articles we think it is evident that there can be no lien acquired upon a homestead by a material man who furnishes material, not to the owners of the property, but to the builder who has contracted with the owners, unless such material man has complied with the provisions of article 3296. The decisions relied on by appellant do not, in our judgment, hold the law to be as he contends. Those decisions do announce that the constitution gives the lien to material men independent of the provisions of the statute; but we understand this to mean that the constitution gives a lien when the contract has been made with the owner of the property by the party asserting the lien. If that contract be not with the owner, but with one who has contracted with him, then the material man can only acquire a lien by a compliance with the provisions of the statute. The owners of a homestead, by entering into a contract for materials for improvements upon their homestead, put the provision of the constitution into operation, and give a lien to the material man when he furnishes the material, without the aid of the statute; so that, as between the parties to that contract, it is not at all necessary that it should be recorded. To this extent do the recent decisions of our supreme court go, as we understand them, but no further. Under former decisions, we had conceived the law to be that, without a compliance with the provisions of the statute, not even those who entered into contract with the owner could secure and fix a lien, unless the contract expressly gave one, without complying with the requirements of the statute. In other words, we had not conceived those provisions of the constitution to be self-executing. It surely was not the intention of the framers of the constitution to give a lien upon a homestead to all who, without contract with the owner, might furnish material or labor for making improvements upon the homestead, without, at the same time, providing safeguards for the owner of the property

against the fraud or delinquency of the party with whom he contracted for the improvements. These safeguards are provided in articles 3296 and 3304 and other articles of this chapter of the Revised Statutes of 1895. A cardinal canon for construing statute law requires that effect be given to each section of the statute. Article 3296, by its language, makes its provisions applicable to all improvements made upon land, whether the land be a homestead or not. Article 3304 applies to improvements made upon homestead of husband and wife only, and its purpose is manifestly the protection of the wife against the fraud or the improvidence of the husband. Now, if we interpret the words of the proviso in this article as intended to relieve the material man from the necessity of contracting with the owners of the homestead in order to secure the lien upon the property, when the contract required in that article has been made by the builder with the owners, and duly recorded, and to allow him (the material man) to secure and fix his lien for the lumber furnished the builder, by complying with the provisions of article 3296, we give full force and effect to each of these two articles; but if we interpret the words of the proviso, as appellant insists that we should do, to mean that the material man, by virtue of the written contract between the builder and the owners of the property, is placed in the same relation to the latter as the builder sustains, and that he is relieved from observing the provisions of article 3296, we render nugatory those articles as applicable to homestead improvements, and we disclose this anomaly in the law: that, while it protects the wife from injury by her husband, it leaves both her and him at the mercy of the contractor or builder and those with whom he may contract, and denies to the owners of homestead property those safeguards which are thrown around the owners of property not homestead. Such an interpretation of the proviso of article 3304 involves a statutory incongruity repugnant to the judicial mind, and one which should not be imputed to the legislature. We understand from his brief that counsel makes no complaint of the judgment of the court dismissing the defendants Weisenger, Keeran, Heath, and Leuschner, and as what we have said disposes, we think, of all appellant's assignments, the judgment is affirmed. Affirmed.

TEXAS & P. RY. CO. v. WATSON.  
(Court of Civil Appeals of Texas. Jan. 8, 1895.)  
REMOVAL OF CAUSES.

A railroad corporation organized under the United States laws, against which suit is brought in a state court to recover an amount exceeding \$2,000, is entitled to a removal of the cause to the proper federal court, on the ground that the "suit arises under the laws of the Unit-

ed States," where plaintiff's petition shows that she is a resident of the state, and defendant's federal character is set forth in its petition for removal.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Suit by Fannie E. Watson against the Texas & Pacific Railway Company to recover for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

W. F. Armistead, for appellant. Hudgins & Estes, for appellee.

TARLTON, C. J. The proper solution of the question presented by this record as to the appellant's right to a removal of the case from the district court of Bowie county to the proper federal court is, in our opinion, fatal to the appellee's cause in this court. The suit was originally instituted on January 21, 1896, in the district court of Bowie county, by the appellee against the appellant, to recover damages in the sum of \$1,999.50, on account of personal injuries sustained by her. In her original petition she alleges that she resides in Bowie county, Tex., and that the defendant is a railway corporation chartered by an act of congress of the United States of America. On October 13, 1896, the plaintiff filed her amended original petition, seeking a recovery in damages in the sum of \$10,000. In the latter petition she represents her residence as in Bowie county, Tex., and alleges that "defendant is a railway corporation, duly incorporated, which owns and operates a line of railway in and through Bowie county, Tex., with an office and agent in said county and state." Thereafter, on October 15, 1896, the defendant filed its petition and bond for removal from the state court to the proper federal court. The bond was approved as sufficient, but the petition was rejected by the court, to which action the defendant duly excepted. The petition for removal, promptly filed, showing the matter in dispute to exceed the value of \$2,000, exclusive of interest and costs, alleges that the Texas & Pacific Railway Company was and is a corporation duly organized and existing under and by virtue of the laws of the United States, to wit, an act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes, approved March 3, 1871, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby, among other things, the name, style, and title of said Texas & Pacific Railroad Company was changed to the Texas & Pacific Railway Company, and that this suit arises under the laws of the United States constituting the charter of the defendant, and under which it was incorporated, and that it is a suit arising under the laws of the United States, of which the circuit court of the United States for the Eastern district of Texas is given jurisdiction by act of congress approved March 3, 1887, amending the act of congress approved March 3, 1875, entitled "An act to determine the jurisdiction

of the circuit courts of the United States, to regulate the removal of causes from the state courts, and for other purposes." It is manifest to us that the decision in the case of *Railway Co. v. Cody*, 163 U. S. 603, 17 Sup. Ct. 703, is decisive in favor of the appellant of the question presented by its assignment of error to the action of the court in refusing the petition of removal. The residence of the plaintiff in the state of Texas appears from the face of her petition, and the federal character of the defendant corporation is manifest from its petition for removal, and is, indeed, the subject of judicial cognizance. The supreme court of the United States in the *Cody* case, advertg to the opinion of that court in *Railway Co. v. Myers*, 115 U. S. 1, 5 Sup. Ct. 1113, wherein it was held that suits against corporations created by act of congress are to be regarded as suits "arising under the laws of the United States," holds that to such corporations "the principle applicable to diverse citizenship may reasonably be applied." From this it follows irresistibly, as we think, that the defendant's petition for removal shows that this suit is one arising under the laws of the United States; that it is analogous to one in which the rule of diverse citizenship obtains; and that the right of removal exists. Without elaborate discussion of the question,—rendered unnecessary, as we think, by the *Cody* decision,—we are constrained to hold that the district court of Bowie county erred in overruling the application to remove to the proper federal forum, and we therefore reverse the judgment, and remand the cause, with direction that the court enter the proper order of removal. So ordered.

#### SOUTHERN PAC. CO. v. REDDING et al.:

(Court of Civil Appeals of Texas. Dec. 16, 1897.)

#### INTERSTATE COMMERCE LAW—SHIPMENT FROM FOREIGN PORT—RATES—STORAGE—BURDEN OF PROOF—ASSIGNMENT OF ERROR.

1. A contract for shipment of goods from a foreign port to an inland point in the United States for a through rate does not necessarily violate the interstate commerce law, though the proportion of the through rate allowed for the carriage from the port of entry to the destination is less than the rate scheduled for freight originating at such port and carried to such destination.

2. A carrier desiring to avoid its contract of carriage on the ground that it contravenes the interstate commerce law must show, not merely that it may have been unlawful, but that it was necessarily so.

3. Where plaintiff's claim consists of various items, and the judgment is for less than the amount sued for, but it does not appear what items were allowed and what disallowed, an assignment that the damage sustained by plaintiff does not equal the amount of the judgment is too general.

4. Detention of goods by a carrier being wrongful, it has no valid claim for storage.

1 Writ of error denied by supreme court.

Appeal from district court, Galveston county; W. H. Stewart, Judge.

Action by E. Redding & Son against the Southern Pacific Company and another. Judgment for plaintiffs. Said Southern Pacific Company appeals. Affirmed.

Mott & Armstrong, for appellant. Joseph H. Wilson, for appellees.

WILLIAMS, J. This action was brought by appellees against appellant, the Southern Pacific Company, and the Gulf, Colorado & Santa Fé Railway Company, to recover damages for the detention and conversion of goods belonging to appellees. The facts, as stated in the petition and shown by the evidence, were that appellees made a contract with the Southern Pacific Company and the West India & Pacific Steamship Company for the shipment of 150 boxes of tin plates from Swansea, Wales, to Galveston, for a through rate of freight of 30 shillings per ton. The evidence satisfactorily shows that the Southern Pacific Company contracted for the carriage of the freight from Swansea to Galveston at that rate. A bill of lading was issued and signed by agents of the steamship company, which stipulated for the carriage of the goods from Swansea to New Orleans by steamship, and from New Orleans to Galveston by railroad or other conveyance. The only freight rate stated in the bill of lading was the through rate of 30 shillings per ton, and the bill of lading stipulated that the receiving parties named were severally, but not jointly, bound. It was agreed between the two companies that the charge for the ocean transportation should be 10 shillings per ton, and the remainder (20 shillings per ton) was to be the charge of the railroad companies. The goods were shipped by steamship to New Orleans, but only 149 boxes were there delivered to the Southern Pacific Company. That company paid to the steamship company the charges upon the tin, including the portion of the freight due for ocean transportation of 150 boxes. The 149 boxes were forwarded by the Southern Pacific Company to Galveston, the portion of the carriage from Houston to Galveston being effected through the agency of the Gulf, Colorado & Santa Fé Railway Company. The latter company, acting upon the instruction of the Southern Pacific Company, demanded of appellees, as charges upon the goods, a sum which included 33 cents per hundredweight, as a charge for carriage from New Orleans to Galveston, and refused to deliver the goods except upon condition that appellees pay such charges. Appellees, having offered to pay all sums due according to the through rate stipulated in the contract of shipment, and this being refused, brought suit for the value of the goods, and damages resulting from their detention. Thereafter, further negotiations ensued, in which the Southern Pacific Company made different reductions in the amount of its char-

ges, and finally offered to accept the amount due according to the bill of lading. Appellees expressed their willingness to accede to this proposition, provided the costs of suit and damages which had accrued were paid by the Southern Pacific Company, but this was not agreed to. The Southern Pacific Company, as its defense, alleged that 33 cents per hundredweight was its regular rate for the transportation of freight from New Orleans to Galveston, regularly scheduled and filed with the interstate commission, and published in accordance with the act of congress regulating interstate commerce, and asserted that it had not contracted, and could not lawfully contract, for any less rate. The Gulf, Colorado & Santa Fé Railway Company, in addition to a general denial, alleged that it was not a party to the shipping contract, and alleged that it had acted simply as the agent of the Southern Pacific Company, and asked that, in case judgment was rendered against it, it have judgment for the like amount over against the Southern Pacific Company. The sum sued for by the plaintiffs amounted to \$1,518.06. The court, trying the case without a jury, rendered judgment in favor of plaintiffs against both defendants for the sum of \$1,206.82, and in favor of the Gulf, Colorado & Santa Fé Railway Company against the Southern Pacific Company for any sum which the former might have to pay upon the judgment. The Southern Pacific Company alone appeals.

The principal contention of appellant is that the contract relied on by appellees is in violation of the act of congress regulating interstate commerce. The schedule filed with the interstate commerce commission, showing the rates of charges for transportation of goods between New Orleans and Galveston, is assumed, in the presentation of that case, to have special reference to shipments which are merely from one of those points to the other, and not to goods imported from abroad, through the port of New Orleans, under a through bill of lading, for carriage from the point of origin to the final destination. Under the decisions of the supreme court of the United States, the schedule rates applying to inland transportation are not necessarily conclusive upon the carrier, in fixing through rates upon imported goods. *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666. Under that decision, in determining whether or not the rate for the carriage of goods which have been imported on a through bill of lading from a foreign shipping point, from the port of entry in the United States to the point of destination, is a violation of the act, competition in ocean transportation is to be taken into consideration; and the fact that the proportion of the through rate allowed for the carriage from the port of entry to the destination may be less than the rate scheduled for freight originating at the same place, and carried to the same destination, does not necessarily render the

lesser rate unlawful. In the present case the facts are not so developed as to force upon the court the conclusion that the contract in question is really violative of the interstate commerce law. Circumstances may have existed to make it legitimate for the contracting parties to stipulate for such a through rate. The case does not occupy such an attitude as to require, in order to uphold the rights of the parties under the contract, an affirmative finding by the court that there were circumstances and conditions which authorized the contract. Appellant entered into the contract, and, after its error in demanding an excessive sum as the condition of the delivery of the freight was pointed out, acceded to the demand of appellees for the recognition of the contract rate. Never, so far as the record shows, until after suit was brought, had appellant denied its right to make the contract which it is shown to have made. By making the contract it necessarily affirmed the right to do so, and certainly, if it can release itself from its undertaking by proof that the contract was illegal, the burden is upon it to furnish such proof, and to show, not simply that the contract may have been unlawful, but that it was necessarily so. In other words, it must exclude the existence of any circumstances or conditions which would have made the contract legitimate. This, we think, the evidence in this case has failed to do; and this view of the matter makes it unnecessary for us to determine what would have been the consequence upon the rights of the parties, had the proof demonstrated that the contract was unlawful. Had such proof been furnished, the question would still have remained whether or not appellant, having received appellees' goods, and having them in its possession, could withhold them, in order to force the payment of a sum which appellees had not agreed to pay, upon the ground that the contract was illegal. This question we do not think it proper to decide, because, as we have seen, the evidence does not render it necessary to hold that the contract was an unlawful one. We think the court was correct in holding that the property of appellees was wrongfully detained, and that they were entitled to recover damages.

The assignment of error which questions the finding of the court as to the amount of damages does not sufficiently present any question for our determination. The plaintiffs' claim consisted of various items, and there are no findings to show upon what basis the court rendered its judgment. The amount allowed is less than that sued for, by more than \$300, and we cannot see what items were allowed and what disallowed by the court. In this state of the case, the assignment that the damage sustained by plaintiffs does not equal the amount of the judgment is too general. From the holding that the detention of the goods was wrongful, it follows that the court did not err in refusing to allow the defendant's claim for storage.

The assignment that the court did not allow defendant for the freight money actually due under the contract is not borne out by the record, for we cannot see that it was not allowed. What we have said virtually disposes of all the assignments of error. Affirmed.

# PHOENIX INS. CO. v. SHEARMAN.

(Court of Civil Appeals of Texas. Jan. 20, 1898.)

## CONSTITUTIONAL LAW—STATUTORY CONSTRUCTION —LAWS REGULATING PROCEDURE—POWER TO MAKE EXCEPTIONS.

1. The act of 1897 amending Rev. St. 1895, art. 1331, so as to cure formal defects in special verdicts, though applying to appeals pending when it was enacted, is not a retrospective law, and therefore unconstitutional, as it merely regulates the conduct of legal proceedings in the courts.

2. Where an act of 1897, passed in obedience to a suggestion that the existing law relating to procedure was "technical, arbitrary, and unreasonable, and calculated rather to obstruct than to promote the administration of justice," was made to take effect immediately after its passage, the emergency clause reciting "the fact that much inconvenience and intolerable delay accrue to litigants, \* \* \* the tendency of which is to prolong litigation," etc., such act applies to actions accrued or pending, as well as to future actions.

3. In construing an amendment which prescribes a single rule for the disposition of causes on appeal or writ of error, repealing the previous law, without excepting pending cases from the operation of such repeal, and declaring a new rule of procedure, without providing for the continuance of the old rule in any case, the courts have no power to make exceptions therein.

On motion for rehearing. Denied.

For original opinion, see 43 S. W. 930.

STEPHENS, J. It is strenuously insisted in this motion, as well as in another case just submitted, that the act of the last legislature amending article 1331, Rev. St. 1895, so as to cure formal defects in special verdicts, is not applicable to appeals taken and judgments rendered before the act was passed. We have therefore concluded to make a fuller statement of our views upon the question.

That the law, though in terms applying, and intended by the legislature to apply, to appeals pending when it was enacted, is not unconstitutional, does not seem to be an open question in this state. At an early day, in the case of *De Cordova v. City of Galveston*, 4 Tex. 470, the question came before the supreme court (upon the construction of a provision of the constitution of the republic forbidding the enactment of retrospective laws) as to what, within the meaning of such provision (which is substantially the same as that now found in our constitution), was a retrospective or retroactive law. After reviewing the decisions construing similar constitutional provisions in other states, Chief Justice Hemphill thus states the conclusion of the court: "The cases to which reference has been made, and the opinions of

the courts in expounding this constitutional inhibition, will serve to illustrate the intention of the convention in imposing the restriction. Laws are deemed retrospective, and within the constitutional prohibition, which by retrospective operation destroy or impair vested rights, or rights to do certain actions or possess certain things according to the law of the land; but laws which affect the remedy, merely, are not within the scope of the inhibition, unless the remedy be taken away altogether, or incumbered with conditions that would render it useless or impracticable to pursue it. Or if the provisions regulating the remedy be so unreasonable as to amount to a denial of right (as, for instance, if a statute of limitations applied to existing causes barred already, or did not afford a reasonable period for their prosecution), or if an attempt were made by law, either by implication or expressly, to revive causes of action already barred, such legislation would be retrospective, within the intent of the prohibition, and would therefore be wholly inoperative. There cannot, in the nature of things, be a vested right to a remedy which existed at the date of the contract; or, in other words, the mode, times, and manner of prosecuting suits must be left to the regulation of the legislative authority." This decision is in line with the current of authority everywhere, and is decisive of the constitutional question involved; the law being one which merely regulates the conduct of legal proceedings in the courts. The constitutionality of the law, however, is not so much questioned, as the construction that it is applicable to appeals pending when it was enacted; and the well-established rule of construction is invoked, "that a statute should have a prospective operation, only, unless its terms show clearly a legislative intention that it should operate retrospectively." But the object of that rule is to avoid retrospective, and hence unconstitutional, or at least objectionable, legislation; the reason of the rule being thus stated in *End. Interp. St.* § 271: "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation." To the same effect is the following language of Judge Roberts in *Martin v. State*, 22 Tex. 214: "Even in England and in our sister states, where there is no express inhibition of retroactive or retrospective laws, the courts will, if possible, construe a law not to have been intended to have such effect, when thereby important rights will be defeated."

As the law, even when applied to pending appeals, is not retroactive, within the meaning of the constitution, we next inquire whether it be unjust to so apply it (that is, whether "important rights will thereby be defeated"); for otherwise the reason and object of the rule of construction invoked would seem to be entirely wanting. That part of article 1331, Rev. St., which was repealed by the amendment in question, required the findings of the

special verdict to be such as that nothing remained for the court but to draw therefrom the conclusions of law, the effect of which had been to cause many judgments to be reversed on appeal solely because a material fact put in issue by the pleadings, though conclusively proven, had not been specifically found by the special verdict. In the late important case of *Silliman v. Gano* (Tex. Sup.) 39 S. W. 559, our supreme court, speaking through the present chief justice, in expressing their disapproval of this rule of practice, used the following language: "The law, in our opinion, is therefore technical, arbitrary, and unreasonable, and calculated rather to obstruct, than to promote, the administration of justice." Soon after that opinion was delivered, and evidently in obedience to the suggestion therein made, the legislature amended the law so as to abolish this unreasonable and unjust rule. The law was made to take effect immediately after its passage, the emergency clause reciting: "The fact that much inconvenience and intolerable delay accrue to litigants in this state, the tendency of which is to prolong litigation, and crowd and burden the dockets of the courts," etc. Concluding, therefore, that it was both within the constitutional power and just purpose of the legislature to at once put an end to further "inconvenience and intolerable delay" by repealing a rule of procedure under which litigants were claiming rights which, so far from being just and important, deserved to fall with the "technical, arbitrary, and unreasonable" rule upon which they depended, we further conclude that the special rule of construction invoked should be discarded as inapplicable, and, consequently, that the general rule should govern, which is thus stated and supported by citation of numerous authorities in *Sutherland on Statutory Construction* (section 482): "Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending, and future actions." The amendment under consideration prescribes but one rule by which we are to dispose of cases on appeal or writ of error, repealing the previous law in toto, without excepting pending cases from the operation of such repeal. It provides a new rule of procedure, without providing for the continuance of the old rule in any case. The general, if not universal, rule of construction in such cases, is that the courts have no power to make exceptions when none have been made by the legislature. The rule applies also to criminal statutes. *Sheppard v. State*, 1 Tex. App. 522, and authorities there cited. Before the adoption of our present appellate system, certain defects in appeal bonds were held to be incurable, and fatal to the appeal; but, in the act providing for the organization of the courts of civil appeals, such courts were authorized to allow such defects, both of form and substance, to be cured by the substitution of new appeal bonds, and this provision of the law has been held to be ap-



plicable to appeals which had already been taken to, and were then pending in, the supreme court. First Nat. Bank v. Preston Nat. Bank, 85 Tex. 560, 22 S. W. 579. This is but another illustration of the well-settled rule thus stated by Mr. Sutherland in the section quoted from above: "If, before final decision, a new law as to procedure is enacted, and goes into effect, it must from that time govern and regulate the proceedings." Following this quotation is a statement of the rule which determines the manner and extent of the application of the new law to pending cases, which is to the effect that, unless an intention to the contrary is plainly manifested, all things done under the repealed law will stand; but our action in the case at bar does not conflict with this rule, since we have disturbed nothing. Indeed, we are forbidden by the new law from disturbing the verdict, in so far as appellant seeks to set it aside upon a ground that has been characterized as "technical, arbitrary, and unreasonable." We thus avoid what the legislature, in response to judicial suggestion, undertook to prevent,— "intolerable delay," and the tendency "to prolong litigation." There was as much reason for preventing the further obstruction of justice and "intolerable delay" in pending as in future cases. Any other construction would impute to the legislature an intention to continue to afflict existing litigants with evils it was easily within their power to prevent without injustice to any one.

The second contention of the motion is that in disposing of this appeal we failed to distinguish the defense of generating illuminating gas from that of the use of gasoline, as prohibited in the policy, citing the eighth page of appellant's brief for a statement of facts showing the generation of illuminating gas, which contains the answers of Mrs. M. A. Parish to questions propounded to her by appellant, showing, as we think, merely the method of lighting the lamp containing the French electric fluid, rather than the manufacture or generation of illuminating gas or vapor inhibited by the policy. The other grounds of the motion are sufficiently covered by the conclusions already filed, and the rehearing is denied.

### GOODBAR SHOE CO. v. SIMS.

(Court of Civil Appeals of Texas. Dec. 24, 1897.)

#### EVIDENCE—ADMISSIONS IN PLEADING—EXPLANATION OF PRIOR TESTIMONY.

1. Material admissions contained in a pleading are competent, though the pleading has been abandoned, and superseded by another.

2. A party, as a witness at the trial, may explain his testimony given in ex parte depositions taken by the adverse party, and filed several months before the trial, though the former made no motion to suppress such depositions, and they are plain and unambiguous.

Appeal from Bowie county court; R. H. Jones, Judge.

Action by the Goodbar Shoe Company against A. L. Sims. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Smelser & Mahaffey and H. W. Vaughan, for appellant. John J. King and Hudgins & Estes, for appellee.

**BOOKHOUT, J.** This suit was instituted in the county court of Bowie county, Tex., by appellant, the Goodbar Shoe Company, against appellee, A. L. Sims, the petition alleging that on or about February 15, 1895, appellee, who was at that time a customer of plaintiff (appellant), and well known to it, came into appellant's place of business, in the city of St. Louis, and introduced to it one G. Powell, and recommended to it said G. Powell as a person worthy of credit and confidence, and that said Powell was a solvent person, and good for his debts, and would be good to appellant for anything he might want; in consideration of which introduction and recommendation, so made to appellant by appellee, of and concerning the good character and solvency of said Powell, appellant on that day sold to said Powell, on credit, a bill of goods amounting to \$240.20, which amount, on account of said Powell's worthlessness and insolvency, was lost to appellant. On April 28, 1897, appellee, A. L. Sims, filed his second amended original answer, in which he pleaded general demurrer, general denial, and a special answer. There was a trial of said cause, with the aid of a jury, which resulted in a verdict for defendant, upon which judgment was duly entered. Appellant filed its motion for new trial, which being overruled, it gave notice of appeal, and has prosecuted its appeal to this court.

Appellant's first assignment of error complains of the action of the court in refusing to permit plaintiff to introduce in evidence the admissions contained in the first amended original answer of A. L. Sims, filed in this cause on April 4, 1896; appellant contending that the admissions contained in said answer were material, and that said admissions were competent evidence. It was a disputed point upon the trial as to whether or not G. Powell was in St. Louis on the date alleged in plaintiff's petition, and whether or not A. L. Sims had recommended him as a person solvent and worthy of credit to appellant. The plaintiff had introduced its testimony, and the defendant had introduced testimony to support his defense. The defendant, Sims, had testified that G. Powell was not in St. Louis on February 15, 1895; but that one T. G. Powell, who is called "Greene" Powell, was in St. Louis on said date, and that he met up with T. G. or "Greene" Powell in appellant's establishment, in the city of St. Louis, where he had a conversation with a member of that company in reference to said Powell. T. G. Powell was a brother of G. Powell, and the latter was doing business in Bassett, Tex. It became important for the jury to know whether

er it was T. G. Powell, known as "Greene" Powell, whom appellee met in the establishment of appellant, in the city of St. Louis, on February 15, 1895, or his brother, G. Powell, who did business at Bassett, Tex. After defendant had closed, plaintiff offered to read in evidence an admission contained in defendant's first amended original answer filed April 4, 1896, in which defendant alleged: "And, if required to answer further, defendant says that at the time alleged in plaintiff's petition he met one G. Powell in the establishment of plaintiff in the city of St. Louis, Mo.; that at said time and place said Powell was attempting to buy goods from plaintiff, and plaintiff inquired of defendant as to said Powell's reputation," etc. This amended answer had been abandoned, and superseded by appellee's second amended original answer, filed April 23, 1897, which contained the following averment in reference to what transpired in St. Louis on February 15, 1895: "And, if required to answer further, defendant avers that at the time alleged in plaintiff's petition he was in St. Louis for the transaction of his own business, and he never met G. Powell in said city at said time, or at any other time, and he never saw him in plaintiff's place of business, and never introduced him to plaintiff or any of its agents; that T. G. Powell was in said city at the time referred to, attempting, as defendant is informed and believes, to purchase goods for the said G. Powell." In this last amendment, upon which defendant went to trial, it will be seen that he denied having met G. Powell in the city of St. Louis at the time alleged in plaintiff's petition. In his former pleading he had admitted meeting G. Powell in the establishment of plaintiff in St. Louis, and that plaintiff inquired of him as to said Powell's reputation, etc. A distinct admission made in pleading by a party to a suit may be read in evidence by the adverse party, although it is contained in pleading abandoned by the party, and superseded by other pleading. *Barrett v. Featherstone*, 89 Tex. 567, 35 S. W. 13, and 36 S. W. 245; *Blum v. Moore* (Tex. Sup.) 42 S. W. 856. Appellant's first assignment of error is well taken. The evidence was competent, and the court erred in not admitting it. In the case of *Railway Co. v. Reed* (Tex. Civ. App.) 32 S. W. 120, we held the reverse of this proposition, following *Coats v. Elliott*, 23 Tex. 606. Since our decision in the *Reed* Case the question arose in the *Barrett* Case, and our supreme court has held the evidence admissible, adopting the opinion of Justice Stephens, and we have felt constrained to follow this decision, in disregard of our own and the previous decision of the supreme court as well.

Appellant's second assignment of error complains of the ruling of the court in permitting the defendant, while on the witness stand as a witness, to explain his testimony given in his ex parte depositions taken by plaintiff several months before the trial of the cause;

because said depositions had been on file a long time before the trial, and defendant had made no motion to suppress said depositions, and because said depositions were plain and unambiguous. At the time of the institution of the suit plaintiff propounded ex parte interrogatories to defendant, A. L. Sims. His answers to said interrogatories were taken, in which he says, in reference to the question concerning G. Powell: "It is probable that I introduced Mr. Powell to some of the members of the Goodbar Shoe Company, but I have no recollection of it." Upon the witness stand witness, referring to this answer, said: "I did not refer to G. Powell, or George Powell, as we knew him. George Powell was never in St. Louis, that I know of. T. G. or 'Greene' Powell is the man who was there when I was." Plaintiff objected to the introduction of this testimony, which objection was overruled. We do not think the court erred in this ruling. If the defendant made a mistake in his answer to the ex parte depositions, he had the right to explain such mistake when testifying before the jury. We think appellant's second assignment of error without merit.

Appellant's third assignment of error complains of the action of the court in overruling its motion for new trial. In view of what we have said, it becomes unnecessary to pass upon this assignment. For the error complained of in appellant's first assignment, the judgment of the court below is reversed, and the cause remanded.

#### INTERNATIONAL & G. N. R. Co. et al. v. PARISH.

(Court of Civil Appeals of Texas. Jan. 12, 1898.)

#### CARRIERS — LIABILITIES — OVERLOADING STOCK — DAMAGES — APPEAL — INSTRUCTIONS.

1. A railroad company is liable for injuries to live stock resulting from overloading, though the shipper contracted to the contrary, as *Rev. St. 1895, art. 320*, prohibits common carriers from limiting their common-law liability.

2. An appellant cannot complain of repugnancy between two instructions, where the incorrect instruction was given at his own request.

3. The measure of damages for injuries to live stock is based on the value at the place of destination, where the shipper prepaid the freight, notwithstanding a contract that the value at the place of shipment should be considered, as *Rev. St. 1895, art. 320*, prohibits common carriers from limiting their common-law liability.

Appeal from Houston county court; E. Winfree, Judge.

Suit by E. L. Parish against the International & Great Northern Railroad Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

G. H. Gould, for appellants. Nunn & Nunn, for appellee.

NEILL, J. This suit was brought by E. L. Parish against the International & Great

Northern and Texas & Pacific Railroad Companies to recover \$205 damages on account of horses killed and injured, shipped by him over said roads from Sweetwater to Crockett, Tex. The damages are alleged to have been occasioned by overloading and negligent handling. In addition to a general denial, appellants pleaded that the direct result of the damages complained of was appellee's negligence, and the wild and unruly condition of the horses shipped. There was a trial before a jury, which resulted in a judgment against appellants for \$150 damages, from which they have appealed.

That some of the horses were killed, and others injured, in transportation, is undisputed, and the evidence is sufficient on either of the grounds alleged as the occasion of the injuries to support the verdict. The questions presented for our consideration are: First, whether, if the damages were occasioned by overloading, appellants are liable; second, if liable, whether under the contract, the value of the horses at the place of shipment, or place of destination, should be taken, in measuring the damages.

The contract of shipment, which is attached to, and made a part of, appellee's petition, is, upon its face, styled "Live-Stock Contract, Limiting the Liability of Carriers." It is stipulated in this contract that appellee assumes, and releases appellants from, "risk, injury, or loss which may be sustained by reason of \* \* \* overloading cars, fright of animals, or crowding one upon another," or any or all other causes, except appellants' negligence. By the contract, appellee agreed, in case of total loss of his stock from any cause for which the carrier would be liable, to pay for the same the actual cash value at the time and place of shipment, "but in no case to exceed the declared value of, if horses, \* \* \* one hundred dollars per head, which shall be taken and deemed as full compensation therefor, and in case of injury or partial loss the amount of damage claimed shall not exceed the same proportions." We will assume that by this stipulation it was intended that the carrier should pay for the loss, and not, as the contract reads, that the owner of the horses should himself pay a loss for which the carrier would be liable. This must be a mistake made in drafting the contract, or of the printer; and we will so treat it, and consider the stipulation in accordance with the evident intention of the parties. Common carriers in this state cannot limit or restrict their liability as it exists at common law in any manner whatever, and a special agreement made in contravention of this statutory inhibition is void. Rev. St. 1895, art. 820. Railroad companies are common carriers of live stock, with substantially the same duties and responsibilities that existed at common law with respect to the carriage of goods, except that they are not liable as insurers against loss and injury resulting from the inherent nature,

propensities, or "proper vice" of the animals themselves. Elliott, R. R. § 1545; Railway Co. v. Trawick, 68 Tex. 314, 4 S. W. 567; Railway Co. v. Harris, 67 Tex. 166, 2 S. W. 574. From this it follows that a contract which by its terms purports to exempt the railway from injury to cattle in transportation, except such as might result from its negligence, is, as to such purported limitation on its liability, invalid. Railway Co. v. Harris, supra. By the very terms of the contract, it was contemplated by the carrier that injury or loss might be sustained by reason of overloading the cars; and it recognized its liability for such loss, and endeavored to avoid it by stipulating against it. It is not pleaded or shown that the appellee contracted or assumed the duty of loading the cars, and, in the absence of such a contract or assumption on his part, the duty of properly loading rested upon appellants. The very term "overloading," the effect of which was stipulated against, signifies that overloading the cars was not a proper loading, and a breach of appellants' duty, for which they were liable, as common carriers, to the shipper. The evidence shows that this overloading was done by appellants, and that their agent assured the appellee, when he expressed his apprehensions that there might not be room enough in the car to safely carry the animals, that he knew his business, and the car was not overloaded. It also proves that appellee, who had no experience in loading cars with horses, believed and relied upon such assurance of the agent. The evidence, as is before stated, discloses the fact that the car was overloaded, and that such overloading, together with appellants' negligent handling in transportation, was the occasion of the damages sued for. This overloading was, then, a breach of appellants' common-law liability, and could not be avoided by the stipulation in the contract by which it was sought to be limited. The court (having charged the jury to find for the appellee if they believed that the horses were injured by reason of overloading and being crowded in the car), at the request of appellants, instructed the jury to find for them if they believed that the horses were injured by being overloaded and crowded. The repugnancy of these charges is apparent. But the responsibility for the inconsistency is upon appellants, who caused the court to give an instruction in their favor at variance with the law upon which the court had given a proper charge. Had the verdict been different, the appellee could have justly complained of the repugnancy in the charges thus occasioned, but the appellants cannot; for it was to their advantage, and they could not have been injured by it. Gooch v. Addison (Tex. Civ. App.) 35 S. W. 83.

Having concluded that appellants are liable for the damages occasioned by overloading, we will consider the other question stated. The evidence shows that the freight on its shipment was prepaid by the appellee.

The common-law liability of the carrier for failure to deliver the property is its value at its destination. *Express Co. v. Hertzberg* (Tex. Civ. App.) 42 S. W. 795. The measure of damages for injuries to live stock in course of shipment is the difference in their market value in the condition in which they arrive at the point of destination, and in which they would have been but for the negligence. *Railway Co. v. Birchfield* (Tex. Civ. App.) 33 S. W. 1022. Therefore a stipulation in a contract which makes the value at the time and place of shipment, when such value is less than what the property is worth at its point of destination, the measure of damages, is a limitation upon the carrier's common-law liability, contrary to the statute referred to, and void. It has even been held, regardless of such a statutory inhibition, that a condition in a bill of lading providing that the amount of loss or damage incurred by the carrier shall be computed upon the value of the property at the place of shipment, and which makes no provision for repayment of the freight charges received by the carrier, is unreasonable, against public policy, and void. *Shea v. Railway Co.*, 63 Minn. 228, 65 N. W. 458. The measure of damages at common law being as stated, the court did not err in so instructing the jury, and in refusing to charge them, at appellants' request, that in assessing the damages they would be governed by the value of the stock at the time and place of shipment. There is no error complained of, requiring a reversal of the judgment, and it is affirmed.

#### YELLOWSTONE KIT v. WOOD, Tax Collector.

(Court of Civil Appeals of Texas. Dec. 18, 1897.)

#### MANDAMUS — MERCHANT'S LICENSE — OCCUPATION TAX — CRIMINAL PROSECUTIONS — INJUNCTION.

1. There was no basis for the issuance of a writ of mandamus to compel a tax collector to issue to an applicant therefor a license as a merchant druggist, where he had not refused, but was ready and willing, to issue such license.

2. A writ will not lie to prohibit a tax collector from demanding of a druggist an occupation tax as a traveling person selling patent or other medicines, nor to restrain him from instituting a criminal prosecution against such person for pursuing such occupation without paying such tax.

3. The writ of injunction cannot be invoked to prevent the institution of criminal proceedings, except when such prosecution will affect property rights, for the preservation of which such writ is necessary, or to prevent repeated prosecutions wrongfully instituted for the purpose of vexing and harassing the defendant therein.

Appeal from district court, Hill county; J. M. Hall, Judge.

Action by Yellowstone Kit against W. H. Wood, tax collector of Hill county, for a writ of mandamus to compel the issuance of a license to pursue the occupation of a merchant druggist, and to restrain the collector from demanding of him an occupation tax as a travel-

ing person selling patent or other medicines. From a judgment denying the relief prayed plaintiff appeals. Affirmed.

Bowlin & Scott and Wilson Gregg, for appellant. Short & Walker, for appellee.

RAINEY, J. This action was brought by appellant against W. H. Wood, tax collector of Hill county, Tex., seeking a writ of mandamus to compel said Wood to issue him a license to pursue the occupation of a merchant druggist, and to restrain said Wood from demanding of him an occupation tax as a traveling person selling patent or other medicines. The evidence shows that said tax collector never refused to issue to appellant a license as a merchant druggist; that, when appellant applied to him for a license as a merchant druggist, he told appellant that he was ready and willing to issue same, but that appellant was liable to pay the tax imposed on traveling persons selling patent or other medicines, and, if appellant did not pay such tax he would institute criminal proceedings against him for failure to so do. The tax collector not having refused to issue to appellant a license as a merchant druggist, but being ready and willing to do so, there was no basis for the issuance of the writ of mandamus in this particular. We also think that appellant was not entitled to the writ to restrain appellee from demanding of him an occupation tax as a traveling person selling patent or other medicines. The function of a writ of mandamus is to compel the doing of an act. It will not issue to restrain the commission of a tort, or an abuse of office. *Merrill, Mand.* § 43. It "runs to inferior tribunals, corporations, or persons, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or situation." *Id.* § 1. Thus, it will be seen that the writ will not lie to prohibit the tax collector from demanding of appellant an occupation tax as a traveling person selling patent or other medicines; nor will it lie to restrain the tax collector from instituting a criminal prosecution against appellant for pursuing such occupation without paying such tax. To prohibit the doing of an act is the office of the writ of injunction. But this writ cannot be invoked to prevent the institution of criminal proceedings (*High, Inj.* §§ 20, 68, 272, 1244; *Beach, Inj.* §§ 59, 60, 574), except when the criminal prosecution will affect property rights, and the writ is necessary to preserve such rights (*High, Inj.* § 48), and to prevent repeated prosecutions wrongfully instituted for the purpose of vexing and harassing the defendant therein. The "rule that courts of equity will not restrain criminal proceedings was applied where a sewing-machine company sought to restrain the sheriff and tax collector from demanding from its agent a license tax imposed by the revenue act, and from prosecuting the agent criminally for violating the provisions of the act." *Beach, Inj.* § 574; *Machine Co. v. Fletcher*, 44 Ark.

130. This, we think, is a correct application of the rule. It is applicable to the facts of the case under consideration, and is conclusive, to the effect that appellant is not entitled to a prohibitory writ against the tax collector.

It is evident that this action was brought to have the civil courts determine whether or not the appellant would subject himself to a criminal prosecution if he pursued a certain line of business without paying an occupation tax as a traveling person selling patent or other medicines. Under such circumstances, the civil courts will not determine what occupation tax he would be liable to pay. If he is satisfied that his occupation does not fall within the class claimed by the tax collector, he can pursue it; and, if criminal proceedings are instituted against him, he can enter his defense, and his rights can there be tested. There was no error in the action of the court below denying the relief sought. The judgment is therefore affirmed.

#### LIGON v. TILMAN.

(Court of Civil Appeals of Texas. Dec. 18, 1897.)

#### FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.

1. A purchaser of property from an insolvent, who gives in good faith his negotiable note therefor, having no knowledge of intent on the part of the seller to defraud his creditors, acquires good title.

2. The fact that an insolvent sells property on credit to one knowing of his insolvency will not make the transaction fraudulent because the purchaser does not see to the application of the negotiable notes given in payment thereof, or their proceeds, to the payment of the debts of the insolvent.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action in attachment by E. M. Tilman against W. C. McDavid & Co. A. W. Heller made affidavit and executed a bond as claimant of the property attached. Pending the action Heller died, and J. H. Ligon, administrator of his estate, was substituted as claimant. From a judgment for plaintiff, defendants and claimant appeal. Reversed and remanded.

Plummer & Skelton and Ramsey & Brown, for appellants. Poindexter & Padelford, for appellee.

RAINEY, J. This is an action for the trial of the right of property. E. M. Tilman, appellee, caused a writ of attachment to issue, which was levied upon certain property alleged to belong to W. C. McDavid & Co., a firm composed of W. C. McDavid and T. C. Parker. The property consisted of a lot of whisky, wine, brandy, and certain bar-room fixtures, valued at \$505. A. W. Heller made affidavit and executed bond in the usual manner, as claimant of said property. Subsequently Heller died, and J. H. Ligon administered upon his estate, and as ad-

ministrator was made a party to the proceedings. There was a sale by W. C. McDavid & Co. to A. W. Heller of their entire stock of liquors and barroom fixtures, which sale E. M. Tilman attacks as fraudulent. The plaintiff introduced evidence tending to show that McDavid & Co., at the time of the sale to appellants, were insolvent, and made the sale with intent to defraud creditors, and that Heller knew of such insolvency. The issue presented by appellants was that Heller was a bona fide purchaser of said merchandise; that he executed his two promissory notes, for \$550 each, one payable to W. C. McDavid, and the other payable to T. C. Parker.

The first assignment of error complains of the action of the court in giving to the jury the special charge asked by plaintiff, as follows: "You are further instructed that a person is said to be insolvent when he has not sufficient amount of means and property to meet their debts as they fall due. You are further instructed that if you find from the evidence that, at the time of the sale of the goods in controversy by W. C. McDavid & Co. to A. W. Heller, the said W. C. McDavid & Co. were insolvent; and if you further find that A. W. Heller knew this fact, or that he was in possession of such facts as would have put an ordinarily prudent man on inquiry as to whether or not said W. C. McDavid & Co. were insolvent, if pursued with ordinary diligence, would have led to that fact; and if you further find that said A. W. Heller, in payment for said goods, executed his promissory notes due in the future to said W. C. McDavid and T. C. Parker for the purchase price thereof; and if you further find that said A. W. Heller did not see that the said note, or the proceeds thereof, was applied to the payment of the creditors of the said W. C. McDavid & Co.,—then you are instructed to find in favor of plaintiff, E. M. Tilman."

Appellants submit two propositions under this assignment: (1) The mere purchase of property from an insolvent debtor, and paying for it with a negotiable promissory note, is not fraudulent as to creditors, even though the purchaser does not see that the consideration paid went to the discharge of the debtor's debt. (2) The mere fact that an insolvent debtor may sell property on credit, even to one who knows of his insolvency, will not necessarily make the transaction fraudulent, especially when the evidence shows that the absolute liability of the buyer is fixed by the contract of sale. The testimony of the witness Skelton is to the effect that the note executed to W. C. McDavid was a negotiable note. Whether or not the note executed to Parker was negotiable, the record is silent. According to Heller's testimony, he paid to Parker on his note \$400 in cash before the goods were levied upon by attachment. If at the time Heller bought the property from McDavid

& Co. he executed and delivered, in good faith, his two negotiable promissory notes, as claimed by him, and he had no knowledge of any intent on the part of said McDavid & Co. to defraud their creditors in making the sale, and was not in possession of facts that would put him upon inquiry, then such sale, as to him, would not be fraudulent, though he may have known of the insolvency of said McDavid & Co. Hadock v. Hill, 75 Tex. 193, 12 S. W. 974; Jacobs v. Totty, 76 Tex. 343, 13 S. W. 372; Cross v. McKinley, 81 Tex. 333, 16 S. W. 1023; Tillman v. Heller, 78 Tex. 597, 14 S. W. 700. In the case of Jacobs v. Totty, supra, Judge Stayton, in speaking for the court, says: "The mere fact that an insolvent debtor may sell property on credit, even to one who knows of his insolvency, will not make the transaction fraudulent, for such a sale may be the very best means of realizing on the property; but in such sales the absolute liability of the buyer ought to be fixed and left subject to all the remedies creditors have in such cases." We think the charge of the court is in conflict with the principle announced by the decisions above cited. By the terms of the special charge given, the jury were authorized to find that the mere execution of the notes due in the future would avoid the sale, unless Heller saw to the application of said notes, or the proceeds thereof, to the payment of the debts of W. C. McDavid & Co. The charge makes no distinction between the execution of non-negotiable and negotiable notes, and the burden placed upon Heller to see to the application of the notes, or the proceeds thereof, if said notes were negotiable, is not in harmony with the law as expressed by our supreme court in the decisions above cited. There are several other errors assigned, but none, in our opinion, are well taken, and we deem it unnecessary to discuss them. For the error of the court in giving the special charge complained of, the judgment of the court below is reversed, and the cause remanded.

#### SANGER et al. v. BURKE et al.

(Court of Civil Appeals of Texas. Jan. 26, 1898.)

#### ASSIGNMENT FOR BENEFIT OF CREDITORS— VALIDITY.

A conveyance, whether a chattel mortgage or an assignment, by an insolvent firm to H., of its property, to sell for cash, and first pay, to three creditors named, amounts specified, was rendered void by the direction that, after the payment of said sums, H. should next apply the money remaining to such of its debts as might be established, "or shall hold the same subject to our order, or the claim of any creditor not hereby preferred, paying each creditor not hereby preferred a pro rata amount of the money that may remain," as it might unreasonably delay creditors who were entitled to such surplus.

Appeal from district court, Bell county; John M. Furman, Judge.

Action in attachment by Sanger Bros. against Burke Bros. J. A. Harrell made affidavit and gave bond, claiming the attached property. From a judgment in favor of claimant, plaintiffs appeal. Reversed and rendered.

Sanger Bros. brought suit in the county court of McLennan county against Burke Bros. on a debt, and obtained an attachment to Bell county. This attachment was levied on certain merchandise. J. A. Harrell made affidavit and gave bond, claiming the property. Issues were made up, and a trial had before the court on January 16, 1897, resulting in a judgment in favor of the claimant. Appellants excepted, and gave notice of appeal. The case is brought up on the court's findings, without a statement of facts. The findings of the court are as follows:

#### Findings of Fact.

"(1) On the 29th day of December, 1894, and prior thereto, Burke Bros. (a firm composed of J. J. Burke and A. L. Burke) were indebted to Sanger Bros. in the sum of \$327.16.

"(2) That on said date Burke Bros. and the members of said firm were in business in Holland, Bell county, Texas, and on said date they executed the following instrument:

"The State of Texas, Bell County. Know all men by these presents, that we, J. J. Burke and A. L. Burke, of Holland, Bell county, Texas, composing the firm of Burke Bros., merchants doing business as such in said town of Holland, being indebted to the persons hereinafter named in the sums hereinafter mentioned, and to other persons not specially herein named, and being desirous of providing for the prompt payment of our said indebtedness in the order hereinafter mentioned, have bargained, sold, and delivered, and by these presents do bargain, sell, convey, and deliver, to J. A. Harrell, of Bell county, Texas, our entire stock of goods, wares, and merchandise now owned by us and in our possession in our storehouse in Holland, Bell county, Texas, and all office furniture, show cases, scales, and fixtures, shelving, and counters, belonging to us in said storehouse: To have and to hold the same unto the said Harrell, for the following uses, purposes, and trusts, absolutely, forever, viz.: The said Harrell shall, as soon as practicable after the execution of this instrument, take possession of, and sell for cash, either at public or private sale, all of the goods, wares, and merchandise, and other property, hereby conveyed, keeping said property, wares, and merchandise insured until disposed of, and shall apply the moneys arising from such sale as follows, viz.: He shall first pay off, in full, our indebtedness due by us by open account to Harris & Saunders, of Belton, Texas, in the sum of one hundred dollars, and, after the payment of said sum of one hundred dollars,

to Harris & Saunders, he, the said Harrell, shall next pay to Reed Bros., bankers, of Holland, Texas, our indebtedness to them, in full, which indebtedness consists in note and overdrafts amounting to three hundred and fifty (\$350.00) dollars; and, after the payment of said sum or three hundred and fifty dollars in full to said Reed Bros., the said Harrell shall next pay our indebtedness, in full, to J. A. Melvin, of Bell county, Texas, consisting of our note to him for four hundred and fifty dollars, and about one year's interest thereon at ten per cent.; and after the payment of said three sums above mentioned, in the order named, said Harrell shall next apply the remaining portion of said moneys to such of our debts as may be established against us, or shall hold the same subject to our order, or the claim of any creditor not hereby preferred, paying each creditor not hereby preferred a pro rata amount of the money that may remain in the hands of said Harrell after the three creditors first herein named are paid in full. And it is hereby expressly provided that said trustee, Harrell, shall be, and is hereby, allowed fifty dollars per month for his services in selling said property and paying out the money as herein provided; said monthly compensation to extend not over two months. But if he shall sell said stock, in bulk, at earlier day than two months hence, his compensation shall, instead of fifty dollars per month, be ten per cent. of the money he received. In case there is any of said money remaining after paying the debts and compensation herein provided for, said Harrell shall pay the same over to us; it being hereby understood that all necessary expenses, and the compensation for said Harrell, shall be retained in his hands as the same are incurred and is earned by him. Witness our hands this, the 29th day of December, A. D. 1894. J. J. Burke. A. L. Burke.

"State of Texas, Bell County. Before me, W. W. Upshaw, clerk of the county court of Bell county, Texas, on this day personally appeared J. J. Burke and A. L. Burke, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed. Given under my hand and seal of office this, the 29th day of December, A. D. 1894. W. W. Upshaw, County Clerk of Bell County. [Seal.]

"Filed for record December 29, 1894, at 7:50 o'clock p. m. W. W. Upshaw, County Clerk of Bell County."

"(3) That, at the time of the making of the said deed of trust, Burke Bros. and the members of said firm were in an insolvent condition.

"(4) That said J. A. Harrell, claimant, immediately accepted under said deed of trust, and the creditors, Harris & Saunders and Reed Bros., mentioned therein, at once notified said trustee of their acceptance under said instrument.

"(5) That about 11 o'clock p. m. on the night of December 29, 1894, said trustee took actual possession of the property described in said deed of trust, but at about the hour of 7:50 o'clock p. m. on said 29th day of December, 1894, said Burke Bros. delivered to said Harrell said deed of trust, which was then filed for record, and at the same time delivered to said Harrell the key to the storehouse where the goods conveyed by the deed of trust were then stored.

"(6) That, a day or two prior to the executing of said deed of trust, J. A. Melvin, the third creditor mentioned in said deed of trust, saw J. J. Burke, and called on them for payment of the debt due him, mentioned in said deed of trust. That J. J. Burke then told Melvin that he could not pay him the money, but he was trying to make the sale of said stock of goods, and that, if he did so, he would protect Melvin. To this, Melvin replied, telling him to make the sale, if he could, but that, if he had to make an assignment or deed of trust, to protect him, and Mr. Burke then told Melvin that he would do so.

"(7) That on the 29th day of December, 1894, Sanger Bros. brought suit on their said claim against Burke Bros., which suit was reduced to judgment on the date stated in plaintiffs' tender of issues, and plaintiffs also recovered judgment for the costs of said suit, in the sum of \$21.30, and that this debt existed prior to the making of said deed of trust.

"(8) That, at the time of filing said suit, Sanger Bros. obtained an attachment against said Burke Bros., and at 1:30 o'clock a. m., December 30, 1894, the officer having said writ of attachment went to the storehouse of Burke Bros., containing the goods mentioned in said deed of trust, and nailed a board across the keyholes of the front door and back door of said house, and on each of said boards posted a notice that he had attached the property contained in said building, by virtue of said writ of attachment.

"(9) That on the morning of December 30th, at some time prior to 11 o'clock, said officer saw Burke Bros. and said Harrell, and demanded the keys to said storehouse, and notified them of said attachment. That they refused to give him possession, or to let him enter said store, and about 11 o'clock a. m. on said day said officer went to said storehouse, which was in the condition he left it in on the night before, and forced an entrance into the same, and plaintiffs designated the portion of the stock attached, which was inventoried in the officer's return to said writ of attachment.

"(10) That, in said judgment (Sanger Bros. against Burke Bros.), Sanger Bros. obtained a foreclosure to their lien on said property attached, subject to the disposition of this case.

"(11) That early on the morning of December 30, 1894, said A. L. Burke left Holland, to notify said Melvin of the execution of said instrument. That he saw said Melvin about

10 o'clock a. m. of said day, and told him that Burke Bros. had made a deed of trust conveying their stock of goods to J. A. Harrell, and that Reed Bros. and himself (Melvin) had been preferred. To this Melvin replied that that was all right.

"(12) The goods conveyed by said deed of trust were of the reasonable value of \$1,150; and the portion of said goods so attached, of the reasonable value of \$600.

"(13) That the trustee has now in his hands, realized from said goods, \$1,011.

"(14) I find that, at the time of the execution of said deed of trust or chattel mortgage by Burke Bros., they were owing Reed Bros., Harris & Saunders, and J. A. Melvin the amounts severally as mentioned in said deed of trust, and said debts are still due and unpaid, and were and are bona fide debts against said Burke Bros."

Boynton & Boynton, for appellants.

KEY, J. (after stating the facts). We do not consider it necessary to determine whether the instrument executed by J. J. and A. L. Burke is a chattel mortgage or an assignment, because, whether it be the one or the other, in our opinion the terms of the instrument, in connection with the fact that the makers were insolvent, and that the property was worth more, and sold for more, than the three secured debts, render it void, as against creditors. The stipulations therein, "And, after the payment of said three sums above mentioned in the order named, said Harrell shall next apply the remaining portion of said moneys to such of our debts as may be established against us, or shall hold the same subject to our order, or the claim of any creditor not hereby preferred, paying each creditor not hereby preferred a pro rata amount of the money that may remain in the hands of said Harrell after the three creditors first herein named are paid in full," are fatal to the validity of this instrument. The effect of these stipulations might be to unreasonably hinder and delay creditors who have a right to have the surplus, after payment of the three secured debts, applied to their demands. If the instrument had merely stated that the surplus should revert to the grantors, or had been silent in reference to the disposition to be made of it, then, as such surplus might have been reached by levying an attachment upon the property as prescribed by article 2349 of the Revised Statutes, or by garnishment proceeding against the trustee, the case would have been different, though we make no ruling as to the validity of such an instrument. The vice in this conveyance is that it makes no definite and specific disposition of the surplus, but leaves it to the discretion of the trustee, either to pay it to the makers of the instrument, or to all their other creditors, in proportion to their several debts, or apply it to the payment of such debts as may be established against the makers. These provisions vest in the trustee a discre-

tion, the exercise of which might enable him to unreasonably hinder and delay, if not absolutely defeat, the efforts of other creditors to subject the surplus to their debts. For instance, if a creditor should attempt to reach this surplus by attachment or garnishment, the trustee could say that, according to the terms of the conveyance, Burke Bros. had no absolute right to the surplus, because he had elected not to hold it subject to their order, or pay it to them, but to dispose of it in one of the other modes prescribed by the instrument; or if the creditor should demand payment of his pro rata part of the surplus, under the last clause of the instrument, as quoted above, the trustee might reply that he had decided not to apply the surplus as authorized by said clause, but to hold it subject to the order of Burke Bros., or pay it out on such debts as might be established against them; and if the creditor sought to reach this money in the mode designated in the first clause, as above quoted, even if the phrase "established against us" has a definite and certain meaning, still, after establishing his claim, the creditor might be met with the assertion that the trustee had concluded to ignore the established claims, and pay the money to Burke Bros. This illustrates the want of certainty as to the disposition to be made of the surplus after paying the three preferred debts. Furthermore, the language, "such of our debts as may be established against us," is ambiguous, and does not sufficiently point out a mode by which creditors could reach this surplus. It does not show whether the debts are to be established by the production of written obligations to pay, by ex parte affidavits, or by judgments; nor does it state whether the money is to be applied to the first debts that are established, or to be prorated among all the debts that may be established within a given time. For these reasons, under the facts of this case, as against the rights of appellants, the instrument in question is void, and did not vest title in the trustee. The judgment of the trial court will be reversed, and judgment here rendered for appellants. Reverse, and rendered.

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OROOM et al. v. WINSTON et al.

(Court of Civil Appeals of Texas, Dec. 23, 1897.)

#### JUDGMENT—PLEADINGS TO CONSTRUCT.

1. In determining whether a judgment against one as executor was obtained against him in his representative capacity, as executor of an estate, and not against him individually, the pleadings in the action in which it was rendered may be considered.

2. In an action to recover land belonging to estate of deceased, sold under an execution issued over 25 years previous upon a judgment rendered 4 years before the sale, against H. "extr.," and D., "extr.," in an action wherein the pleadings have been lost, and all parties to the action (except D.), the counsel, judge, and

1 Rehearing denied.



clerk of court, were dead, the testimony of D. that the action was to recover against the estate of deceased a debt due by deceased in his lifetime, and not for recovery of any debt due by witness or his co-defendant, is admissible to prove what the pleadings in the action contained, notwithstanding the witness did not remember whether he had ever read the petition in the case, or, if he had, could not give its contents.

3. Under Pasch. Dig. § 1371, which made it the duty of the clerk to issue an execution against the estate of defendant's testator when the judgment was against him as executor, it was not essential that the judgment should direct that execution should issue against the property of the estate.

Error from district court, Matagorda county; T. S. Reese, Judge.

Action by W. J. Croom and others against Milton R. Winston and others to recover land. Judgment for defendants. Plaintiffs appeal. Affirmed.

G. P. Dougherty, for appellants. Brooks & Sparkman, for appellees.

PLEASANTS, J. This suit was instituted by appellants against appellees for the recovery of the James Moore league of land, situated in the county of Matagorda. Both the plaintiffs and the defendants claim from a common source. The land in controversy was at the time of his death the community property of A. C. Horton, late of Wharton county, and his wife, Eliza. A. C. Horton died testate in the year 1865 or 1866. By his will he bequeathed to his wife all of his real property for and during her life, and at her death to his only children, his son, Robert J. W. Horton, and Mrs. Patience L. T. Dennis, the wife of I. N. Dennis, in equal moieties, share and share alike. He appointed his wife (Eliza Horton) and his son-in-law executrix and executor of his will, and directed that no action should be had in the probate court in the administration of his estate, other than the probating of his will and the filing of an inventory. This will was duly probated in the county court of Wharton on the 27th of August, 1866. Mrs. Dennis died in 1863, leaving only one descendant, a daughter, Lida T. Dennis, who intermarried with the plaintiff W. J. Croom, and who died in 1880, leaving surviving her only two children, Lida Dennis Croom, the wife of plaintiff J. F. Hodges, and Horton Fry Croom, who died in infancy, on the 20th of June, 1867. Mrs. Eliza Horton, in her own right, and not as executrix of the will of her husband, A. C. Horton, and her son, R. J. W. Horton, conveyed the land in controversy to John and William Brady. The defendants claim title to the land sued for under this deed, and under a sale thereof made by the sheriff of Matagorda county under a writ of execution issued upon a judgment which will be hereafter recited; and the plaintiffs' claim is made under the will of A. C. Horton, and by inheritance through Mrs. Croom and her deceased son, Horton Fry Croom, from Mrs.

Dennis. The judgment under which the land was sold is in these words: "Plunkett & Russell (No. 668) vs. Eliza Horton, Etx., I. N. Dennis, Etx., of A. C. Horton, dec'd. This case being called for trial this 24th day of April, 1868, the parties appeared by their attorneys, viz. John W. Harris for the plaintiff, and Quinlan & Whitten for the defendants, and, waiving a jury and all errors, submitted the case to the court on the merits. And the court having heard the evidence, it appearing to the satisfaction of the court that the plaintiffs have fully established their demands, it is hereby ordered and adjudged that the said plaintiffs have and recover of said defendants the sum of forty-nine and thirty-four hundredths dollars, with interest thereon at the rate of ten per cent. per annum from date hereof until paid. And also the further sum of six thousand seven hundred and twenty-seven <sup>22</sup>/<sub>100</sub> dollars (\$6,627.62), with interest thereon at the rate of twelve per cent. per annum from date hereof until paid, together with all costs of the said plaintiffs in this suit. And by the consent of parties it is further ordered that no execution shall issue herein before the first day of November next, 1868." The execution which was levied on the land was issued from the clerk's office of the district court of Wharton county on the 24th of September, 1872, and recites that "on the 24th day of April, 1868, Plunkett & Russell recovered a judgment in cause 1,868 against Eliza Horton, executrix, and I. N. Dennis, executor, of A. C. Horton, deceased, for \$6,727.62, with interest," and then commands the sheriff of Matagorda county "that of the goods and chattels, lands and tenements, of the said estate of A. C. Horton, deceased, in the hands of Eliza Horton and I. N. Dennis, that he cause to be made the full amount of said judgment, interest, and costs of suit." The return on this writ shows a sale of the property in controversy by the sheriff of Matagorda county on the 5th day of November, 1872. It having been shown that all of the pleadings in cause No. 668 had been lost for many years, I. N. Dennis, the executor of the will of A. C. Horton, testified, over the objections of the plaintiffs, that he and Mrs. Horton were sued by Plunkett & Russell in said cause for the recovery of a debt due from the estate of their testator, and for that debt the judgment above recited was rendered, and not against himself and Mrs. Horton for any debt or liability of theirs. That the suit against himself and Mrs. Horton was for a debt due to the plaintiffs by their testator, A. C. Horton, and not for a debt due by either of them, the witness was positive; but did not remember whether he ever read the petition in the case, or not, and, if ever he did, he could not then state its contents. The judgment and execution were both admitted in evidence over the objections of the plaintiffs, and to the admission of each, as well as to the admission of the testimony of the wit-

ness Dennis, plaintiffs took a bill of exceptions. It being admitted by the plaintiffs that the defendants had whatever title passed to the land in controversy under the deed to John and William Brady, and by the sale under execution, the trial judge directed a verdict for the defendants, which being done, judgment was rendered that the plaintiffs take nothing by their suit, and that the defendants go hence without day. A new trial being refused defendants, they excepted, and appealed to this court.

After deliberate consideration of the appeal as presented in the able brief of the appellants' counsel, we are of the opinion that the judgment should be affirmed; and, in giving our reasons for the conclusion we have reached, we will consider the more salient points in the objections made by the appellants to the evidence offered by appellees in support of their claim of title, and admitted by the court. The judgment of Plunkett & Russell against Mrs. Horton and I. N. Dennis, rendered on the 24th of April, 1898, it is urged by appellants, is a judgment against the defendants in their individual capacity, and not in their representative capacity; that the words "executrix" and "executor," following the names of the defendants, are but words of personal description, and that the judgment makes the defendants liable *de bonis propriis*, and not *de bonis testatoris*; and that, therefore, the judgment will not support the execution issued under it against the property of the estate of A. C. Horton, deceased, in the hands of the defendants, the executor and executrix of the deceased's will. And it is further objected that it is not permissible to show from the pleadings, or by any evidence dehors the minutes of the court, that the suit was against the estate of the defendants' testator, and not against the defendants, and that the judgment made defendants liable *de bonis testatoris*, and not *de bonis propriis*. These objections to the introduction of this judgment as a link in the defendants' claim of title are presented by counsel with much force, under various assignments and many propositions; and, if these objections be valid, the judgment appealed from should be reversed. That judgments rendered in manner and form identical with the one we are considering have in this and many other jurisdictions been held to be judgments against the defendants, and not against the property of the estate of their testator or intestate, cannot be denied. But if it has ever been held by any respectable court that under no circumstances can it be shown by any evidence dehors the minute of the judgment that such judgment was rendered against the executors or administrators in their representative capacity, and not against them individually, we are not aware of such decision. We can readily understand that where execution has been issued upon such a judg-

ment against the property of the executor or administrator, and his property sold, in a suit between the executor and the purchaser of the property the former should not be heard to say that the judgment against him was *de bonis testatoris*, and not *de bonis propriis*. Executors sometimes by their conduct make themselves personally liable to the creditors of their testator, and when this is the case the judgment would impose a liability *de bonis propriis*, although the suit was against the defendant in his fiduciary capacity; and it has ever been the policy of the law to uphold judicial sales, unless they are plainly illegal. In this suit the plaintiffs are assailing as illegal and void a sale made more than a quarter of a century ago, under an execution issued against the estate of the great grandfather upon a judgment rendered some four years before the sale, against the executors of the independent will of their ancestor. Under such a state of facts, it must be clearly shown that the execution was issued without authority of law, before a court of justice would be authorized to pronounce the sale void. If, as has been decided by our supreme court (see *Dunlap v. Southerlin*, 63 Tex. 38, and authorities there cited), the pleadings in a suit may be examined for the purpose of ascertaining whether the judgment was authorized against the defendant, in favor of the party designated as plaintiff in the minute of the judgment, why may not a judgment, which upon its face is ambiguous, be read in the light of the pleadings, for the purpose of explaining and making clear that which is ambiguous? If resort can be had to the pleadings in the one case for the purpose of showing that a judgment which upon its face was valid was in fact a nullity, we think the pleadings may be read in connection with a judgment which *prima facie* makes the defendant personally liable to plaintiff, to show that the plaintiff's suit was not for such purpose, but for the purpose of obtaining a judgment against the property of the estate of the defendant's testator in the possession of defendant. More cogent reasons might be presented, it seems to us, against resorting to the pleadings for the purpose permitted in the case of *Dunlap v. Southerlin*, *supra*, than could be urged against them in this case, for the purpose we have indicated. To interpret and construe the legal effect of the judgment in the light of the pleadings in any case is neither an attack upon, nor an amendment of, the judgment, as counsel seems to consider. If the pleadings, as shown to be the case in cause No. 668, have been destroyed or lost, parol evidence is admissible to show what the pleadings contained. At the time of the trial of this cause, all of the parties to the suit of Plunkett and Russell against Mrs. Horton and I. N. Dennis (save defendant Dennis), as well as the counsel in the cause, and the

judge and the clerk of the court which tried that cause, were dead; and we think the positive testimony of Dennis to the effect that the suit was to recover against the estate of A. C. Horton, deceased, a debt due by the defendant in his lifetime to the plaintiffs, and not for the recovery of any debt due by the witness or his co-defendant, was admissible, notwithstanding the declaration of the witness that he did not remember whether he had ever read the petition in the case or not, and, if he had, he could not then give its contents, to prove what the pleadings in that suit contained. Under the circumstances of this case, it was permissible to show by circumstantial evidence what the pleadings in cause No. 668 were. If the object of the suit was to subject property of the estate of A. C. Horton, deceased, in the hands of his personal representatives, to the payment of a debt due by him at the time of his death to plaintiffs, the inference is that the pleadings were framed with the view to accomplish the purpose of the plaintiffs. If, then, the judgment was against the defendants Dennis and Mrs. Horton in their representative capacity, it would support the execution under which the land in controversy was sold, and it was not essential that the judgment should direct that execution should issue against the property of the estate of the defendants' testator. The statute (article 1371, Pasch. Dig.) made it the duty of the clerk to issue an execution against the estate when the judgment was against an executor. If, as insisted by appellants, no execution could issue against the property of the estate of a decedent in the hands of his executor, unless a judgment expressly so directs, why the necessity for article 1371? Why need the legislature direct the clerk to do that which the judgment, by its express terms, commands to be done? We are not prepared to adopt the appellants' interpretation of this article. We are inclined to the opinion that the purpose of the legislature was something more than merely to authorize the issuance of an execution against the property of an estate upon a judgment against an executor of an independent will. One purpose of the statute would seem to be to instruct the clerk as to his duty where the judgment was, in the language of the statute "against the executor," without directing the issuance of an execution. The object of the statute was doubtless to meet and to obviate the very objection which appellants are urging to the judgment and execution upon which appellees relied to support their claim of title upon the trial of this cause. Believing that the court did not err in overruling appellants' objections to the admission in evidence of the judgment in cause No. 668, nor the execution issued thereon, and under which the land in controversy was sold, nor the sheriff's deed to the purchaser, the judgment is affirmed. Affirmed.

## NEIMAN et al. v. SCHUSTER et al.

(Court of Civil Appeals of Texas. Jan. 19, 1898.)

## HOMESTEAD—WHAT CONSTITUTES—VENDOR AND PURCHASER—BREACH OF CONTRACT—TENDER.

1. The owner of 340 acres, on which he lived, sold 4 acres in one corner, over which a private way from his residence to the highway passed, which was otherwise used only as pasture. *Held* that, there being sufficient left to satisfy all homestead demands, the homestead was not impressed on the part sold, so as to require the wife to join in the deed.

2. A vendor cannot recover of the purchaser as for a failure to perform verbal agreements made with the vendor as part of the consideration, without showing a failure to perform, and that he has been injured thereby.

3. A vendor who sells with an agreement allowing him to repurchase within a certain time and on certain conditions, before he acquires any right to the land, must first make a tender of the price when the privilege accrues.

Appeal from district court, Mills county; John M. Furman, Judge.

Action by R. Schuster and others against George Neiman and others to recover certain real estate. Judgment for plaintiffs. Defendants appeal. Affirmed.

The nature of this suit is disclosed by the conclusions of fact and law filed by the trial judge, which are as follows:

"(1) I find that on March 5, 1895, Geo. Neiman, his wife not joining in the deed, sold and conveyed the land in controversy to Albert Weber; that the only pecuniary consideration for said sale was said Weber's promissory note for \$80, bearing 10 per cent. interest per annum from date, and due February 1, 1896. (2) That at the same time, and as a part of the consideration for said sale, said Weber agreed to build a house upon said lands, with a storeroom and music hall therein, together with rooms for his family, and to reside in said house and upon said lands, and while he so resided thereon to keep a grocery store in said house, and to teach music and a German literary school therein, and to receive and distribute mails to the people of the settlement, and that he would call the place Neiman, and would, at as early a date as possible, get a post office established at that point. (3) That this agreement of said Weber was not written in the deed, nor embodied in any other writing. (4) That at the same time, and as a further part of the consideration for said sale, said Weber executed and delivered to said Neiman a written agreement that, if he (Weber) sold said land within the space of five years from the date of the conveyance to him, the said George Neiman should have the refusal of said land; but, if said Weber kept said land in his possession after five years from the date of said deed, then said agreement should be without effect and void." "(6) That said agreement was made and entered into at the same time and place when and where said deed was made, and that both

instruments were delivered at the same time and place; that the reason said contract was not inserted in the deed from Nelman to Weber was because the justice preparing the papers advised that it would not be legal to embody it in the deed. (7) That said Weber built a house upon said land, in accordance with his agreement aforesaid, and resided therein for the space of about three months, during which time he kept a grocery store therein, taught music, and received and distributed mail to the people of the settlement; that at the end of three months said Weber abandoned said premises, left the state, and is and ever since has been a resident of the state of Wisconsin. (8) That after said Weber abandoned said premises and left the state, as aforesaid, on the 3d day of June, 1896, his wife, Marie Weber, who was then preparing to join her husband in Wisconsin, executed and delivered to the plaintiffs herein a deed of conveyance to said land; that said deed expresses a nominal consideration of five dollars, but that the real consideration therefor, but not therein expressed, was the sum of one hundred and thirty-five dollars, paid and to be paid by plaintiffs for said Weber, and the further consideration of plaintiffs assuming and agreeing to pay off the note due from said Weber to defendant Nelman; that, after the execution and delivery of said deed by Mrs. Weber, the same was sent by plaintiffs to said Albert Weber in Wisconsin, and was afterwards executed and acknowledged by him in said state, and his acknowledgment bears date June 15, 1896; that at the time Mrs. Weber abandoned said house, and before she delivered the deed aforesaid, she had possession of said house, and delivered possession of the same to plaintiffs, and they locked the said house and kept the keys. (9) Mrs. Weber executed and delivered the deed to plaintiffs about 1 o'clock p. m., and about 5:30 o'clock p. m. defendant Nelman informed plaintiff Schuster that he claimed the property, and that he claimed the house, because it was upon his land; that plaintiff Nearens was present when the contract between Nelman and Weber was discussed, but was not present when the same was consummated. (10) That, on the third or fourth day after the execution and delivery of the deed aforesaid by Mrs. Weber, defendant Nelman took possession of the premises, and has ever since held and claimed the same as his own, declaring the contract between himself and said Weber rescinded and of no effect. (11) That afterwards plaintiffs sued said Weber for debt in the sum of \$135, being money that they had paid and agreed to pay for him as hereinbefore stated, and personal service was had upon said Weber in said cause in the state of Wisconsin; that a writ of attachment was duly issued and levied upon the real estate in controversy; that Weber made default in said cause, and judgment by default was taken for said

debt, and fixing the attachment lien upon the said real estate; that an execution thereafter issued, under which the property in controversy was levied upon and sold as real estate, and plaintiffs became purchasers at the sale. (12) That, at maturity of the note aforesaid, plaintiff Schuster tendered and offered to pay defendant Nelman the full amount of same, principal and interest, and afterwards tendered and paid into court the amount so tendered said Nelman, which tender was at all times by said Nelman rejected and refused. (13) That at the time defendant Nelman sold the land in controversy to Weber it was and now is a part of a larger tract of 340 acres owned by said Nelman, and upon which he and his family then resided and now reside, being all the land owned by him; that the north end of said 340-acre tract was, at and long prior to the sale to said Weber, used and occupied by a tenant of said Nelman; that the plot and map hereto attached and marked 'Exhibit A,' and made a part hereof, correctly represents said Nelman's land, together with the land in controversy, and that occupied by said Nelman's tenant. (14) That the only stock water upon said Nelman's land is on the south end of same, and that to cut off 200 acres on the north end would leave said Nelman's dwellings and outhouses on the south 140 acres, and would leave him without stock water, or water for house use; that the distance from the land in controversy to said Nelman's house is between 350 and 400 varas; that, before the property in controversy was sold by defendant Nelman to said Weber, the road by which said Nelman had access to the public road ran across the land in controversy, as shown by the double-dotted line on plot; that said Nelman turned his cattle, sheep, etc., in and out at said S. E. gate, and when they were on the out range he turned them in at said gate for water, there being no water on the out range; that said Nelman had been so using said land for a period long prior to the sale thereof to said Weber, but further than above stated was making no further use of the land in controversy than of other of his pasture lands; that the sale of the land in controversy by said Nelman necessitated a change in the road from said Nelman's house to the public road, from the way it then ran to the way it now runs, as indicated upon the plot, which change put said road upon worse and rougher ground than formerly, and that the road as it now runs is dangerous to travel upon in the nighttime, unless one drives carefully; that Goldthwaite is defendant Nelman's nearest trading point, and is about 17 miles southwest of where he lives; that to go to and return from Goldthwaite usually consumes the day and a part of the night. (15) That plaintiffs, defendants, and said Weber are German people, and speak the German language, and that said Weber speaks readily



his wife sold the land to appellees does not establish the fact that Nelman was not first offered the privilege of purchasing it. Besides, if he had desired the benefit of that privilege, he could, by proper pleadings, have availed himself thereof in this suit. In other words, as appellees acquired only such title as Weber had, appellants could have pleaded their right to purchase the land, tendered the purchase money, and obtained a judgment for the land. The purchase money owing by Weber for the land not being due at the time Nelman took possession and declared the sale rescinded, and it not appearing that Weber had breached any contract the violation of which would authorize Nelman to rescind, the latter's action in taking possession and declaring the rescission did not affect the rights of the parties. All of the questions submitted have been duly considered, and, finding no error, the judgment will be affirmed. Affirmed.

**MISSOURI, K. & T. RY. CO. OF TEXAS v. HAUER.<sup>1</sup>**

(Court of Civil Appeals of Texas. Dec. 9, 1897.)

**MASTER AND SERVANT—INJURIES TO EMPLOYEE—  
NEGLECT AND CONTRIBUTORY NEGLIGENCE—  
PROXIMATE CAUSE—EVIDENCE—INSTRUCTIONS—  
EXCESSIVE DAMAGES.**

1. A switchman, in endeavoring at night to couple a moving car to a standing car, took a link from the latter, set the pin in the drawhead, and went to meet the other car with the link. He inserted the link in the drawhead, and held it there with his right hand, and undertook to insert the pin, but was unable to do so because it was a little too large for the hole, and when the cars came together he injured his right hand. *Held*, that the railroad company was negligent in not providing a suitable coupling pin.

2. The defect in the pin was the proximate cause of the injury.

3. The switchman was not negligent in attempting to make the coupling, and in getting his hand caught in doing so.

4. The court properly refused to charge that plaintiff assumed the risk involved in adjusting the pin and making the coupling "after he had discovered that the pin was unfit or unsuitable," etc., and that, if he could have evaded injury by abandoning the effort, or "any time after he made such discovery," the jury should find for defendant,—as assuming that he discovered the defect in the pin before he was injured.

5. It was not error to charge that, if the failure to furnish a proper pin was negligence, defendant was liable, when the court defined negligence.

6. A railroad employé could testify that he was not given a copy of its rules, and was not familiar with them, in contradiction of his written application for employment, which had been put in evidence by the company.

7. A verdict for \$5,000 in favor of a switchman 44 years old, and earning \$80 per month, for the loss of the fingers of the right hand, is not excessive.

Appeal from district court, Harris county; Sam. H. Brashear, Judge.

Action by Harry T. Hauer against the Missouri, Kansas & Texas Railway Company of

Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Frank Andrews, for appellant. Lovejoy & Sampson, Allen & Watkins, and Norman G. Kittrell, for appellee.

GARRETT, C. J. This suit was brought by the appellee to recover damages of the Missouri, Kansas & Texas Railway Company of Texas for injuries received by him while engaged as a switchman in the employ of the company in coupling cars in its yard at Denison, Tex. The petition alleged negligence on the part of the company in failing to provide for the use of the appellee a suitable coupling pin. Appellant answered by general demurrer and general denial and a special plea of contributory negligence, and assumed risk and knowledge of the defect on the part of appellee; and it was further pleaded that it was appellee's duty, as a switchman, to see that the drawheads of the cars and couplings were supplied with the proper pins. The case was tried by jury, and resulted in a verdict and judgment in favor of the appellee for the sum of \$5,000. This is the second appeal. On the first appeal, which will be found reported in 33 S. W. 1010, the judgment of the court below was reversed, because the evidence then showed that it was appellee's duty to provide himself with a coupling pin suitable for the drawhead in which it was to be used. to be taken or selected by him from a large number of coupling pins differing in shape and size to fit the drawheads of different cars, lying scattered about appellant's switch yard. The appellee had been in railway service as a switchman for 10 or 12 years, and was an experienced and competent switchman. The accident occurred on the 7th day of February, 1894, and resulted in the loss of the fingers of his right hand, which were mashed off by being caught between the drawheads of two cars which he was trying to couple. His account of the manner in which the accident occurred is that he was endeavoring to couple a moving car with an automatic coupler to a car with a common drawhead, standing on a switch track. He found a link in the drawhead of the stationary car, which he took out, and set in a pin in the drawhead, and went up the track to meet the car that was being thrown in. He had the link in his right hand as he went up to the moving car, and raised his lantern, and saw there was no link or pin in the drawhead of that car, but saw a pin lying on the deadwood just above the drawhead. He reached up and got the pin, and inserted the link in the drawhead, and attempted to put the pin down, but it was a little too tight,—a little too large for the hole,—and while he was endeavoring to get the pin down the cars came together, and caught his hand. The pin found on the deadwood of the car was a round pin, such as is used in all automatic couplers. The car was moving north, and the appellee, in attempting to make

<sup>1</sup> Writ of error denied by supreme court.

the coupling, walked along with his right side next to the drawhead, holding the link in the coupler with his right hand, and reaching over his right hand attempted to insert the pin with his left hand, but failed to do so because the pin was too large. It was shown by the evidence that coupling cars, when the drawheads were of different make,—one a common drawhead and the other a drawhead with an automatic coupler,—is more dangerous than coupling cars with the same kind of drawheads, and that it is safer to insert the link in the automatic coupler, and couple to the common drawhead. It was also shown that the pin found on the deadwood was in the proper place, and was intended for use in making the coupling; that all round pins should be of the same size; and that the pin found on the deadwood, and which appellee attempted to use, was defective on account of its being too large. The appellee in attempting to make the coupling did so in the usual and proper manner, and was hurt by reason of the fact that in trying to get the pin down with his left hand he failed to withdraw his right hand, which held the link, as he would ordinarily have done before the cars came together. There was testimony that the moving car had a common drawhead, and the stationary one a drawhead with an automatic coupler; that the coupling pins in use were of different sizes and shapes, and that it was appellee's duty to select a proper pin; but the verdict of the jury was in accordance with the facts as stated above, and there was sufficient evidence to support it. At the time he was injured appellee was 44 years old, and was earning about \$80 per month. Since then he has not been able to find any employment, and has earned practically nothing. He lost the fingers of his right hand. Our conclusion is that the appellant was negligent in failing to furnish a suitable coupling pin for appellee's use; that the defect in the pin was the proximate cause of the injury; and that, under the circumstances, appellee was not guilty of negligence in attempting to make the coupling, and in getting his hand caught in doing so. It was not his duty to provide himself with a pin, and the defect in the pin which he found on the deadwood of the car was not open to his observation. He was not negligent, under the circumstances, in his continued attempt to insert the pin, as it often happened that a pin difficult to insert at first could be made to go down. As stated in our former opinion, circumstances often lead a most prudent person into danger, and it would be unreasonable to require one to meet every exigency as it might afterwards turn out that it ought to have been met. His failing to withdraw his hand was a natural consequence of having his attention absorbed in the work of getting the pin down. It was as necessary to hold the link in position as it was to insert the pin, and doing both was but the one act of making the coupling. Appellee had no time for reflection, because the whole lapse of

time while he was between the cars did not exceed a few seconds.

Appellant's second assignment of error is as follows: "The court erred in refusing to give to the jury special charge No. 5 requested by the defendant, which reads as follows: 'You are instructed that the plaintiff assumed whatever risk was involved in the effort to adjust the pin and make the coupling, after he had discovered that the pin was unfit or unsuitable, if it was unfit or unsuitable; and it was unfit or unsuitable; and, if he could have avoided injury by abandoning the effort to make the coupling, or any time after he made such discovery, you will find for the defendant, although you may believe that it (defendant) was negligent in the premises.'" The foregoing instruction is obviously incorrect, because it assumes that the appellee had discovered that the pin was unfit or unsuitable before the accident occurred. According to the evidence, appellee was justified in the belief that the pin could be made to go down, and as a matter of fact he probably only discovered that he failed to get it down because it was too large after the accident had occurred, and there was no error in refusing the instruction.

The fourth assignment of error is: "The court erred in its main charge, wherein it instructed the jury, in effect, that it was the duty of the defendant to furnish a safe and proper pin with which to make the coupling he was attempting to make when injured." The charge was not obnoxious to the objection urged against it. It is the duty of railway companies to furnish safe appliances for its employes, but in so doing it is only required to exercise ordinary care. The court told the jury that, if the failure to furnish a safe and proper pin was negligence, the defendant would be liable, and defined negligence for them.

There was no error in permitting the appellee to testify as complained of under the fifth assignment of error, to the effect that he was not given a copy of the rules and regulations of the company, and was not familiar with them, in contradiction of his written application for employment, which had been put in evidence by the appellant. The statements in the application were nothing more than declarations of fact, and were not contractual, and the parol evidence was not objectionable as varying the terms of a written contract. We do not think the amount of damages awarded by the jury is excessive. The judgment of the court below will be affirmed. Affirmed.

#### FLINT v. TRAVELERS' INS. CO.<sup>1</sup>

(Court of Civil Appeals of Texas. Jan. 28, 1898.)

ACCIDENT INSURANCE—CONDITIONS—INTOXICATION.

An application for an accident policy provided that it should not cover any injury receive-

<sup>1</sup> Application for writ of error pending.

ed while under the influence of intoxicating liquor or narcotics. The policy issued "in consideration of the warranties in the application" provided that it should not cover death resulting from medical treatment (except amputations necessitated by injuries), intoxication, or narcotics, or voluntary or involuntary taking of poison. The insured became intoxicated, and, when far towards delirium tremens, was taken for treatment to sanitarium, where a physician administered hypodermically several doses of morphine. From the immediate effect of the last dose insured died. *Held*, that the insurer was not liable.

Appeal from district court, McLennan county; M. Surratt, Judge.

Action by Nettie Flint against the Travelers' Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. B. Scarborough, for appellant. J. W. Davis, for appellee.

FISHER, C. J. This was a suit on a \$5,000 accident insurance policy, issued by defendant company to John F. Flint, husband of appellant, made payable to her in case of his death. The pleading of the plaintiff was upon the policy, alleging the accidental death of the insured, and declaring on the policy for the full face value thereof, according to the terms thereof, and asked for judgment. Defendant company answered by demurrer, which was overruled, and by denial, and a special allegation, setting out the application and the policy to the insured, under which they claim exemption from liability, and denied liability, general and special, and pray to go hence, etc. Trial resulted in judgment for defendant, from which plaintiff appeals to this court.

The trial court found the following conclusions of fact and law:

"First. John F. Flint, on March 14, 1895, made written application to the defendant company for an accident policy of insurance payable to his wife, Nettie Flint, for the sum of \$5,000, to be based upon the following statement of facts, which he warrants to be true, containing, among others, the following clause: '(11) My habits are correct and temperate, and I agree that the policy shall not cover any injury happening through or while under the influence of intoxicating drinks or narcotics.'

"Second. Upon this application, said company on said day issued to said John Flint their 'combination' accident policy on the life of Jno. F. Flint, No. K8,508, for a term of 12 months' duration, for \$5,000, payable, in case of death, to Mrs. Nettie Flint, if death results from such injuries alone within ninety days after same were inflicted, containing, amongst others, the following stipulations: 'In consideration of the warranties in the application for this policy, and of twenty-five dollars, does hereby insure John F. Flint,' etc. After setting out in clauses from 'a' to 'f' the amount to be paid on account of various injuries or

losses, the policy contains eight provisions, of which 4 and 5 are as follows: '(4) Written notice, with full particulars, and full name and address of the insured, is to be given said company at Hartford for any accident or injury for which claim is made within sixty days after said accident. Unless affirmative proof of death, loss of limb or sight, or duration of disability, and of their being the proximate result of external, violent, or accidental means, is so furnished within thirteen months from time of such accident, all claims based thereon shall be forfeited to the company. No legal proceedings for recovery hereunder shall be brought within three months after receipt of proof at this office, nor at all, unless begun within two years, three months, and one day after such receipt, except in case of claim of permanent disability under clause above.' (Clause 'a' has reference only to injury resulting in disability for life.) '(5) This insurance does not cover disappearance nor suicide, sane or insane, nor injuries of which there are no visible marks upon the body (the body itself, in case of death, not being deemed such mark), nor accident, nor death, nor loss of limb or sight, nor disability resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: Disease, or bodily infirmity, hernia, fits, vertigo, sleepwalking, medical treatment (except amputations necessitated by injuries), and made within 90 days after accident), intoxication or narcotics, voluntary or involuntary taking of poison or contact with poisonous substances, or inhaling any gas or vapor, sunstroke, freezing, dueling, fighting, war or riot, intentional injuries (inflicted by the insured or any other person except burglars and robbers), voluntary overexertion,' etc.

"Third. Up to within seven or eight months prior to issuance of said policy, John F. Flint at times drank, heavily, intoxicating liquors, and at that time was treated in one of the modern ways for the whisky habit; and that thereafter he had not drank any up to the time said policy was issued, nor thereafter until about a week or ten days prior to the 15th day of April, 1895, at which time he became intoxicated, and continued drinking heavily until the 14th, at which time he was extremely nervous, and far towards delirium tremens, and his stomach violently disordered, but he was perfectly sane, and almost constantly moving or walking. At the request of his friends, he was, on the 14th day of April, taken by parties who had formerly treated him for the whisky habit to their sanitarium for the purposes—First, of being relieved from the effects of the continued intoxication from which he was then suffering, and, second, to again be treated for same habit. That during that day he was given several drinks of whisky. That night, while still suffering greatly from the effects of his spree, his attending physician



(one of the parties to whose sanitarium he had been taken) administered hypodermically to him several doses of morphine, to quiet and give him rest, the last of which was atropia-morphia, or atropine, a narcotic, from the immediate effect of which he died before six o'clock the next morning, while still I find that the physician, in administering said medicine, did not intend or think that the same would produce death, but was given to quiet and give his patient rest as a result, and that treatment as to the kind of medicine administered was proper, but that in quantity an overdose, and to that extent, his death was accidental."

"Fifth. I find that proofs of death, as provided in said provision 4, were never furnished said defendant company, but that it had full knowledge thereof, and of the particulars, and denied liability on said policy before this suit was filed, which was on the 18th day of February, 1896, or about 10 months and three days after said death occurred.

"Conclusions of law: I conclude, as matter of law, from the foregoing facts, that the defendant is exempt from liability on said policy by reason of the extended intoxication of the insured immediately preceding his death, from the effects of which intoxication he was suffering when he died, and to be relieved of which he was under medical treatment at that time, which treatment was superinduced by the intoxication, bringing it clearly within provision 5 of said policy and clause 11 of the application therefor, each of which I think reasonable, and to have been directly in contemplation of the parties thereto when executed. Hence judgment was rendered for the defendant."

We adopt the findings of fact of the trial court, and approve the conclusions of law reached. The judgment is affirmed. Affirmed.

# LAMPASAS HOTEL & PARK CO. v. HOME INS. CO.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 22, 1897.)

## INSURANCE—CANCELLATION OF POLICY—NOTICE TO INSURER—SUFFICIENCY OF EVIDENCE.

One thoroughly familiar with the insurance business received a letter containing a draft for the amount of the premium on the unexpired policy, and stating that the policy had been canceled. The letter further directed him to sign the cancellation receipt on the back of the policy, and return the same, and informed him that another policy, in a different company, had been written by the canceling agent, which was being held for approval. The draft was not cashed, and the policy was not returned, but the holder testified that after receiving this letter he was in doubt as to the amount of insurance then carried on his property, and endeavored to obtain additional insurance elsewhere. *Held*, that it was not error to find that the policy had been in fact canceled, and was so treated by the insurer.

Error from district court, Harris county; S. H. Brashear, Judge.

Action by the Lampasas Hotel & Park Company against the Home Insurance Company on a policy of insurance. Judgment for defendant, and plaintiff brings error. Affirmed.

Hutcheson, Campbell & Sears, for plaintiff in error. Wm. Thompson, for defendant in error.

JAMES, C. J. The agent of defendant in error on January 25, 1895, wrote the following letter to the secretary of plaintiff in error, at Houston, Texas: "Lampasas, Texas, January 25th, 1895. B. F. Weems, Secretary Park Co., Houston, Texas—Dear Sir: The Home Insurance Co. of New York is withdrawing from Lampasas, Texas; and you have policy No. 292, for \$2,000.00, upon the Park Hotel, signed by me on August 16th, 1894, running for one year. Now, I inclose you herewith my draft upon the company in your favor for \$45.38, the return premium due you under the policy up to January 22, 1895, which you will please attach to the policy after filling in and signing the cancellation receipt on back of policy for the amount, and forward same to the company for collection, direct. I have issued another policy in a different company for \$2,000.00, and will hold same till it is approved by the company, and will then send same to you. Yours, very truly, W. R. Young, Agent." The draft accompanied the letter. There is evidence of the following facts: That Weems was in the insurance business, and received the above letter and draft a day or two after its date. He did not forward the draft for collection, and did not return it or the policy to Young, nor did he make any reply to the letter. He still holds the draft. By the terms of the policy, the company had the right to cancel it by giving five days' notice of such cancellation; the company retaining the pro rata premium. The policy was of the New York standard form. The fire occurred on February 10, 1895. In Weems' testimony, he states that the letter went on to say that the writer had written another policy in lieu of this one, which he would hold until approved by the company, and then send it to witness; that this left witness in doubt as to the amount of insurance the company held on the building, and the amount necessary for him to procure; and that he, after receiving Young's letter, endeavored, through agents at Houston, or possibly elsewhere, to place insurance on the property. The above testimony, we think, would warrant the conclusion that Weems regarded the policy as canceled. If he did not regard it as canceled, or if he was not satisfied with the form in which the unearned premium was sent him (being an insurance agent himself, and presumably aware of what was a proper tender to effect a cancellation), why was it that the letter of Young left him in doubt as to the amount of insurance he held on the prop-

<sup>1</sup> Rehearing denied.

erty? And why should he go in quest of other insurance after receiving the letter? We will assume that sending a draft was not such a payment or tender of the unearned premium as the insured was entitled to have made to it; still, it should be deemed sufficient when it appears that the insured treated it as having the effect of canceling the policy, which involves the fact that he was content with this mode of payment; and particularly should this be so when the person to whom the payment is tendered is in a position that makes him familiar with what is essential to effect a cancellation. This is supported by the views expressed in *Hopkins v. Insurance Co. (Iowa)* 43 N. W. 197. We think that the district judge may, under the testimony, have properly concluded that Weems was satisfied with such payment, and received and treated it as sufficient to accomplish the purpose announced by the insurer, and that he in fact treated the policy as at an end by reason of the letter and draft. Therefore there was no error in rendering judgment for the defendant. This conclusion makes it unnecessary for us to consider the other questions discussed in the brief of plaintiff in error. Affirmed.

**LILLEY et al. v. EQUITABLE SECURITIES CO. et al.**

(Court of Civil Appeals of Texas. Jan. 15, 1898.)

**REFORMATION OF DEED—ESTOPPEL.**

Defendant L. induced defendants F. and J. to transfer to him the land upon which they resided, which was the north 64 acres of a 160-acre tract,—a consideration being set out in the deed, but none being paid,—to enable L. to borrow money thereon. The deed to L. described the land as the south 64 acres,—following the description in the deed to them,—as did the trust deed by L. to plaintiff. L. had previously mortgaged the south 96 acres of the same tract to plaintiff to secure a former loan, which mortgage was in plaintiff's New York office when the second loan was negotiated. Plaintiff paid L. the amount of the loan on receipt of the trust deed with an abstract of title for the south 64 acres, which did not show the former mortgage by L. to plaintiff, and was certified as correct by plaintiff's attorney. Defendants F. and J. received a reconveyance from L. of the south 64 acres as soon as the loan was approved, and thereafter paid the interest on the mortgage until it matured, although they had received no part of the loan. On negotiating for a renewal, they discovered that it did not cover the land which they owned, and then repudiated the mortgage. *Held*, that a finding that it was the intention of all the parties that the deed of trust should cover the north 64 acres, and should be corrected accordingly, was supported by the evidence.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Suit by the Equitable Securities Company against E. F. Lilley and others to correct a mistake in the description of certain deeds. From a decree for plaintiff, defendants E. F. and L. J. Lilley appeal. Affirmed.

J. J. Mathews, for appellants. W. A. Bonner, for appellees.

**FINLEY, C. J.** The statement of the case as given in appellees' brief is substantially correct, and is here given:

On July 5, 1895, the Equitable Securities Company instituted this suit in the district court of Hunt county, Tex., against Joseph N. Lilley, J. H. Lilley, E. F. Lilley, Laura J. Lilley, R. C. Hill, and F. G. Phillips, citizens of Hunt county, Tex., and S. M. Finley, trustee, a citizen of Dallas county, Tex., alleging, in substance, that on October 1, 1888, Joseph N. Lilley made and delivered to the Equitable Mortgage Company his certain promissory note for the sum of \$1,000, due October 1, 1893; that on the same date, in order to secure the payment of said note for \$1,000, the said Joseph N. Lilley executed and delivered to S. M. Finley, as trustee, his deed of trust upon 96 acres of land, a part of 160-acre survey No. 26 of the subdivision of University leagues Nos. 4 and 7 (setting out the 96 acres by metes and bounds), off of the south end of the said 160-acre survey; that on February 1, 1889, the said Joseph N. Lilley executed and delivered to the Equitable Mortgage Company his certain promissory note for \$575, due on February 1, 1894, and for the purpose of securing the payment of said note for \$575 the said Joseph N. Lilley on the same date executed and delivered to S. M. Finley, trustee, his deed of trust upon 64 acres of land, a part of the said 160-acre survey No. 26 of subdivision of University leagues Nos. 4 and 7 (said 64 acres being set out in said deed of trust by metes and bounds), also off of the south end of said survey No. 26. The petition further alleged that the Equitable Securities Company was the legal owner and holder of said notes, they having been transferred to it, for a valuable consideration, in due course of trade, before maturity, and further alleged that the defendants R. C. Hill and F. G. Phillips had become the owners of the 96 acres described in the deed of trust first set out, they having purchased the same, and, in the deed to them, assuming the payment of the \$1,000 note. The petition then alleged that the deed of trust conveying the 64 acres of land securing the note for \$575 was intended to cover and convey 64 acres of the north end of the survey, being the remainder and balance of said survey No. 26, of 160 acres, after deducting the 96 acres conveyed by the first deed of trust securing the \$1,000 note, and alleged that the said Joseph N. Lilley and the said Equitable Mortgage Company both intended that the field notes in said deed of trust conveying said 64 acres should have begun at the northeast corner of survey No. 26, and have run thence south 380 varas, thence west 950.4 varas, thence north 380 varas, and thence east 950.4 varas, to the place of beginning, and that the field notes, as written

in said deed of trust conveying 64 acres off of the south end of said survey No. 26, was a mutual mistake on the part of both parties thereto, being the mistake of the person who drafted said deed of trust, and fully setting out the intention of the parties to convey 64 acres off of the north end of said survey. The petition further showed that on November 24, 1888, the defendants Joseph N. Lilley and J. H. Lilley, being the owners of an undivided interest in said survey No. 26, executed and delivered to E. F. and Laura J. Lilley their warranty deed, conveying to them all of their undivided interest as heirs at law of T. N. Lilley, deceased, patentee of said land, in and to 64 acres of land, part of said survey No. 26, off of the south end of said survey, but that said deed was intended by all parties thereto to convey 64 acres off of the north end of said survey, as the said E. F. and Laura J. Lilley had before that time deeded to J. H. and Joseph N. Lilley 96 acres off of the south end, and that the field notes in the deed from J. H. and Joseph N. Lilley to E. F. and Laura J. Lilley, conveying 64 acres off the south end, instead of the north end, of said survey, was a mutual mistake between all the parties. The petition further showed that on November 26, 1888, E. F. and Laura J. Lilley, for a consideration of \$1,800 cash paid, executed and delivered to Joseph N. Lilley their warranty deed, whereby they conveyed to him 64 acres out of the said survey No. 26, off the south end of said survey, but that said deed was intended by all parties to convey 64 acres off the north end, and that the same was a mutual mistake between all the parties thereto, etc. The petition further alleged that it was the intention, agreement, and understanding of Joseph N. Lilley and J. H. Lilley at the time they conveyed to E. F. and Laura J. Lilley the 64 acres by deed dated November 24, 1888, that said deed should cover 64 acres, above described, off of the north end of said survey No. 26, and not off the south end, and that it was the intention, understanding, and agreement of the said E. F. and Laura J. Lilley, in their deed of date November 26, 1888, to convey to Joseph N. Lilley 64 acres off the north end of said survey, and not off the south end, and that it was the intention, understanding, and agreement between Joseph N. Lilley and the Equitable Mortgage Company and S. M. Finley, trustee, that the deed of trust dated February 1, 1889, executed by Joseph N. Lilley to S. M. Finley, trustee, to secure the note for \$575, should convey 64 acres off of the north end of said survey No. 26, and not 64 acres off the south end, and the description in said deeds and said deed of trust was a mutual mistake by and between all of the parties thereto, and that after the execution of said deeds the grantees therein took possession of 64 acres off the north end of said survey, and not off the south end, and that plaintiff, the Equitable Securities Company, was entitled to

have the description in said deeds and deed of trust corrected, and its lien foreclosed on 64 acres off the north end, to pay the \$575 note, and entitled to have its deed of trust first herein mentioned foreclosed on the 96 acres of land off the south end of said survey to pay the \$1,000 note above described. The petition further showed that after the execution of the deed of trust on 64 acres, dated February 1, 1889, securing the note for \$575, Joseph N. Lilley, on, to wit, October 20, 1889, executed and delivered to E. F. and Laura J. Lilley his warranty deed conveying back to them the 64 acres out of said survey, but that, following the field notes of the old deeds, he made the same mistake, and conveyed to them 64 acres off the south end, but that it was his intention to convey to them 64 acres off the north end as aforesaid, and that afterwards, on June 24, 1895, when the said E. F. and Laura J. Lilley and Joseph N. Lilley discovered their mistake, the said Joseph N. Lilley and his wife, Nora Lilley, executed and delivered to E. F. and Laura J. Lilley another deed for a consideration of \$1, and for the purpose of correcting the field notes in the deed of date October 20, 1889, in which last-named deed, to wit, dated June 24, 1895, he conveyed to E. F. and Laura J. Lilley the 64 acres off the north end of said survey, described by metes and bounds above. The petition further alleged that E. F. and Laura J. Lilley had actual notice of the deed of trust given by Joseph N. Lilley to secure said note for \$575, and knew that said deed of trust was intended to cover 64 acres off the north end of said survey, and that it was deeded to them subject to said incumbrance, and that they recognized said deed of trust as a lien upon said 64 acres off the north end, and paid interest on the note, and recognized it as their debt, until they discovered the mistake, later on, when they refused to pay the principal of said loan, or any further interest thereon. The petition further showed that neither the plaintiff nor the defendants discovered the mistake until about June 25, 1895. It was further shown by the petition that S. M. Finley, trustee, had refused to make a sale as trustee on account of the mistake in said deed of trust. Plaintiff prayed for citation against all of the parties defendant, and that its deed of trust securing the note for \$1,000 be foreclosed on the south 96 acres of said survey, and for a correction of the field notes in the various deeds, and in the deed of trust securing the note for \$575, and that its lien be foreclosed on the 64 acres off the north end of said survey. Plaintiff further alleged that Hill and Phillips bought the south 96 acres with constructive notice of both deeds of trust, one securing the note for \$1,000, and one securing the note for \$575, and prayed in the alternative that, if the court should find that the plaintiff was not entitled to have its deed of trust foreclosed upon the north 64 acres to pay the note for \$575, it be foreclosed as a second lien in favor of plaintiff on the

64 acres off the south end of said survey, as therein described, subject to the foreclosure of the deed of trust securing the \$1,000 note; also, for general relief.

Defendants R. C. Hill and F. G. Phillips filed their answer, adopting all the allegations in the plaintiff's first amended original petition, except as to any and all allegations, intimations, or inference to the effect that these defendants purchased said 96 acres of land subject to the trust deed of date February 1, 1889, made to secure the note for the sum of \$575, and further setting up that it was never intended by the parties to incumber any portion of the 96 acres off the south end of said survey No. 26 to secure the \$575 note. They further adopted the prayer of the plaintiff for the correction of said deed of trust, except as to the alternative relief prayed for by plaintiff. Defendant S. M. Finley, trustee, answered, disclaiming any and all interest in the matter. E. F. and Laura J. Lilley filed their answer: (1) General demurrer. (2) Special exceptions, and denying, all and singular, the matters and things stated in plaintiff's petition, except the statement that the deed made by J. H. and Joseph N. Lilley, of date November 24, 1888, was intended to convey 64 acres off the north end of said survey No. 26; admitting that such was their intention. Said answer further showed: That Thomas N. Lilley purchased 160 acres from the state, being survey No. 26, as above stated. That, prior to the issuance of the patent, Thomas N. Lilley died, and left surviving him, as his only heirs, Joseph N. Lilley, J. H. Lilley, Ada Preston, wife of William Preston, and E. F. and Laura J. Lilley, each of whom was entitled to one-fifth of said 160 acres (32 acres of said survey No. 26). That William Preston and wife conveyed their undivided interest to J. H. Lilley; he thereby becoming the owner of 64 acres, a two-fifths interest in said land. That J. H. and Joseph N. Lilley entered into a verbal agreement as to a partition of said land as follows: That E. F. and Laura J. Lilley should have 64 acres off the north end of said 160 acres, including the residence thereon; that J. H. Lilley should have, as his portion of said land, 64 acres immediately south of E. F. and Laura J. Lilley's 64 acres; and that Joseph N. Lilley should have 32 acres off the south end of said survey, just south of J. H. Lilley's 64 acres. That Joseph N. Lilley bought from J. H. Lilley his 64 acres, and that, in pursuance of the agreement above, J. H. Lilley and wife and E. F. and Laura J. Lilley conveyed to Joseph N. Lilley all of their interest as heirs at law of Thomas N. Lilley in 32 acres off the south end of said survey. And on the same date Joseph N. Lilley and E. F. and Laura J. Lilley conveyed to J. H. Lilley all of their interest in the 64 acres north of the 32 acres conveyed to Joseph N. Lilley, and on the same date J. H. Lilley and his wife conveyed to Joseph N. Lilley his 64 acres just north of the 32 acres off the south end of said survey conveyed to Joseph N. Lilley. Said answer fur-

ther sets up that the agent of the plaintiff furnished plaintiff with an abstract of the 96 acres thus vested in J. N. Lilley before the plaintiff made the loan of \$1,000, and took the mortgage on the 96 acres in the south end of the survey. The answer then alleged that, by reason of the agreement of partition, E. F. and Laura J. Lilley became the owners of the 64 acres off the north end of said survey No. 26, and that their possession was notice to the world of their title. But, however, in order to give record title in E. F. and Laura J. Lilley to 64 acres, the said J. H. and Joseph N. Lilley on November 24, 1888, joined in a deed to them conveying 64 acres of land in the north end of said block, and the field notes should have begun at the northeast corner of the said original survey No. 26, and run thence south 380 varas, thence west 950.4 varas, thence north 380 varas, and thence east 950.4 varas, to the place of beginning, and that it was a mistake in the deed conveying them 64 acres off the south end. They then alleged that since that date E. F. and Laura J. Lilley and W. E. Lilley, the son of one of said defendants, had continuously lived upon said 64 acres as a family; that on November 26, 1888, they did sign and deliver a deed to Joseph N. Lilley, whereby they purported therein to convey to said Joseph N. Lilley all of their interest in 64 acres by metes and bounds described in the south end of block 26; that the stated consideration therein of \$1,800 was an error, and in fact no consideration was paid to any one of them; and that, if Joseph N. Lilley was in any way mistaken as to what was thereby conveyed, he had no equity by which he could compel them to correct the mistake. The answer further alleged that J. N. Lilley then made application to the loan company for a loan of \$575 by a mortgage lien on the 64 acres off the south end of block 26. The agents of the company procured an abstract of the title to the land, which they submitted to the attorney of the company to pass on. It alleged that it was the duty of the abstractor to examine all the records which could in any way affect the title to the land, and that the loan company looked entirely to the abstract for the title, and passed on same. Said answer further alleged that N. W. Harrison, of Hunt county, was the person intrusted to forward correct abstracts of the land for both of said loans, to be finally passed on by plaintiff; that S. M. Finley, the man named as trustee in both of said mortgages, was the agent of plaintiff in Texas, to whom said abstract was sent, and who finally decided to make the loan; that both of said abstracts were certified by said Harrison; that the first abstract was an abstract of 96 acres off the south end of said block, and that the second abstract showed title to Joseph N. Lilley in only 64 acres out of the south end of said block, and not in the north end of said block; that said Finley made said second loan with both of said abstracts in his possession at the time, and the draftsman of said second mortgage copied the field notes from said second abstract

to 64 acres in said trust deed, and there could have been no mistake whatever on plaintiff's part as to what security it had for each of the sums loaned; that the abstract failed to indicate any title to Joseph N. Lilley in the north 64 acres of the block; and that abstracts put the company upon inquiry, etc. The defendants E. F. and Laura J. Lilley then filed an answer in answer to the answer of Hill and Phillips, (1) demurring and (2) specially excepting to said petition, because they had no equitable ground against defendants E. F. and Laura J. Lilley, either to enforce a deed from them, as sought for the benefit of Joseph N. Lilley, or for the benefit of either plaintiff, or for Hill and Phillips, and denying all of the allegations contained in Hill and Phillips' answer.

On January 20, 1897, the cause was tried before the court without the aid of a jury. Judgment by default was taken against Joseph N. and J. H. Lilley. On hearing of the cause the court rendered judgment in favor of S. M. Finley, trustee, for his costs, and in favor of the plaintiff, Equitable Securities Company, against Joseph N. Lilley and Hill and Phillips, for the amount of the note for \$1,000, with interest thereon, and attorney's fees, and foreclosing the deed of trust securing the same upon the 96 acres off the south end of the survey No. 26, and in favor of the Equitable Securities Company against Joseph N. Lilley for the amount of the note for \$575, with interest thereon, and attorney's fees, and correcting the deed from J. H. and Joseph N. Lilley to E. F. and Laura J. Lilley, and from them to Joseph N. Lilley, and correcting the deed of trust from Joseph N. Lilley to S. M. Finley, trustee, securing said note for \$575, so as to convey 64 acres off the north end of said survey No. 26, instead of the south end, and foreclosing the same to pay said note, interest, and attorney's fees. From this judgment the defendants E. F. and Laura J. Lilley have appealed.

The conclusions of fact and law found by the trial judge are as follows:

Conclusions of fact: "(1) Thos. N. Lilley died intestate in 1884, leaving as a part of his estate the 160 acres of land in controversy. He had five children, namely, J. N. Lilley and J. H. Lilley, sons, and E. F. and L. J. Lilley, unmarried daughters, then of age, and a married daughter, Mrs. Preston. These children were his sole heirs, and, as such heirs, at their father's death became the owners, each, of an undivided one-fifth interest of the said land. Prior to 1888 Mrs. Preston deeded her undivided interest to J. H. Lilley. (2) On October 11, 1888, three deeds were made,—the first by J. N. Lilley, E. F. Lilley, and L. J. Lilley to J. H. Lilley, conveying their undivided interest in 64 acres out of the 160 acres, the same lying immediately north of 32 acres taken off the south end of the 160 acres; the second by J. H. Lilley to J. N. Lilley, conveying the said 64 acres; and the third by J. H. Lilley, E. F. Lilley, and L. J. Lilley to J. N. Lilley, conveying their undivided interest in the said

32 acres off the south end of the 160 acres. These conveyances put the title in the 96 acres off the south end of the 160 acres in J. N. Lilley, and, though no deeds were then made by J. N. Lilley and J. H. Lilley to E. F. Lilley and L. J. Lilley to the remaining 64 acres off the north end of the 160 acres, the legal effect of the conveyances was to put the absolute title in them; they having received no consideration for the said deeds made by them. The old homestead of Thos. N. Lilley was on the 64 acres, and E. F. Lilley and L. J. Lilley have lived there ever since their father's death. (3) The said three deeds were made in order to put the title to said 96 acres in J. N. Lilley, to enable him to obtain a loan thereon of \$1,000 from the Equitable Mortgage Company. He had already, on October 1, 1888, given the \$1,000 note sued on, and a deed of trust on the 96 acres to secure same, and the loan was closed as soon as the said three deeds were made. An abstract showing correctly the condition of the title to the 96 acres, and including the said three deeds, was furnished the mortgage company before the loan was closed. (4) J. N. Lilley wanted to borrow money on the 64 acres owned by E. F. Lilley and L. J. Lilley, and the mortgage company was willing to make the loan if the title could be gotten in proper shape, and E. F. Lilley and L. J. Lilley were willing to put the title to the land in J. N. Lilley for that purpose; and with that object in view, on November 24, 1888, J. N. Lilley and J. H. Lilley made a deed to E. F. Lilley and L. J. Lilley, and on November 26, 1888, the two latter made a deed to J. N. Lilley. By the first deed it was intended to perfect the legal title of the Lilley sisters to the said 64 acres by conveying the interest of the Lilley brothers to them, and by the second deed it was intended to put the title to the 64 acres in J. N. Lilley by conveying the same to him, so that he could borrow money on it from the said mortgage company; but, by a mistake of the person who prepared the deeds, the land described therein was the 64 acres off the south end of the 160 acres, instead of the 64 acres off the north end. The last deed recited a consideration of \$1,800 paid, but in fact nothing was paid for this conveyance or for the other. The negotiations for the loan proceeded to completion on February 1, 1889, when J. N. Lilley executed the note for \$575 sued on, and a deed of trust to secure the same. It was intended that the deed of trust should cover the 64 acres off the north end, but following the mistake made in the two deeds just mentioned, and because of same, the land described in the deed of trust was in fact the 64 acres off the south end. The abstract furnished the mortgage company contained the same mistake, for the same reason. The abstract did not show anything about the first loan, for the reason that it was supposed by all the parties that the first loan covered 96 acres off the south end

of the 160 acres, and the second loan the remaining 64 acres. (5) At the time of the second loan the first abstract was in the possession of the mortgage company, but was at its New York office, and the papers concerning the second loan were examined at the Dallas office; hence the conflict between the abstracts was not observed. In fact, all the Lilleys and the abstracter and the mortgage company supposed that the two last-named deeds and deed of trust covered no part of the 96 acres first mortgaged, but that the field notes of said deeds and deed of trust covered the 64 acres lying just north of the said 96 acres, and the whole transaction concerning the second loan was carried on by all the parties connected therewith under that mistake; and inquiry of the Lilley sisters would not have disclosed the mistake, but would have developed the fact that they thought they had deeded the 64 acres to J. N. Lilley, who then lived with them. Inquiry of them, however, would have developed the fact that J. N. Lilley paid them nothing for the land, but that the deed to him was made to enable him to borrow money on the land in his name. The mortgage company had no notice of the fact that nothing had been paid by J. N. Lilley for the land, and supposed that the recital in the deed was true. The Lilley sisters got no part of the borrowed money. (6) On October 20, 1889, J. N. Lilley made a deed to E. F. and L. J. Lilley, intending to reconvey to them the north 64 acres; but, following the aforementioned mistake, the land covered by the deed was the south 64 acres. (7) On October 7, 1892, J. N. Lilley sold the 96 acres covered by the first mortgage to Thos. Brannon, who assumed the mortgage. On November 14, 1894, Brannon sold to R. C. Hill and F. G. Phillips, who in turn assumed the mortgage. Brannon and Hill and Phillips, when they bought, knew of the second mortgage, but supposed it covered the north 64 acres. They had never seen any of the deeds, or the record thereof. (8) In 1895, while endeavoring to make a loan from another company to take up the notes sued on, the mistakes aforementioned were discovered by an abstracter. No one had before that time ever noticed the mistakes. The Lilley sisters had themselves paid the interest on the second mortgage. As soon as the mistake was discovered, they repudiated the mortgage. On June 24, 1895, J. N. Lilley, to correct the mistake in his deed to them of October 20, 1889, deeded to them the north 64 acres. (9) Plaintiff owns the notes and liens sued on, and the same are past due and wholly unpaid, except as stated in the petition. (10) All the deeds mentioned in these findings were promptly and properly recorded."

Conclusions of law: "(1) The intention of the parties must control, and it being the undisputed intention of the parties that the deed from the Lilley sisters to J. N. Lilley,

and the deed of trust from him to the mortgage company, should cover the north 64 acres, instead of the south 64 acres, and the loan having been made on the faith thereof, the mistake can and should be corrected. (2) The acts of the Lilley sisters in acknowledging the receipt of the consideration for the land in their deed to J. N. Lilley, and in permitting him to borrow money on the strength of the supposed title conveyed to him by them, are sufficient to estop them, even though J. N. Lilley himself could not have corrected the mistake in the deed to him. (3) The possession of the Lilley sisters, not being exclusive, but jointly with J. N. Lilley, was not sufficient to demand of the mortgage company that it look into the character of their possession and claim. Besides, such inquiry would have been fruitless. Again, the mortgage company had a right to rely on their deed just made and recorded. (4) Plaintiff is entitled to judgment as prayed for."

The conclusions of fact reached by the trial judge are fully supported by the evidence. We also concur in the legal conclusion that the plaintiff was entitled to have the mistake in the deeds and mortgage in the description of the land corrected, and was entitled to foreclose its mortgage upon the 64 acres in the northern part of the 160-acre tract. We think the decree is in all respects correct, and it is therefore affirmed. Affirmed.

#### WILSON v. SMITH et al.<sup>1</sup>

(Court of Civil Appeals of Texas. Nov. 18, 1897.)

#### JUDGMENTS—FINALITY—VACATION—GROUNDS.

1. In the absence of a showing by a party that he was prevented from making a valid defense by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part, he will not be entitled, after expiration of the term of court, to have the judgment vacated.

2. The mistake or ignorance of a party's counsel will not relieve him from a judgment rendered against him.

3. Where a judge of an adjoining county was called in to try cases, some of which the judge of the district was disqualified from hearing, and there was an understanding on the part of the judge of the district and the bar that only such cases should be tried as the judge of the district was disqualified from trying, which fact was communicated to plaintiff by his counsel, and the case in question (not being one of those) was called for trial, and both parties appeared by counsel, and announced "Ready for trial" (plaintiff not being present in person), whereupon the trial proceeded regularly, and judgment was rendered for defendant (it not being charged that there was fraud or misconduct on the part of defendant), plaintiff will not be entitled, after the expiration of the term of court, to have the judgment vacated.

4. The omission of an order of dismissal as to a party who has died pending the litigation, and before judgment, is a mere formal defect, and does not preclude the judgment from being final.

<sup>1</sup> Application for writ of error dismissed for want of jurisdiction.

Appeal from district court, Houston county; J. R. Burnett, Judge.

Action by J. E. Smith and others against Hamp Wilson to set aside a judgment. Judgment for plaintiffs, from which defendant appeals. Reversed.

Nunn, Nunn & Nunn, for appellant. Adams & Adams, for appellees.

PLEASANTS, J. The appellant, H. Wilson, was engaged in 1892, in the town of Crockett, in the warehouse receiving and forwarding business. The warehouse was the property of his sisters-in law, the Misses Breitling, and they allowed appellant one-third of the profits for conducting the business. Appellee J. E. Smith was the public weigher of said town, and he sought and obtained in 1892 an injunction enjoining and restraining appellant from weighing cotton, unless requested in writing, by the owners of the cotton, to do so. Appellant answered by exceptions, and pleaded damages in reconvention against plaintiff and his sureties upon the injunction bond. Upon the final hearing of the cause the exceptions were sustained, and the injunction dissolved. At the fall term, 1894, the appellee Smith, without the knowledge of appellant, dismissed the suit, including appellant's plea in reconvention, but, at same term of court, appellant obtained an order of the court reinstating this cause upon the docket; and said cause was continued from time to time until April 10, 1896, when, both plaintiff and defendant having answered "Ready," by their counsel, the cause was tried by the judge presiding, without the intervention of a jury, and judgment rendered for \$300 damages for the plaintiff (the appellant here) against the appellee Smith and his co-appellees, who, with one S. D. Thompson, were the sureties of Smith upon his injunction bond. The surety S. D. Thompson was dead at the time of the judgment, but there does not appear in the record any suggestion of his death, or any order dismissing the suit as to him. Afterwards execution was duly issued upon this judgment, and on the 1st of June, 1896, the appellees filed suit, praying that the execution be restrained, and that said judgment be vacated, and that they be allowed to appear and defend the suit of the said Wilson for damages against them. And, for cause for granting the writ and reopening said cause, their petition alleges that it was generally understood and agreed that Judge Brashear, who was presiding by exchange with the judge for that district, would try only such causes as the judge for the district was disqualified from trying, and that said judge was not disqualified from trying the suit in which the judgment complained of was rendered; that the plaintiff in said suit, the said Wilson, called up the case, and obtained the judgment, in the absence of complainants, without the knowl-

edge of any of them, and that they were not represented by counsel; that they had no expectation that the cause would be tried by Judge Brashear; that no judgment was rendered against S. D. Thompson, who was co-surety on the injunction bond and co-defendant in said suit, and no disposition was made of him prior to the trial of the cause, and that said judgment is therefore not a final judgment, and that complainants cannot appeal therefrom; that complainants, the sureties of the said Smith, were not cited to appear and answer the motion of the plaintiff, Wilson, to reinstate his suit in reconvention; that complainants were notified that said suit had been dismissed, and had no knowledge of its reinstatement upon the docket of the court; that the injunction bond on which they were sureties was payable to H. Wilson, and not to Carl Wilson, against whom the writ of injunction was issued, and there was nothing in the pleadings averring or showing that Carl Wilson and H. Wilson were one and the same man; that said H. Wilson had no interest in the business which he was conducting; that he was simply an agent for others; that, in truth and in fact, neither Wilson nor the business was injured by the suing out of said injunction against him by their principal, the said Smith; that Wilson had no claim, legal nor equitable, against complainants, and that they had a complete and meritorious defense to said suit; that said Wilson is insolvent; and that complainants will sustain irreparable injury unless the execution of said judgment be enjoined, and the same be reopened, and complainants be allowed to appear and defend the suit. To their petition, complainants filed exhibits as follows: First. Original injunction. Second. Original injunction bond. Third. Execution on judgment rendered April 10, 1896, giving judgment against them for \$300. Fourth. Petition for original injunction. Fifth. Answer of defendant, Wilson. Sixth. Affidavit of complainant Smith that he was sick at the time of trial, and when judgment was rendered on plea of reconvention, and that he thought the case was off the docket. Seventh. Affidavit of W. A. Stewart, attorney who represented plaintiffs in original suit, to the effect that he was unwell when cause was called for trial; that he was present and participated in trial of said cause, and represented the complainants; that the judge held up the cause after argument, and that he was taken sick, or became worse, and was unable to appear in court, afterwards, during the time Judge Brashear presided, and was unable to look after the case, and did not know what had become of it. The defendant, Wilson, filed exceptions and answers as follows: "(1) No reason shown why Judge Brashear should not or could not try the case; (2) allegation that petition was against Carl Wilson, and injunction against Hamp Wilson, was insufficient; (3) allega-

tion that S. D. Thompson was a surety on said bond, and no judgment against him, is sufficient; (4) allegation that complainants did not have citation or notice is insufficient; (5) allegation that the attorney was sick, and that the judge, after hearing the cause, took same under consideration, and rendered judgment thereafter, is not material; (6) the allegations as to sustaining exceptions to plaintiffs' petition in original suit, and the dismissal and reinstatement of the cause on the docket, are insufficient; (7) allegation that Wilson was only an agent weighing cotton, and had no personal interest, is insufficient." And defendant answered to the effect that while suit No. 3,737 (original suit) was against Carl Wilson, as stated in petition, the complainant therein on December 20th filed a supplemental petition alleging that his name was Hamp Wilson, and sued out a writ against Hamp Wilson, restraining him, etc.; "that on March 12, 1894, this defendant filed his plea in reconvention, claiming damages to the amount of \$1,000 against the said Smith and his sureties; that defendant urged trial repeatedly until spring term, 1896, when plaintiffs' attorney and defendant's attorney were in court, and announced 'Ready for trial,' before Judge Brashear, and said trial regularly proceeded, resulting in judgment for this defendant for \$300; that S. D. Thompson, one of the sureties on the original injunction bond, had died prior to trial of said cause, and no judgment was taken against him, and no injury resulted to complainants therefrom, but, if it is deemed necessary that there be an order dismissing as to Thompson, then his death is suggested, and an order asked nunc pro tunc; that, if Smith and his attorney were sick at the time of trial, such fact was not brought to the attention of the court; that it is not shown that a different result would or could have been reached, had trial occurred under other circumstances; and that the grounds of injunction are frivolous, and that injunction is only for delay." Upon filing of the foregoing exceptions and answer by the defendant, the complainants filed a trial amendment, in which, in addition to the allegations in original petition, they aver that complainant Smith was sick in bed at the time the judgment of April 10, 1896, was rendered, and was unable to attend court; that he had been informed by his counsel, Stewart, that no case would be tried by Judge Brashear, except such as Judge Burnett, the judge for the district, was disqualified to try; that Smith was an important witness for the defense of the suit, and would have attended the trial and testified, had his condition permitted him, if he had known or believed that the case would be tried by Judge Brashear; that he told his attorney, Stewart, that he could prove important facts, but did not inform him what the facts were; that neither Smith nor other complainants had any knowledge of the trial, or the judgment had

and rendered against them, until execution was placed in the hands of the sheriff; that several of them were informed by Stewart that the case had been finally disposed of, and that they had no knowledge that it was reinstated on the docket; that Stewart told Smith that he was not present, when the judgment was announced by Judge Brashear; that he was too sick to appear in court, and that he did not believe judgment would be rendered in his absence; that their co-surety, Thompson, was made defendant to this suit with them; that he and they made common defense, and that plaintiff should not be permitted to dismiss as to him; that his estate, if he be dead, is solvent, and, if complainants are required to pay the judgment against them, they are entitled to have contribution from said Thompson, if he be living, and, if he be dead, from his estate, and to allow an order dismissing him to be entered nunc pro tunc would deprive them of their rightful remedy against him, if they are held liable for said judgment. To this trial amendment, appellant excepted generally and specially to every allegation, challenging the sufficiency of each one to authorize the court to vacate the judgment and retry the cause; and he further excepted because the plea was not sworn to. And, by way of replication to said petition, appellant specially averred that neither himself nor his counsel had, by word or act, given complainants, or any one of them, cause to believe that his suit would not be tried before Judge Brashear. And he further alleged that his suit was never dismissed by his knowledge or consent, or that of his counsel, and that said cause could not be legally dismissed by complainant Smith, and that said cause was reinstated upon the docket at the same term at which it was dismissed by the plaintiff in said suit; that, so soon as appellant's counsel knew that his plea in reconvention had been dismissed, he moved the court to reinstate the same in court. And he further averred that he had been urging the trial of his suit at every term of the court since it was instituted, but that his efforts to bring the case to trial had been defeated by the plaintiff Smith and his counsel, and that, when the cause was called by Judge Brashear, counsel for the plaintiff Smith announced "Ready," and jury was waived, and the cause was tried by Judge Brashear. and that after hearing the evidence, and arguments by counsel for appellant and counsel for plaintiff and his sureties, the judge took the case under advisement, and rendered judgment for appellant on the next day. when neither appellant's counsel, nor counsel for Smith and his sureties, were in the court. Appellant further alleged that S. D. Thompson was dead when the said cause was tried, and the judgment was rendered against appellees. The exceptions to the original and amended petition were all overruled, and appellant excepted; and the judg-



ment rendered on the 10th of April, 1896, for appellant and against complainants was set aside, and S. D. Thompson was dismissed from the suit, and it was adjudged that appellant take nothing by his plea of reconvention, and that the plaintiff in said suit, J. E. Smith, and his sureties upon the injunction bond (appellees here), recover all costs incurred in this suit since the service of the writ of injunction upon the defendant, H. Wilson. To which judgment Wilson gave notice of appeal to this court.

The first question which presents itself for our determination is, was the order of the court below, vacating the judgment rendered on the 10th day of April, 1896, for defendant Wilson, upon his plea in reconvention, and reopening the case for trial, authorized under the pleadings and facts disclosed by the record before us? If this question be answered in the negative, the vacating order itself, and all the subsequent proceedings of the court in that cause, must be set aside and held for naught, and the suit of the appellees be dismissed at their costs, and thus leave in full force and effect the judgment rendered by Judge Brashear for appellant against appellees in cause No. 3,737 on the 10th of April, 1896. Judge Brashear, as has been stated, had exchanged seats with Judge Burnett, the judge of the district of which Houston county is part; Judge Brashear being judge for the district composed of the county of Harris. The object of the exchange was to have cases on the Houston county docket, in which the judge for that district was disqualified, tried. But that Judge Brashear had authority to try any case on the Houston county docket, other than those in which Judge Burnett was disqualified, is a proposition which we apprehend none will question. That cause No. 3,737 was called by the judge, and that the parties plaintiff and defendant appeared by their representative counsel, and announced "Ready for trial," and that a jury was waived, and that the trial proceeded regularly, evidence was adduced, and the cause argued by counsel, both for the plaintiffs and the defendant, and that the judge, after the argument had closed, directed defendant to produce his book of accounts in court, and held his judgment in abeyance until the morning of the next day, and in the morning the judge examined the books of defendant in the absence of counsel both for plaintiff and defendant, and fixed the amount of damages to which defendant, in the judgment of the court, was entitled, and rendered judgment accordingly, are all facts conceded, and are all stated in the conclusions of fact filed by the judge who tried this cause, and rendered the judgment from which this appeal is made. It is the well-settled law of this state that, to entitle a party to a new trial after the adjournment of the court, he must be able to show that he was prevented from making a valid defense to the action in which the judgment had been rendered against him by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his

part. Vide *Plummer v. Power*, 29 Tex. 7; *Burnley v. Rice*, 21 Tex. 171; *Vardeman v. Edwards*, id. 737. It is not charged that there was fraud or misconduct on the part of the defendant or his counsel in bringing on the trial, and obtaining the judgment for defendant under his plea in reconvention. Had there been such charge, there is no evidence in the record, that we have discovered, that would support it. It is said in the pleadings on the part of appellees (and this is repeated in the findings of the court) that there was an understanding on the part of the judge of the district, and the bar of Crockett, that only such cases would be tried by Judge Brashear as the judge of the district was disqualified from trying. Such may have been the understanding generally, but unless there is evidence to connect counsel of appellant with such understanding, and that thereby plaintiff Smith and his bondsmen were misled to their injury, such understanding could afford no ground for setting aside the judgment. There is also something said in the finding of the judge about the ill health of the counsel who represented the appellees. But the fact remains that he did appear in court, that he announced "Ready for trial," and that he participated in the trial, and argued the cause before the judge. In the absence of anything to the contrary, this court must presume that the attorney who represented appellees knew his duty to his client, and that he faithfully discharged that duty; and, if the evidence showed otherwise, still the plaintiff would not be entitled on that ground to have the judgment set aside, and the case reopened, nor would the fact that appellees were advised by their counsel that the case would not be tried by Judge Brashear. The mistake or ignorance of a party's counsel will not relieve him from a judgment rendered against him. Vide *Vardeman v. Edwards*, *supra*. It would be dangerous doctrine, indeed, to hold that a party who is absent when his cause is tried may at the next term of the court have the judgment against him vacated, and the case reopened, upon the ground that his counsel was ignorant of the law or the facts of the case, or, as appears in this case, from the affidavit of appellee Smith, that the client had neglected to inform his counsel of evidence material to his defense.

The judge's conclusions of law embrace several propositions, only two of which need be considered in deciding the question we have been discussing; and one of these propositions we have, we think, shown to be erroneous, in what we have said touching the grounds on which the application for vacating the judgment is based in the pleadings of the appellees. The proposition we here refer to is presented in the second of the judge's conclusions of law, to the effect that the plaintiff has shown such a case of mistake or excusable neglect as to entitle him to have the judgment complained of vacated, and the case reopened and tried upon its merits. We will only add to what we have previously said upon the subject that the

rule which permits a judgment to be vacated, and a new trial granted, after the expiration of the term of the court at which the judgment was rendered, in express terms declares that the applicant must be himself without fault or neglect.

The other conclusion of law which we propose to consider is that the judgment rendered on the 10th of April, 1896, is not a final judgment. This conclusion is based upon the undisputed fact that S. D. Thompson, one of the sureties upon the injunction bond given by the plaintiff when he sued out the injunction against defendant, Wilson, was a party defendant to this suit, and that the record in that case shows no suggestion of his death prior to the judgment, nor any order dismissing him, for any cause, from the case; and, if this conclusion of the judge be correct, there was no error in enjoining the execution of the judgment, and, when enjoined, it would doubtless fall within the discretion of the court whether to allow the judgment to be vacated, only to make an entry nunc pro tunc of an order of dismissal, or to reopen the case for retrial upon its merits. But, while it is an admitted fact that Thompson was a party defendant, it is also an indisputable fact that he died several months, at least, before the judgment was rendered. While it is questionable whether the judgment be a final one or not, we are of the opinion that, under the decisions of our supreme court, it should be held to be final. In the case of *Gullett v. O'Connor*, 54 Tex. 408, it was held that a judgment was final which failed to make any disposition of party defendant who had entered a disclaimer. In *Burton v. Varnell*, 5 Tex. 139, and in *Houston v. Ward*, 8 Tex. 124, the judgments were held final, though no disposition, so far as disclosed by the minutes, was made of parties defendant who had not been cited. In *Alston v. Emmerson*, 83 Tex. 231, 18 S. W. 506, in which a decree of partition of land failed to mention one of the parties shown in the pleadings to have an interest in the land, it was held that, to support the judgment, it might be presumed that some reason was shown in the proceedings for the omission in the decree. So it may be presumed, we think, that the death of Thompson was shown at the trial, and therefore no judgment was rendered against him. The omission of an order of dismissal as to a party not served, or of a party who has died pending the litigation, is a mere formal defect, which does not injure the parties actually litigant, and they should not be permitted to object to the judgment for such defect. Such judgments are assuredly not void, and, not being void, their execution cannot be restrained for mere formal defect.

The order of the court made in this case, vacating the judgment rendered in cause No. 3,737 on the 10th of April, 1896, was erroneous, and, being so, it and all judicial proceedings had in said cause No. 3,737 since said date are set aside and held for naught, and the judgment rendered for appellant in said cause

on the 10th of April, 1896, is declared to be unaffected by said proceedings; and it is further adjudged and ordered that appellees' suit be dismissed, and that appellant recover his costs in this and the court below.

## MISSOURI, K. & T. RY. CO. OF TEXAS v. CHAMBERS.<sup>1</sup>

(Court of Civil Appeals of Texas. Dec. 31. 1897.)

LIABILITY TO EMPLOYEES—NEGLIGENCE—INSPECTING CARS—DEFECTIVE CARS—ASSUMPTION OF RISKS—INSTRUCTIONS—OBVIOUS DEFECT—DAMAGES.

1. Plaintiff was permanently injured, rendering him unable to walk without a body brace and crutches, or to sit up without assistance. At the time of the accident he was 27 years old, and prior thereto was in good, sound health, sober and industrious, and earning from \$60 to \$75 per month. Held, that a verdict of \$11,500 was not excessive.

2. It is the duty of a railroad company, in order to protect their employes from injuries, to inspect the cars of other companies, used upon its road, as it would inspect its own cars; and if such cars are sealed, and if the exercise of ordinary care requires it, it is its duty to break the seals, remove the freight, and inspect the inside of the cars.

3. A brakeman on a freight train does not, by accepting such employment, assume the risks incident to the negligent inspection of the cars therein by the company.

4. When a certain portion of a charge, excepted to as assuming a fact, taken in connection with a preceding portion of the charge, not excepted to, clearly left that fact for the jury to decide, it was not reversible error, even when, if taken alone, such charge would be objectionable on that ground.

5. In an action by an employe against a railroad company for personal injuries sustained by reason of a defect in a car, an instruction that, if the defect was obvious, then plaintiff could not recover, and defining "obvious defect" to be a defect which one, by the exercise of ordinary care, would discover, is not erroneous.

Appeal from district court, Grayson county. Don A. Bliss, Judge.

Action by T. M. Chambers against the Missouri, Kansas & Texas Railway Company of Texas to recover damages for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

T. S. Miller and Head, Dillard & Muse, for appellant. C. B. Randell and J. W. Finley, for appellee.

HUNTER, J. This suit was filed June 30, 1890, by the appellee, to recover damages from appellant for personal injuries sustained by him on the night of June 17, 1896, while he was engaged in the performance of his duties as brakeman on one of appellant's freight trains. He alleged that while in the performance of his duty, using ordinary care for his own safety, he was injured by reason of the pulling out, giving way, and breaking of a hand hold in a ladder on one of the cars in one of defendant's trains at the city of Denton, Tex.; that said hand hold and its fastenings were old and worn and out of repair, and that

<sup>1</sup> Writ of error denied by supreme court.

by reason thereof they gave way, pulled out, and broke, and allowed him to fall, and he was thus seriously and permanently injured, and that, if the defendant had used ordinary care to furnish for his use cars, hand holds, and fastenings properly constructed, and in proper repair, and reasonably safe for use, the injury would not have occurred; that the unsafe condition of said car hand hold and fastenings was known to defendant, or by the use of ordinary care might have been known, and was not known to plaintiff. The defendant denied that the injury was caused by its negligence, or by any want of ordinary care, and alleged that, if there was any defect in said hand hold or its fastenings, it was latent,—that is, could not be discovered by the exercise of ordinary care; that said car belonged to a foreign line of railway, was loaded and sealed, and that, if there was any defect in the hand hold or its fastenings, it was not discoverable in the exercise of ordinary care, without unsealing the car and unloading it; that it was a general custom among railway companies, and of the defendant company, to receive foreign cars when loaded and sealed, without unsealing and unloading them, and that plaintiff knew or was chargeable with knowledge of this custom of defendant, and by remaining in defendant's employment assumed the risk of being injured by reason of any defect that might be in any such car which was not discoverable by the customary inspection made by defendant in such cases; that if defendant was mistaken as to the defects being latent or hidden, and if the same were open, then the same were patent to common observation, and plaintiff knew, or in the exercise of proper diligence might have known, of said defects, and if he failed to discover them he was guilty of contributory negligence, and hence ought not to recover. Our statute supplies a general denial to this answer. The cause was tried by a jury on the 20th day of March, 1897, and a verdict and judgment were rendered on that day in favor of plaintiff for \$11,500, and to reverse which this appeal is prosecuted.

The record discloses, in substance, the following facts: The appellee was, on the night of June 17, 1896, in the employment of appellant as a brakeman on a freight train, which at 10:15 o'clock that night was running southward at Denton station, and as the train approached Denton, it having orders to lie by on a side track for a live-stock train to pass it, it became necessary for appellee, who was on top of the train in the discharge of his duties, to go to the forward end of the train, while in motion, running at the rate of 10 or 12 miles an hour, and get on the engine, so that when the switch stand was reached he could alight from the engine and throw the switch, and turn the train in upon the side track. In reaching the engine, it was necessary for him to descend from the top of the box car next to the engine, on a ladder composed of iron rounds screwed at each end to the right-hand side of the car, within two inches of the front

end thereof. In descending on this ladder, and when his feet had about reached the bottom round, with his left hand holding to the second round from the top, he was swinging his right foot and hand to the rear end of the tender when the round of the ladder held in his left hand gave way, caused by the lag screw in the hind end pulling out, and the round at that end, parting from the side of the car, broke off the front end of the round, and appellee fell to the ground, and by the motion of the train was thrown against a switch stand, which struck him in the abdomen, and seriously and permanently injured him, rendering him unable to walk without a body brace and crutches, or even to sit up without assistance. He requires constant attention and nursing, and it is probable that his injuries will remain during his life, and seriously affect his ability to labor and earn a living.

The car from which he fell did not belong to appellant, but was the property of the Chicago, Milwaukee & St. Paul Railway Company, and was attached to this train at Denison, Tex., about 6:55 p. m. of that day, consigned to El Paso, Tex., via Ft. Worth. It was loaded and sealed, and had arrived at Denison from Kansas City, Mo., at 4:40 p. m. of that day. It remained in appellant's yards at Denison 2 hours and 15 minutes, and was inspected by appellant's car inspectors during that time. The evidence of appellant's witnesses, who were on duty as inspectors of cars at Denison that day, tends to prove that their custom is never to break the seals of loaded cars for the purpose of inspecting them inside, and that on this day the two inspectors—one on each side of the train in question—began at the engine, and walked back to the rear, viewing and looking around, over and under the cars, to see if everything was in proper and safe condition. Their evidence tends to establish that they would sometimes climb the cars, and go over them, testing the brakes and ladders, but on this day they were rushed, and did not go on top of or over this train. They viewed the brakes and brake rods from the ground, and in the same manner inspected the ladders. They found nothing wrong with the car in question, but did not climb its ladders, nor take hold of the rounds to see if any were loose. If they had found one loose, they would either have repaired it as it stood, or set out the car, and had it repaired before leaving Denison, because, they testified, it was dangerous to use a car when the rounds of the ladders are loose. They were short of help that day, and did not make as close an inspection as they sometimes did, though the general custom at Denison was to inspect cars by sight only, and not to climb the cars to make inspections. By climbing the ladders one could tell whether the rounds were loose, when the defect would not appear to the sight. They very often did not do this. They were shorter of men at that time than they had been. Sometimes they would fall to do any climbing, on account of being hurried with their work. In short, we find,

from the undisputed evidence of appellant's own witnesses, that this car was not inspected on the outside in an ordinarily careful, skillful manner, and, if it had been, the defective fastenings of this round in the ladder would have been, in all reasonable probability, discovered and repaired, and the injury would not have occurred. The appellee had not previously had occasion to use the car, and did not know of the defect. The defect consisted in the screw which held the hind end of the round of the ladder being loose, caused by the wood around it becoming rotten and decayed, so that the threads of the screw had nothing binding on them to hold them fast in the wood. Appellant's evidence tends to show that the defect was discoverable from the inside of the car only. The appellee was 27 years old, and prior to this injury was in good, sound health, sober and industrious, and was earning from \$60 to \$75 per month. His injuries have permanently impaired his health, inflicted upon him pain and suffering, both of a physical and mental nature, and have rendered him, in all probability, unable to earn a living the balance of his life, or, at least, have greatly impaired his ability to do so. The damages sustained are not unreasonable or excessive, at the sum fixed by the jury.

The third assignment of error is as follows: "The court erred in giving the following paragraph of its charge to the jury: 'If the car, the hand hold on which plaintiff claims was defective, was received by defendant from one of its connecting lines, already loaded and under seal, the defendant would not be required to have said car unloaded or the seal broken, in order to enable it to look for defects therein, unless the exercise of ordinary care requires the defendant so to do,'—such charge being erroneous, in that it leaves it to the jury to say whether or not the exercise of ordinary care requires railway companies to break the seals and unload and inspect on the inside all cars tendered to them by connecting lines." The evidence in this case proves that, by a reasonably proper and ordinarily careful inspection of this car on the outside, the defect which caused the injury would have been discovered, or, at least, such signs of defect as would have suggested, to any ordinarily prudent, competent, and skillful inspector of cars, the necessity of going inside of the car to see if the fastenings were safe, and to repair them on the inside, if it could not be done from the outside. And, if the fastenings were discovered to be loose and defective from the outside, it was the duty of the inspectors to go inside, if necessary, and see and know that they were reasonably safe for use before the car was allowed to depart in the train, if in the performance of this duty they had to break a dozen seals and unload the entire car, or else decline to haul it at all. It does not appear that the car was loaded with perishable goods, or that there was any necessity for rushing it to its destination, and, even if there was such necessity, it does ap-

pear that it lay in appellant's yards at Denison for 2 hours and 15 minutes, showing ample time for a full and careful inspection. In *Railroad Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, Justice Harlan, in discussing the duty of the master to inspect foreign cars, quotes approvingly from the trial judge's opinion in that case the following: " \* \* \* It would be most unreasonable and cruel to declare that, while the faithful workman may obtain compensation from a company for defective arrangement of its own cars, he would be without redress against the same company if the damaged car that occasioned the injury happened to belong to another company." He cites the case of *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344, and quotes approvingly from it, as follows: " \* \* \* When cars come to it [the railway company] which have defects visible or discoverable by ordinary inspection, it must either remedy such defect, or refuse to take such cars; so much, at least, is due to its employes. The employes can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. The rule imposing this responsibility is not an onerous or inconvenient or impractical one. It requires, before a train starts, and while it is upon its passage, the same inspection and care as to all the cars in the train." Continuing, Justice Harlan says: "In a later case (*Goodrich v. Railroad Co.*, 116 N. Y. 398, 401, 22 N. E. 397) the same principle was announced, the court saying: 'It was decided in *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344, that a railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars; that it owes this duty as master, and is responsible for the consequences of such defects as could be disclosed or discovered by ordinary inspection; that when cars come in from another road which have defects, visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them. This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon the defendant's road, or furnished to its employes for transportation. When so furnished, the employes whose duty it is to manage the trains have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer.'" Justice Harlan then concludes the undivided opinion of the supreme court as follows: "We are of opinion that sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employes to dangers arising from such defects in foreign cars as may be discoverable by reasonable inspection before such cars are admitted into its trains." Justice Stayton, in *Railway Co. v. Carlton*, 60 Tex. 403, said: "It is, however,

certainly true that the statutes of this state do not compel any railway company within this state to receive and haul a car of another road which is so defectively constructed, or otherwise unsafe, as manifestly to imperil the life or limb of a single employé." See, also, *Jones v. Shaw* (Tex. Civ. App.) 41 S. W. 693; *Railway Co. v. Kernan*, 78 Tex. 297, 14 S. W. 668; 3 Elliott, K. R. § 1279, and note 2. We think the court properly left it to the jury to say, under all the evidence, whether ordinary care on the part of the inspectors required them to inspect the car on the inside, and we overrule this assignment of error.

The fourth and fifth assignments of error are based upon the proposition that appellee, by accepting employment as brakeman in the freight-train service of appellant, assumed the risks incident to the negligent inspection of cars, whether he knew of the careless manner in which they were inspected or not, as he thereby assumed to understand that such was the manner of inspection, and was in law chargeable with such knowledge, whether he possessed the same or not. We cannot subscribe to such a proposition as this. It is carrying the doctrine of assumed risks further than we are willing to extend it. We think that public policy would not sanction such a cruel principle in the management and operation of any business requiring experience, knowledge, and skill, and which is known to be highly dangerous, even with the most careful management, to the lives and limbs of its operatives. See *Railway Co. v. Eberhart* (Tex. Sup.) 43 S. W. 510.

The sixth assignment of error is as follows: "The court erred in giving to the jury the paragraph of its charge No. 16, as follows: 'Again, if you believe from the evidence that said defective condition of the said hand hold was of such a nature that it would be obvious, and would be seen by a servant of the company, in the exercise of ordinary care, when he came to use the same, then plaintiff, when he came to use said hand hold, in the exercise of ordinary care, would have discovered such condition before he was injured, then he could not recover,'—such charge being erroneous, in that it assumes that the hand hold which caused the injury was defective, when this was one of the contested issues in the case; and also in that, notwithstanding the defects, if any may have been obvious, the jury was authorized to excuse plaintiff, if, in the exercise of ordinary care, he would not have discovered such obvious defect, the law being that an employé is chargeable with notice of patent and obvious defects." Counsel for appellant make two propositions under this assignment, as follows: (1) "An employé is chargeable with patent and obvious defects, whether he has knowledge thereof or not. It is negligence not to see an obvious or patent defect." (2) "The charge complained of assumes that the hand hold was in a defective condition, and is upon the weight of the evidence."

As to the second proposition, the court had in the tenth paragraph of its charge submitted the facts pleaded by the plaintiff as constituting the defect, and the negligence of the master in respect thereto, and charged them as follows: "If you believe, further, from the evidence that the fastenings of said hand hold were worn, out of repair, and not reasonably safe for use; and if you believe, further, from the evidence that the said condition of said hand hold and its fastenings was known to the defendant before the time of said injury, or ought to have been known to it, in the exercise of ordinary care, before said time; and if you believe, further, from the evidence that plaintiff would not have received his said injury if defendant had exercised ordinary care; and if you believe, further, from the evidence that plaintiff himself at the time was using ordinary care for his own safety,—you will find for the plaintiff." This paragraph of the charge, taken in connection with the eleventh and twelfth paragraphs, we think clearly left it to the jury to say whether the car was defective, and we are inclined to think that the error here complained of in the second proposition did the appellant no harm.

As to the alleged error pointed out by the first proposition, the charge in this paragraph, as well as in several others, fully and clearly informed the jury that, if the defect was obvious, then the plaintiff could not recover, and defines "obvious defect" to be a defect which one, by the exercise of ordinary care, would discover. We think this definition is correct, as applied both to the master and to the servant, in the operation of freight trains; but ordinary care on the part of competent inspectors of cars, whose duty it is to hunt for defects, and who are presumed to be skilled in detecting and finding them, may and does mean a great deal more than when applied to a brakeman who, if he faithfully serves his master in the particular line for which he was employed, may have no time to look for defects, but has the legal right to assume that the master will have competent and skillful inspectors to look after that department of the business, and furnish him reasonably safe appliances to use in the performance of his duties as brakeman. Besides, it was at 10 o'clock at night when this injury occurred, and at a time when such a defect would probably not be seen by the brakeman; but it was daylight when the inspectors did their work of inspecting this car, and, with the exercise of ordinary care in the performance of their peculiar duty, they should have discovered it, and to them, therefore, it was obvious, while, under the circumstances, it was not so to the plaintiff. It was their duty, in the exercise of ordinary care, to inspect the ladder, and every round in it because they knew that if one round was loose, and should pull out and break off while the brakeman was on it, it would most probably cause his injury or death, and, if they had

thus inspected the ladder, the evidence of its condition shows that they would have discovered the defect that caused the injury; while, on the other hand, the faithful brakeman, with his whole mind fixed on his particular duties, and on how to perform them in the most efficient manner, and with the least delay to his master's train, had no time to inspect the ladder before he leaped upon it and swung off in the dark of the night, in his rapid course, to do his master's work in the manner required of him. In such a case the defect would have to be quite obvious, before the writer would require him to discover it or charge him with knowledge thereof.

The seventh and eighth assignments of error, in our opinion, are not well taken.

The ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth assignments of error complain of the court's action in admitting and excluding evidence, and are all overruled, as containing no merit.

And we also overrule the fifteenth assignment, which complains that the verdict was excessive, and the sixteenth, complaining that the verdict was contrary to the evidence in the certain particulars therein named, as what we have said answers fully, we think, the points of objection to the verdict here insisted upon. We find no error in the judgment, and order that it be in all things affirmed.

#### GILLEY v. WILLIAMS.

(Court of Civil Appeals of Texas. Dec. 15, 1897.)

#### TRESPASS TO TRY TITLE—IMPROVEMENTS—NOTICE OF ADVERSE TITLE—RECOVERY OF RENT.

In trespass to try title, where a common source of title was shown, but it appeared that the deed from the common source under which defendant claimed did not relate to the lot in question, and that defendant purchased and placed his improvements on such lot after having been repeatedly advised by plaintiff's vendors of their title thereto, and also of their determination to assert such title, defendant's plea of improvements in good faith was not supported by the facts shown.

#### On Rehearing.

Where it was found that defendant's improvements on the lot in controversy were not made in good faith, plaintiff should have been allowed the rental value of the land inclusive of the improvements, instead of rent for the land alone.

Appeal from district court, Bexar county; R. B. Green, Judge.

Trespass to try title by J. M. Williams against Julius Caesar Gilley. From a judgment in favor of plaintiff, defendant appeals. Modified.

T. F. Shields, for appellant. Geo. B. Taliaferro, for appellee.

JAMES, C. J. Action of trespass to try title. There was a common source of title shown, to wit, C. L. Dignowity. The court was warranted by the facts in finding that the

deed from the common source under which appellant claims did not relate to the lot sued for and described in that of plaintiff, and therefore we conclude that the judgment should be affirmed upon the question of title. Defendant pleaded improvements in good faith. The conclusions filed by the court show that the judge arrived at the conclusion that when defendant purchased the lot, and when he placed his improvements thereon, he did neither in good faith. The testimony presented by plaintiff was, in substance, that, prior to the time defendant contracted with Mrs. Purkiss to purchase from her the lot, Hildebrand & Stribling (plaintiff's vendors) sent men to fence the lot, who were driven off by Mrs. Purkiss. Thereupon defendant, being informed of this, went to see Hildebrand & Stribling, and stated to them that he wished to buy the lot, and that Mrs. Purkiss claimed it, and he was by them informed of their title, and was warned that if he bought from Mrs. Purkiss he would buy their property, and with it a lawsuit. He nevertheless went on and contracted with Mrs. Purkiss, and a year afterwards, after completing his payments, he took a deed from her. During this time he had called once or twice on Hildebrand & Stribling, on which occasions they again explained to him their title, and their determination to assert it, and warned him. He bought the lot, as he testified, because he believed Mrs. Purkiss' statement that the lot was hers. There were no facts or circumstances in evidence occurring after his purchase that made his relation to the lot different from what it was at the time of his purchase. In reference to reasonable grounds for his believing he had the better title,—that is, if the court believed the facts to be as stated by plaintiff's witnesses. A person might, under certain circumstances, we think, be protected in his improvements, although advised of the adverse claim, by purchasing and improving on his vendor's assurance that his title was good; but some evidence would certainly be demanded in such case going to show some reasonable ground for relying and acting upon such assurance, which the facts of this case do not show. Even then, the reasonableness of such grounds of belief would be a question of fact, under all the circumstances. Defendant is at the disadvantage of having the fact of good faith in purchasing and improving found against him in the district court. We have hesitated to affirm the judgment on this issue because of the hardship it apparently entails on defendant, but we find that we cannot with any propriety disturb the result reached on the facts in the district court. The petition asked for a judgment for rents, and the court allowed a recovery for same for two years prior to the action down to the date of trial. There was no error in this. The judgment is affirmed.

#### On Rehearing.

FLY, J. An opinion was heretofore rendered in this case by this court through Chief Jus-

tice JAMES, but, upon ascertainment afterwards of his technical disqualification to sit in the cause, a rehearing was granted, and his disqualification was entered. Upon a reconsideration of the case, we conclude that the opinion heretofore rendered made a correct disposition of the matters presented in the brief of appellant, and we adopt the conclusions of law and fact therein found. We conclude, however, that the cross assignment of appellee is well taken, and the court having found that the improvements were not made in good faith, that the rental value of the land, inclusive of the improvements, should have been allowed to appellee by the trial judge instead of rent for the land alone. *Evetts v. Tendick*, 44 Tex. 570; *Evetts v. Roth*, 61 Tex. 86. The court found that the rental value of the land, with improvements, was \$10 per month, and the judgment will be reformed so as to give appellee judgment for \$328.33 rents, instead of \$98.50, and as reformed will be affirmed.

JAMES, C. J., entered his disqualification, and did not sit in this cause.

#### STATE v. MARCKS.

(Supreme Court of Missouri. Jan. 25. 1898.)

Dissenting opinion by SHERWOOD, J.  
For majority opinion, see 41 S. W. 973.

SHERWOOD, J. The charge in this case is rape, of which defendant was convicted, and his sentence fixed at five years in the penitentiary. From the judgment he has appealed. The locality of the crime charged was a small kitchen on the ground floor, in which was a bed on which defendant and his wife slept. There were only three rooms on the ground floor, and these were let to defendant, who, in one of the other two rooms, carried on with his wife the business of coat-making or tailoring. The kitchen, which performed the triple function of kitchen, dormitory, and dining room, was separated from the other room by a little hall; and the upper rooms, leased to defendant's father, were occupied by the latter and his wife, and in one of them was carried on by defendant's father and mother the business of coat-making; and in the rooms devoted to this purpose, both above and below stairs, several hands were employed almost constantly during the usual working hours on week days. The date of the crime is fixed by the indictment and the evidence on April 1, 1895, and the venue laid in the bed in the kitchen. The testimony, in brief, of the prosecutrix, was to the effect: That on the 5th of March preceding she was 16 years old. That on the morning in question she came down from her mother's house to that of defendant's, to work at his business of coat-making. Defendant, it appears, was her

brother-in-law, and had been married to her sister only some five weeks. Arriving at her brother-in-law's at about 7 o'clock in the morning, and knocking at the kitchen door, where her sister and husband were, her sister told her that they would not have any work, but sent her to the store on some errand. On her return her brother-in-law, who had been out, returned with a coat, which he directed his wife to take to pieces, etc. He then picked her up, threw her on the bed, as it was his custom to do, and was wrestling with her, when her sister went out into the front room to put the two pockets in the coat, leaving them on the bed together. Then, the prosecutrix states, defendant suddenly seized her, held her hands across her breast with one of his, pried her legs apart (which were crossed) with his foot, and accomplished his purpose; she struggling, as she says, all she could, to prevent him. During the perpetration of the act, she says, she told him, "My God! Charley, you are killing me," when he said, "Oh, shut up," and then uttered some very vulgar expression. After he had gotten through, she says: "My sister was coming from the room,—he must have heard her coming, for he let me go; and I got up and brushed my hair, and sat back on a chair, so she wouldn't know any different." Asked what defendant did when her sister was coming into the room, she says: "I don't know what he did. I was so busy thinking that I didn't see what he did." Asked if she made any complaint right away, she said: "No sir; it was one week, exactly, in the evening, that I told my mother." Asked why she did not make any complaint at that time, she replied: "Because my sister hadn't been married to him long, and I didn't want to let it be known, to make her unhappy," and that it was on her sister's account that she said nothing. After the transaction on the bed was over, as previously stated, her sister came in, and then, asking her if she wanted it, gave her some coffee, which she drank, but that she didn't tell her sister while she was drinking the coffee, and that she "didn't intend to tell her." This was on Monday morning, April 1st. After she drank the coffee, prosecutrix went home, and felt pains that night, etc. On the next Saturday, she says, her brother-in-law, the defendant, came to her mother's home, and told witness they had some work for her to do, and told her to come down there on the following Monday. Accordingly, on the next Monday morning, one week from the time of the occurrence in the kitchen, she went down to defendant's house; but when she arrived there she was told there wasn't any work to do for defendant, but it was for the "old man," as defendant's father was called; and that she was angry when she heard that, and said she didn't want to work for the old man, because he scolded so much. She then states that defendant, who was alone in bed in the kitchen, called her, and

said: "Come in here, Nell." "He called me five or six times, I guess. I was angry. He called me up to him, and put his arms around my waist. He was in bed. He says: 'You wouldn't do anything for anybody but me, would you, Nell?' I says: 'No; I won't do anything for you.'" "He says: 'Oh, yes you will.' Then he got angry, and took hold of me, and threw me over on the bed; and I had a hard tussle with him to keep him from assaulting me again the same way." That on that night, when she went to bed, she told her mother what had occurred. That the reason she told her was this: "I kept telling her I didn't want to go down there any more. She wanted me to go for some money he owed me. I says, 'I don't want to go down there any more, only when they are working.' I says, 'I never want to be in their house again.'" Her mother then asked her why she did not want to go down to defendant's house, and, speaking of it, she says: "Because my mother asked me, and it made me angry. She told me it was nonsense, the reason why I didn't want to go down there; and that made me angry, to think that she should say it was nonsense, when it was so important a case; and I couldn't keep from telling her, and I just told her." Shortly after this she went to consult a physician, who gave her some medicine, and after this she was confined to her bed for about a week, being attended by a physician; and then, on the 1st day of May, she was sent to the hospital, where she was found to be suffering with a virulent case of specific gonorrhea and peritonitis (arising from such gonorrheal condition); suffering a great deal of pain and high fever, and having a severe discharge. After remaining at the hospital about 12 days, although not cured, she wanted to go home, and was accordingly discharged. Testimony of several witnesses for the defense shows that the incidents which the prosecutrix relates as to her second visit to defendant's rooms really occurred on the 2d day of April, and not a week after the alleged ravishment. It was in evidence, also, that the prosecutrix was very affectionate in her demeanor towards defendant; would follow him around, sit in his lap, and kiss him, on repeated occasions, as testified to by girls who worked in the shop with her. There was also testimony of two witnesses that they (companions of defendant's) had seen him in copulation with prosecutrix, on his bed in the kitchen, on the morning of March 18th, next preceding the Monday of April 1st. Neither on direct nor cross examination of the prosecutrix did it appear that she was threatened or intimidated, or in any manner under the control of defendant, and thus prevented from making complaint. Nor does it appear that her opportunities were not the most ample for making complaint. Indeed, she states that she reached her mother's house shortly after the alleged occurrence,

but did not tell her mother until a week had elapsed, and then only after defendant had made a fresh assault upon her; and then only because she became angry at her mother because the latter insisted that the reason she gave for not wishing to go down to defendant's house was "nonsense." Nor does it appear when she told her sister of the occurrence, but it would seem that it was not until after her return from the hospital; and as she did not ascertain what ailed her until she reached the hospital, and as she remained there for 12 days, it is not at all probable that she conveyed the information to her sister until about the 15th of May, or thereabouts. Indeed, she intimates as much in her cross-examination, because she says, in reference to that, "When I was horribly diseased, then I couldn't help telling her." And thereupon, being asked the following questions, she made thereto the following replies: "Q. And that is the reason you told it? A. Yes; I told it because I wanted him punished. My sister's feelings was all gone then. Q. And, if Charley hadn't given you the disease, you wouldn't have told it, would you? A. I don't know for sure. I might have."

It must be quite apparent from what has been already related that there were no elements of corroboration in this case. Now, corroboration may occur in various ways: First, and chiefly, by the immediate complaint of the outrage, as soon as suitable opportunity offers. Such opportunity certainly was afforded immediately upon the sister of the prosecutrix coming into the room; and certainly such opportunity was again afforded when the prosecutrix returned home, where her mother was just after she drank the cup of coffee her sister gave her. But not a word is heard from the lips of the prosecutrix on the subject of the outrage until a week after its occurrence, until after she had suffered pain, and until after its attempted repetition on the morning of that day. And even then the revelation is not made to the mother as the result of a natural outburst of outraged feelings, but because she grew angry at her mother. In a word, her complaint to her mother was not the language of any emotion caused by the supposed occurrence, but simply hearsay, the relation of a past transaction, and therefore possessed of none of the probative force of a complaint, because lacking every dominant characteristic which makes such utterances receivable in evidence. When such a crime as the one here charged is perpetrated on a woman, it is so natural to tell at once of the foul occurrence, that the universal experience of mankind is that, when it happens, instinctively and immediately the injured female tells of it upon the first opportunity, in heart-broken and frenzied accents. Other features of corroboration consist in outcries made while the act is being done, in torn clothing, in disheveled hair, in exhibitions of physical and mental anguish, in the fact that the ravisher fled for it, etc. None of



these signs or symptoms appear in this record. On the contrary, so soon as she heard her sister coming, the prosecutrix got up and brushed her hair, and sat back in the chair, "so she wouldn't know any different." Defendant admitted the connection, and stated he had enjoyed similar favors on former occasions, but, when testifying, explicitly denied the rape, averring that the prosecutrix was entirely willing. In *State v. Patrick*, 107 Mo. 147, 17 S. W. 666, we ruled that when the defendant denied the criminal act, and when there were no such circumstances of corroboration as above set forth, there would be an equipoise of oath against oath, and that in such case the uncorroborated oath of the prosecutrix alone would be wholly insufficient to warrant a conviction. That case is decisive of this one, and in it the authorities are reviewed at considerable length, many of them which fully sustain the position there taken.

On the 8th of April, one week after the happening of the event charged in the indictment, the prosecutrix was examined by Dr. Marks, who found her laboring under an attack of specific gonorrhea. Over the objection and exception of defendant, he was permitted to prove what was the condition of the prosecutrix on the 8th of April, as already stated. Defendant, however, was not arrested or taken to the hospital until May 8th, five weeks after the date of the offense charged. When defendant reached the hospital, he was examined by the attendant physicians, and found, also, to have specific gonorrhea. This testimony was likewise objected to by defendant, but his objection was overruled. At the close of the evidence, defendant renewed his objection to the testimony respecting the prosecutrix having a certain venereal disease, and, by written motion, moved that the jury be instructed to disregard it, because it did not connect defendant with the offense charged. But this motion was denied, and defendant excepted. Among the instructions given the jury by the court of its own motion was one in these words: "The testimony concerning the prosecuting witness and the defendant having a venereal disease subsequent to the alleged assault is admitted only for the purpose of corroborating the statement of the prosecuting witness that the defendant had sexual intercourse with her. Such disease has no bearing upon the question of force or consent." *State v. Sanford*, 124 Mo. 484, 27 S. W. 1099, has been cited as supporting these rulings in regard to the admission and refusal to exclude such evidence. But that is a misapprehension of that case. There the offense was committed on a little girl only eight years of age, and within a week thereafter the accused being examined was found to have the same disease. The obvious distinction between that case and this is that here the examination of defendant took place five weeks after April 1st, and he was found to have the same complaint as that of the prosecutrix. But this period was entirely too remote to afford any corroboration of the prosecutrix's story. Be-

sides, it could afford no corroboration as to the alleged rape; and, as to the sexual intercourse, this the defendant admitted. So that the only effect of the introduction of such irrelevant evidence was to incumber the case with wholly extraneous matter, and tend to the prejudice of defendant with the jury. *Sutton v. Johnson*, 62 Ill. 209. Error was therefore committed in the admission of such evidence, and in denying the motion of defendant to exclude, by an instruction to the jury, evidence respecting the prosecutrix having a venereal disease. And, where irrelevant evidence is improvidently admitted, it is entirely competent for the court, on motion, to exclude it, at any time before the cause is finally submitted to the jury. *State v. Cox*, 65 Mo., loc. cit. 32; *State v. Owens*, 79 Mo., loc. cit. 631; *State v. Robinson*, 117 Mo., loc. cit. 664, 23 S. W. 1066; *State v. Welsor*, 117 Mo., loc. cit. 579, 21 S. W. 443; *Bank v. Murdock*, 62 Mo., loc. cit. 74. In the three cases first above cited from our own Reports, no objection was made to the admission of the obnoxious evidence, but this was not regarded as preventing the success of such motion to exclude. This is the rule, also, elsewhere. *Selkirk v. Cobb*, 13 Gray, 313; *Id.*, loc. cit. 315, 316, where no objection was made to the objectionable evidence until in the midst of the argument to the jury, and it was ruled that as the evidence was incompetent, and improvidently admitted, the trial court did right in its exclusion, even at that stage of the proceedings. See, also, to the like effect, *Sutton v. Johnson*, 62 Ill. 209; 2 *Thomp. Trials*, § 2354; 3 *Rice, Ev.* 225, 420; *Hangen v. Hachemelster*, 114 N. Y., loc. cit. 572, 21 N. E. 1046; *Wright v. State*, 81 Ga. 745, 7 S. E. 808.

The conduct of the defendant is morally as reprehensible as though the evidence showed him to be legally guilty of the crime alleged against him. But, though he cannot be punished for that offense, yet, if he was aware at the time of the illicit connection with his sister-in-law, though she was willing thereto, that he was infected with the venereal disease, her consent to the sexual act would be abrogated by the fraud practiced upon her, and would consequently constitute the sexual act an assault, for which he may be punished as for a common assault. The rule regarding this point may be stated, in short terms, to be that an assault is within the rule that fraud vitiates consent. *Reg. v. Bennett*, 4 *Fost. & F.* 1105; *Reg. v. Sinclair*, 13 *Cox, Cr. Cas.* 28; *Com. v. Stratton*, 114 *Mass.* 306. The charge of rape necessarily includes within it a charge of assault and battery, and under our statute and rulings a party charged with the former may be convicted of the latter. *State v. Webster*, 77 Mo. 566; *State v. Schloss*, 93 Mo. 361, 6 S. W. 244; *State v. White*, 52 Mo. App. 285; *State v. Karnes*, 51 Mo. App. 293; *State v. Phipps*, 34 Mo. App. 400; *Rev. St.* 1889, § 3950. It has been ruled in England that where a girl has been infected by a party knowing his own condition, and she ignorant of it, he may be convicted of an assault of doing her great bodi-

ly harm. *Reg. v. Bennett*; *Reg. v. Sinclair*, supra. In consideration of these authorities, and of the heinousness of the conduct of defendant, it may be well to call attention to section 3491, Rev. St. 1889. The judgment should be reversed, and the cause remanded.

I deem it proper to add some additional observations to my foregoing opinion, which, though concurred in in division by BURGESS, J., as to there being no rape, has been rejected in banc:

(a) The physical facts in this case, as already related, show that no rape was committed. The upstairs rooms were occupied by the father and mother of defendant, and in the room immediately adjoining was his wife. If the prosecutrix had screamed, she must have been heard. That she did not scream is shown by the testimony of other witnesses, as well as by the surrounding physical facts. And we have repeatedly ruled, both in criminal as well as in civil cases, that neither courts nor juries ought to stultify themselves by believing a witness whose testimony is shown to be in irreconcilable conflict with incontestable physical facts. *Payne v. Railroad Co.*, 136 Mo., loc. cit. 584, 38 S. W. 308. And when a witness testifies in the face of, and in opposition to, obvious physical facts, such testimony is not to be credited, even when sanctioned by the verdict of a jury. 136 Mo. 585, 38 S. W. 308. For these reasons, however reprehensible the conduct of defendant may have been, from a moral standpoint, I do not believe that he was guilty of the crime of rape.

(b) I have cited some cases from our own Reports, as well as from other states, showing that, where irrelevant evidence is inadvertently admitted, it is competent and proper, and the duty of the trial court, to exclude it, on motion, at any time before the cause is finally submitted to the jury. Chief Justice Marshall, when presiding at Burr's trial, thought this was good law. In *State v. Hope*, 100 Mo. 347, 13 S. W. 490, the ruling of this court in *State v. Cox*, 65 Mo., loc. cit. 32, on this point, was overruled; and, although not mentioned, the case of *State v. Owens*, 79 Mo., loc. cit. 631, was also overruled, as well as the earlier case of *Bank v. Murdock*, 62 Mo., loc. cit. 74. The majority opinion, in upholding *State v. Hope*, supra, not only overruled the cases and authorities already mentioned, but also overruled, without mentioning them, the following cases, of later date: *State v. Robinson*, 117 Mo., loc. cit. 664, 23 S. W. 1066, and *State v. Welsor*, 117 Mo., loc. cit. 579, 21 S. W. 443, which were unanimous opinions. Hereafter, when evidence is improvidently admitted, there will be no way of excluding it, under the ruling made in this case. But it is somewhat curious to note that *State v. Hope* was virtually overruled, though nothing was said about it, in *Heinrich v. City of St. Louis*, 125 Mo., loc. cit. 429, 28 S. W. 626, where it was said per Black, P. J., who had concurred in *Hope's Case*: "It is true, the court heard some evidence as to the

value of this strip of thirty by sixty feet, taken by itself; but no objection was made to it until long after it had been admitted, and no motion was made at any time to strike it out. The evidence having been received without objection, the plaintiff should have moved to exclude it." And in this opinion all the members of that division concurred.

## MEMORANDUM DECISIONS.

**RANDOLPH et al. v. UNITED STATES.** (Court of Appeals of Indian Territory. Jan. 14, 1898.) Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, February, 1898. Proceedings on the forfeiture of a bail bond against E. W. Randolph and another. From an order overruling defendants' motion to quash the summons, they appeal. Affirmed. G. B. Denison, N. B. Maxey, and J. P. Clayton, for appellants. Clifford L. Jackson, for the United States.

CLAYTON, J. The facts of this case are the same as those of the case of *Zufall v. U. S.* (decided by this court at the present term) 42 S. W. 760. For the opinion of the court, see that case. Judgment affirmed. THOMAS and TOWNSEND, JJ., concur.

**BETHEL v. BETHEL.** (Court of Appeals of Kentucky. Nov. 24, 1897.) Appeal from circuit court, Jefferson county. "Not to be officially reported." Action by J. S. Bethel against Mary C. Bethel. From an order denying defendant's counterclaim for divorce, she appeals. Reversed. Fairleigh & Straus, for appellant. O'Neal & Pryor, for appellee.

HAZELRIGG, J. The appellee, the husband, brought this action for divorce on the ground that his wife had abandoned him without his fault, to which she answered that the husband had abandoned her. She further averred, in an amended petition, that he had a confirmed habit of drunkenness, etc. The husband dismissed his action, and the case was tried out on the wife's counterclaim. Considerable proof has been taken, a recitation of which would be wholly unprofitable. It is sufficient to say that the wife failed to show such a confirmed habit on the part of her husband as the statute requires. We think, however, that there was a manifest abandonment of the wife by the husband, within the meaning of the statute, and that she is entitled to a divorce. The judgment is therefore reversed for a decree to that effect.

**CHESAPEAKE & O. RY. CO. v. BURDETTE et al.** (Court of Appeals of Kentucky. Nov. 16, 1897.) Appeal from circuit court, Boyd county. "Not to be officially reported." Action by Lizzie Burdette and others against the Chesapeake & Ohio Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed. Wadsworth & Cochran, for appellant. James Andrew Scott, for appellees.

BURNAM, J. This was an action by appellees to recover damages to a lot owned by them in the city of Ashland, Ky., which abuts on Railroad alley, in that city, alleged to have been occasioned by the construction and operation by appellant of a third railway track in the alley; the action resulting in a verdict and judgment thereon in favor of appellees for \$800. A careful reading of the record in this case discloses the fact that the case is almost

identical in its facts and in the errors complained of with the case of Chesapeake & Ohio Railway Company v. Gross, in which an opinion has been heretofore rendered by this court, and it is, therefore, unnecessary to again review them in the opinion in this case; but, for the reasons indicated and the errors pointed out in the opinion filed in the case of Railway Co. v. Gross (decided at this term of the court) 43 S. W. 203, the judgment herein is reversed, and the cause remanded for proceedings consistent with that opinion.

**COMBS et al. v. GODSEY et al.** (Court of Appeals of Kentucky. Dec. 7, 1897.) Appeal from circuit court, Perry county. "Not to be officially reported." Action by John J. Godsey and others against Gilbert Combs and others for possession of land. From a judgment for plaintiffs, defendants appeal. Affirmed. J. J. C. Bach and G. W. Fleenor, for appellants. T. H. Hines, for appellees.

**WHITE, J.** This action was begun in 1877 by appellees, and is in the nature of ejectment, but for some reason was transferred to equity, and tried by the court without a jury. The appellees claim about 250 acres of a 1,000-acre survey, and it is described by courses and distances. The original answer set out the claim of appellants to four boundaries, but does not disclose the fact as to whether they conflict with the 1,000-acre survey or not. It is conceded by appellants that this did not form an issue. After this, an amendment was filed, in which appellants claim that there was a division line run by the former owners of this land, and that appellants claim the land below the line, and as to this land below the division line they plead adverse possession for more than 15 years. At the instance of both parties, there were surveys made and reported to the court, and much proof was taken by deposition, and, after a delay of 17 years, the case was submitted to the court, who determined that the plaintiffs, appellees, were the owners, and entitled to the land claimed, and so adjudged, and from that judgment this appeal is prosecuted. From a careful reading of the proof, we are of opinion that the land embraced within the boundary adjudged to appellees is clearly within the 1,000-acre survey. It also seems to us that the surveys made establish the fact that neither of the four tracts claimed by appellants lies within the boundary of the 1,000-acre survey. The conditional line claimed does not appear to have been marked, and as described by the witnesses was uncertain. The title by adverse possession is not shown, so as, in our opinion, to divest appellees of the title to the land. Finding no error, the judgment of the circuit court is affirmed.

**COMMONWEALTH v. T. J. MEGIBBEN CO.** (Court of Appeals of Kentucky. Nov. 23, 1897.) Appeal from circuit court, Harrison county. "Not to be officially reported." Indictment against the T. J. Megibben Company dismissed, and the commonwealth appeals. Appeal dismissed. W. S. Taylor, Atty. Gen., for the Commonwealth. Blanton & Berry, for appellee.

**DU RELLE, J.** The dates of the judgment and of the lodging of the record in the clerk's office are the same as in the case of Com. v. F. S. Ashbrook Co. (this day decided) 43 S. W. 399. Appeal dismissed.

**DAVIDSON'S ADM'R v. MAY'S ADM'R.** (Court of Appeals of Kentucky. Dec. 9, 1897.) Appeal from circuit court, Floyd county. "Not to be officially reported." Action by W. H. May's administrator against J. M. Davidson's administrator. Referred to a commissioner, and judgment thereon for plaintiff, and defendant appeals. Affirmed. Walter S. Harkins

and J. F. Hopkins, for appellant. Jas. Goble, for appellee.

**GUFFY, J.** This was an action for the settlement of a partnership. It appears that May was the owner of a three-fourths interest in the business, and Davidson a one-fourth interest. The action was instituted in June, 1883, and the cause referred to the commissioner for a settlement, and the final judgment in the action was rendered February 12, 1894, which was in favor of plaintiff, May's administrator, for \$335, with interest from October 31, 1888. It was further adjudged that the estate of May pay three-fourths of the cost and the estate of Davidson pay one-fourth, and from the judgment aforesaid the appellant has appealed. It is insisted for appellant that the report of the commissioner is erroneous, and that judgment should have been rendered in favor of appellant for a considerable sum, while appellee argues that the judgment in favor of May should have been larger, but has prosecuted no cross appeal. It is conceded by the commissioner that it was difficult, if not impossible, to ascertain certainly the state of accounts between the partners. It is also contended by appellant that May was an incompetent witness. It does not appear whether the court ever acted upon appellant's exception to the testimony of May. May was a competent witness for certain purposes, but, of course, incompetent as to conversations or transactions had with appellant's intestate; but it does not appear that his testimony, as given in this case, comes within the rule forbidding him to testify, to such an extent as to prejudice the substantial rights of appellant. Neither does it appear that May was guilty of any fraudulent mingling or mixing of his individual accounts with those of the firm to such an extent as to render him liable for all money that appellant's intestate paid into the firm. From the evidence in this case, and the great length of time which had elapsed from the termination of the partnership until the final judgment herein, it seems to us that it would be impracticable to arrive at a more just or equitable settlement than has been made. We fail to discover any error in the judgment requiring a reversal,—in other words, it seems to us that, taking the whole case together, the final judgment of the chancellor is supported by the evidence introduced. The books of the partnership are not before us, and, even if they were, it is hardly probable that this court could arrive at a more equitable conclusion than that reached by the chancellor. The commissioner had the witnesses before him before making his report, and had access, it seems, to the books of the firm, and the court had before him the commissioner's report, and it is presumed was personally acquainted with the commissioner. He also had before him the witness, who testified orally upon the exceptions to the report, and he was presumably well qualified to reach a just and equitable decision. Judgment affirmed.

**FLANNERY v. CRAWLEY.** (Court of Appeals of Kentucky. Dec. 10, 1897.) Appeal from circuit court, Bracken county. "Not to be officially reported." Action by Mary Crawley against John Flannery on a promissory note. Judgment for plaintiff. Defendant appeals. Affirmed. Thomas H. Hines and George Doniphan, for appellee.

**BURNAM, J.** There are two questions in this case: First, is the note sued on by appellee the note executed by John Flannery to her deceased husband, Michael Conroy; and, second, did appellee's husband, previous to his death, give this note to appellee with the intention of vesting her with the title thereto. The instructions properly present this issue to the jury, and, so far as we are able to see, no error prejudicial to the rights of appellant occurred in the admission of incompetent testi-

mony, and it seems to us that the verdict of the jury was unauthorized by the evidence before them. For the reasons indicated, the judgment is affirmed.

**GLOBE TOBACCO WAREHOUSE CO. et al. v. McCORMACK et al.** (Court of Appeals of Kentucky. Nov. 19, 1897.) Appeal from circuit court, Jefferson county. "Not to be officially reported." Action by B. F. McCormack and others against the Globe Tobacco Warehouse Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed. Stone & Sudduth, for appellants. Carroll & Hagan, for appellees.

**WHITE, J.** The pleadings and facts in this case are similar, almost identical, with the case of Warehouse Co. v. Leach (this day decided) 43 S. W. 423. By consent of all parties, the two cases were heard together in the circuit court, but there are two appeals here. On the authority of the case of these appellants against Leach, the judgment of the circuit court is affirmed.

**KENTUCKY LIFE & ACCIDENT INS. CO. v. FRANKLIN (two cases).** (Court of Appeals of Kentucky. Dec. 18, 1897.) Appeal from circuit court, Hickman county. "Not to be officially reported." Action by Thomas L. Franklin against the Kentucky Life & Accident Insurance Company. Judgment for plaintiff, and defendants appeal. Affirmed. Geo. L. Husbando, for appellants. Thomas H. Hines, Thomas G. Poore, and E. T. Bullock, for appellee.

**HAZELRIGG, J.** These two cases involve the same questions this day determined in the case between the same parties. In that case weekly indemnity was recovered from the time of the injury until the filing of the petition. In the first case alone indemnity is sought from the time of filing the first petition until the filing of the second one, and, in the last-named case above, the indemnity embraced is that alleged to be due from the filing of the second petition until the end of the 52 weeks; that period being the time provided in the policy as the limit for recovery for total disability. On the principles announced in the former case (42 S. W. 1104), the judgments here involved are each affirmed. **WHITE, J.**, not sitting.

**LOUISVILLE & N. R. CO. v. McDONALD.** (Court of Appeals of Kentucky. Dec. 9, 1897.) Appeal from circuit court, Knox county. "Not to be officially reported." Action by W. H. McDonald against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed. Wilson & Rawlings and J. W. Alcorn, for appellant. R. L. Blakeman and Golden & Powers, for appellee.

**WHITE, J.** This is an action for damages brought by appellee in the Knox circuit court against appellant. The cause of action herein stated arose under the separate coach law. Appellee was deputy sheriff, and, in company with the sheriff, one John H. Catron, had a negro lunatic in charge, conveying the negro to the lunatic asylum. The conductor having required that the negro ride in the coach set apart for colored passengers, the sheriff and appellee, deeming it unsafe to leave the lunatic in that compartment without their immediate presence, went into that coach, and bring this action. The trial resulted in a verdict for appellee for \$1,000. This case is a companion case to the case of Railroad Co. v. Catron, decided December 1, 1897, by this court (43 S. W. 443). Appellee here was the deputy of Catron. The transaction was the same, and the witnesses sworn on the trial the same, as in the Catron Case. The opinion in the case of Railroad Co.

v. Catron, above, is adopted and made the opinion in this case. Wherefore the judgment is reversed, and cause remanded, with directions to grant appellant a new trial, and for further proceedings consistent herewith.

**LUNS福德 v. PLUMMER.** (Court of Appeals of Kentucky. Nov. 20, 1897.) Appeal from circuit court, Lee county. "Not to be officially reported." Action by Jeff Plummer against David Lunsford. Judgment for plaintiff. Defendant appeals. Affirmed. H. L. Wheeler, for appellant. Hill & Pollard, for appellee.

**HAZELRIGG, J.** It seems sufficiently clear from the evidence that the note for \$184.80 is the only one for which there was even a lien on the lot now owned by the appellee. This note has been paid, except a small amount, and the proof conduces to show that the owner of the note agreed to look to appellee personally for its payment, and released any lien therefor. The extent to which relief was granted in this action was to declare the lot of the appellee free from lien for purchase money, and to be unaffected by the judgment of sale in an action theretofore tried to which the appellee was not a party. The order of sale was void as to him, and this is the effect of the chancellor's decree, which seems to be fully supported by the proof. While the petition does not, in terms, purport to be one to quiet title, such is substantially the relief sought and granted by the chancellor. Judgment affirmed.

**SENGSTAK et al. v. EMISON.** (Court of Appeals of Kentucky. Nov. 17, 1897.) Appeal from circuit court, Franklin county. "Not to be officially reported." Action by Ben Emison against Walker & Sengstak. Judgment for plaintiff, and defendants appeal. Affirmed. Ira Julian, for appellants. John L. Scott & Son, for appellee.

**GUFFY, J.** This case was before this court on an appeal of this appellee against these appellants, and was reversed, because the court below did not allow this appellee anything for damages on account of these appellants having sold tobacco contrary to this appellee's order. It appeared that no denial had been made of appellee's allegation as to such selling, and, proof of the damage having accrued having been made, this court reversed the judgment, and permitted the lower court to allow further pleadings to be filed. It turned out, however, that the claim for damages had been denied of record, but that part of the record was not before this court upon the former hearing. 31 S. W. 461. After the return of the case, appellants filed an answer controverting the claim, but took no further proof, and the court below rendered judgment in favor of appellee for \$237, or, in other words, for \$250, subject to a credit of \$13, found to be due appellants on the former judgment; and to reverse this last judgment this appeal is prosecuted. It seems to us that the proof sustains the judgment of the court below, and that judgment is affirmed, with damages.

**STATE v. WESTLAKE.** (Supreme Court of Missouri, Division No. 2. Dec. 7, 1897.) Appeal from circuit court, Benton county; James H. Lay, Judge. Thomas Westlake was convicted of felonious assault with intent to kill, and appeals. Affirmed. The Attorney General and Saml. B. Jeffries, for the State.

**GANTT, P. J.** At the April term, 1897, of the Benton circuit court, the defendant was indicted for felonious assault with intent to kill D. C. Allen. He was duly arraigned, tried, and convicted, and sentenced to two years' imprisonment in the penitentiary. His motions for

new trial and in arrest were overruled, and he appeals to this court. He has filed no bill of exceptions, and there is no error in the record proper certified to this court, and the judgment is accordingly affirmed. **SHERWOOD** and **BURGESS, JJ.**, concur.

**STATE ex rel. DOWLEN v. RIGSBY** (Supreme Court of Texas. Dec. 23, 1897.) Application for writ of error to court of civil appeals, First supreme judicial district. Action by the state, on the relation of P. A. Dowlen, against W. L. Rigby. Judgment for defendant was affirmed by the court of civil appeals (43 S. W. 271). Application for writ denied. **M. L. Broocks**, Dist. Atty., and **Votaw**, **Chester & Dies**, for applicant.

**GAINES, C. J.** The court of civil appeals were inclined to doubt whether this proceeding was authorized by law, and we are disposed to agree with them. Growing out of that question is another as to the jurisdiction of this court, but, having examined the case upon its merits, we are clearly of opinion that it was correctly decided in the court of civil appeals. In any event, the application must be refused. The result being necessarily the same, we refuse the application without passing upon either of the jurisdictional questions.

**HODGE v. STATE.** (Court of Criminal Appeals of Texas. Jan. 26, 1898.) Appeal from Hunt county court; **W. H. Ragsdale**, Judge. Sam Hodge was convicted of violating the local option law, and appeals. Affirmed. **Mann Trice**, for the State.

**DAVIDSON, J.** Appellant was convicted of violating the local option law, and his punishment assessed at imprisonment in the county jail for a period of 20 days, and, in addition thereto, a fine of \$25 was assessed against him. There are no assignments of error, and the only ground of the motion for a new trial is that the judgment of the court is contrary to the law and the evidence. The evidence not being incorporated in the record, we cannot, therefore, revise this supposed error. No error appearing in the record, the judgment is affirmed.

**HODGE v. STATE.** (Court of Criminal Appeals of Texas. Jan. 26, 1898.) Appeal from Hunt county court; **W. H. Ragsdale**, Judge. Sam Hodge was convicted for violating the local option law, and appeals. Affirmed. **Mann Trice**, for the State.

**DAVIDSON, J.** Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail; hence this appeal. The only questions suggested for our consideration are the alleged insufficiency of the evidence to support the conviction, and the refusal of the court to give the special charge asked by appellant. In answer to this, it is sufficient to state that the record does not contain a statement of the facts proved on the trial. The judgment is affirmed.

**HOGG et al. v. STATE.** (Court of Criminal Appeals of Texas. Dec. 15, 1897.) Appeal from Nacogdoches county court; **H. E. Dunson**, Judge. **James S. Hogg**, **James I. Perkins**, and **James T. Gibson** were convicted of unlawfully killing a wild deer, and appeal. Affirmed. **Mann Trice**, for the State.

**HENDERSON, J.** The appellants, **James S. Hogg**, **James I. Perkins**, and **James T. Gibson**, were each convicted of unlawfully killing a wild deer in Nacogdoches county, and the punishment of each assessed at a fine of \$25; hence this appeal. The question raised by ap-

pellants in this case is the same as presented in the case of **Dickenson v. State** (decided at the Austin term, 1897) 43 S. W. 520, and also presented on motion for rehearing at the present term of this court, which motion has heretofore been overruled. It is not necessary to further discuss the question here presented, but the views expressed in said **Dickenson Case** are conclusive of this case, and the judgment in this case is accordingly affirmed.

**HOUGH v. STATE.** (Court of Criminal Appeals of Texas. Jan. 12, 1898.) Appeal from district court, Grayson county; **Don A. Bliss**, Judge. **S. L. Hough** was convicted of swindling, and appeals. Affirmed. **Mann Trice**, for the State.

**DAVIDSON, J.** Appellant was convicted of swindling, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal. There is neither a statement of facts nor bill of exceptions in the record. In the absence of a statement of facts, we cannot review the objections contained in the motion for a new trial to the charge of the court, nor to the refusal of the court to give the requested charges. No error appearing in the record, the judgment is affirmed.

**JONES v. STATE.** (Court of Criminal Appeals of Texas. Jan. 19, 1898.) Appeal from Collin county court; **M. G. Abernathy**, Judge. **Bob Jones** was convicted of violating the local option law, and he appeals. Reversed. **Abernathy & Beverly**, for appellant. **Mann Trice**, for the State.

**HENDERSON, J.** Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail; hence this appeal. This is a companion case to cause No. 1,492 (**Jones v. State** [just decided] 43 S. W. 981). The question raised in that case is identical with the question here raised. For the reasons there discussed, the judgment in this case is reversed, and the cause remanded.

**KINMAN v. STATE.** (Court of Criminal Appeals of Texas. Jan. 12, 1898.) Appeal from district court, Grayson county; **Don A. Bliss**, Judge. **E. F. Kinman** was convicted of incest, and appeals. Affirmed. **Mann Trice**, for the State.

**DAVIDSON, J.** Appellant was convicted of incest, and his punishment assessed at five years in the penitentiary, and he prosecutes this appeal. The record does not contain any bill of exceptions or statement of facts. Several charges were requested by appellant, but, in the absence of the testimony, we are unable to say that the court erred in refusing to give them. No error appearing, the judgment is affirmed.

**KINMAN v. STATE.** (Court of Criminal Appeals of Texas. Jan. 12, 1898.) Appeal from district court, Grayson county; **Don A. Bliss**, Judge. **E. F. Kinman** was convicted of rape, and appeals. Affirmed. **Mann Trice**, for the State.

**HENDERSON, J.** Appellant was convicted of rape, and his punishment assessed at 10 years' confinement in the penitentiary; hence this appeal. In the absence of a statement of facts, we cannot review the exceptions taken to the charge of the court in the motion for a new trial, nor the exceptions taken to the refusal of the court to give the requested charges. The charge as given by the court appears to be a correct enunciation of the principles of law as applicable to such a case. No error appearing in the record, the judgment is affirmed.

**Ex parte MERLE.** (Court of Criminal Appeals of Texas. Dec. 22, 1897.) Appeal from district court, Bexar county; Robert B. Green, Judge. Jacob Merle, being indicted for murder, brings habeas corpus to be admitted to bail, and, being refused, he appeals. Reversed. Tarleton & Jones, for appellant. Mann Trice, for the State.

**HURT, P. J.** Appellant was indicted for the murder of John J. Murteaugh, and resorted to the writ of habeas corpus for the purpose of securing bail. Upon the trial, he was remanded to custody, bail being refused, and from this judgment he appeals. We have carefully read the statement of facts, and believe the trial court erred in refusing appellant bail. Following our usual practice, we avoid a discussion of the testimony. The judgment is reversed, and bail fixed at \$5,000. Upon giving bond in said amount, in the terms and conditions of the law, the officer now holding appellant will release him.

**YOAKUM v. STATE.** (Court of Criminal Appeals of Texas. Jan. 26, 1898.) Appeal from district court, Fannin county; E. D. McClellan, Judge. Monroe Yoakum was convicted of burglary, and appeals. Affirmed. Mann Trice, for the State.

**DAVIDSON, J.** Appellant was charged by indictment with burglary in two counts,—the first with intent to commit the crime of theft, and the second with the intent to commit the crime of rape. He was convicted, and given four years in the penitentiary. Three errors are alleged in the motion for a new trial, there being no assignment of errors in the record. These are as follows: "(1) Because I did not have a lawyer to defend me; (2) that I did not have a fair trial; (3) that I did not put my hands on the house." This is signed by the defendant in person. There is nothing in the record to sustain either of these propositions; they are simply statements made in the motion. The testimony is not before us, and, so far as this record discloses, these grounds are not sustained. From the record, the trial appears to have been fair, the indictment charges the offense in appropriate language, the charge of the court was applicable to a state of facts provable under the allegations in the indictment, and the judgment is affirmed.

**GULF, C. & S. F. RY. CO. v. VIENO et al.** (Court of Civil Appeals of Texas. Jan., 1898.) Appeal from district court, Bell county; W. A. Blackburn, Judge. Suit brought by Edwin Vieno and another against the Gulf, Colorado & Santa Fé Railway Company to recover damages for the death of their minor son. From a judgment for plaintiffs, defendant appeals. Reversed. J. W. Terry and Chas. K. Lee, for appellant. A. M. Monteith, for appellees.

**FLISHER, C. J.** This is a suit brought by the appellees against the railway company to recover damages resulting from the death of their minor son while in the employ of the railway company against their consent. The recovery had below was solely based upon the theory that the minor son was wrongfully employed by the railway company, without the consent of his parents, and that at the time the appellant knew he was a minor, and placed him in a dangerous service. The facts show that he was instantly killed by being run over by one of the cars of the train upon which at the time he was performing the duties of brakeman. The court below submitted to the jury, as the only element of damages for which the plaintiffs could recover, the value of the services of their minor son from the time of his death to the time that he would have reached the age of 21 years. The ruling that we have this day made on a similar question in the case of *Railway Co. v. Beall*, 43 S. W. 606, based on the opin-

ion of the supreme court in response to a certified question in that case, disposes of this case. We are in doubt as to what course to pursue,—whether to reverse and remand, or to render a judgment here in favor of the appellant. It is clear, from the theory of the case submitted by the court below to the jury, and from the questions presented on this appeal, that the only question considered in the trial of the case was whether the appellant could be held liable in a common-law action by the plaintiffs for the value of the services of their minor son; and, if no other issue was raised by the pleadings, we would render judgment in favor of appellant. But there are some averments, although very general, in the petition, which might be construed, in the absence of a demurrer, as raising the issue as to the plaintiffs' right to recover, under the statute, for the damages they may have sustained, if any, resulting from the death of their son; and, in view of this condition of the pleadings, we reverse and remand the cause for another trial. Reversed and remanded.

**MULLER v. HOLT et al.** (Court of Civil Appeals of Texas. Dec. 8, 1897.) Appeal from Galveston county court; William T. Armstrong, Special Judge. Action by William Muller against Holt, Pabst & Leinbach. From a judgment in favor of defendants, plaintiff appeals. Affirmed. Harris & Harris, for appellant. Morgan M. Mann, for appellees.

**NEILL, J.** This is an action for the trial of the right to certain personal property levied upon by virtue of a writ of attachment issued out of the justice court of Galveston county in favor of the appellees against one E. W. Moore. The appellant filed his claimant's affidavit to the property in the court from which the attachment was issued, and, upon the trial of the case upon issues joined in that court, judgment was rendered in favor of Muller, from which judgment appellees herein appealed to the county court, and, upon a trial there before a jury, judgment was rendered in their favor, from which judgment this appeal is prosecuted. The appellant claimed the property by virtue of an alleged sale thereof made by Moore to him prior to the levy of the attachment. The appellees alleged in their tender of issues that the sale was fraudulent, and made by the vendor with the intent to defraud and cheat his creditors. The contention on the part of appellant was that the sale was bona fide, and made in consideration of a pre-existing debt due him from E. W. Moore. It was claimed by appellees that the alleged debt was fictitious and simulated. The only issue in the case is as to whether the alleged debt was fictitious. This issue was submitted to the jury by an appropriate charge, and we conclude that the evidence upon it was sufficient to support the verdict. It follows, therefore, that the assignments of error which complain of the insufficiency of the testimony are not well taken. The issue in the case was fully presented by the charge of the court, and by special charges, given at the instance of appellant, and there was no error in the court's refusal to give other special charges asked by him. The judgment of the county court is affirmed.

**RUMSEY v. GRA.** (Court of Civil Appeals of Texas. Dec. 15, 1897.) Appeal from district court, Waller county; T. S. Reese, Judge. Trespass to try title by Will Gra against A. W. Rumsey. From a judgment in favor of plaintiff, defendant appeals. Reversed and rendered. A. J. & J. D. Harvey and Lipecomb & Styles, for appellant. R. E. Hannay and H. M. Browne, for appellee.

**FLY, J.** The parties to this suit have agreed that the judgment of the district court should be reversed, and judgment rendered for appel-

lant. An inspection of the record shows that the suit was one of trespass to try title, instituted by appellee, and that he recovered judgment for the land, and that this court has obtained jurisdiction of the matter. In accordance with the agreement, the judgment of the district court will be reversed, and judgment here rendered in favor of appellant.

**STATE ex rel. BROWN et al. v. CALLAGHAN, Mayor.** (Court of Civil Appeals of Texas, Jan. 5, 1898.) Appeal from district court, Bexar county; J. L. Camp, Judge. Application for writ of mandamus by the state of Texas, on the relation of J. N. Brown and others, against Bryan Callaghan, mayor. From a judgment refusing the writ, relators appeal. Questions certified to supreme court. 43 S. W. 12. C. A. Keller and Mason Williams, for appellants. John A. Green, Sr., for appellee.

**NEILL, J.** This appeal is from a judgment of the district court refusing relators a writ of mandamus to compel the appellee, as mayor of the city of San Antonio, to order an election, to determine whether the public schools of said city should be placed under the control of a board of trustees. We presented to the supreme court the following facts, shown by the record in this case: "The city council of the city of San Antonio, a municipal corporation, on the 19th day of September, 1876, duly submitted to a vote of the majority of the property taxpayers of said city, the proposition as to whether said city should assume control of the public free schools within its limits, and, at an election duly held on the 18th day of October, 1876, upon the question submitted, it was decided by a vote of the majority of the property taxpayers of said city that it should assume control of the public free schools within its limits. Immediately thereafter, the city of San Antonio assumed exclusive control of all the public free schools within its limits, and has continued to exercise such control over them ever since. Since said election, no proposition involving the control of the public free schools of the city has been submitted to the electors of said city. On the 15th day of April, 1897, the following application in writing, signed by more than fifty of the qualified electors of the city of San Antonio, was made and presented to the Hon. Bryan Callaghan, mayor of said city, to wit: 'To the Honorable Bryan Callaghan, Mayor of the City of San Antonio—Sir: Under the statute laws of Texas, the citizens of this city have a right to determine, by a vote, whether or not the public schools of this city shall be managed by a board of trustees, to be elected by the people. We therefore respectfully petition you, as mayor of the city of San Antonio, to order an election at an early day,

in order that the voters of this city may determine whether or not the public schools of the city of San Antonio shall be placed under the control of a board of trustees, as provided by the statute laws of this state,'—and asked this question: "Under these facts, was it the legal duty of Bryan Callaghan, as mayor of the city of San Antonio, to order the election applied for?" This question was answered by that court in the negative. This answer renders it unnecessary to consider any other question, and requires an affirmance of the judgment of the district court. Affirmed.

### YARBROUGH v. COLLINS.

(Court of Civil Appeals of Texas. Jan. 8, 1898.)

#### APPEAL BONDS—AMOUNT.

Appeal from Henderson county court; M. H. Gill, Judge.

Action by M. B. Yarbrough against Mrs. A. W. Collins in justice court: There was a judgment for defendant, and an appeal to the county court was dismissed, and plaintiff appeals. Reversed.

Faulk & Faulk, for appellant. Richardson, Watkins & Miller, for appellee.

**FINLEY, C. J.** The appeal to the county court from the justice's court was dismissed, for the reason that the appeal bond was given in double the amount of the judgment, not including the costs; the county court holding that the bond should have been in double the amount of the judgment, including the costs. In *Colorado Co. v. Delaney*, 54 Tex. 280, our supreme court held that the appeal bond need not include the costs, but was sufficient if given in double the amount of the judgment. The court of civil appeals, Second district, held in *Bell v. Brown*, 33 S. W. 303, that the appeal bond must be given in double the amount of the judgment, including the costs, refusing to follow the *Delaney Case*, and stating that it should no longer be regarded as authority. The court of appeals had formerly also denied the correctness of the holding in the *Delaney Case*. *Owens v. Levy*, 1 White & W. Civ. Cas. Ct. App. § 409. The jurisdiction of the court of appeals at that time was final in such cases, and that of the court of civil appeals is now final in cases generally appealed from the county court. To avoid the embarrassment and evil results of conflicting decisions by the courts of civil appeals, we certified the question to the supreme court for its decision (42 S. W. 1052), and it has adhered to the *Delaney Case*. In conformity to this decision, the judgment of the court below is reversed, and the cause remanded.





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See, also, "Criminal Law"; "Homicide"; "Justices of the Peace"; "New Trial"; "Review." Appellate jurisdiction of particular courts, see "Courts."

An application to the supreme court for a writ of error to review a judgment of the court of civil appeals reversing and remanding a cause, does not oust the trial court of jurisdiction to proceed with the case, unless it appears that the supreme court has jurisdiction, under Rev. St. 1895, art. 996, to grant the writ.—*Stone v. Stone* (Tex. Civ. App.) 567.

Under Rev. St. 1895, art. 1042, it is the duty of the court of civil appeals to enter judgment in accordance with the answers given by the supreme court to a certificate of dissent upon being notified thereof.—*Eustis v. City of Henrietta* (Tex. Sup.) 259.

Where two parties each obtained a judgment fixing a lien upon defendant's chattels, he may appeal from one judgment alone.—*Constantine v. Fresche* (Tex. Civ. App.) 1045.

Appeal dismissed for failure to make a defendant below a party to the appeal bond, reinstated.—*Finley v. Jackson* (Tex. Civ. App.) 41.

An appellant assigning an instruction as error held not restricted in argument to the reason assigned.—*Davis v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 44.

A trustee may prosecute an appeal from a judgment subjecting the trust estate to payment of debts.—*Young's Trustee v. Bullen* (Ky.) 687.

### Decisions reviewable.

Under Rev. St. 1895, art. 1383, an appeal lies to the court of civil appeals from an interlocutory order appointing a receiver in a suit for divorce and partition.—*Stone v. Stone* (Tex. Civ. App.) 567.

An order directing a specific attachment to issue upon execution of a bond is not such a final order as is appealable.—*Brashears v. Holcomb* (Ky.) 226.

An order directing an assignee for creditors to rent out land for one year pending an appeal by the assignor, with supersedeas, from a judgment confirming a sale of the land procured by the assignee, is appealable.—*Van Meter v. Parker* (Ky.) 200.

The quashing of a summons and the return thereof is not an appealable order.—*Winn v. Carter Dry-Goods Co.* (Ky.) 436.

Order refusing to set aside an order granting a new trial is not appealable.—*Christman v. Chess* (Ky.) 426.

After an order granting a new trial, an order refusing to enter judgment on the verdict is not appealable.—*Christman v. Chess* (Ky.) 426.

Where a case has been remanded by the court of civil appeals, the supreme court has no jurisdiction, unless the application for a writ of error shows that the judgment of such court settled the case.—*Galveston, H. & S. A. Ry. Co. v. Masterson* (Tex. Sup.) 875.

A judgment in a contested election proceeding cannot be reviewed by writ of error.—*Buckler v. Turbeville* (Tex. Civ. App.) 810.

Appeal dismissed, where the amount in controversy was out \$3.02.—*Mackin v. Wilson* (Ky.) 247.

### Presentation and reservation of grounds of review.

Where no provision was made by defendant to require plaintiff to elect between causes of action, the objection cannot be raised on appeal.—*Hardigen's Adm'ts v. Simkins* (Ky.) 410.

Exceptions to the recovery of land upon a deed made after the suit is brought must be urged upon the trial, or they will not be considered upon appeal.—*Pope v. Riggs* (Tex. Civ. App.) 306.

In order to raise an objection that the verdict is not supported by the evidence, there must be a motion for new trial on that particular ground.—*Texas Farm & Land Co. v. Story* (Tex. Civ. App.) 933.

An objection, on motion for a new trial, that the verdict and judgment are contrary to the evidence, held insufficient on which to base assignments of error.—*Texas Farm & Land Co. v. Story* (Tex. Civ. App.) 933.

Only such objections to evidence as were presented below will be considered.—*Wheeler v. Tyler S. E. Ry. Co.* (Tex. Sup.) 876.

Grounds for setting aside a sale under execution cannot be first raised on appeal.—*Bean v. City of Brownwood* (Tex. Civ. App.) 1036.

Exceptions to rulings adjudging plaintiff to have the burden of proof held waived.—*Louisville & N. R. Co. v. Kirby* (Ky.) 441.

Where plaintiff in a contested election case goes to trial without insisting on an answer, he will, on appeal, be held to have waived it.—*Sanders v. Lacks* (Mo.) 653.

Failure to make up the issue as to whether a writing was a will, as required by Rev. St. 1889, § 8883, did not justify a reversal where the jury found on the issue, and no objection was made.—*Gordon v. Burris* (Mo.) 642.

Where a judgment is made up of several different items, those items not excepted to by appellants will not be disturbed.—*Trapp v. Fidelity Nat. Bank* (Ky.) 470.

That a certain matter was not embraced in a charge held not error where no instruction was requested.—*Pace v. American Freehold Land & Mortgage Co.* (Tex. Civ. App.) 36.

Under Sayles' New Civ. St. art. 1331, the failure to submit an issue is not ground for reversal, where the complaining party did not request the court to submit the issue at the trial, and took no exception to the charge omitting it.—*Phoenix Ins. Co. v. Shearman* (Tex. Civ. App.) 930.

An assignment that conclusions of fact were insufficient cannot be considered where there was no request for more specific conclusions.—*Spencer v. James* (Tex. Civ. App.) 556.

An exception should be taken to an order continuing a motion for new trial.—*Peoples v. Terry* (Tex. Civ. App.) 846.

Error in the admission of testimony will not be considered on appeal where no exception was reserved.—*Moffett-West Drug Co. v. Byrd* (Indian Ter.) 864.

### Requisites and proceedings for transfer of cause.

Under Rev. St. art. 1389, the time in which a writ of error may be sued out begins to run

from the rendition of the judgment, and not from the order overruling a motion for a new trial.—*Cooper v. Yoakum* (Tex. Sup.) 871.

The trial court cannot grant an appeal after the term during which the judgment was rendered.—*City of Louisville v. Muldoon* (Ky.) 867.

The 60 days during which, by virtue of Civ. Code, § 988, a court having continuous session has power to grant an appeal, do not begin to run until the order or motion for new trial is made.—*City of Louisville v. Muldoon* (Ky.) 867.

Where plaintiff died after judgment dismissing the action, and before an appeal had been taken, her representatives had two years in which to prosecute an appeal.—*Cray v. Wilson* (Ky.) 186.

The date of filing a bill of exceptions, or the expiration of the time allowed therefor, will be considered the date of the judgment appealed from in determining appellant's diligence.—*Cunningham v. Roush* (Mo.) 161.

Though the original transcript does not show that an appeal was prayed for or granted, the appeal will not be dismissed on rehearing, where a corrected copy of the record shows both facts.—*Trapp v. Fidelity Nat. Bank* (Ky.) 470.

On appeal by an intervener in an action against a garnishee, the bond required is for double the costs.—*Williams v. Vaughan* (Tex. Civ. App.) 850.

#### **Record and proceedings not in record.**

The court will not consider a question not presented by the record.—*Wilkinson v. Stanley* (Tex. Civ. App.) 606.

Evidence dehors the record cannot be considered by the appellate court.—*Galveston, H. & S. A. Ry. Co. v. McCray* (Tex. Civ. App.) 275.

Where evidence offered by plaintiff after defendant's motion for judgment on the pleadings had been sustained was treated by the parties in argument as a part of the record, *held*, that the supreme court would also thus consider it.—*Jacobs v. Omaha Life Ass'n* (Mo.) 375.

The certificate of the clerk to a transcript, that the foregoing is a "copy in substance of the record" in a certain case, is not a compliance with Civ. Code, § 737, subsec. 12.—*Brashears v. Holcomb* (Ky.) 226.

A certificate of the clerk that "the foregoing is a true copy, in substance," of the records, *held* insufficient.—*Brashears v. Frazier* (Ky.) 244.

Certificate of clerk that the transcript "contains, in substance, the complete and material parts of the proceedings," *held* insufficient.—*Brashears v. Frazier* (Ky.) 244.

Under Civ. Code, § 737, subsec. 12, a certificate that the transcript is a copy "in substance" of the record is insufficient.—*Brashears v. Venters* (Ky.) 405.

Where the absence of the presiding judge from his home prevents a party from filing his statement of facts in time, a motion to strike it from the files will be denied.—*P. J. Willis & Bro. v. Smith* (Tex. Civ. App.) 325.

A district clerk has no authority to file a statement of facts as of a date before he receives it.—*P. J. Willis & Bro. v. Smith* (Tex. Civ. App.) 325.

Where the statement of facts in the action is not made a part of a motion to correct the judgment, it need not be included in the transcript on appeal from the decision on the motion.—*Hedgecoxe v. Conner* (Tex. Civ. App.) 322.

In an action to restrain a sale on execution, the finding that plaintiff was concluded by a former judgment will not be reversed in the absence of a statement of facts.—*Finlay v. Jackson* (Tex. Civ. App.) 310.

Failure to file statement of facts in time *held* not to be excused.—*Owen v. Cibolo Creek Mill & Mining Co.* (Tex. Civ. App.) 297.

A statement of facts not properly signed and approved cannot be considered.—*Owen v. Cibolo Creek Mill & Mining Co.* (Tex. Civ. App.) 297.

A statement of facts cannot be made and filed at the term of court subsequent to the trial.—*Peoples v. Terry* (Tex. Civ. App.) 846.

Violation of rule requiring condensation of statement of facts is not cured by a compliance with the rule requiring material facts to be stated in brief.—*Caswell v. Hopson* (Tex. Civ. App.) 547.

Statement of facts violating the rule requiring the statement to be condensed will be stricken out.—*Caswell v. Hopson* (Tex. Civ. App.) 547.

Appellee *held* not estopped to move to strike out an agreed statement of facts requiring condensation.—*Caswell v. Hopson* (Tex. Civ. App.) 547.

The appellate court cannot consider the grounds of a motion for a new trial when the bills of exception are not approved by the trial judge, and the record contains no statement of facts.—*Noble v. State* (Tex. Cr. App.) 978.

Overruling a motion for a new trial on the ground of interest of juror cannot be reviewed where there is no bill of exceptions raising the question or any reference to it in the statement of facts.—*Texas Farm & Land Co. v. Story* (Tex. Civ. App.) 983.

An assignment of error based on the refusal of the court to consider a will as evidence will not be considered, where the bill of exceptions or statement of facts does not contain a copy of the will.—*Mattfield v. Huntington* (Tex. Civ. App.) 53.

An appeal is good, though no bill of exceptions is filed.—*Cunningham v. Roush* (Mo.) 161.

The action of the lower court in refusing to allow a pleading to be filed cannot be reviewed unless there is an order of court making the rejected pleading a part of the record, or a bill of exceptions identifying it as the one offered.—*Bartram v. Burns* (Ky.) 686.

Where bill of exceptions does not disclose answers to questions objected to, the error will not be considered.—*Herring v. Mason* (Tex. Civ. App.) 797.

Where objections are sustained to a question, the bill of exceptions must show what the answer would have been.—*Lindsey v. Singletary* (Tex. Civ. App.) 273.

Where bills of exception are filed long after the adjournment of the court in which the cause was tried, assignments of error based thereon cannot be sustained.—*P. J. Willis & Bro. v. Smith* (Tex. Civ. App.) 325.

#### **Assignment of errors.**

An assignment of error in overruling a motion for new trial, based on points in previous assignments, is too general.—*Houston & T. C. R. Co. v. Gaither* (Tex. Civ. App.) 266.

Where plaintiffs' claim consisted of several items, and the judgment was for less than the total amount, an assignment that the damage sustained did not equal the judgment is too general.—*Southern Pac. Co. v. Redding* (Tex. Civ. App.) 1061.

An assignment of error that "the court erred in its charge to the jury on the law of 'the case'" is too general to be considered on appeal.—*Deware v. Wichita Val. Mill & Elevator Co.* (Tex. Civ. App.) 1047.

Assignments of error *held* too general.—*Blain v. Blain* (Tex. Civ. App.) 66; *Bryant v. Galbraith* (Tex. Civ. App.) 833.

Where one excepts to a charge to justify which there must be evidence on two propositions, and in his assignment of error he questions the existence of evidence as to only one proposition, the court will not consider whether there was

evidence upon the other proposition.—*Texas & P. Ry. Co. v. Eberhart* (Tex. Sup.) 510.

An error of law apparent on the record is fundamental, requiring consideration on appeal without assignment.—*Willard v. Guttman* (Tex. Civ. App.) 901.

#### **Briefs.**

An appeal will be dismissed where appellant fails to file brief 20 days before day of submission.—*Brashears v. Venters* (Ky.) 405.

Where no briefs are filed, only fundamental errors, as shown by the record, will be considered.—*Unsworth v. Straughan* (Tex. Civ. App.) 290.

Under Rev. St. 1895, art. 1417, and rule 102 (20 S. W. xviii., 84 Tex. 722), an appeal will be dismissed when appellant has failed to file his brief with the lower court, as required.—*Paris, M. & S. P. R. Co. v. Killingsworth* (Tex. Civ. App.) 1046.

#### **Review.**

The supreme court will determine a certified question, though other questions must be determined before a decision on the question certified becomes necessary.—*State v. Callaghan* (Tex. Sup.) 12.

Exceptions to an allowance made in accordance with a ruling of the court on a former appeal of the case must be held to have been adjudicated by the former decision, where no new evidence is introduced on the subject.—*Scudder v. Ames* (Mo.) 659.

Where a certain action of the court was not reviewable on appeal under the law in force when the action was taken, it cannot be reviewed, although, by a change in the law before the motion for a new trial was acted on, such rulings are made reviewable.—*Owensboro & N. Ry. Co. v. Barclay's Adm'r* (Ky.) 177.

Where the court admitted evidence subject to objection, and there was no definite ruling excluding it made, the party offering it cannot allege its rejection as error.—*Seiferer v. City of St. Louis* (Mo.) 163.

Record held to show no agreed statement of facts, nor a case where the evidence was wholly documentary, so that the supreme court could apply the law to the facts, where no declarations of law were given or refused by the court.—*Seiferer v. City of St. Louis* (Mo.) 163.

On motion to affirm, the court will not consider a ground not stated in the motion.—*Cunningham v. Roush* (Mo.) 161.

Abstract questions raised by the briefs, but not arising on the facts, will not be considered.—*Spicer v. Henderson* (Tex. Civ. App.) 27.

On appeal from a judgment in trespass to try title by two of the defendants, one of whom had notice of plaintiff's rights, and the other proved no valuable consideration paid, held, that the question of innocent purchaser was not before the appellate court.—*Miller v. Gist* (Tex. Sup.) 263.

Where the case is tried on its merits, exceptions to the sufficiency of the answer to authorize the court to dissolve a temporary injunction will not be considered.—*Jordan v. Chester* (Tex. Civ. App.) 904.

#### **Parties entitled to allege error.**

Where a case is dismissed at the request of one of the parties, such party cannot complain, on appeal, of the act of the court in dismissing the case.—*Brightman v. Fry* (Tex. Civ. App.) 60.

An appellant cannot complain of a charge given at his own request.—*International & G. N. R. Co. v. Parish* (Tex. Civ. App.) 1066.

A special charge given at the request of the appellant cannot be objected to by him.—*Pope v. Riggs* (Tex. Civ. App.) 306.

A defendant held not to have a right to complain that no judgment was rendered against a

co-defendant.—*Mexican Cent. Ry. Co. v. Goodman* (Tex. Civ. App.) 580.

Warrantors brought into a suit to vouch the title of their vendee, and to answer to him on their warranty, can take advantage of any error injurious to their vendee.—*P. J. Willis & Bro. v. Smith* (Tex. Civ. App.) 325.

On appeal by the owner of a note from the dismissal of a garnishment proceeding which was joined with an action on the note, the judgment debtors on the note cannot, by filing a cross assignment, bring the judgment on the note before the court for review.—*First Nat. Bank v. East* (Tex. Civ. App.) 558.

#### **Presumptions.**

Where a case is tried by the court, it will be presumed that the judgment was based on the competent evidence in the record.—*Ward v. Armistead* (Tex. Civ. App.) 63.

In the absence of conclusions not filed, where the case is tried by the judge, it will be presumed that he considered the competent evidence submitted.—*Ward v. Armistead* (Tex. Civ. App.) 63.

A court in rendering a judgment is presumed to have disposed of the issues presented by the pleadings.—*Woolley v. Sullivan* (Tex. Civ. App.) 919.

In the absence of a bill of exceptions, the court will presume that a peremptory instruction was properly given.—*Brashears v. Frazier* (Ky.) 244.

The record being incomplete, it was presumed that issue had been properly taken on a plea of adverse possession.—*Combs v. Combs* (Ky.) 697.

#### **Questions of fact, verdicts, and findings.**

Where the evidence is conflicting, the verdict will not be disturbed.—*Texas & P. Ry. Co. v. Hall* (Tex. Civ. App.) 25; *McGuire v. West* (Ky.) 458; *Raley v. Abright* (Tex. Civ. App.) 538; *Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548; *Ford v. Denton* (Tex. Civ. App.) 568.

The verdict of a jury will not be disturbed on appeal unless palpably and flagrantly wrong.—*Greene v. Anderson* (Ky.) 195; *Smithern v. Waddle* (Ky.) 453; *Richardson v. Huff* (Ky.) 454.

Where the evidence, though conflicting, fairly supports the verdict, the judgment will not be disturbed.—*Alley v. Hopkins* (Ky.) 168.

Where the question is one of fact for the jury, their verdict will not be disturbed on appeal.—*Borchers v. Mead* (Tex. Civ. App.) 300.

The rule that a judgment will not be reversed as against the evidence, unless palpably and flagrantly so, does not apply to equity cases.—*Stephens v. Dickinson* (Ky.) 212; *Same v. Robinson, Id.*; *Same v. Joanbrock, Id.*

A finding as to damages based on conflicting evidence will not be disturbed.—*Texas Cent. R. Co. v. Fisher* (Tex. Civ. App.) 584.

Findings of fact in condemnation cases held not subject to review in the absence of error in law in determining the same.—*City of St. Joseph v. Crowther* (Mo.) 786.

A reviewing court is not bound by the report of a master where such report is indefinite.—*Horne v. Greer* (Tenn. Ch. App.) 774.

An allowance of expenses and attorney's fees to administratrix will not be disturbed where there is no showing of unfairness in the allowance.—*Scudder v. Ames* (Mo.) 659.

A finding by court of chancery appeals on a question of fact is not reviewable by the supreme court.—*Ellis v. Northwestern Mut. Life Ins. Co.* (Tenn. Sup.) 766.

Findings of fact by a chancellor, supported by material evidence, held conclusive.—*Shaver v. Southern Oil Co.* (Tenn. Ch. App.) 736.

A finding by a chancellor will be set aside where it is not sustained by the evidence.—*Marcofsky v. Franks* (Ky.) 440.

— **Harmless error.**

Allowing an unnecessary amendment during trial is harmless error.—*Lindsley v. Parks* (Tex. Civ. App.) 277.

Discharging jurors because they were taxpayers of defendant city is not reversible error unless it affirmatively appears that the city thereby suffered an injury.—*City of Marshall v. McAllister* (Tex. Civ. App.) 1043.

A rehearing would not be granted because of a mistake of the supreme court militating against contestant, where the court was convinced that the opposite party was entitled to the judgment rendered.—*Strong v. Jones* (Ky.) 704.

When there is testimony that all the engines on a line were equipped with spark arresters, *held* harmless error to exclude evidence to prove that the engine in question was so equipped.—*Gulf, C. & S. F. Ry. Co. v. Baugh* (Tex. Civ. App.) 557.

The admission of a deed executed by one plaintiff to another while the suit was pending *held* harmless error.—*La Master v. Dickson* (Tex. Civ. App.) 911.

A party *held* not harmed by the admission of a deposition, where he afterward made the deponent his own witness.—*La Master v. Dickson* (Tex. Civ. App.) 911.

A defendant cannot complain of the admission of a co-defendant's *ex parte* deposition, where it was limited so as not to affect defendant.—*La Master v. Dickson* (Tex. Civ. App.) 911.

In an action to recover school lands on a certificate, the admission of a former rejected application made by plaintiff for land, only part of which was the land in suit, was harmless error.—*Simon v. Stearns* (Tex. Civ. App.) 50.

The introduction of inadmissible testimony of parties, as to a transaction with a decedent, is not reversible error, where the case is tried to the court, and there is other testimony tending to prove the same facts.—*Staley v. Hankla* (Tex. Civ. App.) 20.

If exception to the admission of testimony is taken, and nothing is proven on its admission, the party excepting cannot complain.—*Moffett-West Drug Co. v. Byrd* (Indian Ter.) 864.

Refusal to admit a writing *held* immaterial where the writing was proved by parol.—*Watson v. Winston* (Tex. Civ. App.) 862.

The rejection of evidence admissible to show that a conveyance was not fraudulent as to one of two issues *held* not error where the court found the conveyance was fraudulent on both issues.—*Moore v. Temple Grocer Co.* (Tex. Civ. App.) 843.

*Held* harmless error, in an action to set aside sale of ward's land for \$400, to exclude evidence that it was worth \$600, where the ward received other benefit to the amount of \$1,000.—*Fitzwilliams v. Davis* (Tex. Civ. App.) 840.

A proper instruction as to the measure of damages does not cure an error in admitting evidence assuming a different measure of damages to be the true one.—*Chesapeake & O. Ry. Co. v. Gross* (Ky.) 203.

Erroneous admission of evidence as to an item of damages not allowed is without prejudice.—*Herring v. Mason* (Tex. Civ. App.) 797.

Admission of certain incompetent evidence *held* prejudicial.—*Fletcher v. Dulaney* (Indian Ter.) 955.

The admission of certain testimony in an action on a note *held* to be harmless error.—*Hall v. Cornett* (Ky.) 706.

Erroneous admission of evidence to impeach a witness *held* prejudicial.—*Texas Brewing Co. v. Dickey* (Tex. Civ. App.) 577.

The admission of improper evidence is harmless where the facts are shown by proper evidence.—*Armstrong v. Ames & Frost Co.* (Tex. Civ. App.) 302.

Where it is evident from the findings in a trial to the court that its conclusion was based on inadmissible evidence, the judgment will be reversed.—*Ricker Nat. Bank v. Brown* (Tex. Civ. App.) 909.

Refusal to present an issue of fact in an instruction will not avail appellant, when the same, if presented, would have been in favor of appellant.—*Galveston, H. & S. A. Ry. Co. v. Farriah* (Tex. Civ. App.) 536.

An instruction that the railroad company must prove that the injured employé knew of the existence of the rule, and of its enforced observance, is an immaterial error, when it does not appear that the injury resulted from a violation of the rule introduced in evidence.—*Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877.

The excess in a judgment attributable to an erroneous instruction having been remitted, the judgment will not be reversed for the error in the instruction.—*Greene v. Anderson* (Ky.) 195.

Where the question was whether plaintiff had any right to recover by reason of defendant's representations, an erroneous instruction that defendants must have honestly believed that their representations were true *held* not prejudicial to plaintiff.—*Hawkins v. Wells* (Tex. Civ. App.) 816.

It was harmless error to give an instruction authorizing a verdict for plaintiff in excess of the amount sued for, the verdict returned being within that amount.—*Hall v. Cornett* (Ky.) 706.

Where the jury finds that plaintiff in wrongful attachment was not entitled to recover, failure to instruct on the damages is harmless error.—*Aboshoh v. Buck* (Ky.) 425.

**Decision.**

In an action to quiet title, where the evidence was insufficient to sustain judgment for plaintiff, *held*, the cause would be remanded for further proceedings.—*Davidson v. Combs* (Ky.) 409.

Although the judgment surcharging a settlement confirmed by the probate court is not sustained, yet, where the chancery court obtained jurisdiction, and it would be burdensome to remand the parties to the original court, final decree will be entered in the supreme court.—*Haden v. Sweptston* (Ark.) 393.

Appellate court must dispose of a case under the law in force when its decision is rendered.—*Phoenix Ins. Co. v. Shearman* (Tex. Civ. App.) 930.

No authorities being cited in support of an assignment of error, and no error appearing upon examination of the record, petition, and judgment, the judgment will be affirmed.—*Turner v. City of Houston* (Tex. Civ. App.) 69.

**Liabilities on bonds.**

A supersedeas bond executed to stay proceedings under a judgment, the right to appeal from which does not at the time exist, is not binding on the obligors.—*City of Louisville v. Muldoon* (Ky.) 867.

Where an intervener in an action against a garnishee appeals, and files the bond provided for by Rev. St. 1895, § 1670, he is not thereby made liable to a judgment for the fund in the hands of the garnishee.—*Williams v. Vaughan* (Tex. Civ. App.) 850.

Sureties in a bond superseding an order directing an assignee for creditors to rent out land for one year are liable, on the dismissal of the ap-

peal, for the rental value of the land for the period fixed by the order, with interest from the expiration of the year.—*Van Meter v. Parker* (Ky.) 200.

## APPLIANCES.

Liability of employer for defects, see "Master and Servant."

## APPLICATION.

For continuance, see "Continuance."  
Of assets of partnership, see "Partnership."  
To purchase public land, see "Public Lands."

## APPOINTMENT.

Of receivers, see "Receivers."  
Of school treasurer, see "Schools and School Districts."

## ARGUMENT OF COUNSEL.

See "Trial."

## ARREST.

See, also, "Bail"; "False Imprisonment."

City ordinance authorizing arrest, without a warrant, of citizens deemed suspicious *held void*.—*Joske v. Irvine* (Tex. Civ. App.) 278.

## ARSON.

An indictment for arson may charge the ownership of the building to be in the owner of the fee, where defendant was in possession of the building when it was burned.—*Gutgesell v. State* (Tex. Cr. App.) 1016.

Evidence that witnesses had told defendant that it was the opinion of the people of the town that he had burned the house *held inadmissible*.—*Gutgesell v. State* (Tex. Cr. App.) 1016.

## ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide."

Evidence of an assault on a woman by an abled-bodied man *held sufficient* to render it aggravated.—*Tucker v. State* (Tex. Cr. App.) 106.

Evidence on prosecution of teacher for assault on pupil *held to justify conviction*.—*Howerton v. State* (Tex. Cr. App.) 1018.

A school teacher may inflict corporal punishment on a pupil to enforce a compliance with proper instructions.—*Thomason v. State* (Tex. Cr. App.) 1013.

An assault by a teacher upon a pupil *held justifiable*.—*Thomason v. State* (Tex. Cr. App.) 1013.

## ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain."

Of expenses of public improvements, see "Municipal Corporations."  
Of tax, see "Taxation."

## ASSETS.

Marshaling, see "Marshaling Assets and Securities."

Of partnership, see "Partnership."

## ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Of error, see "Appeal and Error"; "Criminal Law."

Of notes, see "Bills and Notes."

Of policies, see "Insurance."

An order of the fiscal court is assignable.—*Combs v. Crawford* (Ky.) 477.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Assignment by corporation, see "Corporations."

The assignee of an insolvent firm takes the property subject to equities against the assignors.—*Byrne v. Ft. Smith Nat. Bank* (Indian Ter.) 957.

An assignee contracting for the benefit of the estate *held personally bound*, unless he stipulates to the contrary.—*Gibson v. Gray* (Tex. Civ. App.) 922.

An agent employed by the assignee to sell property of the estate *held entitled to an order* that his judgment against the estate for commission be paid out of the estate.—*Gibson v. Gray* (Tex. Civ. App.) 922.

The allowance of separate fees to attorneys employed by the assignee was not the taxation of more than one fee in the case, where one of the attorneys employed by the assignee died and another attorney was substituted in his place.—*Louisville Banking Co. v. Etheridge Manuf'g Co.* (Ky.) 169; *Riley v. Merchants' Nat. Bank, Id.*; *Brown v. Riley, Id.*

Although an assignment executed by a corporation is declared fraudulent, the assignee is entitled to compensation for his services rendered prior to the institution of suits attacking the assignment, and also to an allowance of counsel fees.—*Louisville Banking Co. v. Etheridge Manuf'g Co.* (Ky.) 169; *Riley v. Merchants' Nat. Bank, Id.*; *Brown v. Riley, Id.*

In action to hold assignee liable for breach of trust, it was proper to exclude the record of a suit by the debtor and his wife against the trustee, to which plaintiff was not a party.—*Milburn Manuf'g Co. v. Wayland* (Tenn. Ch. App.) 129.

An assignee failed in his duty where he made no report, misapplied the assets, and unreasonably failed to pay complainant's debt.—*Milburn Manuf'g Co. v. Wayland* (Tenn. Ch. App.) 129.

Propriety of payment by assignee of taxes and insurance premiums determined.—*Faulkner v. Marion Nat. Bank* (Ky.) 249.

In action by creditor, under the act of 1856, to have transfers by insolvent adjudged assignment for benefit of creditors, a creditor not a party plaintiff may come in as defendant by petition.—*Oliver v. Sutton* (Ky.) 475.

All transferees of insolvent debtor's property may be joined as parties defendant in action to have the transfers adjudged assignments for benefit of creditors.—*Oliver v. Sutton* (Ky.) 475.

The right of plaintiff to sue as trustee for creditors cannot be called in question by defendant on the ground that the order appointing him was fraudulently procured.—*Turner v. New Farmers' Bank's Trustee* (Ky.) 721.

The fact that a creditor has personal security for his debt does not prevent him from maintaining an action to have a preference declared to operate as an assignment.—*Borches v. Williams* (Ky.) 683.

A failure to accept under a deed of trust to goods will not impair a lien on said goods for rent.—*Missouri Glass Co. v. Marsh* (Tex. Civ. App.) 546.

A judgment directing the refunding to an assignee of certain money derived from a sale of his house and lot *held not prejudicial to creditor*.—*Armstrong v. Wagner's Ex'r* (Ky.) 478.

### Requisites and validity.

A chattel mortgage and an unrecorded contemporaneous agreement, whereby the mortgagee took possession and had the right of en-

tire disposition of the property, *held* an assignment of the property, and fraudulent because not accompanied by bond or inventory.—*Hargadine-McKittrick Dry-Goods Co. v. Bradley* (Indian Ter.) 947.

Where a chattel mortgage and a contemporaneous agreement together constituted an assignment, the fact that the assignment is void in part will make it void as a whole.—*Hargadine-McKittrick Dry-Goods Co. v. Bradley* (Indian Ter.) 947.

Assignment to a trustee of a specific fund to pay a particular debt *held* not such an assignment recorded.—*Bottoms v. McFerran* (Ky.) 236.

The fact that a firm, before making an assignment for creditors, turned over to one of the partners certain judgments and accounts in payment of a loan made by him to the firm, and marked the accounts on the books as settled, does not show fraud in the assignment.—*Stephens v. Dickinson* (Ky.) 212; *Same v. Robinson*, Id.; *Same v. Joanbrock*, Id.

The failure of debtors, before making an assignment for creditors, to keep a cash book, is not evidence of fraudulent intent.—*Stephens v. Dickinson* (Ky.) 212; *Same v. Robinson*, Id.; *Same v. Joanbrock*, Id.

An assignment having been openly made, and everything then undisposed of turned over to the assignee, acts of the debtors prior to the assignments, constituting grounds for an attachment, do not authorize the court to set aside the assignment.—*Stephens v. Dickinson* (Ky.) 212; *Same v. Robinson*, Id.; *Same v. Joanbrock*, Id.

A mortgage executed in contemplation of insolvency *held* to operate as a general assignment for creditors, under Act 1856.—*Walker v. Davis* (Ky.) 406.

Where an insolvent debtor executes a mortgage to secure a pre-existing indebtedness, the presumption is that it was designed to be preferential.—*Walker v. Davis* (Ky.) 406.

Assignment construed, and *held* void, as an unreasonable delay of creditors entitled to surplus.—*Sanger v. Burke* (Tex. Civ. App.) 1070.

A statutory assignment, if executed and delivered before the levy of an attachment, passes title to the assignee.—*Calisher v. Mathias* (Tex. Civ. App.) 265.

An instruction that title of assignee vests from the execution of the assignment *held* erroneous, as the statute uses the words "execution and delivery."—*Calisher v. Mathias* (Tex. Civ. App.) 265.

Where there was no delivery to a trustee for creditors, the preferred creditors had no interest in the goods, as against an unpreferred attaching creditor.—*Bolts v. Engelke* (Tex. Civ. App.) 47.

## ASSOCIATIONS.

See "Building and Loan Associations."

## ASSUMPTION.

Of risk by employé, see "Master and Servant."

## ATTACHMENT.

That the affidavit is for a less sum than that claimed in the petition does not invalidate the writ.—*Aultman, Miller & Co. v. Smyth* (Tex. Civ. App.) 932.

A bond need not state in the caption the county where executed.—*Aultman, Miller & Co. v. Smyth* (Tex. Civ. App.) 932.

Under Rev. St. 1889, § 570, the court cannot determine, as between conflicting attachments, controversies that may arise between the different attachment plaintiffs respecting the same

property.—*Stephenson v. Parker Stationery Co.* (Mo.) 390.

The failure of a sheriff, also the claimant as trustee, to file claimant's bond in the proper court, *held* an abandonment of the suit.—*Deware v. Wichita Val. Mill & Elevator Co.* (Tex. Civ. App.) 1047.

Refusal to allow defendant to renew motion to discharge *held* within the discretion of the court.—*Hoobler v. Howland* (Ky.) 483.

A judgment dismissing an attachment, and adjudging that the supposed interest of defendant in a certain company, upon which the attachment was levied, did not exist, will not be disturbed on appeal, the evidence fully sustaining the judgment.—*Perdum v. Ramsey* (Ky.) 219.

Pledgee of stock to secure debt *held* entitled to protection as against an attachment, though transfer of the stock is not shown on the books.—*Tombler v. Palestine Ice Co.* (Tex. Civ. App.) 896.

Where the order fails to state the amount of the debt sought to be secured, the amount may, after the execution of the order, be inserted *nunc pro tunc*, so as to give priority over intervening attaching creditors.—*Louisville Banking Co. v. Etheridge Manufg Co.* (Ky.) 169; *Riley v. Merchants' Nat. Bank*, Id.; *Brown v. Riley*, Id.

### Nature and grounds.

A fraudulent assignment by an insolvent corporation for the benefit of creditors is such a fraudulent disposition of its property as will entitle a creditor to an attachment.—*Louisville Banking Co. v. Etheridge Manufg Co.* (Ky.) 169; *Riley v. Merchants' Nat. Bank*, Id.; *Brown v. Riley*, Id.

Creditors may attach goods of their debtor in the hands of those who have conspired with him to conceal goods.—*Adams v. Paletz* (Tenn. Ch. App.) 133.

Attachment cannot issue on a contingent demand.—*Aultman, Miller & Co. v. Smyth* (Tex. Civ. App.) 932.

A prayer for attorney's fees, which petition shows will not be included in the suit, *held* not to destroy the right to attach for so much of the debt as was properly included.—*Aultman, Miller & Co. v. Smyth* (Tex. Civ. App.) 932.

### Levy and lien.

Levy of attachment by a sheriff on property in his possession as trustee is not void.—*Deware v. Wichita Val. Mill & Elevator Co.* (Tex. Civ. App.) 1047.

An attachment levy cannot be collaterally attacked unless it is void.—*Deware v. Wichita Val. Mill & Elevator Co.* (Tex. Civ. App.) 1047.

A levy was presumed to be legal, under the facts.—*Deware v. Wichita Val. Mill & Elevator Co.* (Tex. Civ. App.) 1047.

Under Civ. Code, § 207, no lien attaches to a fund in court by leaving a copy of attachment with the master commissioner holding the fund subject to the order of the court.—*Bottoms v. McFerran* (Ky.) 236.

Under Civ. Code, § 212, the lien of attachment completed by levy *held* to relate back to the time when the writ was given to the officer, and entitled to priority over an intervening assignment for benefit of creditors.—*Exchange Bank of Kentucky v. Gillispie's Assignee* (Ky.) 401.

### Liabilities on bonds.

Action cannot be maintained on bond to restore money secured by judgment, under attachment, until such judgment has been set aside.—*Daisy v. Houlihan* (Ky.) 487.

Bond by defendant in attachment to satisfy the judgment "on the proceedings of the attachment in this case" *held* not to allow recovery until judgment adverse to defendant on the attach-



ment branch of the case.—*Brashears v. Webb* (Ky.) 417.

That a bond is not for double the amount claimed *held* not to invalidate it, where a portion of the amount claimed was not payable, and the bond was double the real debt.—*Aultman, Miller & Co. v. Smyth* (Tex. Civ. App.) 932.

#### **Wrongful attachment.**

Where no actual damages have resulted from a wrongful attachment, plaintiff is liable for nominal damages.—*Reeves v. John* (Tenn. Ch. App.) 134; *Carhart v. John, Id.*; *Martin v. Cate, Id.*

On wrongful attachment, attaching plaintiff is not bound by the value reached by the sheriff in his invoice.—*Reeves v. John* (Tenn. Ch. App.) 134; *Carhart v. John, Id.*; *Martin v. Cate, Id.*

Measure of actual damages on wrongful attachment determined.—*Reeves v. John* (Tenn. Ch. App.) 134; *Carhart v. John, Id.*; *Martin v. Cate, Id.*

In action for wrongful attachment, plaintiff cannot recover the expense of defending the suit, without proof of malice and want of probable cause.—*Abobosh v. Buck* (Ky.) 425.

In an action for wrongful attachment, the burden is on plaintiff to show that the attachment was wrongful.—*Armstrong v. Ames & Frost Co.* (Tex. Civ. App.) 302.

Certain evidence in an action for wrongful attachment as to value of the property *held* admissible.—*Armstrong v. Ames & Frost Co.* (Tex. Civ. App.) 302.

An instruction in an action for wrongful attachment *held* proper.—*Armstrong v. Ames & Frost Co.* (Tex. Civ. App.) 302.

### **ATTORNEY AND CLIENT.**

Arguments and conduct of counsel at trial in criminal prosecutions, see "Criminal Law." Attorneys as public officers, see "District and Prosecuting Attorneys."

On a sale of land to satisfy lien securing note, right of attorney for collection to become purchaser determined.—*Clark v. Robertson* (Ky.) 245.

In an action to recover for services rendered by plaintiff as attorney in assisting defendant as attorney in the prosecution of an action, the particular instruction *held* not to be prejudicial to defendant.—*Ducker v. Nelson* (Ky.) 210.

Agreement of attorneys as to terms of settlement *held* binding on the parties.—*Ward v. Wilson* (Tex. Civ. App.) 833.

Attorneys retained to conduct litigation *held* not affected as to right to compensation because their client had consulted other attorneys.—*Pate v. Maples* (Tenn. Ch. App.) 740.

An attorney employed "to bring suit or settle by suit or compromise a claim for damages" has no authority to make a compromise without the approval of the client.—*Brown v. Bunker* (Ky.) 714.

### **AUTHENTICATION.**

Of records on appeal, see "Appeal and Error."

### **AUTHORITY.**

Of agent, see "Principal and Agent."  
Of attorney, see "Attorney and Client."

### **BAGGAGE.**

Of passenger, see "Carriers."

### **BAIL.**

Taking and approving a recognizance by the sheriff *held* a sufficient compliance with Rev. St. 1889, § 4129.—*State v. Austin* (Mo.) 165.

Sufficiency of record of forfeiture to entitle state to scire facias to enforce the same determined.—*State v. Austin* (Mo.) 165.

A recognizance to answer to another indictment after the first indictment had been held bad on appeal *held* not invalid because a new indictment was not returned.—*State v. Austin* (Mo.) 165.

A recognizance by a sheriff while holding a prisoner under a judgment reversing conviction *held* sufficient.—*State v. Austin* (Mo.) 165.

Code Cr. Proc. 1895, art. 498, providing that, when a defendant who has been arrested has previously given bail, his sureties shall be released by such arrest, does not apply where the second arrest is under a second indictment, though such indictment be based on the same transaction as the first.—*Foster v. State* (Tex. Cr. App.) 80.

A recognizance on conviction of libel *held* to sufficiently describe the offense.—*Jones v. State* (Tex. Cr. App.) 78.

In a forfeiture of a bail bond under Mansf. Dig. §§ 2064, 2068, the bail bond itself is the basis of the action.—*Zufall v. United States* (Indian Ter.) 760.

In a forfeiture of a bail bond, the summons issued under Mansf. Dig. § 2068, is not to be a writ of scire facias.—*Zufall v. United States* (Indian Ter.) 760.

A bail bond and order of forfeiture held to state a good cause of action, under Mansf. Dig. § 5026, par. 3, and sections 2064 and 2068.—*Zufall v. United States* (Indian Ter.) 760.

A recognizance is insufficient which does not recite the offense with which defendant was charged, but only that of which he was convicted.—*Williams v. State* (Tex. Cr. App.) 996.

### **BAILIFFS.**

Compensation of court bailiff, see "Courts."

### **BAILMENT.**

See "Carriers"; "Innkeepers"; "Warehousemen."

### **BANKRUPTCY.**

See "Assignments for Benefit of Creditors."

### **BANKS AND BANKING.**

That officers of a bank knew her husband to be a man of dissolute habits would not make the bank liable for checks drawn by him against his wife's money deposited in her name.—*Coleman v. First Nat. Bank* (Tex. Civ. App.) 938.

The indorser of a note discounted by a bank *held* indebted, within the charter provision giving banks a lien on the stock for stockholder's indebtedness, though no steps had been taken against maker.—*Bank of Kentucky v. Bonnie* (Ky.) 407.

Holder of bank stock as collateral security *held* to have a prior lien as against bank's charter lien against the stock for notes subsequently discounted by it.—*Bank of Kentucky v. Bonnie* (Ky.) 407.

An unaccepted check will not support an action by the holder against the bank on which it is drawn.—*House v. Kountze* (Tex. Civ. App.) 561.

**BAR.**

By limitation, see "Limitation of Actions."  
Of action by judgment, see "Judgment."  
Of dower, see "Dower."

**BATTERY.**

See "Assault and Battery."

**BENEFICIAL ASSOCIATIONS.**

Mutual benefit insurance associations, see "Insurance."

**BEQUESTS.**

See "Wills."

**BETTING.**

See "Gaming."

**BILL OF EXCEPTIONS.**

See "Exceptions, Bill of."

**BILL OF EXCHANGE.**

See "Bills and Notes."

**BILL OF LADING.**

See "Carriers."

**BILLS AND NOTES.**

Liability of sureties, see "Principal and Surety."

In a suit on a note indorsed in blank, the burden is on defendant to allege and prove lack of bona fides.—*Ricker Nat. Bank v. Brown* (Tex. Civ. App.) 909.

Allegations in answer held sufficient to let in proof of failure of consideration.—*Ricker Nat. Bank v. Brown* (Tex. Civ. App.) 909.

The plaintiff having, as attorney for the maker of the bill sued on, made a compromise and settlement with the payees, and upon payment of the sum agreed taken an indorsement of the bill to himself, he can recover of the accommodation acceptors only the amount paid by him for the bill.—*Greer v. Bently* (Ky.) 219.

The indorsee of a bill of exchange is bound by an agreement of which he had notice that the acceptors are not to pay until the maker shall collect a certain claim.—*Greer v. Bently* (Ky.) 219.

Where the consideration for a note was a contract by the payee that a third person, then indebted to the payee, would perform a certain contract with the payor, and said third person failed to perform the contract, the consideration for the note failed.—*Gale v. Harp* (Ark.) 144.

One sued on a note on proof of overpayment can recover the balance.—*James v. Daniels* (Tex. Civ. App.) 28.

A note given for a part of the purchase price of land held to have been given for a valid consideration.—*Davis v. Weathered* (Tex. Civ. App.) 21.

In an action against drawee and accommodation drawer and indorser of bill of exchange, instructions as to effect of misapplication of such bill construed.—*Walden v. Citizens' Sav. Bank* (Ky.) 488.

Where a note fell due in September, 1892, and execution was not issued thereon until December, 1894, there is such a lack of diligence as will deprive the holder of the note of his remedy against his assignor.—*Six v. Price* (Ky.) 433.

When a petition in an action on land notes by the assignee against the assignor shows that the plaintiff assignee at one time was not the

owner of the notes, and does not show how he became reinvested with the title, it is insufficient.—*Six v. Price* (Ky.) 433.

An assignee of land notes held not entitled to maintain an action against his assignor until he has exhausted all remedies upon the notes against their maker.—*Six v. Price* (Ky.) 433.

Admissibility of evidence in action on note, where surety claimed release by reason of extension, determined.—*Young v. New Farmers Bank* (Ky.) 473.

Evidence held insufficient to show payment of note sued on.—*Garrett v. Robinson* (Tex. Civ. App.) 288.

A note, the signature to which was fraudulently procured, held valid in the hands of a third person.—*McCoy v. Gouvion* (Ky.) 699.

One accepting a draft cannot withdraw his acceptance on the ground of mistake.—*Grumbach v. Hirsch* (Tex. Civ. App.) 1081.

**BONA FIDE PURCHASERS.**

Of bill of exchange or promissory note, see "Bills and Notes."

Of land, see "Vendor and Purchaser."

Of property fraudulently conveyed, see "Fraudulent Conveyances."

**BONDS.**

See, also, "Bail"; "Principal and Surety."

Construction bonds of turnpike companies, see "Turnpikes and Toll Roads."

In attachment, see "Attachment."

In replevin, see "Replevin."

Municipal bonds, see "Municipal Corporations."

Of counties, see "Counties."

Of sheriffs, see "Sheriffs and Constables."

On appeal, see "Appeal and Error"; "Criminal Law"; "Justices of the Peace."

Sequestration bonds, see "Sequestration."

In reconvention on a sequestration bond judgment cannot be rendered against the sureties without introduction of the bond and writ of sequestration with return thereon.—*Wilkinson v. Stanley* (Tex. Civ. App.) 603.

The fact that an officer's bond was not delivered to the county judge for approval and filing until more than 20 days after he had received his certificate of election will not render such bond void.—*McFarlane v. Howell* (Tex. Civ. App.) 315.

**BOUNDARIES.**

Geographical or political provisions, see "Counties."

Parol evidence is admissible to show the line actually run and marked by a surveyor, though it deviates from the course called for.—*Hagins v. Whitaker* (Ky.) 224.

Where a survey borders on a lake, a strip extending into the water beyond a straight line called for by the surveyor held a part of such survey.—*Bland v. Smith* (Tex. Civ. App.) 49.

In action to determine boundary lines, an instruction that the intent of the surveyor that a line should run the distance called for in his field notes must be determined by evidence outside of the call for distances in the notes held error.—*Mock v. Hatcher* (Tex. Civ. App.) 30.

**BREACH.**

Of condition, see "Insurance."

Of contract, see "Contracts"; "Sales"; "Vendor and Purchaser."

Of covenant, see "Covenants."

Of trust by assignee, see "Assignments for Benefit of Creditors."

Of warranty, see "Sales."

## BRIEFS.

On appeal or writ of error, see "Appeal and Error."

## BROKERS.

Where a broker, contracting to make a sale of personality, knows of no defect in his principal's title, he has a right to assume that it is good.—*Berg v. San Antonio St. Ry. Co.* (Tex. Civ. App.) 929.

A broker, at the time of contracting to do certain work knowing of matter which will defeat his efforts, is not entitled to compensation.—*Berg v. San Antonio St. Ry. Co.* (Tex. Civ. App.) 929.

A real-estate broker has discharged his duty when he produces a purchaser willing and able to buy, whether the sale is consummated or not.—*Gibson v. Gray* (Tex. Civ. App.) 922.

Where plaintiff shows that he has procured purchasers for land which are satisfactory to defendant, he is entitled to recover his commissions for such sale, having been employed to sell the land by defendant.—*Smith v. Patrick* (Tex. Civ. App.) 535.

## BUILDING AND LOAN ASSOCIATIONS.

Act Minn. April 22, 1889, held not to apply to associations incorporated prior thereto.—*Pioneer Savings & Loan Co. v. Pancoast* (Tex. Civ. App.) 280.

A building and loan association is not relieved from liability for a false representation made by its president, because the president believed the representation to be true.—*Mutual Building & Loan Ass'n v. McGee* (Tex. Civ. App.) 1030.

Right of owner of stock, on purchasing from other stockholders additional shares on obtaining loan from the association, determined.—*Mutual Savings & Loan Ass'n v. Owings* (Ky.) 422.

A borrower is liable only for the amount of the loan, with legal interest.—*Mutual Savings & Loan Ass'n v. Owings* (Ky.) 422.

Stock certificate construed and rights of holder thereof on withdrawal determined.—*Pioneer Savings & Loan Co. v. Pancoast* (Tex. Civ. App.) 280.

## BURGLARY.

Evidence held not to render it uncertain whether a burglary was committed with intent to steal, or with intent to commit an assault.—*Pilot v. State* (Tex. Cr. App.) 1024.

## CANCELLATION OF INSTRUMENTS.

Cancellation of policy, see "Insurance."

## CARNAL KNOWLEDGE.

See "Rape."

## CARRIERS.

Regulation of interstate commerce, see "Commerce."

### Carriage of goods and live stock.

Failure to furnish transportation facilities at a point on the line where there was no competition, in a year when shipments were unexpectedly heavy, held not unjust discrimination as against shippers at such point, within Act March 24, 1887, though, at points where there was competition, facilities were furnished.—*Little Rock & Ft. S. Ry. Co. v. Oppenheimer* (Ark.) 150.

A carrier held not liable, under the rules of the railroad commission, for improper compression of cotton, where the shipper has a special agree-

ment with the compressor as to the method of compressing.—*Sass v. Houston & T. C. R. Co.* (Tex. Civ. App.) 270.

Where a carrier wrongfully detains goods, it has no claim for storage.—*Southern Pac. Co. v. Redding* (Tex. Civ. App.) 1061.

Contract of shipment construed, and held, the railroad company not liable for delay to freight by connecting line.—*Richmond, N. I. & B. R. Co. v. Richardson* (Ky.) 465.

A carrier desiring to avoid his contract as a violation of interstate commerce act must show that it was necessarily so.—*Southern Pac. Co. v. Redding* (Tex. Civ. App.) 1061.

Contract for shipment from a foreign port to an inland point in the United States, for a through rate, held not a violation of the interstate commerce law.—*Southern Pac. Co. v. Redding* (Tex. Civ. App.) 1061.

A contract with a railroad for a less interstate freight rate than the one agreed on as provided in the interstate commerce act is void.—*Houston & T. C. R. Co. v. Dumas* (Tex. Civ. App.) 609.

A bill of lading for carrying stock to a point outside of the state held not to violate the statute relating to restrictions on the liabilities of carriers.—*Galveston, H. & S. A. Ry. Co. v. Armstrong* (Tex. Civ. App.) 614.

A railroad company is liable for overloading stock though the shipper contracted otherwise, as Rev. St. 1895, art. 320, prohibits limitations of a carrier's liability.—*International & G. N. R. Co. v. Parish* (Tex. Civ. App.) 1066.

The value at the place of destination should be taken in measuring damages caused by overloading stock.—*International & G. N. R. Co. v. Parish* (Tex. Civ. App.) 1066.

### Carriage of passengers.

Under Ky. St. § 801, a negro prisoner in the custody of a white officer may be compelled to ride in the car provided for colored people.—*Louisville & N. R. Co. v. Catron* (Ky.) 443.

In an action for wrongfully taking up plaintiff's ticket, and for abusive language used by the conductor, it was immaterial that the language was not used at the time the ticket was taken up and destroyed, but a few minutes later, since it was one transaction.—*Louisville & N. R. Co. v. Donaldson* (Ky.) 439.

The words "You are a pretty thing,—trying to beat your way," spoken by a conductor to a passenger, implied a charge of attempted fraud.—*Louisville & N. R. Co. v. Donaldson* (Ky.) 439.

Liabilities of a sleeping-car company for loss of a passenger's baggage.—*Belden v. Pullman Palace-Car Co.* (Tex. Civ. App.) 22.

Evidence in an action against a sleeping-car company for loss of a passenger's baggage held to support a finding that the loss did not occur from the negligence of defendant's servants.—*Belden v. Pullman Palace-Car Co.* (Tex. Civ. App.) 22.

### Fares, tickets, and special contracts.

A railroad ticket is nonnegotiable.—*Levinson v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 901.

A railroad company has a right to take up a nontransferable ticket when not in the original purchaser's hands.—*Levinson v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 1032.

A railroad company is not bound to redeem a passenger ticket once used by purchaser, under Act 1893, providing for the redemption of tickets.—*Levinson v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 901.

Where a conductor took up and destroyed a ticket, when it was his duty, whether it was good or bad, to turn it in to the auditor of the road, it was held to raise a presumption in favor

of the passenger that the ticket was good.—*Louisville & N. R. Co. v. Donaldson* (Ky.) 439.

Where a ticket seller authorized the purchaser to sign it differently than was authorized by its terms, such facts must be pleaded in an action for rejection of the ticket by the railroad company.—*Mexican Cent. Ry. Co. v. Goodman* (Tex. Civ. App.) 580.

Evidence *held* not to show that the purchaser of railroad tickets knew they were issued fraudulently, and without authority.—*Mexican Cent. Ry. Co. v. Goodman* (Tex. Civ. App.) 580.

A railroad company is bound to accept a ticket signed differently than authorized by its terms, where the ticket seller authorized such signature.—*Mexican Cent. Ry. Co. v. Goodman* (Tex. Civ. App.) 580.

An instruction not clearly showing that knowledge of an agent's want of authority in selling plaintiff his ticket would alone defeat recovery for wrongful ejection *held* erroneous.—*Mexican Cent. Ry. Co. v. Goodman* (Tex. Civ. App.) 580.

When a contract for transportation contains a limitation on the back, in order to bind the holder thereof, it must be shown that he read or knew of such limitation at the time he accepted the contract.—*San Antonio & A. P. Ry. Co. v. Newman* (Tex. Civ. App.) 915.

A drover's pass was made out for three persons, which is one more than is allowed on such a pass. Two of them, one of whom, to the conductor's knowledge, was not entitled to ride, drew straws to determine which should get off, and the one entitled to ride lost, and was ordered off. *Held* a wrongful ejection.—*San Antonio & A. P. Ry. Co. v. Newman* (Tex. Civ. App.) 915.

#### — Personal injuries.

Evidence *held* insufficient to show that a passenger was injured by the negligence of a carrier.—*San Antonio & A. P. Ry. Co. v. Choate* (Tex. Civ. App.) 537.

To establish a liability of a railroad company for injuries to a United States mail clerk, it is not necessary to show a written contract to carry mail between the company and the United States.—*International & G. N. Ry. Co. v. Davis* (Tex. Civ. App.) 540.

It is the duty of a railroad company to keep its mail car so heated as to be safe and comfortable for the mail clerk while in the discharge of his duties.—*International & G. N. Ry. Co. v. Davis* (Tex. Civ. App.) 540.

Where drovers in charge of cars of stock belonging to different owners are under the directions of one man, with the knowledge of the conductor, the company *held* liable for injury of one of them, although he was attending to stock which did not belong to his employer.—*Missouri, K. & T. Ry. Co. of Texas v. Jahn* (Tex. Civ. App.) 575.

Where a drover in charge of stock is told by the conductor that he will have time to punch up the cattle which are down, and is injured by the starting of the train, the company *held* liable.—*Missouri, K. & T. Ry. Co. of Texas v. Jahn* (Tex. Civ. App.) 575.

A carrier *held* not liable for an accident to a passenger due to the conduct of a fellow passenger.—*Dumas v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 908.

## CARRYING WEAPONS.

See "Weapons."

## CATTLE.

See "Animals"; "Carriers"; "Railroads."

## CATTLE GUARDS.

See "Railroads."

## CAUSE OF ACTION.

See "Malicious Prosecution."

## CENSUS.

Of school children, see "Schools and School Districts."

## CERTIFICATE.

As evidence, see "Evidence."

For public land, see "Public Lands."

Of nomination, see "Elections."

Of record for purpose of review, see "Appeal and Error."

## CERTIORARI.

Certiorari to set aside order of sale of insane person's land *held* not a matter of right.—*Fitzwilliams v. Davie* (Tex. Civ. App.) 840.

## CHALLENGE.

To juror, see "Jury."

## CHANCERY.

See "Equity."

## CHANGE OF VENUE.

Of civil action, see "Venue."

Of criminal prosecutions, see "Criminal Law."

## CHARACTER.

Of witness, see "Witnesses."

## CHARGE.

To jury in civil actions, see "Trial."

— in criminal prosecutions, see "Criminal Law."

## CHARTER.

Of municipal corporations, see "Municipal Corporations."

## CHATTEL MORTGAGES.

The fact that defendant's father wrote prosecutor, some time after his son had sold property covered by a mortgage, that he would pay for it, was immaterial, on a prosecution for disposing of the property.—*Haile v. State* (Tex. Cr. App.) 999.

An indictment for disposing of mortgaged property *held* to sufficiently allege that defendant executed and delivered a valid mortgage to prosecutor previous to the alleged disposition.—*Haile v. State* (Tex. Cr. App.) 999.

A chattel mortgagee has no lien on proceeds of voluntary sale of chattels by mortgagor.—*Estes v. McKinney* (Tex. Civ. App.) 556.

Where the mortgagors remained in possession of the property, and there was evidence, in explanation of that fact, to the effect that the trustee had employed them as clerks, *held*, that the question of fraud as against creditors was for the jury.—*Boltz v. Engelke* (Tex. Civ. App.) 47.

Rev. St. 1895, art. 2548, does not apply to an agreement between a retail merchant and a manufacturer, whereby the manufacturer is to retain the title to goods shipped to the merchant until same shall be sold at retail.—*Bowen v. Lansing Wagon Works* (Tex. Sup.) 872.

Before claimants under a chattel mortgage of a stock of goods can enforce their rights to priority under Rev. St. 1895, arts. 3327, 3328, over an unrecorded lien, they must show consideration and no notice.—*Bowen v. Lansing Wagon Works* (Tex. Sup.) 872.

Rev. St. 1895, arts. 3327, 3328, apply to claimants, under a mortgage of a stock of goods, and entitle them to enforce their lien in preference to an unrecorded mortgage.—*Bowen v. Lansing Wagon Works* (Tex. Sup.) 872.

A chattel mortgage and an instrument purporting to be a power of attorney, which were executed at the same time and between the same parties, and had reference to the same property, will be construed together.—*Hargadine-McKittrick Dry-Goods Co. v. Bradley* (Indian Ter.) 947.

Sureties on a replevin bond given in proceedings to foreclose a chattel mortgage could not complain that the judgment for plaintiff did not in terms foreclose the mortgage.—*McLeod Artesian Well Co. v. Craig* (Tex. Civ. App.) 984.

## CHECKS.

See "Bills and Notes."

## CHILD.

See "Guardian and Ward"; "Parent and Child."

## CITIES.

See "Municipal Corporations."

## CLAIM AND DELIVERY.

See "Replevin."

## CLAIMS.

Against estate assigned for creditors, see "Assignments for Benefit of Creditors."  
— of decedent, see "Executors and Administrators."

For mechanics' liens, see "Mechanics' Liens."

## CLERKS OF COURTS.

Under Const. Ky. § 161, circuit court clerks in office at the time of the enactment of Ky. St. § 1722, are not entitled to the benefit of that statute which allows to circuit court clerks compensation for services in felony cases.—*Bright v. Stone* (Ky.) 207.

The penalty of 10 per cent., prescribed by Ky. St. § 4091, for failure to pay taxes, is neither a fine nor a forfeiture, within the meaning of Ky. St. § 1721, which allows circuit clerks 10 per cent. of all fines and forfeitures.—*Ford v. Stone* (Ky.) 721.

## CLIENTS.

See "Attorney and Client."

## COLLATERAL ATTACK.

On attachment levy, see "Attachment."  
On judgment, see "Judgment."

## COLLATERAL SECURITY.

See "Pledges."

## COLLATERAL UNDERTAKING.

See "Guaranty."

## COMMERCE.

Rev. St. 1895, arts. 3378, 3379, preventing telegraph companies from limiting certain liabilities by agreement, cannot apply where messages are sent from another state.—*Western Union Tel. Co. v. Burgess* (Tex. Civ. App.) 1033.

A ticket purchased at less rate than could be purchased by other citizens *had* not void under the interstate commerce act.—*Mexican Cent. Ry. Co. v. Goodman* (Tex. Civ. App.) 580.

A contract for the shipment of animals to a point out of the state *held* to constitute a contract for interstate shipment.—*Galveston, H. & S. A. Ry. Co. v. Armstrong* (Tex. Civ. App.) 614.

A foreign corporation may maintain an action on an account in Texas, where the contract on which the action is based was made in the home state of the corporation.—*Brin v. Wachusett Shirt Co.* (Tex. Civ. App.) 295.

Act imposing a privilege tax on railroad companies *held* not unconstitutional as interfering with interstate commerce.—*Knoxville & O. R. Co. v. Harris* (Tenn. Sup.) 115.

## COMMISSIONS.

Of agents, see "Usury."  
Of brokers, see "Brokers."

## COMMITTEE.

Guardianship of insane persons, see "Insane Persons."

## COMMON CARRIERS.

See "Carriers."

## COMMUNITY PROPERTY.

See "Property."

## COMPENSATION.

For property taken for public use, see "Eminent Domain."

Of assignees, see "Assignments for Benefit of Creditors."

Of attorney, see "Attorney and Client."

Of broker, see "Brokers."

Of clerks of courts, see "Clerks of Courts."

Of county officers, see "Counties."

Of court bailiffs, see "Courts."

Of executor or administrator, see "Executors and Administrators."

Of guardian, see "Guardian and Ward."

Of prosecuting attorneys, see "District and Prosecuting Attorneys."

## COMPETENCY.

Of evidence, see "Criminal Law"; "Evidence."

Of juror, see "Jury."

Of witnesses in general, see "Witnesses."

## COMPLAINT.

In civil actions, see "Pleading."

In criminal prosecution, see "Indictment and Information."

## COMPOSITIONS WITH CREDITORS.

A note executed by S. for the balance of a note upon which he was surety is without consideration, if the creditor agreed to accept a composition by the principal with his creditors in discharge of both its secured and unsecured debts against him, and received its pro rata under the

composition settlement.—*Schuff v. Germania Safety-Vault & Trust Co. (Ky.)* 229.

## COMPROMISE AND SETTLEMENT.

See "Compositions with Creditors"; "Payment"; "Release."

Power of attorney to compromise claim, see "Attorney and Client."

## COMPUTATION.

Of interest, see "Interest."

## CONCEALED WEAPONS.

See "Weapons."

## CONDEMNATION.

Of property for public use, see "Eminent Domain."

## CONDITIONS.

In insurance policies, see "Insurance."

## CONFESSION.

As evidence in criminal prosecutions, see "Criminal Law."

## CONFIDENTIAL RELATIONS.

Of parties to contract or conveyance, see "Fraudulent Conveyances."

## CONSIDERATION.

Of contract, see "Contracts."

Of fraudulent conveyance, see "Fraudulent Conveyances."

Of guaranty, see "Guaranty."

Of promissory note, see "Bills and Notes."

## CONSPIRACY.

A statement by one of two defendants charged with conspiracy, made in the absence of the other, is admissible in an action against them for damages.—*Smithern v. Waddle (Ky.)* 453.

## CONSTITUTIONAL LAW.

Enactment and validity of statutes, see "Statutes."

Statutes relating to particular subjects, see "Abatement and Revival"; "Clerks of Courts"; "Commerce"; "Counties"; "Death"; "Dower"; "Jury"; "Municipal Corporations"; "Taxation."

Ky. St. §§ 3661, 3662, authorizing the circuit court to transfer a town or city from one class to another, is unconstitutional.—*Jernigan v. City v. Madisonville (Ky.)* 448.

Ky. St. § 1762, providing that judges of the court shall regulate the compensation of certain county officers, held not unconstitutional, as a delegation of legislative power.—*Winston v. Stone (Ky.)* 397.

Acts 1897, amending Rev. St. 1895, art. 1331, so as to cure formal defects in special verdicts, is not unconstitutional because applying to pending appeals.—*Phoenix Ins. Co. v. Shearman (Tex. Civ. App.)* 1063.

## CONSTRUCTION.

Of particular instruments, see "Deeds"; "Guaranty"; "Wills."

Of statutes, see "Statutes."

## CONSTRUCTIVE TRUSTS.

See "Trusts."

## CONTEMPT.

The refusal of defendant to withdraw an answer which the court has refused to permit him to file is not a contempt of court, as an answer which has not been filed cannot be withdrawn.—*Turner v. New Farmers' Bank's Trustee (Ky.)* 721.

## CONTEST.

Of election, see "Elections."

Of will, see "Wills."

## CONTINGENT REMAINDERS.

Creation, see "Wills."

## CONTINUANCE.

In criminal prosecution, see "Criminal Law."

The absence of documentary evidence or of witnesses does not entitle defendant to a continuance where no diligence is shown in procuring the evidence or witnesses.—*Moody v. Commonwealth (Ky.)* 209.

The fact that defendant had not procured attorneys until the morning of the trial did not entitle him to a continuance, no reason being shown for his failure to do so sooner.—*Moody v. Commonwealth (Ky.)* 209.

Defendant was not entitled to a continuance for the absence of witnesses when the affidavit failed to show that witnesses resided within 20 miles of the county seat, so as to give the defendant the right of their personal attendance.—*Cope v. Deaton (Ky.)* 190.

A continuance to retake depositions held improperly denied.—*Whitaker v. Whitaker (Ky.)* 464.

Application for a second continuance held properly denied for lack of diligence and for immateriality of the evidence desired.—*Owen v. Cibolo Creek Mill & Mining Co. (Tex. Civ. App.)* 297.

Allowing an unnecessary trial amendment is not ground for continuance.—*Lindsley v. Parks (Tex. Civ. App.)* 277.

Affidavit on application for continuance because of absence of witness must state fully the testimony to be introduced.—*Shaver v. Southern Oil Co. (Tenn. Ch. App.)* 736.

## CONTRACTS.

Agreements for release, see "Release."

— within statute of frauds, see "Frauds, Statute of."

Alteration of, see "Alteration of Instruments."

Damages for breach, see "Damages."

Gambling contract, see "Gaming."

Of particular classes of parties, see "Carriers"; "Corporations"; "Husband and Wife"; "Municipal Corporations"; "Schools and School Districts"; "Warehousemen."

Operation and effect of usury laws, see "Usury."

Parol or extrinsic evidence, see "Evidence."

Particular classes of express contracts, see "Assignments"; "Assignments for Benefit of Creditors"; "Guaranty"; "Insurance"; "Sales"; "Specific Performance"; "Subscriptions"; "Vendor and Purchaser."

Reformation, see "Reformation of Instruments."

Violation of interstate commerce law, see "Commerce."

Whether a contract to maintain a depot requires an agent at the depot held one for the jury.—*Levy v. Tatum (Tex. Civ. App.)* 941.

Allegations, in action for breach of contract to accept sawlogs, that they were duly tendered, *held* sufficient to admit proof of compliance with contract by plaintiff.—*Sabine Tram Co. v. Jones* (Tex. Civ. App.) 905.

A contractor may recover contract price on building where he did not finish because of defendant's refusal to perform his agreement.—*Vaughn v. Digman* (Ky.) 251.

In an action to recover the value of services rendered by plaintiff in nursing and caring for his deceased stepfather, it was error to give an instruction hinging the right of recovery on the fact that plaintiff intended to charge for the services, without any reference to the intention of the decedent to pay for same, or to whether decedent had information of plaintiff's intention to charge therefor.—*Lowe v. Webster* (Ky.) 217.

Where the defect in a building has in a large degree been removed at small expense, and the building is safe and in use, the measure of damages recoverable by the owner against the contractor is the difference between the value of the building in its present condition and the contract price.—*Short v. Moore* (Ky.) 211.

A mere promise by devisee to purchase land sold for taxes, and convey the same to executor of devisor, is without consideration.—*Thorp v. Gordon* (Tex. Civ. App.) 323.

Right of one giving order on an insurance company for payment of advance premium of soliciting agent to withdraw the same without canceling the application determined.—*Smith v. Covenant Mut. Ben. Ass'n* (Tex. Civ. App.) 519.

An agreement not to engage in a particular business for two years is not in violation of the trust law, or against trade.—*Erwin v. Hayden* (Tex. Civ. App.) 610.

A complaint for breach of contract not to engage in business for a certain time *held* sufficient on demurrer.—*Erwin v. Hayden* (Tex. Civ. App.) 610.

An agreement of a partner to pay the emoluments of a public office into the firm's funds is void as against public policy.—*Santleben v. Froboese* (Tex. Civ. App.) 571.

Evidence examined in an action to recover for wages under an implied contract by the year, where a void oral contract for five years had been made, and *held* sufficient to show an implied contract.—*Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548.

Mortgage obtained by threats from one infirm in body and mind *held* void.—*Perkins v. Adams* (Tex. Civ. App.) 529.

## CONTRADICTION.

Of witness, see "Witnesses."

## CONTRIBUTION.

Among sureties, see "Principal and Surety."

## CONTRIBUTORY NEGLIGENCE.

See "Master and Servant"; "Negligence"; "Street Railroads."

## CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

## CONVEYANCES.

By or to particular classes of parties, see "Guardian and Ward"; "Husband and Wife." Of homestead, see "Homestead." Particular classes of, see "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

## CONVICTS.

A bond for hiring out a convict was *held* invalid where the parties to it did not reside in the county where the conviction occurred.—*Ex parte Medaris* (Tex. Cr. App.) 517.

## CORPORATIONS.

Particular classes of, see "Banks and Banking"; "Building and Loan Associations"; "Municipal Corporations"; "Railroads"; "Street Railroads"; "Telegraphs and Telephones"; "Turnpikes and Toll Roads."

Taxation of corporations and corporate property, see "Taxation."

Where a corporation has abandoned business for years, and has no officers, a stockholder can file a bill in its behalf to preserve its property, without demanding that the corporation bring suit.—*Tennessee Mountain Petroleum & Mining Co. v. Ayers* (Tenn. Ch. App.) 744.

A stockholder cannot, without authority from the corporation, join it with himself as complainant in a bill to wind it up.—*Tennessee Mountain Petroleum & Mining Co. v. Ayers* (Tenn. Ch. App.) 744.

A turnpike company adjudged to issue stock to the several subscribers pro rata where the cost of the improvement was in excess of the amount estimated.—*Clark County v. Winchester & S. Turnpike Road Co.* (Ky.) 716.

Power of the president and secretary to execute a chattel mortgage cannot be attacked by sureties on replevin bond given in foreclosure proceedings.—*McLeod Artesian Well Co. v. Craig* (Tex. Civ. App.) 934.

A contractor cannot by his own vote or the votes of those representing his interests secure an exorbitant salary for himself.—*Harris v. Lemming-Harris Agricultural Works* (Tenn. Ch. App.) 869; *Lemming v. Same*, *Id.*

A creditor of an insolvent corporation may by attachment acquire a special lien upon its property which will entitle him to a lien over other unsecured creditors.—*Louisville Banking Co. v. Etheridge Manuf'g Co.* (Ky.) 169; *Riley v. Merchants' Nat. Bank*, *Id.*; *Brown v. Riley*, *Id.*

A corporation may have a fraudulent intent in the execution of a deed of assignment for the benefit of creditors.—*Louisville Banking Co. v. Etheridge Manuf'g Co.* (Ky.) 169; *Riley v. Merchants' Nat. Bank*, *Id.*; *Brown v. Riley*, *Id.*

Circumstances examined, and *held*, that a loan purporting to be made to a corporation, which the officers of the bank knew to be in a failing condition, was a loan to an officer of the corporation, and not to it.—*Trapp v. Fidelity Nat. Bank* (Ky.) 470.

Where there is no plea denying the existence of a corporation, as required by Rev. St. 1895, art. 1265, it is not necessary to prove its existence.—*P. J. Willis & Bro. v. Smith* (Tex. Civ. App.) 325.

Creditors *held* to have waived the right to appointment of a receiver by ratifying the transfer of a corporation's property to a partnership composed of the officers of the corporation.—*Tenney v. Ballard, Webb & Burnette Hat Co.* (Tex. Civ. App.) 296.

Unless it is made to appear that a person owned some substantial interest in the assets of a company, the fact that he is excluded from participation in its business will not entitle him to an accounting.—*Bryant v. Galbraith* (Tex. Civ. App.) 833.

## COSTS.

In divorce proceedings, see "Divorce."

The fee allowed the attorney general by Code Cr. Proc. 1895, c. 4, art. 1119, is an item of

costs authorized by law to be taxed, within the meaning of article 1071.—*Arbuthnot v. State* (Tex. Cr. App.) 1024.

Where conviction of defendant for misdemeanor is affirmed on appeal, execution for costs may be issued against defendant and his sureties for attorney general's fee.—*Arbuthnot v. State* (Tex. Cr. App.) 1024.

Where the attorney who wrote a deed of trust was paid to perform that service, and also to support it, the trustee should not be allowed an attorney fee for the services of the attorney in writing an answer in a garnishment proceeding.—*Missouri Glass Co. v. Marsh* (Tex. Civ. App.) 546.

Evidence examined, and *held*, that the costs of taking depositions in New York as taxed are exorbitant.—*Collins v. Rosenham* (Ky.) 726.

Where a temporary injunction is made permanent, costs will not be adjudged against defendants who had not participated in the tort.—*Morris v. Sanders* (Ky.) 738.

When one is a proper party to a suit foreclosing a mechanic's lien, on the question of the right of foreclosure, although not liable upon the issue of debt, the costs may be adjudged against him, as well as the other defendant.—*Lindsley v. Parks* (Tex. Civ. App.) 277.

Under Rev. St. 1889, § 2920, allowing costs to the prevailing party, an allowance of compensation to a guardian ad litem cannot be taxed as costs, where the wards are the prevailing party.—*Jones v. Yore* (Mo.) 384.

In trespass to try title, where defendant first disclaims as to a part, and afterwards again disclaims as to a portion of that part, and plaintiff proceeds to trial of the issues raised by the second disclaimer, and judgment goes for defendant, plaintiff is entitled to costs up to the time of the second disclaimer.—*Bexar County v. Vogt* (Tex. Sup.) 14.

Though a plaintiff had by his own fault lost a deed from defendant, yet, defendant having resisted the suit to obtain another conveyance, it was proper to render judgment in another suit against her for the costs accumulated by her defense.—*McCauley v. Galloway* (Ky.) 225.

Sureties who are made parties by citation, and contest their liability, *held* liable to pay the costs of such litigation, they having been held liable.—*McLeod Artesian Well Co. v. Craig* (Tex. Civ. App.) 934.

## CO-SURETIES.

See "Principal and Surety."

## COUNTERCLAIM.

See "Set-Off and Counterclaim."

## COUNTIES.

Gen. Laws 1881, relating to county bonds, *held* constitutional.—*Mitchell County v. City Nat. Bank* (Tex. Sup.) 880.

Bonds issued under Gen. Laws 1881, p. 5, Gen. Laws (Sp. Sess.) 1884, pp. 29, 30, relating to debts by counties and issuing bonds therefor, *held* valid, though the county has not levied the tax required to provide for their payment.—*Mitchell County v. City Nat. Bank* (Tex. Sup.) 880.

Bridge bonds issued, under Gen. Laws (Sp. Sess.) 1884, pp. 29, 30, *held* valid in so far as issued for the purposes therein provided, and invalid where the record of the county shows they were issued for other purposes.—*Mitchell County v. City Nat. Bank* (Tex. Sup.) 880.

Ky. St. §§ 1751-1754, relating to salaries of county officers, applied to the commissioner and

receiver of Jefferson county.—*Winston v. Stone* (Ky.) 397.

Under Const. art. 5, § 18, providing for the division of counties into precincts by the commissioners' court, an order changing the boundaries of two precincts need not redistrict the whole county.—*State v. Rigby* (Tex. Civ. App.) 271.

The fact that an order of the commissioners' court, changing the boundaries of precincts, was made at a special term, is no objection to it.—*State v. Rigby* (Tex. Civ. App.) 271.

Act Feb. 20, 1893, providing that the salary of the collector of Sebastian county be \$1,200 per annum, including clerk hire, *held* not shown to be such a reduction in the compensation as to be unconstitutional by virtually abolishing the office.—*Bugg v. Ft. Smith Dist., Sebastian County* (Ark.) 506.

## COURTS.

See, also, "Judges"; "Justices of the Peace." Judicial power, see "Constitutional Law." Right to trial by jury, see "Jury."

Bailiff sent by court to arrest certain witnesses *held* entitled to a sheriff's allowance for mileage and necessary expenses in lodging and transporting them.—*Mann v. Commonwealth* (Ky.) 694.

Under Const. 1875, art. 6, § 12, the supreme court has jurisdiction of a case in which the election of county collector of revenue is contested.—*Sanders v. Lacks* (Mo.) 653.

Under Rev. St. 1895, art. 906, the judgment of the court of civil appeals upon an appeal from an interlocutory order appointing a receiver is final.—*Stone v. Stone* (Tex. Civ. App.) 567.

Where the court had jurisdiction of the amount as originally asserted in the petition, it will not lose it when one cause of action is dismissed on account of limitations, and the amount left in controversy is not within its original jurisdiction.—*Kelly v. Western Union Tel. Co.* (Tex. Civ. App.) 532.

The supreme court has no jurisdiction to determine a motion for summary judgment against the sheriff for failure to return an execution issued from such court.—*Massey-Herdon Shoe Co. v. Powell* (Ark.) 506.

The courts cannot interfere with an act of the legislature fixing the compensation of an officer provided for in the constitution, unless the compensation as fixed is clearly so low as to practically abolish the office.—*Bugg v. Ft. Smith Dist., Sebastian County* (Ark.) 506.

The court of appeals in Indian Territory is bound by a decision of the supreme court of Arkansas interpreting a statute, rendered prior to the adoption of the statutes of Arkansas for the Indian Territory by act of congress of May 2, 1890.—*Zufall v. United States* (Indian Ter.) 760.

The court of civil appeals has no jurisdiction solely upon motion to review the approval of a statement of facts by the lower court.—*P. J. Willis & Bro. v. Smith* (Tex. Civ. App.) 325.

Since no appeal or certiorari is allowed from a judgment in justice court for less than \$20, the district court has jurisdiction to enjoin the execution of a void justice's judgment for less than that amount.—*Jennings v. Shiner* (Tex. Civ. App.) 276.

Code Cr. Proc. art. 98, though declared unconstitutional by the court of last resort having criminal jurisdiction, is sustained by the court of last resort having civil jurisdiction, and a county attorney is entitled to his fees for prosecuting criminals thereunder.—*May v. Finley* (Tex. Sup.) 257.

Injunction restraining waste pending ejectment suit *held* not to involve title to real estate



so as to give the supreme court jurisdiction on appeal.—*Heman v. Wade* (Mo.) 162.

The act of 1897, amending Rev. St. 1895, tit. 4, art. 33, by extending the terms of court in certain counties, does not by implication supersede or repeal the original article.—*Ex parte Cannon* (Tex. Cr. App.) 87.

The district court has jurisdiction to afford relief by injunction to one whose property is assessed unreasonably and fraudulently by the board of equalization.—*Johnson v. Holland* (Tex. Civ. App.) 71.

The supreme court has no jurisdiction to entertain a writ of error in cases where the whole case depends on a question of boundary.—*Cox v. Finks* (Tex. Sup.) 1.

Case *held* to be one of boundary, and not within the jurisdiction of the supreme court on writ of error.—*Cox v. Finks* (Tex. Sup.) 1.

On appeal from grant of injunction restraining waste, where the loss to defendants was not shown, the case was not beyond the jurisdiction of the court of appeals, on the ground that more than \$2,500 was involved.—*Heman v. Wade* (Mo.) 162.

## COVENANTS.

There can be no breach of a covenant against incumbrances that will sustain an action, until an eviction has occurred, or, in case the breach is caused by a dower claim, until an action for dower has been brought, and judgment recovered and satisfied.—*Bartlett v. Ball* (Mo.) 783.

Where there are no covenants as to title, none will be implied, except as to prior conveyance by the grantor, and that the estate is free from incumbrances.—*Hawkins v. Wells* (Tex. Civ. App.) 816.

## CREDIBILITY.

Of witness, see "Witnesses."

## CREDITORS.

See "Assignments for Benefit of Creditors."

## CREDITORS' SUIT.

Judgment for debt refused, where petition did not pray for that specific relief.—*Tenney v. Ballard, Webb & Burnette Hat Co.* (Tex. Civ. App.) 296.

## CRIMINAL LAW.

See, also, "Grand Jury"; "Indictment and Information"; "Jury."

Arrest of accused, see "Arrest."

Bail, see "Bail."

Convicts, see "Convicts."

Disposal of mortgaged chattels, see "Chattel Mortgages."

Particular offenses, see "Adultery"; "Arson"; "Assault and Battery"; "Burglary"; "Disorderly House"; "Disturbance of Public Assembly"; "False Pretenses"; "Forgery"; "Gambling"; "Homicide"; "Incest"; "Intoxicating Liquors"; "Larceny"; "Libel and Slander"; "Perjury"; "Rape"; "Robbery"; "Weapons."

In cases of misdemeanor, all are principals.—*Bolton v. State* (Tex. Cr. App.) 984.

The criminal district court of Galveston and Harris counties does not have original jurisdiction to try the offense of keeping a disorderly house.—*Ex parte Smith* (Tex. Cr. App.) 1000.

It is no defense, where defendant was the aggressor, that the deceased engaged voluntarily in the encounter.—*Godwin v. State* (Tex. Cr. App.) 386.

Insanity from recent use of morphine and cocaine *held* a defense to a criminal accusation, involving the formation of an intent.—*Edwards v. State* (Tex. Cr. App.) 112.

Where insanity is produced by other causes, such as morphine or cocaine, in conjunction with the recent use of intoxicating liquors, an act done in such a state of mind cannot be attributed solely to the use of the liquor.—*Edwards v. State* (Tex. Cr. App.) 112.

The objection that an indictment charges two distinct and separate offenses, in different counts, cannot be made for the first time by motion in arrest of judgment.—*Collins v. State* (Tex. Cr. App.) 90.

Where a motion to quash an indictment because of certain defective counts is erroneously overruled, the conviction will be set aside, though some of the counts were good.—*McMurtry v. State* (Tex. Cr. App.) 1010.

Refusal to quash an information on the ground that the complaint was not filed at the time of the filing of the information *held* proper, though the complaint appeared to have been filed on the day of the trial.—*Castleman v. State* (Tex. Cr. App.) 994.

The fact that the sheriff was afraid accused would be mobbed, and called the troops out, *held* not sufficient to show prejudice warranting a change of venue.—*Harrison v. State* (Tex. Cr. App.) 1002.

But little weight should be given to the mere opinion of witnesses that accused could not have an impartial trial in the county.—*Harrison v. State* (Tex. Cr. App.) 1002.

Evidence *held* sufficient to show venue.—*McGlasson v. State* (Tex. Cr. App.) 93.

When notice of appeal has been given, and the term at which the case was tried has expired, the trial court has lost jurisdiction to enter judgment.—*Estes v. State* (Tex. Cr. App.) 982.

### Former jeopardy.

An acquittal of a charge of carrying "brass-knuckles" *held* a bar to a prosecution for carrying "knuckles made out of metal."—*Morrison v. State* (Tex. Cr. App.) 113.

A plea that a demurrer was sustained to a former indictment for the same offense, and the indictment dismissed, *held* not good as a plea of former acquittal.—*Commonwealth v. C. B. Cook Co.* (Ky.) 400.

A plea of former acquittal cannot be considered when interposed after verdict.—*Barton v. State* (Tex. Cr. App.) 987.

A plea of former acquittal may be interposed, together with a plea of not guilty or alone.—*Barton v. State* (Tex. Cr. App.) 987.

### Evidence.

Depositions taken by agreement were objected to when offered in evidence. *Held*, that they should not have been suppressed, or, having been suppressed, the party was entitled to continuance to replace them.—*Blake v. State* (Tex. Cr. App.) 107.

Evidence cannot be rejected because other evidence offered by the same party contradicts it.—*Blake v. State* (Tex. Cr. App.) 107.

An unsigned writing claimed by the state to be the evidence of one of the defendant's witnesses at an inquest *held* inadmissible to show what the testimony was at the inquest.—*Price v. State* (Tex. Cr. App.) 96.

Letters written by accused when not under arrest are admissible as confessions.—*Edens v. State* (Tex. Cr. App.) 89.

The court is the judge of the admissibility of confessions as evidence.—*Dugan v. Commonwealth* (Ky.) 418.

Confession *held* not to have been induced by such promises, threats, fear, or advice as to render it inadmissible.—*Dugan v. Commonwealth (Ky.)* 418.

A confession out of court, accompanied by proof that the crime was committed, will warrant a conviction.—*Dugan v. Commonwealth (Ky.)* 418.

Voluntary statements by accused while in custody, but before arrest, *held* admissible in evidence.—*Smith v. State (Tex. Cr. App.)* 794.

Evidence of declarations of accused *held* inadmissible as part of the *res gestae*.—*McNeal v. State (Tex. Cr. App.)* 792.

Where a confession was made by accused before he was arrested, it is not necessary to lay a predicate for introduction of testimony in relation thereto.—*Harrison v. State (Tex. Cr. App.)* 1002.

Admissibility of evidence on the question of the insanity of defendant determined.—*Green v. State (Ark.)* 973.

One indicted for a misdemeanor is a competent witness for the state in the prosecution of another for the same offense.—*Bolton v. State (Tex. Cr. App.)* 964.

When the evidence will sustain a verdict of guilty, the jury may disregard alibi testimony, though it is complete.—*Droak v. State (Tex. Cr. App.)* 988.

Dying declarations are admissible, though Bill of Rights, § 10, requires that accused be confronted with the witnesses against him.—*Taylor v. State (Tex. Cr. App.)* 1018.

Evidence showing that a bullet decreases in weight by passing through a human body is admissible to rebut defendant's evidence that weight of bullet that killed deceased was less than that of the caliber shown by commonwealth to have been fired by defendant.—*Dugan v. Commonwealth (Ky.)* 418.

Evidence in rebuttal *held* properly admitted.—*Magee v. State (Tex. Cr. App.)* 98.

On prosecution of a school teacher for assaulting a pupil, opinion evidence by the teacher that chastisement was not excessive is inadmissible.—*Howerton v. State (Tex. Cr. App.)* 1018.

Evidence of a physician that a wounded person could have gone from the house where the injury was received to the place where his body was found, without leaving sign of blood, *held* admissible as expert evidence.—*Pilot v. State (Tex. Cr. App.)* 1024.

One of the witnesses for the defense denied that he had offered a party money not to testify against him on the trial. *Held*, that the party bribed could not testify concerning it on behalf of the state.—*Clark v. State (Tex. Cr. App.)* 522.

Where one accused of crime was present when his brother furnished a state's witness means to leave the country, it is not error for the state to prove the transaction.—*Clark v. State (Tex. Cr. App.)* 522.

Evidence examined, and *held* to sufficiently corroborate testimony of accomplices in a trial for murder to warrant a conviction.—*Williamson v. State (Tex. Cr. App.)* 523.

Where defendants offer themselves as witnesses, the state can attack their general character.—*State v. May (Mo.)* 637.

Testimony of threats made by defendant on the previous day to kill somebody, but not directed in any way towards the deceased, are inadmissible.—*Godwin v. State (Tex. Cr. App.)* 336.

In order to render admissible testimony that after the commission of the offense charged defendant left the county, *held* not necessary to lay predicate, showing that defendant had no

right to leave the county.—*Henry v. State (Tex. Cr. App.)* 340.

Testimony of the sheriff that during three years he had writs of capias for the arrest of defendant, but had failed to find him, *held* admissible to show the flight of defendant.—*Henry v. State (Tex. Cr. App.)* 640.

#### Time of trial and continuance.

Facts *held* sufficient to justify the court in overruling defendant's application for a continuance.—*Benson v. State (Tex. Cr. App.)* 527.

Defendant's failure to prove alibi by witnesses called, *held* no reason why his application for continuance to permit him to replace depositions on the same question, unexpectedly suppressed, should be denied.—*Blake v. State (Tex. Cr. App.)* 107.

An order denying a continuance for absence of witnesses out of the state will be sustained, where no effort was made to procure their depositions.—*Halle v. State (Tex. Cr. App.)* 999.

Continuance for absence of witnesses was properly denied where the state admitted the truth of what the witnesses would testify to.—*Bolton v. State (Tex. Cr. App.)* 1010.

A continuance for absent witness *held* properly refused.—*Pilot v. State (Tex. Cr. App.)* 1024.

Where a motion for continuance sets up that the defendant expects to prove by absent witnesses facts about which there is no controversy, and is vague and indefinite, it is not error to overrule it.—*Clark v. State (Tex. Cr. App.)* 522.

A defendant whose trial is set for a day 19 days after the date of the indictment, and who delays 14 days in applying for process for a witness, *held* not to have shown diligence.—*Benson v. State (Tex. Cr. App.)* 527.

Absence of character witnesses is not ordinarily ground for continuance.—*Benson v. State (Tex. Cr. App.)* 527.

A continuance for absence of witnesses *held* properly denied.—*Steel v. State (Tex. Cr. App.)* 101; *McIntyre v. State (Tex. Cr. App.)* 104.

A new trial will not be granted because of the refusal of a continuance on account of the absence of a witness, where it is not probable that the witness can be procured.—*Maloney v. State (Tex. Cr. App.)* 980.

Nor where it does not appear that the witness was present at the time of the transaction in question.—*Maloney v. State (Tex. Cr. App.)* 980.

#### Trial.

Under Laws 1896, p. 166, § 4204, accused *held* entitled to the jury list either 24 hours or 12 hours before trial in specified cases.—*State v. May (Mo.)* 637.

One is not served with jury list 24 hours before trial, where it is delivered at 12 m. Saturday, and at 10:30 Monday he is required to announce his challenges.—*State v. May (Mo.)* 637.

A deputy sheriff, who is also a witness, may be released by the court from the rule excluding witnesses during the trial.—*Brite v. State (Tex. Cr. App.)* 342.

Where evidence was plainly hearsay, it should have been excluded, though the objection was put on the general ground that it was incompetent, irrelevant, and immaterial.—*Parker v. United States (Indian Ter.)* 858.

Permitting a witness to testify in spite of the fact that he had violated an order excluding witnesses from the court room *held* not an abuse of discretion.—*Parker v. United States (Indian Ter.)* 858.

It is not error to admit in rebuttal original evidence rebutting defendant's evidence of an alibi.—*Pilot v. State (Tex. Cr. App.)* 1024.

A refusal to set aside a verdict on affidavit of juror that it was compelled by threats *held* proper.—*Pilot v. State* (Tex. Cr. App.) 1024.

The mere fact that the jury, while in the charge of the sheriff taking exercise, went to the store where the killing occurred for the purpose of procuring some tobacco, did not constitute the receiving of evidence out of court.—*Tudor v. Commonwealth* (Ky.) 187.

A statement of the commonwealth's attorney to the jury not being an obvious allusion to defendant's failure to testify, the action of the court in permitting it to be made is not substantial error.—*Tudor v. Commonwealth* (Ky.) 187.

Where an attorney talks with witnesses placed under the rule, it is proper to reprimand him in the presence of the jury.—*Magee v. State* (Tex. Cr. App.) 98.

A prejudicial remark made by the county attorney in a low tone of voice, which the judge rebuked immediately, and instructed the jury not to consider, is not error.—*Clark v. State* (Tex. Cr. App.) 522.

#### — Instructions.

Where the first count of an indictment is defective, but the second count is valid, there is no error where the court, in his charge, submits the second count alone.—*Butler v. State* (Tex. Cr. App.) 992.

Instruction on the law of principals, in a prosecution for violating the local option law, *held* proper.—*Wolfe v. State* (Tex. Cr. App.) 997.

An omission to charge with reference to the purpose for which the jury should consider certain evidence *held* not error.—*Pilot v. State* (Tex. Cr. App.) 1024.

An instruction which attaches importance to particular facts is error.—*Henry v. State* (Ark.) 490.

Where testimony is introduced simply for the purpose of impeachment, *held* not necessary to give instruction that it is to be restricted to the purpose for which it is admitted.—*Magee v. State* (Tex. Cr. App.) 512.

A charge that, if the jury had a reasonable doubt "from the evidence" as to the guilt of defendant, they should acquit him, was no ground for reversal, although the doubt may arise from a want of evidence.—*Tomlinson v. State* (Tex. Cr. App.) 332.

Where the evidence showed a witness for the state an accomplice of defendant, it was error to refuse to charge on accomplice evidence.—*Robinson v. State* (Tex. Cr. App.) 526.

Where there are circumstances tending to convict defendant independent of the testimony of the alleged accomplice, *held* not error to refuse an instruction that, if the witnesses were accomplices, the jury should acquit.—*Henry v. State* (Tex. Cr. App.) 340.

Instruction defining accomplices, and submitting to the jury the question whether certain parties were accomplices, *held* sufficient.—*Martin v. State* (Tex. Cr. App.) 352.

An instruction on fraudulent intent that omits the word "doubt" is cured by the submission of another that correctly defines a "reasonable doubt" and applies it to the case.—*Poteet v. State* (Tex. Cr. App.) 339.

Instructions as to the credibility of a witness examined, and *held* not prejudicial to defendant.—*Benson v. State* (Tex. Cr. App.) 527.

A charge defining a fraudulent intent *held* to sufficiently guard the defendant's rights.—*Brite v. State* (Tex. Cr. App.) 342.

A charge upon a theory of defense, which the defendant had prepared himself to advance or act, as circumstances required, *held* not erroneous.—*Brite v. State* (Tex. Cr. App.) 342.

Where a defendant may or may not have had assistance in committing a larceny, a charge upon the law of principals *held* not prejudicial, when accompanied by an instruction that the defendant must have engaged in committing the larceny as a principal.—*Brite v. State* (Tex. Cr. App.) 342.

Instruction as to reasonable doubt *held* sufficient.—*Ray v. State* (Tex. Cr. App.) 77.

Evidence considered, and *held* not to necessitate a special charge on circumstantial evidence.—*Brown v. State* (Tex. Cr. App.) 986.

Where testimony as to the robbery and the identity of defendant is direct, an instruction on circumstantial evidence is not necessary.—*Droak v. State* (Tex. Cr. App.) 988.

Instructions examined, and *held* sufficient as to circumstantial evidence.—*Simmacher v. State* (Tex. Cr. App.) 354.

It is error to group certain circumstances in an instruction, and indicate the force to be given them.—*Brown v. Commonwealth* (Ky.) 214.

Charge *held* erroneous, as being on the weight of the testimony.—*Martin v. State* (Tex. Cr. App.) 91.

Where the law has been fully given by the court, it is not necessary to repeat the instructions in another form.—*Ray v. State* (Tex. Cr. App.) 77; *Russell v. Same* (Tex. Cr. App.) 81; *Ormand v. Same* (Tex. Cr. App.) 521.

#### Motions for new trial.

Under Rev. St. § 4270, a motion for a new trial cannot be amended after four days from verdict.—*State v. Hunt* (Mo.) 389.

A motion for new trial on the ground of prejudgment of a juror must be supported by affidavit of defendant and counsel.—*State v. Hunt* (Mo.) 389.

In passing on a motion for new trial, the court may look at the evidence of a witness on the examining trial, to ascertain whether it is probable that a witness will swear to facts as stated in the motion.—*Maloney v. State* (Tex. Cr. App.) 980.

An affidavit for new trial alleging newly-discovered evidence, which shows on its face that the accused was a participant in the acts set up as newly discovered, is insufficient.—*Blades v. State* (Tex. Cr. App.) 979.

New trial because of surprise *held* properly refused.—*McNeal v. State* (Tex. Cr. App.) 792.

That a defendant was surprised by the evidence of his own witness is not ground for a new trial.—*Simmacher v. State* (Tex. Cr. App.) 512.

Evidence on which a defendant moved for a new trial examined, and *held* insufficient.—*Simmacher v. State* (Tex. Cr. App.) 512.

It is proper to deny a new trial asked on the ground of newly-discovered evidence, where no affidavit of discovery is made.—*Baxter v. State* (Tex. Cr. App.) 87.

Accused *held* not to have used diligence in procuring evidence claimed to be newly discovered.—*Cunningham v. State* (Tex. Cr. App.) 988.

Lack of diligence of one's attorney in looking up evidence is no ground for new trial.—*Simmacher v. State* (Tex. Cr. App.) 512.

It is proper to refuse a new trial asked on the ground of newly-discovered evidence, where such evidence is merely cumulative.—*Baxter v. State* (Tex. Cr. App.) 87.

A new trial for newly-discovered evidence, which could not affect the result, *held* properly denied.—*Hodge v. State* (Tex. Cr. App.) 994.

A new trial will not be granted for newly-discovered impeaching testimony.—*Poteet v.*

State (Tex. Cr. App.) 339; *McNeal v. Same* (Tex. Cr. App.) 792.

Application for new trial on the ground of newly-discovered evidence *held* insufficient.—*Simnacher v. State* (Tex. Cr. App.) 354.

New trial on the ground of newly-discovered evidence *held* properly refused.—*McNeal v. State* (Tex. Cr. App.) 792; *Wade v. Same* (Tex. Cr. App.) 990.

#### **Appeal and error.**

An entry sustaining a motion to quash an indictment, but without any further order, is not a final judgment, and an appeal will not lie.—*State v. Fraker* (Mo.) 389.

Conviction upon one count, and judgment upon another, is not final and appealable.—*Womble v. State* (Tex. Cr. App.) 114.

An appeal will be dismissed where no notice thereof was given.—*Hurlock v. State* (Tex. Cr. App.) 992.

Notice of appeal is essential to give jurisdiction.—*Hurlock v. State* (Tex. Cr. App.) 992.

Where a recognizance is defective, a proper one cannot be entered into pending the appeal, so as to perfect it.—*Youngman v. State* (Tex. Cr. App.) 519.

It is no excuse for failing, on appeal from justice, to file within the prescribed time a statutory bond, that defendant did not have a lawyer.—*Ward v. State* (Tex. Cr. App.) 985.

The record being before the court, without judgment having been entered below, the appeal will be dismissed.—*Estes v. State* (Tex. Cr. App.) 982.

#### **— Presentation and reservation of grounds of review.**

An objection to duplicity in an information cannot be first raised on appeal.—*Howerton v. State* (Tex. Cr. App.) 1018.

Assignment of error that the court failed to give an instruction cannot be maintained where no exception was reserved or presented in the motion for a new trial, under Acts 25th Leg. p. 17.—*Magee v. State* (Tex. Cr. App.) 512.

An improper remark of counsel will not be reviewed, unless an objection has been made, a ruling obtained, and an exception saved.—*Parker v. United States* (Indian Ter.) 858.

Alleged improper remarks of district attorney will not be reviewed, where there was no request for charge in relation thereto.—*Franklin v. State* (Tex. Cr. App.) 85.

Error in admitting evidence will not be reviewed where no ground of objection was specified.—*Price v. State* (Tex. Cr. App.) 96.

Failure to give an instruction is no ground for reversal, where the charge was not asked, and no exception was preserved.—*Russell v. State* (Tex. Cr. App.) 81.

Where no exception is saved to rulings on motion to quash an information, the action cannot be reviewed.—*State v. Campbell* (Mo.) 187.

One who asks for a statement from the court cannot predicate error upon its having been made in presence of the jury, where he did not ask to have the jury retired.—*Gregory v. State* (Tex. Cr. App.) 1017.

#### **— Record and proceedings not in record.**

A transcript filed April 29, 1897, on appeal from a judgment rendered March 1, 1897, is within the 60 days prescribed by the Code.—*Commonwealth v. G. W. Taylor Co.* (Ky.) 390.

Where transcript is not filed within the 60 days prescribed by the Code, the appeal will be dismissed.—*Commonwealth v. F. S. Ashbrook Co.* (Ky.) 390.

A transcript showing delivery to appellant's attorney, and that it then found its way into the appellate court, will be stricken out under Code Cr. Proc. 1895, art. 897.—*Pilot v. State* (Tex. Cr. App.) 112.

A refusal of a new trial for insufficiency of the evidence cannot be reviewed where there is no statement of facts.—*Williams v. State* (Tex. Cr. App.) 518; *Green v. Same* (Tex. Cr. App.) 1006.

Whether or not there was evidence to justify a verdict of guilty cannot be reviewed on appeal where the record does not contain the statement of facts.—*Williams v. State* (Tex. Cr. App.) 517; *Smith v. Same* (Tex. Cr. App.) 1008.

Where there is no statement of facts, whether the verdict is contrary to the law cannot be reviewed.—*Smith v. State* (Tex. Cr. App.) 1006.

Rulings on evidence cannot be considered in the absence of a statement of facts.—*Castleman v. State* (Tex. Cr. App.) 994; *Smith v. Same* (Tex. Cr. App.) 1006.

A statement of facts not approved by the trial judge cannot be considered.—*Castleman v. State* (Tex. Cr. App.) 991; *Green v. Same* (Tex. Cr. App.) 1003.

A statement of facts not agreed to or approved cannot be considered.—*Green v. State* (Tex. Cr. App.) 1006.

Where a statement of facts is not approved by the trial judge, the instructions cannot be reviewed.—*Johnson v. State* (Tex. Cr. App.) 1007.

A statement of facts filed out of time without consent will not be considered on appeal.—*Gregory v. State* (Tex. Cr. App.) 1017.

A statement of facts filed out of term, and without an order entered for that purpose, cannot be considered.—*Butler v. State* (Tex. Cr. App.) 992.

A statement of facts approved after adjournment cannot be considered.—*Glasscock v. State* (Tex. Cr. App.) 985.

Sufficient diligence in filing statement of facts and bill of exceptions after term *held* not shown so as to authorize their consideration.—*Record v. State* (Tex. Cr. App.) 114.

Statement of facts embodying questions and answers of witnesses will be stricken out.—*Ex parte Nairn* (Tex. Cr. App.) 82.

Bills of exception filed 10 days after the term cannot be considered.—*Ellis v. State* (Tex. Cr. App.) 978.

Where bills of exceptions are not approved, and the record contains no statement of facts, the grounds of motion for new trial cannot be considered.—*Noble v. State* (Tex. Cr. App.) 978.

Bill of exceptions not approved by the trial judge cannot be considered.—*Moss v. State* (Tex. Cr. App.) 983; *Glasscock v. Same* (Tex. Cr. App.) 985; *Green v. Same* (Tex. Cr. App.) 1006.

The denial of a continuance cannot be reviewed in the absence of a bill of exceptions.—*Ellis v. State* (Tex. Cr. App.) 978; *Smith v. Same* (Tex. Cr. App.) 991.

When the record contains no bill of exceptions, rulings of the court cannot be considered on appeal.—*Wartelsky v. State* (Tex. Cr. App.) 991.

Exclusion of evidence will not be reviewed where the evidence is not set forth in the bill of exceptions.—*Hoskins v. State* (Tex. Cr. App.) 1008.

Objection on motion for new trial to testimony cannot be determined in the absence of a bill of exceptions.—*Kearly v. State* (Tex. Cr. App.) 990.

Failure of bill of exceptions to set out allegations required by statute in application for a

continuance cannot be cured by allegations in motion for new trial.—*Bresnan v. State* (Tex. Cr. App.) 111.

A refusal to grant a continuance cannot be reviewed where the motion is not in the record, and the bill of exceptions does not state that it was not for delay, or reasonable expectation of procuring attendance at a future day.—*Bresnan v. State* (Tex. Cr. App.) 111.

An objection that witnesses were allowed to remain in the court room will not be considered when not shown by a bill of exceptions.—*Magee v. State* (Tex. Cr. App.) 98.

Error in permitting witness to be recalled after argument closed must be presented by a bill of exceptions.—*Childress v. State* (Tex. Cr. App.) 100.

Grounds for a new trial cannot be considered without a bill of exceptions or statement of facts.—*Sullivan v. State* (Tex. Cr. App.) 342; *Glasscock v. Same* (Tex. Cr. App.) 985; *Wakefield v. Same* (Tex. Cr. App.) 985.

Errors in rulings on evidence or in instructions cannot be reviewed where no bill of exceptions was preserved, and there was no statement of facts.—*Halloway v. State* (Tex. Cr. App.) 103; *Kearly v. Same* (Tex. Cr. App.) 990.

Error in overruling an objection to certain evidence will not be reviewed where the bill of exceptions fails to state what the witness testified to.—*Green v. State* (Tex. Cr. App.) 1003.

Bill of exceptions to admission of evidence to prove certain facts *held* insufficient where it did not state that such facts were proved.—*Howerton v. State* (Tex. Cr. App.) 1018.

Suggestions in trial court as to error in giving instructions are not bills of exceptions to the charge.—*Martin v. State* (Tex. Cr. App.) 352.

A bill of exceptions on a trial for murder, stating that defendant offered to prove and could have proved by two witnesses that, if more than one shot had been fired, they would have seen it, *held* too indefinite.—*Ormand v. State* (Tex. Cr. App.) 521.

Bill of exceptions cannot be aided by reference to statement of facts.—*Howerton v. State* (Tex. Cr. App.) 1018.

Bill of exceptions cannot be aided by statements in writing on motion for new trial nor by the statement of facts.—*McGlasson v. State* (Tex. Cr. App.) 98.

Bills of exceptions which require a statement of facts to determine the error alleged cannot be considered in the absence of a statement.—*Gregory v. State* (Tex. Cr. App.) 1017.

Bill of exceptions *held* to show the inadmissibility of the evidence.—*McGlasson v. State* (Tex. Cr. App.) 98.

Refusal to quash an information on the ground that the complaint was filed in justice court will not be sustained, where the record does not show that it was filed there.—*Castleman v. State* (Tex. Cr. App.) 994.

When the record does not contain the evidence, the court's refusal to give certain instructions cannot be considered on appeal.—*Wartelsky v. State* (Tex. Cr. App.) 991.

Error in overruling a motion to continue to meet testimony of a witness will not be reviewed where the evidence is not in the record.—*Green v. State* (Tex. Cr. App.) 1003.

The failure to exclude a certain witness under the rule must be shown to be prejudicial to the appellant by showing what testimony the witness heard.—*Brite v. State* (Tex. Cr. App.) 342.

Error in giving instructions cannot be considered in the absence of the statement of facts.—*Moss v. State* (Tex. Cr. App.) 983.

In the absence of a statement of facts, a refusal of instructions cannot be reviewed.—*McNair v. State* (Tex. Cr. App.) 987.

Where the charge given is applicable under the allegations of the indictment, and there is no statement of facts, a reversal on the ground that all necessary instructions were not given will be denied.—*Yvarra v. State* (Tex. Cr. App.) 341.

Record *held* to show that defendant is in jail as against a motion to dismiss.—*Lewis v. State* (Tex. Cr. App.) 82.

In the absence of testimony, a refusal of a new trial for newly-discovered evidence cannot be considered.—*Lewis v. State* (Tex. Cr. App.) 82.

Alleged error in changing a file mark on information will not be considered where there is no evidence of the change.—*Moss v. State* (Tex. Cr. App.) 983.

#### — Review.

The court of criminal appeals cannot inquire upon what evidence the grand jury found an indictment.—*Clark v. State* (Tex. Cr. App.) 522.

Where the record of a case shows that a jury was "duly selected, impaneled, and sworn," the presumption is that the jury was sworn in the case wherein the entry is made.—*Harrison v. State* (Tex. Cr. App.) 1002.

In the absence of a statement of facts, it will be presumed on appeal that the evidence was sufficient.—*Williams v. State* (Tex. Cr. App.) 983.

Where defendant is convicted of manslaughter under an indictment for murder, the error, if any, in an instruction defining "malice aforethought," is harmless.—*Moody v. Commonwealth* (Ky.) 209.

Error cannot be assigned on evidence which the court instructs the jury to disregard.—*Magee v. State* (Tex. Cr. App.) 98.

Admission of improper impeaching evidence *held* harmless.—*Price v. State* (Tex. Cr. App.) 96.

The giving of a charge which permits a conviction of an offense not sufficiently charged in the information, though a lesser included offense is charged, is reversible error, where it is uncertain of which offense the jury found the defendant guilty.—*Lomax v. State* (Tex. Cr. App.) 92.

Instructions *held* not prejudicial to defendant.—*Tucker v. State* (Tex. Cr. App.) 106.

A refusal by the court to permit defendant to examine a witness for the commonwealth touching transactions that would tend to impeach said witness, where the facts sworn to by this witness were substantiated by the testimony of other witnesses, is not reversible error.—*Dugan v. Commonwealth* (Ky.) 418.

Admission of evidence of statements made to a witness for commonwealth by a witness for defendant *held* not prejudicial to defendant.—*Dugan v. Commonwealth* (Ky.) 418.

A certain instruction *held* harmless.—*Cunningham v. State* (Tex. Cr. App.) 988.

The omission to instruct upon the purpose of certain evidence was not ground for reversal, where no prejudice was shown.—*Brown v. State* (Tex. Cr. App.) 986.

Defendant *held* not prejudiced by the failure of the court to explain the sort of verdict to be rendered, where the jury assessed the minimum punishment.—*Stevens v. State* (Tex. Cr. App.) 102.

Evidence that the person from whom one accused of cattle theft obtained the stolen cow said in the presence of the accused that he had stolen many a cow, but had not stolen this cow, *held* not

prejudicial to the accused.—*Clark v. State* (Tex. Cr. App.) 522.

A conviction, where there is evidence to sustain it, will not be disturbed.—*Russell v. State* (Tex. Cr. App.) 81; *Harrison v. Same* (Tex. Cr. App.) 1002.

A conviction on conflicting evidence will not be disturbed.—*Wade v. State* (Tex. Cr. App.) 990; *Smith v. Same* (Tex. Cr. App.) 991.

## CROSS COMPLAINT.

See "Pleading."

## CROSS-EXAMINATION.

See "Witness."

## CROSSINGS.

Railroad crossings, see "Railroads."

## CURTESY.

Right of surviving husband of deceased reversioner to curtesy in the reversion determined.—*Martin v. Trail* (Mo.) 655.

## CUSTODY.

Of child, see "Divorce."

## DAMAGES.

Arising from maintenance of nuisance, see "Nuisance."

—operation of railroads, see "Railroads."

Breach by buyer of contract for sale of goods, see "Sales."

—by vendor of contract for sale of land, see "Vendor and Purchaser."

For causing death, see "Death."

For property taken for public use, see "Eminent Domain."

Recovery in particular actions, see "Ejectment"; "Trespass to Try Title."

In action for breach of contract to accept certain sawlogs sold, plaintiff was not entitled to recover for interest on notes of defendant and the cost of idle time.—*Sabine Tram Co. v. Jones* (Tex. Civ. App.) 905.

Profits under a contract which are certain and definite *held* a proper measure of damages on breach of the contract.—*Sabine Tram Co. v. Jones* (Tex. Civ. App.) 905.

Courts will not treat as liquidated damages a sum named as such, when it does not bear such proportion to the actual damages that it may reasonably be presumed to have been arrived at on a fair estimation by the parties of the compensation to be paid for the prospective loss.—*Wilcox v. Walker* (Tex. Civ. App.) 579.

Damages cannot be recovered for mental pain unaccompanied by physical injury.—*Peay v. Western Union Tel. Co.* (Ark.) 965.

Mental anguish caused by apprehension as to the condition of one's family, as a result of personal injuries, cannot be considered in estimating damages.—*Planters' Oil Co. v. Mansell* (Tex. Civ. App.) 913.

### Exemplary damages.

Facts *held* to justify a verdict for exemplary damages, even though plaintiff did not state he was humiliated or mortified.—*Louisville & N. R. Co. v. Donaldson* (Ky.) 439.

Where the award of punitive damages is not necessarily the result of passion or prejudice, the verdict will not be disturbed.—*Louisville & N. R. Co. v. Donaldson* (Ky.) 439.

In an action arising under Const. Ky. § 241, before the enactment of Ky. St. § 6, punitive damages may be recovered.—*Owensboro & N. Ry. Co. v. Barclay's Adm'r* (Ky.) 177.

### Excessive damages.

\$9,000 for permanent injuries to a printer *held* not excessive.—*Houston City St. Ry. Co. v. Medlenka* (Tex. Civ. App.) 1028.

A verdict for \$5,000 for loss of fingers of right hand *held* not excessive.—*Missouri K. & T. Ry. Co. of Texas v. Hauer* (Tex. Civ. App.) 1078.

Verdict of \$11,500 for permanent injuries to a switchman *held* not excessive.—*Missouri K. & T. Ry. Co. of Texas v. Chambers* (Tex. Civ. App.) 1090.

\$5,000 for personal injuries *held* not excessive.—*Galveston, H. & S. A. Ry. Co. v. Parrish* (Tex. Civ. App.) 536.

Evidence *held* to show that the damages awarded were excessive.—*Texas & N. O. R. Co. v. Syfan* (Tex. Civ. App.) 551.

### Pleading, evidence, and assessment.

Allegations in a petition in an action for personal injuries *held* not sufficiently specific.—*City of Marshall v. McAllister* (Tex. Civ. App.) 1043.

Allegations as to damages for breach of contract not to engage in a certain business for a specified time *held* sufficient on general demurrer.—*Erwin v. Hayden* (Tex. Civ. App.) 610.

Evidence of complaints by plaintiff to his physician when examining him *held* admissible as part of the *res gestæ*.—*Wheeler v. Tyler S. E. Ry. Co.* (Tex. Sup.) 876.

Where the injury appears serious and permanent, direct evidence of mental suffering is unnecessary if alleged in the petition.—*City of San Antonio v. Kreusel* (Tex. Civ. App.) 615.

In an action for damages it is prejudicial error to admit testimony that a certain attorney had advised the bringing of the suit because he thought recovery might be had.—*Planters' Oil Co. v. Mansell* (Tex. Civ. App.) 913.

It was error to submit the question of a medical bill agreed to be paid by plaintiff, where it was not shown that the amount was reasonable.—*Wheeler v. Tyler S. E. Ry. Co.* (Tex. Sup.) 876.

Instructions in an action by a mother on her own behalf, and on behalf of her infant son, to recover damages for injury to the latter, *held* not to direct a double recovery for the services of infant during infancy.—*Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex. Civ. App.) 583.

An instruction in an action by a mother for loss of services of her infant son, based upon the pleading, which alleged his age as 6 years, when the evidence showed him to be 10 years old, *held* not misleading as directing the jury to compute damages upon the basis of the age of the son being 6 years.—*Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex. Civ. App.) 583.

It is not error to instruct the jury to consider the decreased earning capacity, in assessing damages, when there is evidence that presents that phase of damages.—*Galveston, H. & S. A. Ry. Co. v. Parrish* (Tex. Civ. App.) 536.

A charge as to personal injuries criticized as calculated to confuse the jury, and to induce them to give damages twice for the same loss.—*Missouri K. & T. Ry. Co. of Texas v. Hannig* (Tex. Sup.) 508.

The court need not make separate findings on each item of damages unless so requested.—*Texas Cent. R. Co. v. Fisher* (Tex. Civ. App.) 584.

## DEATH.

Const. Ky. § 241, giving a right of action to the personal representative against any person caus-

ing the death of his intestate by wrongful act, does not constitute the taking of property without due process of law, although the recovery may be for the benefit of persons who have no pecuniary interest in the life of deceased.—*Owensboro & N. Ry. Co. v. Barclay's Adm'r* (Ky.) 177.

In an action for killing of plaintiff's son by defendant's employes, petition *held* not to state cause of action, under Ky. St. §§ 4, 6.—*Harris v. Kentucky Timber & Lumber Co.* (Ky.) 462.

A father cannot maintain action against an employer for killing of son by fellow servants, under Ky. St. §§ 4, 6.—*Harris v. Kentucky Timber & Lumber Co.* (Ky.) 462.

Where plaintiff, in an action for the death of a relative, shows that there are other relatives that should have been joined as plaintiffs, it is incumbent upon him to request a stay of proceedings, until the necessary amendment can be made; and, if this be not done, plaintiff cannot recover.—*Galveston, H. & S. A. Ry. Co. v. McCray* (Tex. Civ. App.) 275.

Verdict for \$2,000, awarded a mother for the death of her son, *held* not excessive.—*Gulf, C. & S. F. Ry. Co. v. Royall* (Tex. Civ. App.) 815.

## DECEDENTS.

Estates, see "Executors and Administrators."

## DECLARATIONS.

As evidence in civil actions, see "Evidence."  
—in criminal prosecutions, see "Criminal Law."

## DEDICATION.

Of street, see "Municipal Corporations."

The marking of one of three squares as "Meeting-House Square" *held* to be a dedication for religious purposes.—*City of Maysville v. Wood* (Ky.) 408.

## DEEDS.

See, also, "Covenants"; "Vendor and Purchaser."

Construction of mineral deed, see "Mines and Minerals."

Estoppel by, see "Estoppel."

Of homestead, see "Homestead."

Of trust, see "Assignments for Benefit of Creditors"; "Mortgages."

Parol or extrinsic evidence, see "Evidence."

Tax deed, see "Taxation."

Though it may be that plaintiff, having by his own fault lost a deed from defendant to his grantor before it was recorded, could not compel defendant to execute another deed, it was proper to direct a commissioner to convey on her part.—*McCauley v. Galloway* (Ky.) 225.

Plaintiffs are not entitled to recover land which they claim under a deed which they made no effort to record for 25 years, the land having in the meantime been sold under execution against the grantor, and purchased by defendants, who recovered possession in ejectment and have held it for many years.—*Logan v. Catron* (Ky.) 213.

The grantor in a conveyance, who was not capable of understanding its nature, and who received no consideration therefor, is entitled to have it set aside as against the heirs of a subsequent grantee who paid nothing for the land.—*Cray v. Wilson* (Ky.) 186.

A deed to a person and her bodily heirs after her decease conveys an estate in fee.—*Brown v. Brown* (Tenn. Ch. App.) 126.

Instrument binding obligor to make a deed on demand *held* to pass the equitable title.—*Tompkins v. Brooks* (Tex. Civ. App.) 70.

Reservation in deed construed, and *held* to give a grantor no power to sell the property.—*O'Connor v. Vineyard* (Tex. Civ. App.) 55.

The record of a deed was notice, though it had been destroyed by fire at the time of a subsequent purchase of the land, where the deed was again recorded after the purchase, and before the passage of the act relating to destroyed records.—*Mattfeld v. Huntington* (Tex. Civ. App.) 53.

The record of a deed in but one of two counties in which the land lies is notice of the grantee's title to the part of the land lying in the other county.—*Mattfeld v. Huntington* (Tex. Civ. App.) 53.

A deed describing the land conveyed as acquired by will from his grandfather, when it was acquired by deed, *held* not to affect the validity of the deed.—*Shields v. Hinkle* (Ky.) 485.

Description of land in deed construed.—*Presnell v. Headley* (Mo.) 378.

Covenants by a corporation are sufficiently proved by a deed executed by P. J. W. & Bro., "incorporated."—*P. J. Willis & Bro. v. Smith* (Tex. Civ. App.) 325.

Parol evidence is admissible to prove consideration additional to that recited in a deed.—*Garrett v. Robinson* (Tex. Civ. App.) 288.

Delivery of deed to notary to be deposited for record for the grantee is a sufficient delivery.—*Herring v. Mason* (Tex. Civ. App.) 797.

Where a grantor reserves in a conveyance the tan bark growing on the land, and the right to enter to cut and remove the same, he must exercise the right within a reasonable time.—*Morris v. Sanders* (Ky.) 733.

Where the joint owners of a contingent interest in land agreed to convey each to the other one-half the land, the deed executed by one of them will not be set aside on the ground that it was without consideration.—*Weatherford v. Boulware* (Ky.) 729.

## DEFAMATION.

See "Libel and Slander."

## DEFAULT.

Judgment by, see "Judgment."

## DEFECTS.

In bridges, liability of municipal corporation, see "Municipal Corporations."

In machinery and appliances, see "Master and Servant."

Of parties, see "Parties."

## DELAY.

In transportation or delivery of goods by carrier, see "Carriers."

## DELIVERY.

Of deed, see "Deeds."

Of gift, see "Gifts."

Of goods sold, see "Sales."

## DEMURRER.

See "Pleading."

To evidence, see "Trial."

## DEPOSITIONS.

See, also, "Witnesses."

Under Code Cr. Proc. 1895, art. 803, and Rev. St. 1895, art. 2289, formal objections to deposi-

tions must be made at the first term after the filing of them.—*Blake v. State* (Tex. Cr. App.) 107.

When deposition taken in ejectment suit may be used in a suit to restrain its prosecution.—*Carter v. Stewart* (Tenn. Ch. App.) 366.

Nonresponsive answers in a deposition can be suppressed only on motion made before the trial.—*McFarlane v. Howell* (Tex. Civ. App.) 315.

Admission in evidence of exhibits to a deposition taken by defendant by allowing plaintiff to read same is wholly in the court's discretion.—*Moffett-West Drug Co. v. Byrd* (Indian Ter.) 864.

A party may read any admission of the adverse party contained in a deposition taken ex parte, without being compelled to read the whole.—*Watson v. Winston* (Tex. Civ. App.) 852.

## DEPUTIES.

See "Officers."

## DESCENT AND DISTRIBUTION.

See, also, "Executors and Administrators"; "Wills."

*Held*, that a judgment for the price of land purchased by one since deceased must be made out of deceased's property still in the hands of the devisee.—*Dorsey's Adm'r v. Swann* (Ky.) 692.

Life insurance policy must be distributed according to the laws of the state of deceased's domicile.—*Ellis v. Northwestern Mut. Life Ins. Co.* (Tenn. Sup.) 766.

Where a lien is reserved in a deed for the purchase price, the rights under such lien descend to the heirs of the grantor.—*Smith v. Pate* (Tex. Civ. App.) 312.

## DESCRIPTION.

Of land in notice of tax sale, see "Taxation."  
Of property conveyed, see "Deeds."

## DEVICES.

See "Wills."

## DIRECTING VERDICT.

In civil actions, see "Trial."

## DISABILITIES.

Effect on limitation, see "Limitation of Actions."

## DISCHARGE.

From indebtedness, see "Compositions with Creditors"; "Release."  
—liability as surety, see "Principal and Surety."  
Of attachment, see "Attachment."

## DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Criminal Law."

## DISORDERLY HOUSE.

Pen. Code 1895, arts. 359, 361, provide for a separate offense for each day a disorderly house is kept, and the penalty must be assessed for each day separately.—*Ex parte Smith* (Tex. Cr. App.) 1000.

On conviction, where indictment charges that the house was kept open for several days, the

penalties must be assessed for each day separately, and not aggregated.—*Ex parte Smith* (Tex. Cr. App.) 1000.

## DISQUALIFICATION.

Of judge, see "Judges."

## DISSOLUTION.

Of attachment, see "Attachment."  
Of corporation, see "Corporations."

## DISTRESS.

For rent, see "Landlord and Tenant."

## DISTRIBUTION.

Of estate assigned for creditors, see "Assignments for Benefit of Creditors."  
—of decedent, see "Executors and Administrators."

## DISTRICT AND PROSECUTING ATTORNEYS.

Where it is the law that, if there is a county attorney, the attorney for a city in the county cannot represent the state, *held*, that a petition by the city attorney against the county for fees was defective, in not alleging that there was no county attorney.—*Harris County v. Stewart* (Tex. Civ. App.) 52.

## DISTRICT COURTS.

See "Courts."

## DISTURBANCE OF PUBLIC ASSEMBLAGE.

An indictment for disturbing a congregation assembled for religious worship *held* fatally defective under the statute.—*Kizzia v. State* (Tex. Cr. App.) 86.

## DIVORCE.

Under Sand. & H. Dig. § 2517, it is error to award a wife as alimony one-third of the remainder of the husband's estate, after deducting his indebtedness.—*Beene v. Beene* (Ark.) 968.

In divorce, questions of venue are not waived by a failure to plead in abatement.—*Bruner v. Bruner* (Tex. Civ. App.) 796.

Where a divorce case is submitted upon special issues, *held*, the jury must make findings as to jurisdictional questions to support the judgment.—*Bruner v. Bruner* (Tex. Civ. App.) 796.

When a decree of divorce is entered, and no order is made touching community property, the husband and wife become tenants in common of the community interest.—*Southwestern Mfg. Co. v. Swan* (Tex. Civ. App.) 818.

The habitation of the wife, as contradistinguished from her legal domicile with her husband, is regarded as her residence, for the purpose of conferring jurisdiction.—*Hall v. Hall* (Ky.) 429.

That a husband was sentenced for felony for life more than five years before the wife sued for divorce, alleging condemnation as a ground, does not bar her under Civ. Code, § 423, subd. 3.—*Davis v. Davis* (Ky.) 168.

Where a husband is serving a life sentence in the penitentiary, the wife should not be denied a divorce for abandonment upon the ground that the living apart "is not voluntary."—*Davis v. Davis* (Ky.) 168.



Right of husband to enforce an order for restoration of property received in consideration of marriage determined.—*Bennett v. Bennett* (Ky.) 247.

Wife, when required on divorce to restore property obtained from husband, *held* entitled to retain rents received therefrom.—*Bennett v. Bennett* (Ky.) 247.

The court can make costs in divorce by the wife a charge against the community interest of the husband.—*Ghent v. Boyd* (Tex. Civ. App.) 891.

The action of the court in awarding the custody of two boys, aged five and nine years, to the father, *held* proper as to the nine year old boy, but improper as to the other.—*Beene v. Beene* (Ark.) 968.

## DOCUMENTS.

As evidence in civil actions, see "Evidence."  
— in criminal prosecutions, see "Criminal Law."

## DONATIONS.

See "Gifts."

## DOWER.

In a suit for dower interest in land in the hands of second grantees, defendants may prosecute a cross bill for breach of warranty against the heirs of the deceased husband.—*Richmond v. Harris* (Ky.) 703.

Under Ky. St. § 2141, a widow cannot claim dower in land conveyed by her husband, when her full dower can be furnished out of the remaining estate.—*Richmond v. Harris* (Ky.) 703.

A breach of warranty or of a covenant against incumbrances does not create such a debt, within 1 Rev. Laws 1825, p. 333, as will bar a widow from asserting dower in land conveyed by her husband without her joining.—*Bartlett v. Ball* (Mo.) 783.

Under Rev. St. 1889, § 8889, a widow may be a devisee, and chargeable as such with liability as against the husband's creditors, and yet her dower right remain unaffected.—*Bartlett v. Ball* (Mo.) 783.

The wife's right to dower being inchoate, it may be modified or abolished without contravening any vested right.—*Bartlett v. Ball* (Mo.) 783.

## DRAFT.

See "Bills and Notes."

## DYING DECLARATIONS.

See "Homicide."

## EJECTMENT.

Where the land in suit is alleged to be within the boundaries of a larger tract, it is sufficient if the latter be described, without a precise description of the particular tract.—*Combs v. Combs* (Ky.) 697.

In ejectment for premises held under an oral lease for life for caring for bastard child, a judgment that tenant is entitled to compensation for caring for child in cash and rental value, where the child is taken away, and that she must surrender possession, *held* not error.—*Bradshaw v. Jones* (Ky.) 428.

Damages for destroying plaintiff's garden *held* not excessive.—*Seiferer v. City of St. Louis* (Mo.) 163.

Plaintiff can recover for fence removed and garden destroyed under Rev. St. 1889, § 4638.—*Seiferer v. City of St. Louis* (Mo.) 163.

One holding title by gift can maintain ejectment for the land, though no valuable consideration was paid.—*Nicholas v. Shiplett* (Ky.) 248.

## ELECTIONS.

Local option election, see "Intoxicating Liquors." Of members of board of education, see "Schools and School Districts."

Where, by reason of disturbance and intimidation, so large a number of voters were prevented from voting that what would have been the result if they had been allowed to vote cannot be ascertained, the election will be set aside.—*Hodge v. Jones* (Tex. Civ. App.) 41.

The provisions of the statute as to the acknowledgment of the certificate of nomination, and as to what the certificate shall contain in order to authorize the county clerk to place the names of candidates on the ballot, are directory merely.—*Hallon v. Center* (Ky.) 174.

The requirement of the statute that certificates of nomination shall be filed not less than 15 days before the election is mandatory.—*Hallon v. Center* (Ky.) 174.

The requirement of the statute that certificates of nomination shall be filed not more than 60 days before the election is directory merely.—*Hallon v. Center* (Ky.) 174.

In the absence of allegations and proof of fraud or misconduct on the part of the judges of election in a precinct, the vote will not be thrown out because the judges are not equally apportioned to the two leading political parties.—*Sanders v. Lacks* (Mo.) 653.

In the absence of evidence of intentional deviation from the law, the returns from a precinct will not be thrown out because there were four judges of election instead of six, as required by Rev. St. 1889, § 4777.—*Sanders v. Lacks* (Mo.) 653.

The acceptance of judges of election by the mutual consent of the voters present, without any formal election, *held* a sufficient compliance with Rev. St. 1889, § 4791.—*Sanders v. Lacks* (Mo.) 653.

Under Rev. St. 1889, § 4665, the vote will not be thrown out on account of the failure of a judge to take an oath.—*Sanders v. Lacks* (Mo.) 653.

Where depositions were taken and filed by both parties to a contest, after which a demurrer to the notice was sustained, and on appeal to the circuit court the demurrer was overruled, the depositions could be considered by the circuit court.—*Strong v. Jones* (Ky.) 704.

## EMANCIPATION.

Of child, see "Parent and Child."

## EMINENT DOMAIN.

In taking land for public street, it is illegal to pay for it in benefits assessed to the owner's remaining land, and charge him with benefits to the strip taken.—*City of St. Joseph v. Crowther* (Mo.) 786.

Validity of assessment of damages and benefits on taking land for public street determined.—*City of St. Joseph v. Crowther* (Mo.) 786.

In an action by heirs for damages by taking land for a right of way, and injury done to a farm, where defendant claimed the land under a deed by deceased, judgment for plaintiff will not be reversed for failure to direct a conveyance to defendant, as none was necessary.—*Richmond, N. I. & B. R. Co. v. Thomas* (Ky.) 466.

Damages allowed for condemnation of property in cities of the second class, under Act March

28, 1896, determined.—City of St. Joseph v. Crowther (Mo.) 786.

The property owner does not lose the right to possession after the property has been injured, taken, or destroyed by failure to sue for an injunction until the damages to result therefrom have been estimated and paid.—City of Henderson v. McClain (Ky.) 700.

Bill of Rights, § 14, and Const. § 242, abolish the requirements of direct physical injury to property in order to establish a claim for damages.—City of Henderson v. McClain (Ky.) 700.

A switch track constructed and operated along an alley by authority of the city is for a public use.—Sherlock v. Kansas City Belt Ry. Co. (Mo.) 629.

## EMPLOYES.

See "Master and Servant."

## ENTRY.

Of judgment, see "Judgment."

Of public lands, see "Public Lands."

## EQUALIZATION.

Of taxes, see "Taxation."

## EQUITY.

Equitable relief from judgment, see "Judgment." Particular subjects of equitable jurisdiction and equitable remedies, see "Creditors' Suit"; "Divorce"; "Dower"; "Gifts"; "Injunction"; "Marshalling Assets and Securities"; "Mortgages"; "Partition"; "Partnership"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Subrogation"; "Trusts."

Where a clerk and master is interested as a party, his deputy is disqualified to act as special master.—Horne v. Greer (Tenn. Ch. App.) 774.

Where the cause was referred to a master to determine as to interlocutory orders, and the master erroneously reported on the merits, it was error to confirm the report and enter final judgment, since there was no lawful trial on the merits.—Simon v. Thompson (Indian Ter.) 861.

The married woman's act does not abrogate the common-law rule that a married woman cannot be guilty of laches.—Lindell Real-Estate Co. v. Lindell (Mo.) 868.

Under the facts, *held*, that a married woman who did not institute suit for an interest in land until 11 years after the cause of action accrued was not guilty of laches.—Lindell Real-Estate Co. v. Lindell (Mo.) 868.

Refusal to allow cross bill to be filed several years after answer *held* not an abuse of discretion.—Williams v. Sax (Tenn. Ch. App.) 868.

## ERROR, WRIT OF.

See "Appeal and Error."

## ESTABLISHMENT.

Of boundaries, see "Boundaries."

## ESTATES.

Created by deed, see "Deeds."

— by will, see "Wills."

Decedents' estates, see "Executors and Administrators."

Particular estates, see "Remainders."

Trusts, see "Trusts."

## ESTOPPEL.

By judgment, see "Judgment."

To avoid or forfeit insurance policy, see "Insurance."

To deny authority of agent, see "Principal and Agent."

To object to pleadings, see "Pleading."

Children accepting deed of a portion of real estate under a division made by their mother at their instigation *held* estopped, after the mother's death, to claim the whole of the land under a subsequent deed from her.—Floyd v. Sharp (Ky.) 258.

The maker of a note is estopped to plead usury against one whom he has induced to purchase it by his representation that he had no defense.—Blades v. Newman (Ky.) 176.

A claimant of land, who gave a warranty deed to the other claimant, *held* not estopped to subsequently acquire title to the land from the state, neither party having had title at the time the deed was given.—Simon v. Stearns (Tex. Civ. App.) 50.

Where both parties in ejectment claim title under the same person, they are estopped to dispute it.—Bleidorn v. Oakdale Iron, Coal & Transportation Co. (Tenn. Ch. App.) 890.

Plaintiff *held* not estopped by an allegation in his pleadings as to the time when a certain law took effect.—Purcell v. Texas & P. Ry. Co. (Tex. Civ. App.) 836.

Assignee of chattel mortgage obtaining possession of property before condition broken under promise to allow redemption *held* estopped to set up an alleged prior title.—Grady v. Newman (Indian Ter.) 764.

The fact that one who had bought goods and given a note for the purchase price thereafter settled certain accounts between him and the seller did not estop him from afterwards disputing the consideration.—Graham v. Guinn (Tenn. Ch. App.) 749.

A junior lienor *held* estopped to assert his lien as against a senior lienor by reason of representations made by him to the latter.—First Nat. Bank v. Hamilton Nat. Bank (Tex. Civ. App.) 613.

Owners of chattels that, while in the possession of tenant, had been distrained by the landlord for rent, *held* not estopped to assert their title to the property.—Davis v. Washington (Tex. Civ. App.) 585.

The maker of a note *held* estopped from asserting its invalidity.—Harrison v. Luce (Ark.) 970.

Declaration of attaching creditors' attorney, at dismissal of claimant's suit, that he intended to do nothing further *held* not to estop a suit on claimant's bond.—Deware v. Wichita Val. Mill & Elevator Co. (Tex. Civ. App.) 1047.

## EVIDENCE.

See, also, "Depositions"; "Witnesses."

Admissibility of testimony given before grand jury, see "Grand Jury."

— under pleading, see "Pleading."

Defense of statute of frauds, see "Frauds, Statute of."

In particular criminal prosecutions, see "Adultery"; "Arson"; "Assault and Battery"; "Burglary"; "Criminal Law"; "Forgery"; "Homicide"; "Intoxicating Liquors"; "Larceny"; "Libel and Slander"; "Perjury"; "Rape"; "Weapons."

Of adverse possession, see "Adverse Possession."

Of agency, see "Principal and Agent."

Of boundary, see "Boundaries."

Of damages, see "Damages."

Of fraud in conveyance, see "Fraudulent Conveyances."

Of payment, see "Payment."  
 Of venue, see "Criminal Law."  
 Questions of fact for jury, see "Trial."  
 Reception at trial, see "Criminal Law."  
 Review on appeal or writ of error, see "Appeal and Error."

Where defendant admits execution of a note, and pleads that it was induced by fraud, the burden is on him to show it.—*American Harrow Co. v. Tweddle* (Ky.) 409.

The mere fact that witnesses had seen receipts purporting to have been executed by plaintiff is not evidence of their execution, unless the witnesses were acquainted with plaintiff's handwriting.—*Cope v. Deaton* (Ky.) 190.

It is error in a foreclosure action to charge that the issue must be established "beyond a reasonable doubt."—*Pace v. American Freehold Land & Mortgage Co.* (Tex. Civ. App.) 36.

On issue whether an official bond had been filed and approved, the evidence reviewed, and held sufficient to sustain finding of jury.—*McFarlane v. Howell* (Tex. Civ. App.) 315.

In an action for personal injuries it is error to allow the plaintiff to testify that his wife had no means of support except her own labor.—*Missouri, K. & T. Ry. Co. of Texas v. Hannig* (Tex. Sup.) 508.

A party to an action in which the pleadings had been lost could testify as to whether it was to recover against him personally or against the estate of which he was an executor, though he did not remember the petition nor its contents.—*Croom v. Winston* (Tex. Civ. App.) 1072.

Testimony of a witness that he "thought" that he had told the foreman of his inexperience is to be taken to be testimony as to what witness remembered.—*Galveston, H. & S. A. Ry. Co. v. Parrish* (Tex. Civ. App.) 536.

#### Declarations and admissions.

Declarations relating to identity, not made ante litem motam, are inadmissible.—*Schott v. Pellerim* (Tex. Civ. App.) 944.

Declarations of an alleged grantee in a patent that he had acquired property in Texas held admissible in an action by the heirs of the petitioner to prove his identity.—*Schott v. Pellerim* (Tex. Civ. App.) 944.

A husband's declarations in derogation of his wife's title to land by parol gift are inadmissible when made after her rights had accrued.—*La Master v. Dickson* (Tex. Civ. App.) 911.

A declaration made by one of two defendants in the absence of the other is admissible against the former.—*Smithern v. Waddle* (Ky.) 453.

Declarations of a party in his own favor, after attachment of land, as to what he intended to be his homestead, held admissible, under the circumstances.—*Gunn v. Wynne* (Tex. Civ. App.) 290.

Evidence of statements of county judges that he had approved a bond are admissible to impeach his testimony, but not as affirmative evidence against the sureties.—*McFarlane v. Howell* (Tex. Civ. App.) 315.

Admissions of defalcation, made by a treasurer after the expiration of his term of office, are admissible against him, but not against the sureties on his bond.—*McFarlane v. Howell* (Tex. Civ. App.) 315.

#### Hearsay.

Certain evidence held inadmissible as hearsay.—*Walker v. Stilson* (Indian Ter.) 959.

Evidence as to what a third person had said in witness' presence in relation to statements of accused held inadmissible as hearsay.—*Ross v. State* (Tex. Cr. App.) 1004.

A defendant's declarations as to what a co-defendant had said held to be hearsay.—*Gordon v. Burris* (Mo.) 642.

Testimony as to the market value of poultry at a certain time and place, based on knowledge derived from quotations sent out by commission merchants at the same time, and from the same place, is competent.—*Texas Cent. R. Co. v. Fisher* (Tex. Civ. App.) 584.

#### Documentary evidence.

Original signed assessment lists are admissible against the makers.—*Jones v. Cummins* (Tex. Civ. App.) 854.

Admitting subpoena for witness, with order to produce books, to raise presumption against the parties for failure to appear, held error.—*Texas & N. O. R. Co. v. Farmer* (Tex. Civ. App.) 806.

Where tax deed is void on its face, a quitclaim deed by the grantee in the tax deed is not admissible to show title.—*Loring v. Groomer* (Mo.) 647.

Certificate of comptroller, showing amount paid to treasurer, admissible in evidence in action on his official bond.—*McFarlane v. Howell* (Tex. Civ. App.) 315.

In a suit on an official bond, where the issue is whether the bond was filed and approved, it may be introduced in evidence.—*McFarlane v. Howell* (Tex. Civ. App.) 315.

In an action to recover school lands on a certificate, it is not error to admit in evidence the application made by plaintiff for the purchase of the land.—*Simon v. Stearns* (Tex. Civ. App.) 50.

It was also proper to admit in evidence the application made by plaintiff for the purchase of the adjoining portion of the same section of the school lands on which he had settled, since it showed his right to purchase the portion in controversy.—*Simon v. Stearns* (Tex. Civ. App.) 50.

The rejection of a will as evidence because of a defect in the recording of it, which was afterwards corrected, held error, under the circumstances.—*Mattfeld v. Huntington* (Tex. Civ. App.) 53.

Certificate of clerk of court held sufficient to make a transcript of proceedings in a certain estate admissible in evidence.—*O'Connor v. Vineyard* (Tex. Civ. App.) 55.

In determining whether a judgment against one as "executor" was against him individually, the pleadings may be examined.—*Croom v. Winston* (Tex. Civ. App.) 1072.

Material admissions in an abandoned pleading held admissible.—*Goodbar Shoe Co. v. Sims* (Tex. Civ. App.) 1065.

A letter head of one corporation held inadmissible against another, to prove that the same person is an officer in both.—*Ricker Nat. Bank v. Brown* (Tex. Civ. App.) 909.

Letter from payee to maker, written after indorsement of note to third person, held inadmissible against him.—*Ricker Nat. Bank v. Brown* (Tex. Civ. App.) 909.

The fact that one party to a suit had notified the other party to produce certain letters at the trial, held not to authorize their introduction over the objection of the party who served the notice.—*Ricker Nat. Bank v. Brown* (Tex. Civ. App.) 909.

#### Parol evidence.

Evidence of witness as to terms made on receipt of telegraphic message for delivery held not inadmissible, as tending to vary the terms of the written contract as shown by the message.—*Robinson v. Western Union Tel. Co.* (Tex. Civ. App.) 1053.

Parol evidence held receivable in proceeding to reform a mortgage.—*Byrne v. Ft. Smith Nat. Bank* (Indian Ter.) 967.

In action on foreign judgment, parol evidence is inadmissible to prove the judgment.—*Schwab Clothing Co. v. Cromer* (Indian Ter.) 951.

Evidence *held* not inadmissible on the ground that it varies the terms of a written contract of insurance agency.—*Lea v. Union Cent. Life Ins. Co.* (Tex. Civ. App.) 927.

Where a written transfer of a headright does not sufficiently identify the certificate, it may be identified by parol evidence.—*Staley v. Hankla* (Tex. Civ. App.) 20.

Where a headright certificate is transferred, and at the same time a power of attorney to locate the certificate is given the transferee, as agent of the transferor, parol evidence is admissible to show that the transaction was an absolute sale of the certificate.—*Staley v. Hankla* (Tex. Civ. App.) 20.

Parol evidence *held* inadmissible to prove contents of public record, to which the witness refers while testifying.—*Mt. Sterling Nat. Bank v. Bowen* (Ky.) 483.

Where no fraud or mistake is shown in the making of a written contract, parol evidence as to its terms is inadmissible.—*Richmond, N., I. & B. R. Co. v. Richardson* (Ky.) 465.

Parol evidence *held* admissible to show consideration of deed.—*Garrett v. Robinson* (Tex. Civ. App.) 288.

Fraudulent representations inducing execution of written contract may be proved by parol.—*Herring v. Mason* (Tex. Civ. App.) 797.

Parol evidence *held* inadmissible to vary the terms of an unambiguous contract for dissolution of partnership.—*Yocum v. Cary* (Indian Ter.) 756.

Parol evidence is inadmissible to show that the directors of a corporation, who signed a guaranty to a creditor, intended to create only a corporate liability.—*Marx v. Luling Co-Op. Ass'n* (Tex. Civ. App.) 596.

Parol evidence *held* admissible to explain the intention of partners in making a deed between themselves.—*Henderson v. Stith* (Tex. Civ. App.) 566.

Where a deed expresses a pecuniary consideration, parol evidence is admissible to show how said consideration was paid.—*Duveneck v. Kutzer* (Tex. Civ. App.) 541.

#### Opinion evidence.

Evidence of an expert, obtained from experiments made by others at his request, but not in presence, *held* not admissible.—*Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548.

Hypothetical question submitted to expert need not embrace all the testimony on the subject.—*Burt v. State* (Tex. Cr. App.) 344.

Facts *held* to show a physician an expert concerning the effect on the weight of a bullet of firing it into a human body.—*Dugan v. Commonwealth* (Ky.) 418.

Admissibility of expert testimony as to insanity of defendant in a criminal case determined.—*Green v. State* (Ark.) 973.

Whether or not a brand on a cow is a "picked brand" is a matter of common observation, and need not be proved by experts.—*Clark v. State* (Tex. Cr. App.) 522.

Expert witness may express an opinion as to the character of the injury suffered.—*Galveston, H. & S. A. Ry. Co. v. Parrish* (Tex. Civ. App.) 536.

The testimony, "Finding the bond in this condition makes me think it may have been presented to me for approval and rejected," is inadmissible, as being only an opinion.—*McFarlane v. Howell* (Tex. Civ. App.) 315.

A mere statement of opinion by employé as to negligence of a telegraph company *held* not admissible.—*Graddy v. Western Union Tel. Co.* (Ky.) 468.

Witness, who is acquainted with a party, and knows what his occupation has been, may be

allowed to testify that he did not have any experience in stopping hand cars with brakes.—*Galveston, H. & S. A. Ry. Co. v. Parrish* (Tex. Civ. App.) 536.

## EXAMINATION.

Of witnesses in general, see "Witnesses."

## EXCEPTIONS, BILL OF.

See, also, "Appeal and Error"; "Criminal Law."

Under Ky. St. § 1016, allowing a party in a court having continuous sessions 60 days after the judgment becomes final in which to file his bill, he may ignore an order obtained by him giving him until an earlier day, and rely on the statute.—*Metz's Adm'r v. Louisville & N. Ry.* (Ky.) 215.

If, instead of relying on this right, he relies on a bill signed by a special judge who did not preside at the trial, when he had opportunity to present it to the trial judge, the bill will not be considered, though signed by the trial judge some 10 months thereafter.—*Metz's Adm'r v. Louisville & N. Ry.* (Ky.) 215.

Where appellants presented their bill within the time allowed, they are not prejudiced by the delay of the court in signing the same.—*Chenault v. Quisenberry* (Ky.) 717.

Under Sand. & H. Dig. § 5848, a bill of exceptions signed by the clerk by order of the judge, and amended by the latter after the time for filing had expired, cannot be considered.—*McFarlane v. Johnson* (Ark.) 971.

## EXCESSIVE DAMAGES.

See "Damages."

## EXCUSABLE HOMICIDE.

See "Homicide."

## EXECUTION.

Exemptions, see "Homestead."

Where constable's deed is apparently valid, and execution defendant would avoid it as against subsequent purchaser for value, he must show that purchaser had notice of extrinsic defenses.—*Lebreton v. Lemaire* (Tex. Civ. App.) 81.

The fact that an affidavit has been filed to obtain an execution instantan need not appear in or upon the execution.—*Lebreton v. Lemaire* (Tex. Civ. App.) 81.

Where judgment is rendered on affirmance by the appellate court, the district court may issue execution thereon.—*Cope v. Lindsey* (Tex. Civ. App.) 29.

A range levy under Rev. St. 1895, art. 2350, cannot be made on stock in an inclosure of 1,280 acres.—*Cope v. Lindsey* (Tex. Civ. App.) 29.

An execution issued without a judgment or decree to support it is void.—*O'Connor v. Stone* (Ky.) 483.

Statement in sheriff's return *held* a sufficient recital of levy.—*Lock v. Slusher* (Ky.) 471.

Ky. St. § 1710, providing that sales by fraud may be set aside, does not apply where the claim is that there was no sale, and that the return thereof was false.—*Lock v. Slusher* (Ky.) 471.

A suit to restrain levy of execution because of satisfaction of a previous execution, and answer alleging that the previous execution had been quashed, *held* insufficient.—*Lock v. Slusher* (Ky.) 471.

In action for wrongful levy, *held*, the question of ownership was for the jury.—*McGuire v. West* (Ky.) 458.

Right on death of defendant in execution to obtain execution against independent executrix determined.—*Govan v. Bynum* (Tex. Civ. App.) 819.

A vendor who received part of the price, and put vendee in possession under contract of sale, *held* to have no interest in the land subject to execution.—*Jones v. Howard* (Mo.) 635.

A leasehold interest, in which lessee has no general power to sublet, *held* not subject to levy and sale.—*Boone v. First Nat. Bank* (Tex. Civ. App.) 594.

The sale of a wife's separate property on execution against the husband does not affect the wife's interest, though the title was in the husband, where the purchaser had notice.—*Raley v. Abright* (Tex. Civ. App.) 538.

A range levy upon cattle in M. county *held* sufficient.—*Sparks v. McHugh* (Tex. Civ. App.) 1045.

Where land was sold under execution, the owner cannot complain of inadequacy of price to which his conduct contributed.—*Bean v. City of Brownwood* (Tex. Civ. App.) 1038.

Irregularities combined with inadequacy of price will not affect an execution sale, unless the irregularities contributed to the inadequacy.—*Bean v. City of Brownwood* (Tex. Civ. App.) 1038.

## EXECUTORS AND ADMINISTRATORS.

See, also, "Descent and Distribution"; "Wills." Distribution of decedent's estate, see "Marshaling Assets and Securities." Testimony as to transactions with decedents, see "Witnesses."

Rights and powers of temporary administrator pending contest of will determined.—*In re Souard's Estate* (Mo.) 617.

An executor was not negligent in failing to withdraw a bank deposit made by the testator before the suspension of the bank, where he followed the advice of the testator, a prominent business man.—*Cook v. Barnes* (Ky.) 682.

A right of action given by a statute of another state for a death caused there does not confer upon the appellate court in Kentucky jurisdiction to appoint an administrator of the decedent, when he was not a resident of Kentucky, and left no assets to be administered in Kentucky.—*Louisville Trust Co. v. Louisville & N. R. Co.* (Ky.) 698.

Payment by administrator to one of several heirs of more than his share of personalty *held* not to give the other heirs a lien on his share of the realty in the hands of his grantee.—*Cockrill v. Linton* (Ky.) 451.

Where a will provides that an estate shall be administered outside the court, and gives the executor power to sell land to pay debts, the burden is on the heirs to show that there was no debt when the executor made certain deeds.—*Terrell v. McCown* (Tex. Sup.) 2.

Where lands of a decedent are illegally sold, his heirs will not be required to pay before recovering the lands, where it is not shown that the estate ever had the benefit from the price of the lands.—*Fishback v. Page* (Tex. Civ. App.) 317.

Confirmation of an unauthorized sale of real estate by an administrator will not pass title, unless it is clear that the court had the unauthorized act called to its attention.—*Fishback v. Page* (Tex. Civ. App.) 317.

In an action by the executrix, defendant was entitled to a judgment for the sale of testator's

land to satisfy her debt, which had been ascertained and determined in an action to settle the estate.—*Harrison's Ex'r v. Taylor* (Ky.) 723.

### Allowance and payment of claims.

Under St. § 3870, an affidavit failing to state any reason for affiant's belief that a claim is just is insufficient.—*Dewhurst v. Shepherd's Ex'r* (Ky.) 253.

A claim *held* properly rejected where it is excepted to and no evidence is heard.—*Dewhurst v. Shepherd's Ex'r* (Ky.) 253.

A claim for the funeral expenses of a dead mortgagor is not entitled to priority over the mortgage lien.—*Milward v. Shields* (Ky.) 184.

Claim for cost of family monument *held* properly charged against the estate.—*Cate v. Cate* (Tenn. Ch. App.) 365.

Credits on note held by estate *held* properly allowed.—*Cate v. Cate* (Tenn. Ch. App.) 365.

A year's allowance to widow is not chargeable against the real estate of deceased.—*Cate v. Cate* (Tenn. Ch. App.) 365.

A year's allowance for widow is not a general or preferred charge against the general assets.—*Cate v. Cate* (Tenn. Ch. App.) 365.

Certificate of deposit in favor of decedent *held* properly canceled, where there was proof that it had been paid.—*Cate v. Cate* (Tenn. Ch. App.) 365.

### Actions.

In an action by an administrator under the statute of another state for the death of his intestate, caused there, the question as to the power of a Kentucky court to appoint the plaintiff as administrator cannot be raised by special demurrer if the want of authority does not affirmatively appear upon the petition, but it must be made by a plea to the jurisdiction.—*Louisville Trust Co. v. Louisville & N. R. Co.* (Ky.) 698.

Where the petition in an action by an administrator affirmatively shows that the county court appointing the administrator had no jurisdiction to grant administration, the objection may be made by special demurrer.—*Louisville Trust Co. v. Louisville & N. R. Co.* (Ky.) 698.

Statement of an executor made while a contest over the will was in progress *held* inadmissible in an action against the estate after the will was established.—*Williamson's Ex'r v. Green* (Ky.) 695.

Affidavit *held* unnecessary in action against executor on a compromise made by him with plaintiff.—*Newton's Ex'r v. Cecil* (Ky.) 734.

A defendant who questions plaintiff's right to sue as an administrator because of the pendency of an appeal to the circuit court from the order of the county court appointing him, must aver that a supersedeas has been issued.—*Owensboro & N. Ry. Co. v. Barclay's Adm'r* (Ky.) 177.

### Accounting and settlement.

Executor *held* not entitled to deduct counsel fees, in action to construe contract, where there was sufficient property left in his hands after payment under contract to pay the fees.—*Briggs v. Walker* (Ky.) 479.

Liability of executor for interest on fund in his hands pending determination of rights of claimants to the fund determined.—*Briggs v. Walker* (Ky.) 479.

Costs of suit by administratrix to determine right to administer *held* not a proper charge against the estate.—*Cate v. Cate* (Tenn. Ch. App.) 365.

An executor cannot bind the estate for payment of retainer fee.—*Pate v. Maples* (Tenn. Ch. App.) 740.

Where the residuary legatees, after probate of will, brought suit to contest its validity, attorney's fees incurred in defending such suit should

not be allowed as a charge against the estate.—*In re Soulard's Estate* (Mo.) 617.

Where a will was established under a contest, the devisees were entitled to rents collected by the temporary administrator on property devised to them, less the commission of such administrator.—*In re Soulard's Estate* (Mo.) 617.

#### Foreign and ancillary administration.

A foreign administrator may sue by agreement between the parties.—*Ellis v. Northwestern Mut. Life Ins. Co.* (Tenn. Sup.) 766.

A foreign administrator has no authority to compromise a claim due the estate, without an order of the local probate court.—*Smith v. Pate* (Tex. Civ. App.) 312.

Where intestate owns property in state other than that of his domicile, administration must be taken out in such state.—*Ellis v. Northwestern Mut. Life Ins. Co.* (Tenn. Sup.) 766.

### EXEMPLARY DAMAGES.

See "Damages."

### EXEMPTIONS.

See, also, "Execution"; "Homestead"; "Taxation."

Rents due from one trespassing on a homestead are exempt to the owner thereof.—*La Master v. Dickson* (Tex. Civ. App.) 911.

A debtor cannot claim as exempt, in lieu of breadstuffs for his family and of provender for his stock, property levied on under execution, where he has property remaining sufficient to satisfy the deficiency in breadstuffs and provender.—*Turner-Looker Co. v. Garvey* (Ky.) 202.

A block being exempt as part of defendant's homestead, the rental value thereof allowed as damages during wrongful seizure is also exempt.—*National Bank of Denison v. Kilgore* (Tex. Civ. App.) 566.

### EXPERT TESTIMONY.

In civil actions, see "Evidence."

### FALSE IMPRISONMENT.

Where defendant promoted the unlawful arrest of plaintiff, he was responsible for the consequences, as though made at his instance.—*Joske v. Irvine* (Tex. Civ. App.) 278.

Where plaintiff alleges humiliation, pain, anxiety, and injury, he can recover such sum as will compensate him for physical inconvenience, mental anguish, and humiliation.—*Joske v. Irvine* (Tex. Civ. App.) 278.

### FALSE PRETENSES.

An indictment which charges defendant with obtaining money by falsely representing that he had money in a certain bank is not defective in failing to allege that such bank was incorporated.—*Brown v. State* (Tex. Cr. App.) 986.

An instruction that, to convict, the jury must find that defendant used the representation charged in the indictment, excludes the idea that they could convict upon finding that defendant used some other representation.—*Brown v. State* (Tex. Cr. App.) 986.

A person may be guilty of swindling by the use of a fictitious name.—*Brown v. State* (Tex. Cr. App.) 986.

### FALSE REPRESENTATIONS.

See "Fraud."

### FALSE SWEARING.

See "Perjury."

### FEES.

Of attorney, see "Attorney and Client."

Of clerks of courts, see "Clerks of Courts."

### FELLOW SERVANTS.

See "Master and Servant."

### FENCES.

While the statute does not authorize the removal of a partition fence until after the 1st day of December, yet a removal on that day, though unauthorized at the time, has the same effect as a removal on a subsequent day, except that the adjoining landowner may recover nominal damages, or such actual damages as he has sustained by reason of the removal a day earlier than the statute authorized.—*Clemmons v. Grow* (Ky.) 728.

The removal by a landowner of a panel of that part of a partition fence erected by him on his own land so as to detach it from that part of the fence erected by the adjoining landowner is a removal of the fence, in contemplation of the statute.—*Clemmons v. Grow* (Ky.) 728.

The provision of Ky. St. § 1786, which authorizes a landowner to remove his part of a partition fence between certain dates upon notice, refers to any one of the partition fences named in the various sections of the statute.—*Clemmons v. Grow* (Ky.) 728.

### FILING.

Assignment for benefit of creditors, see "Assignments for Benefit of Creditors."

Bill of exceptions, see "Exceptions, Bill of."

Certificates of nomination, see "Elections."

Claims for mechanics' liens, see "Mechanics' Liens."

Indictment or presentment, see "Indictment and Information."

Statement of facts on appeal in criminal prosecutions, see "Criminal Law."

### FINDINGS.

Review on appeal or writ of error, see "Appeal and Error."

Special findings by jury, see "Trial."

### FIRES.

Caused by operation of railroad, see "Railroads."

### FIRMS.

See "Partnership."

### FORCIBLE ENTRY AND DETAINER.

Complaint in forcible entry and detainer held insufficient, because it does not locate the land in the precinct where action is brought, does not sufficiently describe the land, does not state statutory grounds for bringing the action, and shows no ouster.—*Lasater v. Fant* (Tex. Civ. App.) 321.

A tenant forcibly dispossessed of land must seek redress by an action in forcible entry and detainer.—*Vinson v. Flynn* (Ark.) 146.

### FORECLOSURE.

Of mortgage, see "Chattel Mortgages"; "Mortgages."

Of vendor's lien, see "Vendor and Purchaser."

## FOREIGN ADMINISTRATION.

See "Executors and Administrators."

## FOREIGN RECEIVERSHIP.

See "Receivers."

## FORFEITURES.

Of bail bonds, see "Bail."  
Of homestead, see "Homestead."  
Of insurance, see "Insurance."

## FORGERY.

A charge *held* on the weight of the evidence.—*Millsaps v. State* (Tex. Cr. App.) 1015.

Variance between the purport and tenor clauses of an indictment *held* fatal.—*Millsaps v. State* (Tex. Cr. App.) 1015.

An indictment charging forgery *held* bad for variance.—*Thulemeyer v. State* (Tex. Cr. App.) 83.

On trial of payee for forging note, evidence of declarations of the maker that he always repudiated it is not harmless.—*McGlasson v. State* (Tex. Cr. App.) 98.

## FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law."

## FORNICATION.

See "Adultery"; "Incest."

## FRAUD.

Of debtor, see "Assignments for Benefit of Creditors."  
— as ground for attachment, see "Attachment."

Conduct induced by a false representation *held* not to relieve the party making the representation from liability.—*Mutual Building & Loan Ass'n v. McGee* (Tex. Civ. App.) 1080.

## FRAUDS, STATUTE OF.

In an action on a parol contract the statute of frauds as a defense must be pleaded.—*Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548.

A verbal agreement not to engage in a particular business for two years may possibly be performed within one year, and hence is not within the statute.—*Erwin v. Hayden* (Tex. Civ. App.) 610.

Where a person does not allege whether the contract is in writing, and it is required to be in writing by statute, it is presumed to be in writing.—*Gale v. Harp* (Ark.) 144.

Where the consideration of a note is the parol promise by the payee, made to subvert his own purpose, that a third person will perform a contract with the payor, the promise is not within the statute.—*Gale v. Harp* (Ark.) 144.

Improvements not exceeding the value of rents *held* sufficient to take a parol gift out of the statute of frauds.—*La Master v. Dickson* (Tex. Civ. App.) 911.

## FRAUDULENT CONVEYANCES.

By insolvent debtors, see "Assignments for Benefit of Creditors."

By mortgagor of chattels, see "Chattel Mortgages."

Where a conveyance is fraudulent as to creditors, though made without fraudulent intent,

the grantees are entitled to a lien for improvements, less the value of the rent.—*Bartram v. Burns* (Ky.) 248.

Where the husband buys land, and has it conveyed to his wife intending to pay for it with the proceeds of his own labor or of other property, with intent to defraud his creditors, crops raised by him thereon are subject to execution for his debts.—*Turner-Looker Co. v. Garvey* (Ky.) 202.

Evidence *held* insufficient to show that a conveyance to the wife was in fraud of the husband's creditors.—*Mt. Sterling Nat. Bank v. Bowen* (Ky.) 483.

A voluntary disposition of homestead *held* not fraudulent as to judgment creditors of vendor.—*Baker v. Hines* (Ky.) 452.

Creditors *held* to be estopped from attacking a transfer of corporate property as fraudulent, where they have acquiesced in such transfer.—*Tenney v. Ballard, Webb & Burnette Hat Co.* (Tex. Civ. App.) 296.

A purchase from an insolvent *held* not fraudulent though purchaser knew of insolvency, where he did not know of any intent to defraud creditors though the sale was on credit.—*Ligon v. Tilman* (Tex. Civ. App.) 1069.

The price a fraudulent purchaser received for the property was not admissible to show its value.—*Moore v. Temple Grocer Co.* (Tex. Civ. App.) 843.

Estimated value of book accounts was *held* admissible against a fraudulent purchaser thereof.—*Moore v. Temple Grocer Co.* (Tex. Civ. App.) 843.

The burden of proof is on the vendee of a stock of goods to show the bona fides of the debt for which the goods were sold, when the sale is shown to be in fraud of the rights of creditors.—*Foster v. Haglin* (Ark.) 763.

A conveyance by an insolvent of a stock of goods for part cash, the balance to be applied on a debt on which the purchaser was a surety of the insolvent, *held* a fraudulent preference as to such balance.—*Slusher v. Simpkinson* (Ky.) 692.

Transfer of goods by insolvent *held* valid unless suit is brought to decree it a general assignment.—*Atkins v. Heoberlin* (Ky.) 711.

Evidence *held* to show a fraudulent conveyance.—*Ridenour-Baker Grocery Co. v. Monroe* (Mo.) 633.

Evidence *held* to show that certain deeds by debtors were not fraudulent as to creditor.—*Duveneck v. Kutzer* (Tex. Civ. App.) 541.

## FREIGHT.

See "Carriers."

## GAMING.

Under indictment for betting at craps, it was immaterial whether it was a banking game, or one played between individuals.—*Williams v. State* (Tex. Cr. App.) 987.

Transaction for purchase of cotton for future delivery *held* a gambling transaction, precluding recovery of margins paid, though partnership may have existed between some of the parties.—*Cunningham v. Fairchild* (Tex. Civ. App.) 32.

## GARNISHMENT.

Under Rev. St. arts. 220, 221, 225-227, 239, 245, where a garnishee, when served, and when he files his answer, is not indebted to, and has in his hands no effects of, the debtor, except notes given to him for collection, the writ will not charge him with moneys collected on the notes after filing of the answer.—*Planters' & Mechanics' Bank v. Floeck* (Tex. Civ. App.) 589.

The statute defining the liability of garnishees is to be strictly construed in their favor.—*Planters' & Mechanics' Bank v. Floeck* (Tex. Civ. App.) 589.

On trial of an issue between plaintiff and garnishee, production of the writ of garnishment is not essential to plaintiff's recovery, the garnishee having answered.—*Jones v. Cummins* (Tex. Civ. App.) 854.

The court of a county where a garnishee resides acquires no jurisdiction of a cause begun against him in another county until all the proceedings have been produced, as required by Rev. St. 1895, art. 248.—*Jones v. Cummins* (Tex. Civ. App.) 854.

Under Rev. St. 1895, art. 248, providing that, on a change of venue, "the proceedings in garnishment; including the plaintiff's application for the writ, and the answer of the garnishee, and the affidavit controverting the same," shall be filed, etc., the writ of garnishment need not be filed.—*Jones v. Cummins* (Tex. Civ. App.) 854.

Where the court to which the cause is transferred under Rev. St. 1895, art. 248, fails to take jurisdiction because of a failure to file the proceedings therein, it should dismiss the cause against the garnishee, and not render judgment in his favor.—*Jones v. Cummins* (Tex. Civ. App.) 854.

## GAS.

See "Mines and Minerals."

## GIFTS.

Enforcement of parol gifts, see "Specific Performance."

A settlement in writing construed, and held not to constitute a gift *inter vivos*.—*In re Soulard's Estate* (Mo.) 617.

To constitute a valid gift *inter vivos*, there must be an intent to give and an unconditional delivery.—*In re Soulard's Estate* (Mo.) 617.

Evidence of declarations of deceased of intent to make provision for plaintiff, and the fact that he was in possession of certain notes at her death, held to make the question of the gift of the notes one for the jury.—*Jones v. Jones* (Ky.) 412.

## GOOD FAITH.

Of purchaser, see "Bills and Notes"; "Fraudulent Conveyances"; "Vendor and Purchaser."

## GRAND JURY.

Evidence as to what defendant testified to before the grand jury while it was investigating his case held not admissible.—*Gutgesell v. State* (Tex. Cr. App.) 1016.

## GRANTS.

Of public lands, see "Public Lands."

## GUARANTY.

A contract of guaranty construed, and held to be a personal obligation.—*Marx v. Luling Co-op. Ass'n* (Tex. Civ. App.) 596.

The performance of the thing to be done as a consideration for the giving of a guaranty for a debt is a sufficient acceptance of the guaranty.—*Marx v. Luling Co-op. Ass'n* (Tex. Civ. App.) 596.

The guarantors are liable to the extent of the guaranty for a balance on account, though pay-

ments have been made by the principal debtor in excess of the amount of the guaranty.—*Eaton v. Harris* (Ky.) 199.

Under a guaranty of a payment of any bill of goods that O. may purchase "within 90 days from date of purchase," notice of the acceptance of the guaranty, or that goods have been sold on the faith of it, is necessary to charge the guarantors, but formal notice in writing is not necessary.—*Eaton v. Harris* (Ky.) 199.

## GUARDIAN AND WARD.

See, also, "Infants"; "Insane Persons."

Where a guardian, without order of court, cultivated a farm belonging to the ward, and appropriated the proceeds, he was liable to the estate for the reasonable rental value of the farm.—*Parlin & Orendorff Co. v. Webster* (Tex. Civ. App.) 569.

A court that appointed a guardian ad litem could not allow him compensation for his services after final judgment, without notice to the wards.—*Jones v. Yore* (Mo.) 384.

The court that appoints a guardian ad litem may allow him compensation as against the wards.—*Jones v. Yore* (Mo.) 384.

Where a guardian was appointed in 1871, but the real estate of his ward was not turned over to him by the administrator until 1875, he is chargeable only with the rent actually turned over to him.—*Haden v. Sweptston* (Ark.) 393.

Decree of confirmation of sale of ward's property by guardian held void.—*O'Connor v. Vineyard* (Tex. Civ. App.) 55.

Wards held entitled to recover lands sold by their parents without returning the money received, where it was not shown that the money was expended for their benefit, or that their parents were unable to support them.—*O'Connor v. Vineyard* (Tex. Civ. App.) 55.

Rights of creditors of guardian in bank stock purchased by guardian in his own name, out of common funds of ward and guardian, determined.—*Beaven v. Citizens' Nat. Bank* (Ky.) 242.

## HARMLESS ERROR.

In civil actions, see "Appeal and Error."  
In criminal prosecutions, see "Criminal Law."

## HEARSAY EVIDENCE.

In civil actions, see "Evidence."

## HEIRS.

See "Descent and Distribution"; "Wills."

## HIGHWAYS.

Accidents at railroad crossings, see "Railroads."

## HOLDING OVER.

By tenant, see "Landlord and Tenant."

## HOMESTEAD.

See, also, "Exemptions."

Nature, acquisition, and extent.

Under Homestead Law 1895, §§ 1, 7, the head of a family did not acquire a homestead in land used as such at the time he inherited it, since he had no deed to file in the recorder's office, as required by statute.—*Loring v. Groomer* (Mo.) 647.

Nor did he acquire a homestead, within section 7, at the time the land inherited by him and



others was partitioned, where the report of the commissioners in partition was not filed in the recorder's office.—*Loring v. Groomer* (Mo.) 647.

Acts 1887, p. 197, amending the homestead law so as to exempt homesteads acquired by descent or devise from levy on all causes of action accruing after the acquisition of the homestead, construed as to land occupied as a homestead at its passage.—*Loring v. Groomer* (Mo.) 647.

Where one was not a housekeeper at the time he inherited land, or at the time of otherwise acquiring land, he could not acquire a homestead therein simply by becoming a housekeeper.—*Loring v. Groomer* (Mo.) 647.

The creditor who stood by at the allotment of a homestead under an assignment for creditors *held* estopped three years thereafter to complain of mistake in judgment of commissioners in making allotment.—*Wood v. Corley* (Ky.) 235.

Where vendor's lien notes on land which became a homestead after delivery of the notes are paid, the homestead rights of the maker's wife attach.—*James v. Daniels* (Tex. Civ. App.) 26.

Land purchased by a widow as a homestead *held* exempt as against a judgment rendered after it was bought, founded on a contract which was invalid because made by her while married.—*Baker v. Hines* (Ky.) 452.

Evidence *held* to show that a debtor was not entitled to claim a homestead.—*Ridenour-Baker Grocery Co. v. Monroe* (Mo.) 633.

The share of a husband who has been divorced in the property in which he formerly had a community interest *held* not a homestead, and subject to execution for his debts.—*Southwestern Mfg. Co. v. Swan* (Tex. Civ. App.) 813.

Facts *held* sufficient to entitle a divorced wife to homestead in her share of land, in which he formerly had a community interest.—*Southwestern Mfg. Co. v. Swan* (Tex. Civ. App.) 813.

A charge failing to define what uses must be made of land to make it part of the homestead *held* not misleading.—*Gunn v. Wynne* (Tex. Civ. App.) 290.

Intent of wife in selecting homestead *held* admissible to show intent of husband, where husband and wife are in accord.—*Gunn v. Wynne* (Tex. Civ. App.) 290.

A rural homestead *held* not lost, though it became included within the limits of an adjacent city.—*Wilder v. McConnell* (Tex. Civ. App.) 807.

#### **Transfer or incumbrance.**

An act relating to defective conveyances of homesteads *held* not to affect vested rights acquired before the passage of the act.—*Bluff City Lumber Co. v. Bloom* (Ark.) 503.

A homestead can be alienated only by joint deed of husband and wife.—*Bank of Cookville v. Brier* (Tenn. Ch. App.) 140; *Threat v. Same, Id.*; *Dibrill v. Same, Id.*; *Fallers v. Same, Id.*

A vendor's lien on a homestead, acquired by virtue of a void transfer of title to one having valid title, cannot be foreclosed.—*Hayes v. Taylor* (Tex. Civ. App.) 314.

There being sufficient land left to satisfy all homestead demands, *held*, that the homestead character was not impressed on a part that was sold, so as to require the wife to join in the deed.—*Neiman v. Schuster* (Tex. Civ. App.) 1075.

A mortgage of a homestead, in which the wife fails to join, is void.—*Bluff City Lumber Co. v. Bloom* (Ark.) 503.

#### **Abandonment.**

Family living off their homestead farm for eight years, for the purpose of educating their children in town, *held* not to be a conclusive aban-

donment of homestead.—*Gunn v. Wynne* (Tex. Civ. App.) 290.

Where a woman who has a homestead marries and lives on the homestead of her husband, with no intent of repossessing herself of her former home, she cannot claim it as a homestead.—*Ghent v. Boyd* (Tex. Civ. App.) 891.

A charge upon the question of a homesteader's intentions while living off the homestead *held* to fairly present the idea that the formation of an intent to abandon the homestead would work an abandonment thereof.—*Gunn v. Wynne* (Tex. Civ. App.) 290.

## **HOMICIDE.**

Though two parties conspire to beat another with their fists, one is not answerable for his death where the other, acting independently, struck him with a club.—*State v. May* (Mo.) 637.

One who killed another knowing that she was committing a wrong act *held* not legally responsible if her mind was so defective that she had lost the power to choose between right and wrong.—*Green v. State* (Ark.) 973.

If defendant aided and abetted in the killing, he was a principal in the second degree, and not an accessory.—*Tudor v. Commonwealth* (Ky.) 187.

A refusal of a new trial for newly-discovered evidence as to threats by deceased *held* error.—*Price v. State* (Tex. Cr. App.) 96.

Instruction as to murder in the first degree *held* warranted by evidence that defendant struck deceased on the head with a club when helpless on the ground.—*State v. May* (Mo.) 637.

Evidence *held* to show defendant guilty of manslaughter.—*Childress v. State* (Tex. Cr. App.) 100.

One who calls another a liar, and picks up a gun, is not conclusively guilty of assault with intent to kill.—*Stevens v. State* (Tex. Cr. App.) 1005.

Evidence *held* to justify a finding of guilty of shooting with intent to kill.—*Williams v. Commonwealth* (Ky.) 455.

Operation of threats by one of two conspirators *held* limited to the one who made them.—*State v. May* (Mo.) 637.

Evidence considered, and *held* not to show a conspiracy to effect the death of the deceased.—*State v. May* (Mo.) 637.

#### **Excusable or justifiable homicide.**

Killing an assailant is not justified where resort may be had to other means.—*Taylor v. State* (Tex. Cr. App.) 1019.

The accused, having intervened in a fight between two others, and killed one of them, cannot justify his action by evidence that the deceased had brought on the difficulty, when that fact was unknown to him at the time of the killing.—*Tudor v. Commonwealth* (Ky.) 187.

#### **Indictment.**

An indictment charging the defendant with the murder of deceased by one of them shooting him, the others being present aiding and abetting, but that which one did the actual shooting and killing, or which aided and abetted, was unknown to the jury, is good.—*Tudor v. Commonwealth* (Ky.) 187.

An indictment in the county in which the death occurred *held* sufficient, though it charges the commission of the murder in another county.—*Navarro v. State* (Tex. Cr. App.) 105.

#### **Evidence.**

Evidence of the statement of one accused of murder, made within 3 or 4 minutes of the killing, and within 30 feet of the scene of the difficulty, is admissible as part of the res gestae.—*Ingram v. State* (Tex. Cr. App.) 518.

Statements of accused within a few minutes of the killing *held* admissible as part of the *res gestæ*.—*Ingram v. State* (Tex. Cr. App.) 518.

Statements of deceased, made 15 or 20 minutes after he had received the mortal wound, and when believing that he was going to die, *held* admissible as *res gestæ*.—*Benson v. State* (Tex. Cr. App.) 527.

Evidence as to the conduct and remarks of deceased soon after he had received the mortal wound *held* admissible for the purpose of laying the predicate for introducing the dying declarations of deceased.—*Benson v. State* (Tex. Cr. App.) 527.

Where deceased was rational, and believed that he was going to die, and that very soon, his declarations *held* admissible as dying declarations.—*Benson v. State* (Tex. Cr. App.) 527.

Dying declarations are admissible, though questions were asked directing deceased's mind to the subject upon which they were made.—*Taylor v. State* (Tex. Cr. App.) 1019.

Dying declarations are admissible, though deceased had to be aroused while making them.—*Taylor v. State* (Tex. Cr. App.) 1019.

Under indictment for shooting with intent to kill, testimony as to extent of the injury *held* competent.—*Williams v. Commonwealth* (Ky.) 455.

Where the accused intervened in a fight between two others, and killed one of them, threats made by deceased against the other combatant, of which the accused had no knowledge, were not admissible in his behalf.—*Tudor v. Commonwealth* (Ky.) 187.

On prosecution for killing his wife, evidence of exclamation of the wife in the house the evening before the murder *held* competent.—*Burt v. State* (Tex. Cr. App.) 344.

The clothes worn by deceased at his death are admissible in a trial for murder.—*Gregory v. State* (Tex. Cr. App.) 1017.

A threat made four years before the killing, and not shown to have been against accused, *held* not admissible in a trial for murder.—*Gregory v. State* (Tex. Cr. App.) 1017.

Evidence of an altercation prior to the homicide, not connected with it, *held* inadmissible.—*Ross v. State* (Tex. Cr. App.) 1004.

Evidence of an altercation between deceased and another not connected with defendant *held* erroneously admitted.—*Ross v. State* (Tex. Cr. App.) 1004.

Evidence of defendant's resistance to a prior arrest *held* irrelevant on a trial for homicide.—*State v. May* (Mo.) 637.

#### **Trial.**

The fact that a juror separated a short time from the others does not justify a new trial.—*Taylor v. State* (Tex. Cr. App.) 1019.

#### **Instructions.**

Where there is no evidence suggesting mutual combat, it is error to instruct on the law applicable thereto.—*Ingram v. State* (Tex. Cr. App.) 518.

An instruction *held* not open to objection that it limited the right of self-defense to an attack by deceased, instead of by deceased and his father, who was with him at the time of the killing.—*McNeal v. State* (Tex. Cr. App.) 792.

On a joint indictment for murder, an instruction should be given as to each of the distinct defenses set up by defendant.—*Ross v. State* (Tex. Cr. App.) 1004.

Submission to the jury of the question whether dying declarations were made under the safeguards required by law *held* not objectionable, as giving undue prominence to the declarations.—*Taylor v. State* (Tex. Cr. App.) 1019.

An instruction that, if defendant did "so kill," he should be found guilty of murder in the first degree, following a charge defining such murder, requires the killing to be such as was set forth in the preceding proposition.—*Burt v. State* (Tex. Cr. App.) 344.

Instruction limiting the consideration of evidence introduced by the state *held* not to injuriously affect the rights of defendant.—*Martin v. State* (Tex. Cr. App.) 352.

Evidence *held* to justify an instruction on the question of attempted escape.—*State v. Hunt* (Mo.) 389.

Where there is nothing in the evidence in a trial for murder suggesting mutual combat, it is error to instruct thereon.—*Ingram v. State* (Tex. Cr. App.) 518.

Instructions as to effect of temporary insanity produced by liquor *held* sufficient.—*Navarro v. State* (Tex. Cr. App.) 105.

An instruction directing the jury to find defendant guilty of manslaughter, and not of murder, if they believed beyond a reasonable doubt that he killed S. in sudden heat and passion, or that in sudden heat and passion he aided and abetted some one who did kill S., is erroneous, there being no evidence authorizing a qualification as to the defendant's right of self-defense.—*Tudor v. Commonwealth* (Ky.) 187.

An instruction authorizing an acquittal if defendant believed he had no other safe means, "short of flight," to avert the danger, is not objectionable as requiring the jury to believe that the accused should have resorted to flight, as it could not have been so understood.—*Moody v. Commonwealth* (Ky.) 209.

It is not proper to give an instruction calling special attention to evidence of threats.—*Ray v. Commonwealth* (Ky.) 221.

It is not error to instruct the jury that defendant had the right to use such force as seemed to him to be necessary for his own defense, "and no more."—*Ray v. Commonwealth* (Ky.) 221.

Instructions on a prosecution for assault with intent to murder, in which the evidence showed that defendant was intoxicated at the time of the alleged assault, *held* applicable and proper.—*Darity v. State* (Tex. Cr. App.) 982.

Necessity of instruction on murder in the second degree determined.—*State v. May* (Mo.) 637.

Instructions relative to manslaughter and self-defense *held* unnecessary under the evidence.—*Navarro v. State* (Tex. Cr. App.) 105.

An instruction on murder in the first degree *held* proper.—*State v. Hunt* (Mo.) 389.

A certain instruction *held* proper in connection with the evidence.—*Taylor v. State* (Tex. Cr. App.) 1019.

Evidence *held* to justify an instruction on aggravated assault.—*Stevens v. State* (Tex. Cr. App.) 1005.

#### **Appeal and error.**

A verdict finding defendant guilty of manslaughter will not be disturbed on the evidence, though there was evidence tending to show that deceased was the assailant in the fight, there being some evidence to support the finding.—*Butrey v. Commonwealth* (Ky.) 233.

The error, if any, in omitting from an instruction the requirement that the jury should believe beyond a reasonable doubt that the person who did the actual killing did so in sudden heat and passion, in order to reduce the offense of defendant in aiding and abetting such killing from murder to manslaughter, was harmless.—*Tudor v. Commonwealth* (Ky.) 187.

The error in permitting the commonwealth's attorney to make misleading statements in his argument to the jury is harmless if it is apparent

that no other verdict could have been rendered.—*Ray v. Commonwealth* (Ky.) 221.

## HOTELS.

See "Innkeepers."

## HUSBAND AND WIFE.

See, also, "Curtsey"; "Divorce."

Conveyances between, see "Fraudulent Conveyances."

— of homestead, see "Homestead."

Exemption of married women from operation of limitations, see "Limitation of Actions."

Rights of survivor, see "Homestead."

The sale by the husband of a piano bought by him for his wife, who controlled and managed it, and had possession of it at the time of the sale, did not pass the title, and the wife is entitled to the piano as against the purchaser.—*De Witt v. Moore* (Ky.) 697.

An action to foreclose a chattel mortgage executed by husband and wife, in which the wife, sued both as administratrix of her husband and in her individual capacity, pleaded her coverture at the time the note and mortgage were executed, and that the mortgaged property belonged to her, was properly dismissed on the evidence.—*Friedrizie v. Moorman's Adm'x* (Ky.) 691.

The wife is not entitled to personal property sold by the husband to another, the evidence showing that both the title and possession were in the husband.—*De Witt v. Moore* (Ky.) 697.

Where property has been conveyed to a trustee in trust for a married woman, the cestui que trust does not own a separate interest therein.—*Lindell Real-Estate Co. v. Lindell* (Mo.) 368.

A judgment conferring on a married woman the rights of a feme sole does not authorize her to make a contract of suretyship.—*Lane v. Traders' Deposit Bank* (Ky.) 442.

Land in the wife's name, for which the husband gave his notes, and on which he made the first payment, is subject to the prior debts of the husband only after the claim of the wife for her own money invested therein has been satisfied.—*McKenzie v. Salyer* (Ky.) 450.

The burden of proof is upon a wife to sustain her claim to real estate in her name for which her husband gave his notes and made the first payment, in an action by prior creditors of husband.—*McKenzie v. Salyer* (Ky.) 450.

Right of abandoned wife to sue to enforce claim of husband determined.—*Daisy v. Houlihan* (Ky.) 487.

Judgment against husband for community debt held superior to a prior judgment in favor of the husband's interest in the community property.—*Ghent v. Boyd* (Tex. Civ. App.) 891.

A husband cannot convey title to securities belonging to the wife without her consent.—*Coleman v. First Nat. Bank* (Tex. Civ. App.) 938.

Rev. St. 1895, art. 2967, does not authorize the husband to convey title to his wife's separate estate.—*Coleman v. First Nat. Bank* (Tex. Civ. App.) 938.

Under Rev. St. 1895, art. 2966, a husband can check out money deposited by the wife as her separate property.—*Coleman v. First Nat. Bank* (Tex. Civ. App.) 938.

A contract executed by a married woman in another state, where it is valid, can be enforced in Kentucky.—*Young's Trustee v. Bullen* (Ky.) 687.

The separate estate of a married woman is not liable for her debts, contracted even for necessities, unless such be the agreement at the time of the contract.—*Quisenberry v. Thompson* (Ky.) 723.

Where a husband who had a right to maintain an action for homestead has abandoned his wife, she has a right to prosecute such action.—*Daisy v. Houlihan* (Ky.) 487.

## HYPOTHETICAL QUESTIONS.

To expert witnesses, see "Evidence."

## IDIOTS.

See "Insane Persons."

## IMPEACHMENT.

Of witness, see "Witnesses."

## IMPRISONMENT.

See "Arrest"; "Bail"; "Convicts"; "False Imprisonment."

## IMPROVEMENTS.

Allowance or recovery of compensation, see "Trespass to Try Title."

## INCEST.

Under Sand. & H. Dig. §§ 1689, 1690, 4908, as amended, first cousins who commit adultery or fornication are guilty of incest.—*Nations v. State* (Ark.) 396.

## INDICTMENT AND INFORMATION.

See, also, "Criminal Law"; "Grand Jury."

Disposal of mortgaged chattels, see "Chattel Mortgages."

Disturbing switch, see "Railroads."

Failure of railroad to give statutory signals, see "Railroads."

Particular offenses, see "Arson"; "Disturbance of Public Assemblage"; "False Pretenses"; "Forgery"; "Homicide"; "Intoxicating Liquors"; "Libel and Slander"; "Nuisance"; "Perjury"; "Rape"; "Robbery"; "Weapons."

The copy of a forged order set forth in an indictment for perjury compared with the original, and held no variance.—*Emmons v. State* (Tex. Cr. App.) 518.

Evidence held to show a fatal variance on trial for indictment for passing a forged railroad ticket.—*Robinson v. State* (Tex. Cr. App.) 526.

Where the complaint is attached to the information, the filing of the information is a sufficient filing of the complaint.—*Castleman v. State* (Tex. Cr. App.) 994.

An indictment held not a continuation of a former prosecution, so as to bar limitations.—*Commonwealth v. G. W. Taylor Co.* (Ky.) 399.

Indictment for misdemeanor need not allege that it was committed within 12 months, if the date alleged shows that it was committed within that time.—*Commonwealth v. C. B. Cook Co.* (Ky.) 400.

Under an indictment for shooting with intent to kill, a conviction of shooting is valid.—*Williams v. Commonwealth* (Ky.) 455.

In the prosecution of a railroad company for having failed 400 times to keep its ticket office and waiting room open, as required by law, 400 separate offenses are charged.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 458.

Two or more violations of a penal statute cannot be prosecuted in one action.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 458.

The fact that accused disproved an allegation of the theft did not entitle him to an acquittal on

the ground of variance.—*Baxter v. State* (Tex. Cr. App.) 87.

## INDORSEMENT.

Of promissory note, see "Bills and Notes."

## INFANTS.

See, also, "Guardian and Ward"; "Parent and Child."

Custody and support on divorce of parents, see "Divorce."

Sale of liquor to minors, see "Intoxicating Liquors."

An infant served with summons in manner required by statute, and represented by guardian, *held* properly before the court.—*Shields v. Hinkle* (Ky.) 485.

## INFORMATION.

Criminal accusation, see "Indictment and Information."

## INJUNCTION.

Restraining collection of judgment, see "Judgment."

Where the operation of a track would prove a continuous damage to property owners, no adequate remedy at law can be had, and a court of equity has jurisdiction to grant an injunction.—*Sherlock v. Kansas City Belt Ry. Co.* (Mo.) 629.

Where a railroad company has constructed a track along an alley, so that its operation would obstruct it, equity has jurisdiction to enjoin the company from so using its tracks, although no injury has yet been done.—*Sherlock v. Kansas City Belt Ry. Co.* (Mo.) 629.

Injunction will not lie to restrain a tax collector from instituting criminal proceedings against one pursuing occupation without paying the tax.—*Yellowstone Kit v. Wood* (Tex. Civ. App.) 1068.

An injunction will not be granted to prohibit a tax collector from demanding an occupation tax.—*Yellowstone Kit v. Wood* (Tex. Civ. App.) 1068.

Collection of licenses issued by city will not be restrained, where the validity of the license is not questioned, but only its application to complainant.—*Ludlow & C. Coal Co. v. City of Ludlow* (Ky.) 435.

Where a plea of privilege to be sued in the county of one's residence, when properly entered and established, is ignored or improperly overruled by a justice, the execution of the judgment rendered by the justice may be enjoined as void for want of jurisdiction.—*Jennings v. Shiner* (Tex. Civ. App.) 276.

Injunction is the proper remedy to enjoin a judgment void for want of jurisdiction.—*Jennings v. Shiner* (Tex. Civ. App.) 276.

Affidavits are admissible in evidence on hearing on answer and motion to dissolve injunction restraining sale of land under decree.—*Brightman v. Fry* (Tex. Civ. App.) 60.

The execution of a judgment can only be enjoined by the court in which it was rendered.—*Bell v. York* (Tex. Civ. App.) 68.

## INNKEEPERS.

Right of innkeeper to a lien on samples in drummer's possession, under Rev. St. 1895, art. 3318, determined.—*Torrey v. McClellan* (Tex. Civ. App.) 64.

## IN PAIS.

Estoppel, see "Estoppel."

## INSANE PERSONS.

Insanity as a defense to criminal accusation, see "Criminal Law."

Though the defendant's mind was impaired at the time of a judgment against him, and he was afterwards adjudged to be insane, yet, as he then had sufficient mind to understand the effect of legal proceedings, a judgment should not be vacated.—*Spurlock v. Noe* (Ky.) 231.

A guardian of an insane person having right to set aside sale because of inadequacy of price can accept such a sum from the purchaser in addition as would make a fair price for the land.—*Fitzwilliams v. Davie* (Tex. Civ. App.) 840.

Irregularity in notice of sale of land of insane person *held* not to deprive the court of jurisdiction to make the sale.—*Fitzwilliams v. Davie* (Tex. Civ. App.) 840.

A committee for an idiot *held* not liable for orders for necessities purchased by parents.—*Brashears v. Frazier* (Ky.) 427.

Where a committee for an idiot has sufficient funds, he is liable for necessities furnished by a former committee.—*Brashears v. Frazier* (Ky.) 427.

## INSOLVENCY.

See "Assignments for Benefit of Creditors."

Conveyance by insolvent, see "Fraudulent Conveyances."

Of corporation, see "Corporations."

## INSPECTION.

Of animals, see "Animals."

## INSTRUCTIONS.

In civil actions, see "Trial."

In criminal prosecutions, see "Criminal Law": "Homicide."

## INSURANCE.

Facts *held* sufficient to constitute a cancellation of a policy of insurance.—*Lampasas Hotel & Park Co. v. Home Ins. Co.* (Tex. Civ. App.) 1081.

In order to make out a case of false swearing in making the proof of loss by fire, so as to affect the policy, the facts alleged to be false must have been known to have been such by the party swearing to them.—*Phoenix Ins. Co. v. Shearman* (Tex. Civ. App.) 930.

A written application for insurance, not made a part of the policy, will not avoid the verbal notice of the true condition of the title given by the insured to the insurer's agent, while soliciting the insurance.—*Queen Ins. Co. of America v. May* (Tex. Civ. App.) 73.

An accident policy which provides against death or injury resulting from fighting, intentional injury, or violation of law is forfeited by engaging in a fight voluntarily, and being shot while so engaged.—*Morris v. Travelers' Ins. Co.* (Tex. Civ. App.) 898.

Where an insurance policy is alleged to have been assigned, and is read in evidence with the assignment, and the assignment is only put in issue by general denial, the assignment is sufficiently proved, under *Sayles' New Civ. St. art. 313*.—*Phoenix Ins. Co. v. Shearman* (Tex. Civ. App.) 930.

A condition requiring the insured to use due diligence for his safety and protection requires him to use only such care as prudent persons are accustomed habitually to use, and it was for the jury to say whether he was in the exercise of such care.—*Kentucky Life & Accident Ins. Co. v. Franklin* (Ky.) 709.

Where "French Electric Fluid," made from gasoline, was used on insured premises, and there was no evidence that it was the same as gasoline, *held*, that a finding that no illuminating gas was generated on the premises, and no gasoline was used on the premises, was warranted.—*Phoenix Ins. Co. v. Shearman* (Tex. Civ. App.) 930.

**Insurance agents.**

In action by agent to recover deposit from company, *held*, the burden is on the company, pleading an agreement as to the effect of lapse of policies, to prove such lapse.—*Sun Life Ins. Co. of America v. Bevan* (Ky.) 427.

An agent *held* entitled to commissions on a policy withdrawn by the company before delivery.—*Lea v. Union Cent. Life Ins. Co.* (Tex. Civ. App.) 927.

Where an insurance company claims exemption from liability to its agent by reason of the terms of its contract, it must allege and prove that such terms were complied with.—*Lea v. Union Cent. Life Ins. Co.* (Tex. Civ. App.) 927.

A company *held* to have waived a provision in its contract that its agent should forward premium notes at the end of a month by accepting them sooner without objection.—*Lea v. Union Cent. Life Ins. Co.* (Tex. Civ. App.) 927.

**The contract in general.**

A policy indemnifying insurance against loss of time in a sum not exceeding \$25 per week, not exceeding, however, 52 consecutive weeks from the time of the happening, does not require the insured to wait until his disability has ceased, or until the end of the year, before bringing his action for loss of time.—*Kentucky Life & Accident Ins. Co. v. Franklin* (Ky.) 709.

Accident insurance policy construed, and *held*, that where insured died from effect of an overdose of morphine, given to cure delirium tremens, the insurer was not liable.—*Flint v. Travelers' Ins. Co.* (Tex. Civ. App.) 1079.

The clause, "This entire policy shall be void if, with the knowledge of the insured, foreclosure proceedings are commenced by virtue of any mortgage," is valid and binding.—*Hartford Fire Ins. Co. v. Clayton* (Tex. Civ. App.) 910.

**Waiver of right to forfeit policy.**

A forfeiture is waived by acceptance of a premium with knowledge of the facts.—*Morris v. Travelers' Ins. Co.* (Tex. Civ. App.) 898.

Evidence of waiver by acceptance of premium *held* should have been submitted to the jury.—*Morris v. Travelers' Ins. Co.* (Tex. Civ. App.) 898.

Knowledge by an insurance company that a mortgage on property will mature during the life of the policy thereon is not a waiver of a clause providing that the policy shall be void if foreclosure proceedings are begun by virtue of any mortgage.—*Hartford Fire Ins. Co. v. Clayton* (Tex. Civ. App.) 910.

**Mutual benefit insurance.**

Where member of mutual company, with knowledge that his first payment was applied on membership fee, retains a certificate until forfeiture for nonpayment of bimonthly call, he cannot complain that such application was wrongful.—*Smith v. Covenant Mut. Ben. Ass'n* (Tex. Civ. App.) 819.

Contract for mutual benefit insurance construed, and *held*, that advance premiums were in the nature of a membership fee, and not to meet bimonthly calls.—*Smith v. Covenant Mut. Ben. Ass'n* (Tex. Civ. App.) 819.

Policy providing for forfeiture on breach of any of the conditions construed.—*Smith v. Covenant Mut. Ben. Ass'n* (Tex. Civ. App.) 819.

Validity of mortuary call of mutual insurance company determined.—*Smith v. Covenant Mut. Ben. Ass'n* (Tex. Civ. App.) 819.

Notice of mortuary call *held* in compliance with statutory requirements.—*Smith v. Covenant Mut. Ben. Ass'n* (Tex. Civ. App.) 819.

**INTENT.**

Fraudulent, see "Fraudulent Conveyances."

**INTEREST.**

See, also, "Usury."

A deferred payment on a parcel of land, the title to which was in litigation, *held* not to bear interest until suit begun to recover the payment.—*Dorsey's Adm'r v. Swann* (Ky.) 692.

In action for injuries, interest for the period between the date of injury and the judgment cannot be allowed.—*Texas & N. O. R. Co. v. Carr* (Tex. Sup.) 18.

Where a note bore interest payable "annually," a payment made October 19, 1889, of the interest to become due December 29, 1889, should be credited of the date of maturity of the interest.—*Ross v. Rees* (Ky.) 215.

As the note provided that the maker might pay it all or any part of it at any time, payments made February 27, 1890, and August 12, 1890, when no interest was due until December 29, 1890, should be credited on the principal as of the dates on which they were made.—*Ross v. Rees* (Ky.) 215.

Interest is not allowable on costs, except where they have been actually paid.—*Ghent v. Boyd* (Tex. Civ. App.) 891.

**INTERLOCUTORY JUDGMENT.**

Appealability, see "Appeal and Error."

**INTERROGATORIES.**

To witnesses, see "Depositions."

**INTERSTATE COMMERCE.**

See "Carriers"; "Commerce."

**INTERVENTION.**

In actions in general, see "Parties."

**INTOXICATING LIQUORS.**

A widow can sue on saloonkeeper's bond to recover for sale of liquor to a minor son.—*Frobese v. Peavy* (Tex. Civ. App.) 900.

Evidence that a distiller shipped liquor to a man in Missouri is no evidence that the sale of the liquor was made at the place from which it was shipped.—*Henry v. State* (Ark.) 498.

Evidence as to whether the order announcing the result of a local option election had been published, as required by Rev. Civ. St. 1895, art. 3391, *held* for the jury, and not for the court.—*Jones v. State* (Tex. Cr. App.) 981.

Indictment for violation of local option law must allege the sale was made in prohibited territory.—*Williams v. State* (Tex. Cr. App.) 115.

Evidence *held* to show a sale of intoxicating liquors.—*Williamson v. State* (Tex. Cr. App.) 983; *Hodge v. Same* (Tex. Cr. App.) 994; *Stiles v. Same* (Tex. Cr. App.) 993; *Glasscock v. Same* (Tex. Cr. App.) 989; *Wade v. Same* (Tex. Cr. App.) 995; *Wolfe v. Same* (Tex. Cr. App.) 997.

Evidence *held* to show that defendant knew that a minor was such when he sold him liquor.—*Bivens v. State* (Tex. Cr. App.) 1007.

Evidence *held* not to show a sale of intoxicating liquors to a minor.—*Bartman v. State* (Tex. Cr. App.) 984.

Defendant, charged with the offense of selling liquor as a druggist, without a prescription, in violation of a city ordinance, was properly acquitted where the evidence failed to show when or where the offense was committed, or that there was any ordinance.—Board of Council of City of Danville v. Forman (Ky.) 682.

Proof of a sale of liquor is not sufficient to support a verdict of guilty where there is no evidence connecting the defendant with it.—Henry v. State (Ark.) 499.

A druggist cannot be convicted for making more than one sale of liquor on a prescription, except in a local option district, or in a city having an ordinance forbidding such sale.—Board of Council of City of Danville v. Forman (Ky.) 682.

Under Sand. & H. Dig. § 1904, the owner of a saloon cannot be convicted where gambling was permitted by the barkeeper without the owner's knowledge, and contrary to his orders.—Wilson v. State (Ark.) 972.

The finding of the jury on the question of the sale of intoxicating liquors cannot be disturbed on appeal.—Ellis v. State (Tex. Cr. App.) 978.

Where the defendant, in a prosecution for selling liquor without a license, testified that he purchased whisky and alcohol for others, and kept it at his place of business for their accommodation, he showed a clear intent to evade the law, and was in fact guilty, as charged.—Hartgraves v. State (Tex. Cr. App.) 331.

In a prosecution for selling liquor without a license, evidence of witnesses that they drank at defendant's place of business liquor that they had ordered through him, and by him kept at his place of business for their convenience, and that they became intoxicated, is admissible.—Hartgraves v. State (Tex. Cr. App.) 331.

The fact that defendant, who was accused of violating the local option law, was the renter of the property, and owned the goods therein, is sufficient corroboration of the testimony of one jointly indicted that the business was conducted for defendant.—Bolton v. State (Tex. Cr. App.) 984.

## ISSUES.

Presented for review on appeal, see "Appeal and Error."

## JOINDER.

Of causes of action, see "Action."

Of offenses in indictment, see "Indictment and Information."

Of parties in civil actions, see "Parties."

## JUDGES.

Power to regulate compensation of county officers, see "Constitutional Law."

A judge, a taxpayer of a city, *held* not disqualified in an action against the city to recover on its bonds.—Thornburgh v. City of Tyler (Tex. Civ. App.) 1054.

## JUDGMENT.

Decisions of courts in general, see "Courts."

Enjoining execution, see "Injunction."

On appeal or writ of error, see "Appeal and Error."

On the pleadings, see "Trial."

Review, see "Appeal and Error"; "Criminal Law"; "Review."

Sales under, see "Judicial Sales."

A judgment confirming another judgment of said court *held* not error, as constituting two judgments for same debt.—Shepherd v. Harvey's Adm'r (Ky.) 456.

Where a judgment has been rendered and satisfied by execution, entry of a second judgment on

the same claim is error.—O'Connor v. Stone (Ky.) 488.

Order of commissioners' court acted upon for years *held* not void because of failure to enter on the minutes, in accordance with Rev. St. 1896, art. 1554.—Waggoner v. Wise County (Tex. Civ. App.) 836.

Record *held* to show that defendant had his day in court before judgment rendered.—Shepherd v. Harvey's Adm'r (Ky.) 456.

The district court has no jurisdiction to correct an erroneous judgment for costs after the term, on motion to retax costs.—Hedgecoxe v. Conner (Tex. Civ. App.) 322.

A judgment foreclosing a tax lien cannot be impeached by collateral attack.—Rean v. City of Brownwood (Tex. Civ. App.) 1036.

After the jury had been sworn, it was error to render judgment for plaintiff on the ground that the answer did not state a defense, no objection being made thereto by demurrer or motion.—Hartbill v. Cooke's Ex'r (Ky.) 705.

There is no judgment in fact on a verdict until the motion for new trial is decided.—City of Louisville v. Muldoon (Ky.) 867.

An order of court confirming a master's report on the merits *held* a final judgment, which could not be entered in vacation, though the cause was referred to the master only to determine as to the allowance of interlocutory orders.—Simon v. Thompson (Indian Ter.) 861.

The omission of an order of dismissal as to a party that died pending suit, and before judgment, did not preclude the judgment from being final.—Wilson v. Smith (Tex. Civ. App.) 1086.

Answer in action on a foreign judgment *held* a sufficient denial of the allegations of complaint to require plaintiff to prove the judgment.—Schwab Clothing Co. v. Cromer (Indian Ter.) 951.

To an action on a judgment of a justice's court in another state, the plea of limitation to the claim on which the judgment is based is not available.—Roberts v. Hinkle (Ky.) 233.

## By default.

It is error to enter judgment by default upon an amended petition, where the defendant was not cited to answer it, and did not waive citation, accept service, nor enter an appearance.—Pena v. Pena (Tex. Civ. App.) 1027.

A default judgment cannot be set aside for error in taking the default by collateral attack.—Thorp v. Gordon (Tex. Civ. App.) 323.

A default judgment on a forged note will not be set aside on the ground that defendant was dissuaded by her attorney from making defense.—Cox v. Armstrong (Ky.) 189.

## On trial of issues.

Though a suit is based upon a promise, and the promise is not proved, yet, if plaintiff proves himself entitled to relief in relation to the essential matters in dispute, relief should be granted.—Dorsey's Adm'r v. Swann (Ky.) 692.

A judgment for the sale of land must properly describe the land to be sold.—Harrison's Ex'r v. Taylor (Ky.) 723.

A judgment against "the defendant," instead of "the defendants," in a suit against two, is not void for uncertainty.—Turner v. City of Houston (Tex. Civ. App.) 69.

It is error to render judgment for the amount of an account not referred to in the pleading.—Chaney v. Ramey (Ky.) 235.

Judgment non obstante veredicto *held* proper in an action against a city for interest on bonds, where the answer showed the money to have been deposited at a bank other than that agreed upon with the purchasers of the bonds.—City of Brownwood v. Noel (Tex. Civ. App.) 890.

It is not necessary for the court to enter judgment on the verdict where the jury found that a writing was a will, under Rev. St. 1889, § 8989, making the verdict "final" on such issue.—*Gordon v. Burris* (Mo.) 642.

#### Opening or vacating.

A party cannot have a judgment vacated after the term, in the absence of fraud, accident, or wrongful act of the opposite party, unmixed with fault on his part.—*Wilson v. Smith* (Tex. Civ. App.) 1086.

Mistake of one's counsel will not relieve one from an adverse judgment.—*Wilson v. Smith* (Tex. Civ. App.) 1086.

Where a judge of an adjoining county was called in to try cases which the judge of the district court was disqualified from hearing, and he tried another case also, *held* that it was no ground for vacating the judgment after the term, in the absence of fraud.—*Wilson v. Smith* (Tex. Civ. App.) 1086.

Judgment vacated because of unavoidable casualty.—*Cooley v. Barboursville Land & Improvement Co.'s Assignee* (Ky.) 464.

Where it appears that judgments purporting to have been entered by agreement were entered without authority, the judgments and all proceedings thereunder will be set aside.—*Foley's Ex'r v. Gatliff* (Ky.) 190.

#### Equitable relief.

A bill for a new trial must present issues involved in the original action.—*Woolley v. Sullivan* (Tex. Civ. App.) 919.

The fact that an attorney "failed to appear" *held* not sufficient to justify setting aside judgment.—*Woolley v. Sullivan* (Tex. Civ. App.) 919.

Upon the filing of a petition for review of a judgment in partition, within the proper time, the court has jurisdiction to make such disposition of the disputed interests as may seem just.—*Lindell Real-Estate Co. v. Lindell* (Mo.) 368.

Evidence *held* insufficient to entitle a judgment debtor to restrain execution.—*McCray v. Freeman* (Tex. Civ. App.) 37.

Sufficiency of excuse for delay in bringing action to correct a judgment.—*McCray v. Freeman* (Tex. Civ. App.) 37.

A petition referring to a former suit, and asking that a judgment for dismissal therein be set aside because it was procured by fraud, and that the two cases be consolidated, states a good cause of action, and must be regarded as seeking the relief sought in the original action.—*Cray v. Wilson* (Ky.) 186.

The collection of a judgment on a contract, only part of which has been performed, will not be enjoined, unless the reasonable value of the services performed be tendered.—*Jordan v. Chester* (Tex. Civ. App.) 904.

Where notes given in consideration of services to be performed were put in judgment before performance, and afterwards the payee neglected to perform, the enforcement of the judgment should be enjoined.—*Jordan v. Chester* (Tex. Civ. App.) 904.

#### Res judicata.

Where the court enters judgment for plaintiff on foreclosure except as to certain articles claimed as exempt, the question of exemption is *res judicata*.—*National Bank of Denison v. Kilgore* (Tex. Civ. App.) 565.

A judgment in partition, in which respective adverse interests of co-tenants were not in issue, *held* not a bar to ejectment by one of the parties thereto against the other.—*Martin v. Trail* (Mo.) 655.

A judgment of the United States circuit court overruling a motion by defendant to quash an execution sale, on the ground that the property was his homestead, is a bar to a subsequent ac-

tion by defendant to recover the property on the same ground.—*Reed v. Whitlow* (Ky.) 686.

Where there has been a plea in reconvention, and testimony thereon introduced, a verdict for plaintiff and judgment thereon are *res judicata* as to the matters in issue between the parties.—*Bemus v. Donnigan* (Tex. Civ. App.) 1052.

A judgment in partition is conclusive as to every right that has been adjudicated therein.—*Lindell Real-Estate Co. v. Lindell* (Mo.) 368.

A judgment *held* not *res judicata* as against one not a party thereto, though the same issue of facts was involved.—*Treadwell v. Pitts* (Ark.) 142.

A judgment in an action involving the title to land is a bar to a subsequent action to recover the land, though plaintiff has perfected his title since the former judgment.—*Carlisle v. Howes* (Ky.) 191.

The dismissal of an action is conclusive, unless the pleadings and judgment show that the case was determined on its merits.—*Carlisle v. Howes* (Ky.) 191.

Defendant, in trespass to try title, who neglects to set up a title acquired after suit brought, cannot maintain a subsequent action between the same parties on such subsequent title.—*McCray v. Freeman* (Tex. Civ. App.) 37.

A bill for a new trial *held* to show that the issue as to a widow's right to an allowance was involved in the original suit.—*Woolley v. Sullivan* (Tex. Civ. App.) 919.

## JUDICIAL SALES.

On execution, see "Execution."

Under Civ. Code, § 696, providing that judicial sales shall be on a credit of at least six months, a court has no authority to direct a sale on a credit of three months.—*McKenzie v. Salyer* (Ky.) 450.

## JURISDICTION.

See "Courts"; "Venue."

Amount in controversy, see "Removal of Causes." Justices' courts in civil cases, see "Justices of the Peace."

Of divorce suit, see "Divorce."

On appeal in civil actions, see "Appeal and Error."

— in criminal prosecutions, see "Criminal Law."

## JURY.

See, also, "Grand Jury."

Custody and conduct, see "Criminal Law."

Disqualification, ground for new trial, see "New Trial."

Instructions in civil actions, see "Trial."

— in criminal prosecutions, see "Criminal Law."

Taking case or question from jury at trial, see "Trial."

That a juror's name was misspelled on a list furnished defendant in a criminal case from which to make challenges, *held* not ground for reversal, where the error was cured before defendant passed on the panel.—*State v. Hunt* (Mo.) 389.

It is no ground for quashing a special venire that only 42 of 100 jurors were in attendance.—*Martin v. State* (Tex. Cr. App.) 852.

Juror who has formed an opinion from newspaper reports *held* not disqualified, where he states that he can give defendant a fair trial.—*State v. Hunt* (Mo.) 389.

Taxpayers of a city are not, for that reason, disqualified to sit as jurors in a suit against the

city for damages.—City of Marshall v. McAllister (Tex. Civ. App.) 1043.

One who was negligent in not being present at the trial in person or by attorney cannot complain that his case was not retained on the jury docket.—Harris v. Kellum & Rotan Inv. Co. (Tex. Civ. App.) 1027.

Where the one demanding a jury trial withdraws the jury fee, he cannot complain that the case was not tried by a jury.—Harris v. Kellum & Rotan Inv. Co. (Tex. Civ. App.) 1027.

In a capital case, *held* error to serve defendant with two copies of a venire, one containing 60 and the other 52 names.—Foster v. State (Tex. Cr. App.) 1009.

A litigant, for the purpose of exercising his right of peremptory challenge, should be permitted to ask a juror whether he occupies the relation of client to the opposing attorneys, but the refusal to permit the juror to answer the question is not reversible error, in the absence of anything tending to show that appellant was prejudiced thereby.—Lowe v. Webster (Ky.) 217.

Under the constitution, providing that a county-court jury shall consist of six men, the court cannot discharge one and force a trial by the remaining five.—Jackson v. J. A. Coates & Sons (Tex. Civ. App.) 24.

## JUSTICES OF THE PEACE.

A bond on appeal from a justice is not void because made payable to appellee, "or to their certain attorney, executors, or administrators, or assigns."—Brazoria County v. Grand Rapids School-Furniture Co. (Tex. Civ. App.) 900.

The 10 days for filing bond on appeal from a justice runs from date of overruling motion for new trial when determined within 10 days after entry of judgment.—Jackson v. J. A. Coates & Sons (Tex. Civ. App.) 24.

Under Rev. St. 1895, art. 1670, a bond filed on appeal from justice court need be for double the amount of the judgment only, and not for double the amount of the judgment and costs.—Blanks v. Stamps (Tex. Civ. App.) 18.

Where a bond on appeal from a justice was defective, *held*, a new bond could not be filed in the county court.—Houston & T. C. R. Co. v. Red Cross Stock Farm (Tex. Civ. App.) 795.

A justice of the peace takes his office subject to the power of the people to change the limits of his jurisdiction.—State v. Rigsby (Tex. Civ. App.) 271.

A justice of the peace has jurisdiction to finally determine a plea of privilege, and his determination on conflicting evidence will not be reviewed.—Jennings v. Shiner (Tex. Civ. App.) 276.

Judgment entered by a justice of the peace in an action where a plea in reconvention is filed examined, and *held* to be final as to both parties.—Lewis v. Smith (Tex. Civ. App.) 294.

Where a transcript filed in county court on appeal from a justice in a criminal case fails to show the giving of notice of appeal, the record cannot be corrected by a nunc pro tunc order of the justice, and the appeal will be dismissed.—Truss v. State (Tex. Cr. App.) 92.

A justice of the peace has no jurisdiction to dispossess a tenant of land.—Vinson v. Flynn (Ark.) 146.

## JUSTIFICATION.

Of homicide, see "Homicide."

## LABELS.

See "Trade-Marks and Trade-Names."

## LACHES.

As bar to action, see "Equity."  
— for reformation of instruments, see "Reformation of Instruments."

## LANDLORD AND TENANT.

Rights of railroad lessee, see "Railroads."

A landlord, under Rev. St. 1895, art. 3235, has no lien on proceeds of voluntary sale of crops by tenant.—Estes v. McKinney (Tex. Civ. App.) 556.

The fact that chattels were on the rented premises when the lease was made, and had been there prior to that time, will not, of itself, secure to the landlord a lien upon them for rent.—Davis v. Washington (Tex. Civ. App.) 585.

Under Rev. St. 1879, art. 3122a, a landlord has no lien upon furniture and fixtures used by tenant which are the property of third persons.—Davis v. Washington (Tex. Civ. App.) 585.

Privilege of subletting *held*, under the terms of the lease, a personal trust, and not a general power to sublet.—Boone v. First Nat. Bank (Tex. Civ. App.) 594.

Elements of damage or wrongful dispossession of tenant determined.—Wilkinson v. Stanley (Tex. Civ. App.) 606.

A holding over by the tenant, constituting a renewal of the lease by its terms, is a renewal upon the part of the lessor of his covenant to repair.—Harthill v. Cooke's Ex'r (Ky.) 705.

A tenant was not liable for rent after his abandonment of the premises, after notice to the landlord, because of the landlord's failure to keep his covenant to repair.—Harthill v. Cooke's Ex'r (Ky.) 705.

A landlord suing under Rev. St. 1895, art. 3251, giving him a lien upon property in a leased building, must allege the leasing of the building.—Constantine v. Fresche (Tex. Civ. App.) 1045.

Assignee of rent note, who is not assignee of reversion, cannot bring distress.—Hutsell v. Deposit Bank of Paris (Ky.) 469.

Distress warrant *held* not invalid because it directs levy on property of tenant and subtenant, though the property of the latter only is liable.—Hutsell v. Deposit Bank of Paris (Ky.) 469.

Where a lessee and his heirs held over without giving notice that they claimed the land as their own, *held*, that their possession was the possession of the lessor, as against a subsequent purchaser of the land.—Mattfeld v. Huntington (Tex. Civ. App.) 53.

A tenant unlawfully dispossessed may have an action for actual and unnecessary damages to goods and person.—Vinson v. Flynn (Ark.) 146.

Tenant cannot show interest in land in an action for damages for unlawful dispossession.—Vinson v. Flynn (Ark.) 146.

Under Ky. St. § 2302, a landlord may have an attachment for rent when there are reasonable grounds for belief, and he does in fact believe, that unless an attachment issue he will lose his rent, and the finding of the lower court, upon conflicting evidence, of the existence of such grounds for the attachment, will not be disturbed.—Porter v. Sparks (Ky.) 220.

## LANDS.

See "Public Lands."

## LARCENY.

Evidence.

In a prosecution for cattle stealing, a bill of sale by which defendant conveyed the stolen ani-



mal is admissible in evidence, as a circumstance to show defendant's control of the animal at the time.—*Brite v. State* (Tex. Cr. App.) 342.

It was not error to exclude evidence of indictments against another person pending for theft, to raise a probability that such other person, and not defendant, was the guilty party.—*Johnson v. State* (Tex. Cr. App.) 1007.

To identify cattle sold by defendant with the cattle charged to have been stolen, evidence that other cattle sold by him at the same time were stolen property *held* inadmissible.—*Parker v. United States* (Indian Ter.) 858.

Evidence *held* to justify a conviction of theft of an estray horse.—*Baxter v. State* (Tex. Cr. App.) 87.

Unexplained possession of recently stolen goods *held* to justify conviction of theft.—*Ray v. State* (Tex. Cr. App.) 77.

Evidence examined, and *held* sufficient to identify stolen cotton by circumstantial evidence.—*Simmacher v. State* (Tex. Cr. App.) 354.

The evidence in a prosecution for stealing one hog examined, and *held*, that there was sufficient evidence of the theft of two hogs for the court to charge the jury on the subject of contemporaneous theft.—*Poteet v. State* (Tex. Cr. App.) 339.

Proof that defendants sold an animal between 12 and 18 months old, branded S., without evidence as to its sex or color, does not tend to show defendant guilty of theft of a red cow about 2½ years old, branded S.—*Scott v. State* (Tex. Cr. App.) 336.

Want of consent to the taking on the part of the owner of the property *held* sufficiently shown.—*Hoskins v. State* (Tex. Cr. App.) 1003.

#### **Trial—Instructions.**

An instruction *held* not misleading, though the court confused the name of the owner of the property.—*Stevens v. State* (Tex. Cr. App.) 102.

It was proper to submit the question of accused's good faith in taking a horse by bill of sale from another not in possession, where he was charged with theft of the horse as an estray.—*Baxter v. State* (Tex. Cr. App.) 87.

Evidence on a trial for theft of an estray horse *held* not to require a charge as to circumstantial evidence.—*Baxter v. State* (Tex. Cr. App.) 87.

Instructions *held* to sufficiently present the defense that accused had purchased the stolen property.—*Russell v. State* (Tex. Cr. App.) 81.

A request to charge that if defendant "took" the horse alleged to be stolen, and gave a reasonable explanation, the state must prove the explanation false, should be refused.—*Ray v. State* (Tex. Cr. App.) 77.

In a prosecution for cattle stealing, where the stolen animal showed that it had been ear-cropped recently, and since being stolen, a charge that recent possession was the only inculpatory evidence in the case was properly refused.—*Brite v. State* (Tex. Cr. App.) 342.

A charge examined, and *held* to properly submit the question of ownership of stolen property.—*Brite v. State* (Tex. Cr. App.) 342.

An instruction which might be construed to deprive the defendant in a prosecution for hog stealing of an explanation made on the spot by his accomplice, *held* cured by another, that gave him the benefit of the explanation in support of his theory of defense.—*Poteet v. State* (Tex. Cr. App.) 339.

Where the alleged theft was committed by a servant left temporarily in charge of his master's shop, *held*, that an instruction as to possession by the servant was unnecessary.—*Livinston v. State* (Tex. Cr. App.) 1008.

An instruction as to a taking by mistake *held* properly refused where there was no evidence

to sustain it.—*Smith v. State* (Tex. Cr. App.) 794.

A charge omitting to state that a theft must be without consent of the owner *held* no error.—*Simmacher v. State* (Tex. Cr. App.) 512.

## **LAW OF THE CASE.**

Decision on appeal, see "Appeal and Error."

## **LEASES.**

See "Landlord and Tenant."

## **LEGACIES.**

See "Wills."

## **LEGISLATIVE POWER.**

See "Constitutional Law."

## **LEVY.**

Of distress warrant, see "Landlord and Tenant."  
Of execution, see "Execution."

## **LIBEL AND SLANDER.**

Indictment for libel construed, and *held* sufficient.—*Jones v. State* (Tex. Cr. App.) 78.

In a criminal prosecution it was immaterial whether defendant was responsible for the publication, where he admitted the writing of the article.—*Noble v. State* (Tex. Cr. App.) 80.

An action for libel is an action for "slander," within the meaning of Ky. St. § 10, and does not, therefore, survive the death of the plaintiff.—*Johnson's Adm'r v. Haldeman* (Ky.) 226.

Where the words spoken imported an infamous occupation, though not indictable, a petition alleging that they were intended to charge an indictable offense, and that thereby plaintiff had been socially ostracized, shows special damages.—*Mudd v. Rogers* (Ky.) 255.

Words charging an indictable offense, punishable by an infamous or corporal punishment, *held* actionable per se.—*Mudd v. Rogers* (Ky.) 255.

Words importing an infamous occupation, which was not an indictable offense, *held* not actionable per se.—*Mudd v. Rogers* (Ky.) 255.

An instruction on prosecution for slander that, if the jury had a reasonable doubt as to whether the statements were maliciously made, they should acquit, *held* proper.—*Tippens v. State* (Tex. Cr. App.) 1000.

In a criminal prosecution for slander, evidence of statements concerning other persons than prosecuting witness *held* inadmissible.—*Tippens v. State* (Tex. Cr. App.) 1000.

On a criminal prosecution for slander in the presence of B., defendant cannot be convicted on evidence of statements to other persons than B.—*Tippens v. State* (Tex. Cr. App.) 1000.

Sufficiency of evidence determined.—*Tippens v. State* (Tex. Cr. App.) 1000.

Testimony in a criminal prosecution for slander that witness had traced the reports to defendant *held* inadmissible, where he obtained his information from some one other than defendant.—*Tippens v. State* (Tex. Cr. App.) 1000.

Complaint construed, and *held*, that the words alleged to have been spoken were actionable per se.—*Lyons v. Stratton* (Ky.) 446.

## **LICENSES.**

A tax of 1 per cent. per annum, levied by a city upon the stocks of merchants in said city,

is not an occupation tax.—City of Brookfield v. Toocy (Mo.) 387.

## LIENS.

Acquired by attachment, see "Attachment."  
Particular classes of, see "Chattel Mortgages"; "Innkeepers"; "Landlord and Tenant"; "Mechanics' Liens"; "Mortgages"; "Railroads"; "Vendor and Purchaser."

## LIFE ESTATES.

See "Dower."

## LIMITATION OF ACTIONS.

See, also, "Adverse Possession."  
Laches, see "Equity."

Action against a telegraph company for mental anguish, disappointment, sorrow, etc., resulting from the nondelivery of a telegram, must be brought within one year.—Kelly v. Western Union Tel. Co. (Tex. Civ. App.) 532.

Action against a telegraph company to recover the toll paid for a message which was not delivered, need not be brought within one year.—Kelly v. Western Union Tel. Co. (Tex. Civ. App.) 532.

Limitations continue to run, as against items in an amended complaint, up to the time the amendment is filed.—Santleben v. Froboese (Tex. Civ. App.) 571.

Limitations held not to begin to run against a claim for price of land sold until the purchase of an outstanding interest by vendee.—Dorsey's Adm'r v. Swann (Ky.) 692.

An improvement certificate given by a city to a sewer contractor is not founded on the written contract between the city and the contractor, and hence an action thereon is barred under the two-years statute as to debts.—Glover v. Storrie (Tex. Civ. App.) 1035.

An action to recover installments on bonds maturing more than four years before suit brought held barred by limitations.—Thornburgh v. City of Tyler (Tex. Civ. App.) 1054.

Though a judgment is suspended by an appeal, it is not thereby so vacated as to allow limitations to run after its rendition in a suit to recover lands held adversely.—Miller v. Gist (Tex. Sup.) 263.

Such mental unsoundness as would toll limitations held not shown by the evidence.—Carter v. Stewart (Tenn. Ch. App.) 366.

Married woman's act does not by implication repeal the statute of limitations exempting married women from the operation of said statute.—Lindell Real-Estate Co. v. Lindell (Mo.) 368.

An action is brought within a year after the accident if brought in the following year, on the same day of the month as the accident.—Texas & P. Ry. Co. v. Moore (Tex. Civ. App.) 67.

Where cross petition shows the claim therein asserted accrued more than 15 years before pleading was filed, a demurrer was properly sustained.—Bradford v. Bradford (Ky.) 244.

An action on a written promise to pay an account is not barred until four years.—Willard v. Guttman (Tex. Civ. App.) 901.

Limitations do not expire as to a cause of action based on a mutual current account between merchant and merchant until four years.—Willard v. Guttman (Tex. Civ. App.) 901.

The lapse of 30 years after the sale of land bars the right to sue for the price and to foreclose the equitable lien therefor.—Bearrow v. Wright (Tex. Civ. App.) 902.

## LIMITATION OF LIABILITY.

Of carrier, see "Carriers."

## LIQUORS.

See "Intoxicating Liquors."

## LIVE STOCK.

See "Animals."

Injuries from operation of railroads, see "Railroads."

Transportation, see "Carriers."

## LOAN COMPANIES.

See "Building and Loan Associations."

## LOCAL LAWS.

See "Statutes."

## LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors."

## MACHINERY.

Liability of employer for defects, see "Master and Servant."

## MALICIOUS PROSECUTION.

An action cannot be maintained where the court in which the prosecution was had had no jurisdiction, or where want of probable cause is not shown, or where the writ complained of was void.—Vinson v. Flynn (Ark.) 146.

Instructions examined as to applicability to malicious prosecution in an action by tenant against landlord for unlawful dispossession, and held improper.—Vinson v. Flynn (Ark.) 146.

## MANDAMUS.

Where the court orders directors of a school to issue warrants, it must direct that the warrants specify out of which fund they should be paid.—School Dist. No. 14 v. School Dist. No. 4 (Ark.) 501.

Mandamus will not lie to compel a tax collector to issue a license as merchant druggist where he had not refused to do so.—Yellowstone Kit v. Wood (Tex. Civ. App.) 1068.

In a mandamus proceeding, a general denial goes for naught, and the facts alleged in the petition must be taken as true.—May v. Finley (Tex. Sup.) 257.

On appeal in mandamus proceeding, a motion for a new trial and a bill of exceptions must be filed.—School Dist. No. 14 v. School Dist. No. 4 (Ark.) 501.

## MANSLAUGHTER.

See "Homicide."

## MARRIAGE.

See, also, "Divorce."

All marriages not solemnized or contracted in presence of an authorized person or society are void.—Robinson v. Reed's Adm'r (Ky.) 435.

## MARRIED WOMEN.

See "Husband and Wife."

## MARSHALING ASSETS AND SECURITIES.

A lien creditor *held*, under peculiar circumstances, after exhausting his lien, to stand, as to the balance of his debt, upon an equality with other creditors in distributing a decedent's estate.—*Woolley v. Johnson's Ex'rs* (Ky.) 678.

## MASTER AND SERVANT.

### Master's Liability for injury to servant.

Necessity of a master to provide rules for protection of his employes determined.—*Sanner v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.) 533.

Evidence *held* sufficient to show that injury to railroad employé was caused by defective frog.—*International & G. N. R. Co. v. Turner* (Tex. Civ. App.) 560.

The test of duty of a railroad company in furnishing machinery is not what railroads do generally, but whether the road in question was reasonably careful.—*Gulf, C. & S. F. Ry. Co. v. Beall* (Tex. Civ. App.) 605.

Whether defendant was guilty of negligence in furnishing his servant with horses, without warning of their dangerous character, is a question for the jury.—*Bowman v. Texas Brewing Co.* (Tex. Civ. App.) 808.

Evidence *held* to show that a switchman was injured by negligence of defendant in not providing suitable coupling pins.—*Missouri, K. & T. Ry. Co. of Texas v. Hauer* (Tex. Civ. App.) 1078.

Duty of railroad company as to inspection of cars of other companies to protect employes against injuries considered.—*Missouri, K. & T. Ry. Co. of Texas v. Chambers* (Tex. Civ. App.) 1090.

Evidence *held* insufficient to show plaintiff injured by negligence of his employer.—*Louisville & N. Ry. Co. v. Bass* (Ky.) 463.

Evidence in action by engineer for injuries by negligence of defendant *held* to sustain verdict for plaintiff.—*Chesapeake & O. S. W. R. Co.'s Receiver v. Hoskins* (Ky.) 484.

Failure of defendant railroad's servants to exercise ordinary care in observance of schedule in management of trains *held* gross negligence.—*Chesapeake & O. S. W. R. Co.'s Receiver v. Hoskins* (Ky.) 484.

The law imposes the duty on a railroad company to have the proper inspection of its cars made, regardless of the rules of the company.—*Kentucky Cent. Ry. Co. v. Carr* (Ky.) 193.

A railroad company, as a duty to its employes, is required to use only ordinary care in erecting and maintaining its structures and appliances in a safe condition.—*Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877.

A railroad company is not required to use a greater degree of care towards an employé in danger than towards one who is not in such danger.—*Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877.

The degree of care required by a railroad company towards a servant is not dependent upon what the injured party would be expected to do under the circumstances.—*Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877.

Evidence examined, and *held* to show that the speed of a railway train was dangerous.—*Galveston, H. & S. A. Ry. Co. v. McCray* (Tex. Civ. App.) 275.

### — Fellow servants.

A brakeman on a freight train, and the fireman of a switch engine making it up, *held* fellow servants, for whose negligence the railroad company

is not liable.—*Sanner v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.) 533.

There being no statute on the subject of fellow servants in New Mexico, the common law governs.—*Sanner v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.) 533.

On issue of incompetency of fellow servant, evidence *held* sufficient.—*Galveston, H. & S. A. Ry. Co. v. Parrish* (Tex. Civ. App.) 536.

### — Assumption of risks and contributory negligence.

A railway employé does not assume more than the ordinary risks pertaining to the service.—*Texas & P. Ry. Co. v. Eberhart* (Tex. Sup.) 510.

Brakeman on a freight train does not assume risks incident to negligent inspection of cars.—*Missouri, K. & T. Ry. Co. of Texas v. Chambers* (Tex. Civ. App.) 1090.

Whether a yard master was guilty of contributory negligence *held* a question for the jury.—*International & G. N. R. Co. v. Turner* (Tex. Civ. App.) 560.

Evidence *held* to show that a switchman injured in coupling cars was not guilty of contributory negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Hauer* (Tex. Civ. App.) 1078.

Duty of brakeman to inspect loads on cars does not charge him with knowledge of latent defects in loading.—*Galveston, H. & S. A. Ry. Co. v. McCray* (Tex. Civ. App.) 275.

An employé of a railroad company is presumed to know the rules governing his duties.—*Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877.

A railway employé need not exercise care to ascertain whether the company has established proper rules to afford its servants protection, since he has a right to presume that it has done so.—*Texas & P. Ry. Co. v. Eberhart* (Tex. Sup.) 510.

The duty of exercising ordinary prudence to ascertain the danger incident to the work he is assigned to, and whether it is directed to be done so as to avoid such danger, is not imposed upon a servant.—*Missouri, K. & T. Ry. Co. of Texas v. Hannig* (Tex. Sup.) 508.

Ky. St. § 2732, providing for the punishment of miners who neglect or refuse to prop the roof of any working place under their control, does not apply to one specially employed as track layer in the entry of a mine.—*Ashland Coal, Iron & Railway Co. v. Wallace's Adm'r* (Ky.) 207.

Whether a flaw in an iron clip on a wagon is an obvious defect, and such as would render it dangerous to use, is for the jury.—*Bowman v. Texas Brewing Co.* (Tex. Civ. App.) 808.

Whether a defect in a wagon was such that an ordinarily prudent man would consider it dangerous to use is a question of fact for the jury.—*Bowman v. Texas Brewing Co.* (Tex. Civ. App.) 808.

### — Actions.

A recovery for the death of an employé, based upon the incapacity of fellow servants generally, and upon the faulty condition of a switch yard, *held* erroneous under the pleadings.—*Gulf, C. & S. F. Ry. Co. v. Beall* (Tex. Civ. App.) 605.

In an action against a railroad company for causing the death of an employé, evidence that the employes of the road failed to go to the place where the deceased lay dead is inadmissible.—*Gulf, C. & S. F. Ry. Co. v. Beall* (Tex. Civ. App.) 606.

Testimony of a witness *held* so contradictory in two depositions as to justify the jury in returning a verdict that deceased had no notice of a defective appliance.—*Gulf, C. & S. F. Ry. Co. v. Royall* (Tex. Civ. App.) 815.

A railroad employé could testify that he was not given a copy of the rules, though his application for appointment stated that he had read them.—*Missouri, K. & T. Ry. Co. of Texas v. Hauer* (Tex. Civ. App.) 1078.

Where an allegation that the rails, or their fastenings, or the switch, or the switch rods, were out of repair, or not properly fastened together, was supported by evidence that the accident was due to a missing bolt, that should have held the switch rods together, there was no variance.—*Houston & T. C. R. Co. v. Gaither* (Tex. Civ. App.) 266.

Where plaintiff alleges that the defect in machinery, by the effect of which he was injured, was "unknown to defendant," it being manifest that the pleader's meaning was that the defect was unknown to plaintiff, the petition will be so construed.—*Kentucky Cent. Ry. Co. v. Carr* (Ky.) 193.

In an action by a brakeman to recover for injuries resulting from defective coupling machinery, the testimony stated, and *held* not to authorize the direction of a verdict for defendant.—*Kentucky Cent. Ry. Co. v. Carr* (Ky.) 193.

A servant relying upon the nonenforcement of a railroad company's rule governing its employes' duties must prove such fact.—*Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877.

In an action by a servant for personal injuries, a charge was *held* properly refused on the ground that it would have prevented a recovery, even if defendant was guilty of negligence.—*Texas & P. Ry. Co. v. Eberhart* (Tex. Sup.) 510.

A charge *held* not to impose extraordinary care on the part of defendant railroad company in relation to discovering defects in switches.—*Houston & T. C. R. Co. v. Gaither* (Tex. Civ. App.) 266.

An instruction that the failure of a railroad company to do certain acts for the safety of its employes constituted negligence *held* not on the weight of the evidence.—*Houston & T. C. R. Co. v. Gaither* (Tex. Civ. App.) 266.

A request for instruction *held* properly refused, as ignoring the question of defendant railroad's negligence in failing to discover that a bolt had been removed from a switch.—*Houston & T. C. R. Co. v. Gaither* (Tex. Civ. App.) 266.

Pleadings and proof *held* to authorize an instruction as to negligence of defendant railroad in failing to discover that a bolt had been removed from a switch.—*Houston & T. C. R. Co. v. Gaither* (Tex. Civ. App.) 266.

Where it was admitted that the accident was due to a missing bolt, that should have held the switch rods together, it was proper to refuse to instruct that, if the accident was the result of causes incident to the business of railroading, plaintiff could not recover.—*Houston & T. C. R. Co. v. Gaither* (Tex. Civ. App.) 266.

An abstract definition of "negligence" *held* no guide for the jury in deciding upon the issue of negligence as between master and servant.—*Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877.

An instruction on assumed risks, in an action for damages for personal injury, should be given where that question arises from the pleadings or the testimony.—*Planters' Oil Co. v. Mansell* (Tex. Civ. App.) 913.

Definition of "obvious defect" in an instruction as to duties of railroad employé *held* proper.—*Missouri, K. & T. Ry. Co. of Texas v. Chambers* (Tex. Civ. App.) 1000.

The burden is upon the defendant to show that deceased had knowledge of a defect in the appliance that caused the injury.—*Gulf, C. & S. F. Ry. Co. v. Royall* (Tex. Civ. App.) 815.

## MASTER IN CHANCERY.

See "Equity."

## MATERIALITY.

Of alteration of written instrument, see "Alteration of Instruments."

## MATERIAL MEN.

See "Mechanics' Liens."

## MEASURE OF DAMAGES.

See "Damages."

## MECHANICS' LIENS.

A lien of a mortgage *held* superior to the lien of a material man.—*Monticello Bank v. Sweet* (Ark.) 500.

Lien for materials furnished *held* to prevail against a subsequent attachment.—*Finck & Schmidt Lumber Co. v. Mehler* (Ky.) 766.

A deed of trust executed subsequent to a mechanic's lien does not impair the latter.—*Mutual Building & Loan Ass'n v. McGee* (Tex. Civ. App.) 1030.

A subcontractor can acquire no lien on a homestead unless he has complied with Rev. St. 1895, § 8296.—*Gilmer v. Wells* (Tex. Civ. App.) 1058.

Where the owner has paid the contractor for the material furnished, he is not personally liable to a subcontractor who has not filed his claim, as required by Rev. St. 1895, art. 3296.—*Gilmer v. Wells* (Tex. Civ. App.) 1058.

A lien for labor performed or materials furnished for a contractor or subcontractor relates back, and takes precedence of intervening liens, if notice be given within 60 days.—*Fenck & Schmidt Lumber Co. v. Mehler* (Ky.) 403.

One who is estopped by representations made from asserting a claim to a lot superior to a mechanic's lien will be bound by such lien, although not a party to the contract on which it is based.—*Lindsley v. Parks* (Tex. Civ. App.) 277.

## MESSAGES.

Delay or failure to deliver, see "Telegraphs and Telephones."

## MINES AND MINERALS.

Petroleum and gas are minerals, within the reservation of a deed of "mines, minerals, and metals."—*Murray v. Allard* (Tenn. Sup.) 355.

## MINORS.

See "Guardian and Ward"; "Infants"; "Parent and Child."

## MISJOINDER.

Of parties, see "Parties."

## MISREPRESENTATION.

See "False Pretenses."

By insured, see "Insurance."

## MISTAKE.

As ground for reforming contract, see "Reformation of Instruments."

**MORTGAGES.**

Of homestead, see "Homestead."

Rights acquired by holder of void mortgage rendered valid by curative act after sale of land on foreclosure of mechanic's lien determined.—Bluff City Lumber Co. v. Bloom (Ark.) 503.

The holder of a void mortgage, not made a party to a suit foreclosing a mechanic's lien on the property, *held* not entitled to redeem from a sale under such foreclosure after the time has expired, where Act April 13, 1893, did not cure such mortgage until the rights of the lienholder became vested by purchase.—Bluff City Lumber Co. v. Bloom (Ark.) 503.

Under Sand. & H. Dig. § 3713, the holder of a mortgage on a homestead, in which the wife failed to join, *held* not a necessary party to a suit foreclosing a mechanic's lien.—Bluff City Lumber Co. v. Bloom (Ark.) 503.

In an action to foreclose a note and mortgage, when the defense is that maker was, by reason of age and mental infirmity, induced to execute the instrument sued on by threats to prosecute his sons for an alleged felony, it is error not to submit the question of duress to the jury.—Perkins v. Adams (Tex. Civ. App.) 529.

Deed absolute in form *held* a mortgage.—Timmons v. Center (Ky.) 437.

Rule for accounting between the mortgagor and mortgagee, where the latter sells a portion of the land, and cuts timber therefrom, determined.—Timmons v. Center (Ky.) 437.

Rights of mortgagors construed, and *held* to be prima facie evidence that loan was made to both mortgagors jointly.—Lane v. Traders' Deposit Bank (Ky.) 442.

A mortgage left with the proper officer to be recorded *held* to take priority over a subsequent mortgage, though by oversight it was not recorded for several years.—Buckner v. Davis (Ky.) 445.

Complaint in action to foreclose mortgage *held* sufficient.—O'Connor v. Stone (Ky.) 483.

Where a mortgage executed by a corporation to a stockholder to indemnify him as surety stipulated that it was not to be foreclosed unless absolutely necessary to "protest" the mortgage, and the mortgage was not acknowledged until just before a fraudulent assignment was executed by the corporation for the benefit of creditors, it cannot be enforced as against attaching creditors.—Louisville Banking Co. v. Etheridge Manufg Co. (Ky.) 169; Riley v. Merchants' Nat. Bank, Id.; Brown v. Riley, Id.

The mere fact that the mortgagor was not of a high order of intellect, or that he has entered into imprudent and disastrous ventures, is not sufficient to establish his incapacity to contract, the burden being on his representatives resisting the enforcement of the mortgage to show his incapacity.—Hall's Adm'r v. Mutual Life Ins. Co. (Ky.) 194.

The lien acquired by the levy of an attachment has priority over an unrecorded mortgage which was in existence, but of which the attaching creditor had no notice, at the time his debt was created.—Wicks v. McConnell (Ky.) 205.

**MOTIONS.**

New trial in civil actions, see "New Trial."  
—in criminal prosecutions, see "Criminal Law."

Presentation of objections for review, see "Appeal and Error."

Relating to pleadings, see "Pleading."

**MUNICIPAL CORPORATIONS.**

See, also, "Schools and School Districts."

Municipal taxes, see "Taxation."

Regulation of railroads, see "Railroads."

Tax on merchant's stock, see "Licenses."

Extension of the limits of a town so as to embrace ground dedicated as a street *held* not an acceptance of the dedication.—Cochran v. Town of Shepherdsville (Ky.) 250.

Under Rev. St. 1889, § 1465, the courts of the state take judicial cognizance of the organization of cities of the third class.—City of Brookfield v. Tooley (Mo.) 387.

A municipal corporation cannot hold land in trust for religious purposes.—City of Maysville v. Wood (Ky.) 403.

Attempted organization *held* void because certificate of sheriff holding election was not indorsed on application for charter, and registered with it.—City of Dayton v. Dayton Coal & Iron Co. (Tenn. Ch. App.) 740.

A municipal corporation has no power to grant the use of an alley to a railroad company, when such use would amount to a monopoly of the alley.—Sherlock v. Kansas City Belt Ry. Co. (Mo.) 629.

**Officers.**

The fact that a city officer, by the statutes designated a "recorder," was by the ordinances of a city designated "police judge," does not affect the jurisdiction of such officer.—City of Brookfield v. Tooley (Mo.) 387.

Under Ky. St. § 3484, a member of the council, acting under an order of the council, cannot recover the reasonable value of his services in making a settlement with the city tax collector.—City of Winchester v. Frazer (Ky.) 453.

Where a settlement between a city and its tax collector is required to be made by the council, a member of that body cannot recover for services rendered in making the settlement.—City of Winchester v. Frazer (Ky.) 453.

Rev. St. 1895, arts. 2460, 5198, 5208, construed together, and *held*, that a charge of city tax collector of \$2.50 costs for selling for taxes one of ninety-nine tracts of land belonging to the same owner is in excess of the amount allowed by law.—Eustis v. City of Henrietta (Tex. Sup.) 259.

One injured in a city prison by reason of the failure of a policeman to properly search another prisoner *held* to have no cause of action against the chief of police.—Stinnett v. City of Sherman (Tex. Civ. App.) 847.

A private citizen cannot maintain an action for damages against a chief of police for failure to comply with a city ordinance, requiring him to safely keep prisoners.—Stinnett v. City of Sherman (Tex. Civ. App.) 847.

**Public improvements.**

A lien for a street improvement cannot exist before the work had been received by the city, as the apportionment warrant cannot issue until the work has been received.—Warfield v. Erdman (Ky.) 708.

The city of Covington *held* not prohibited by Acts 1883-84, vol. 2, p. 445, from assessing abutting property of a turnpike company for the costs of sewerage in its streets.—Lewis v. Schmidt (Ky.) 433.

**Torts.**

The fact that one injured while crossing a bridge was driving at an unlawful gait will not preclude a recovery unless such violation of the law contributed thereto.—City of Marshall v. McAllister (Tex. Civ. App.) 1043.

Where there were piles of rubbish in the street, and plaintiff cut his foot on glass therein, *held*, that he could recover.—City of Galveston v. Reagan (Tex. Civ. App.) 48.

A city not having accepted the dedication of a street, *held* not liable for injuries to animals by a barbed-wire fence therein.—Cochran v. Town of Shepherdsville (Ky.) 250.

A city is not answerable in damages for the negligence of its officers while exercising its police powers.—Stinnett v. City of Sherman (Tex. Civ. App.) 847.

#### **Fiscal management and taxation.**

On reincorporation of an abolished municipality, where the property of the old corporation is taken, bonds issued to pay for the indebtedness on such property *held* valid, although the property was not taken nor the debt assumed by vote of taxpayers.—City of Brownwood v. Noel (Tex. Civ. App.) 890.

Under Laws 1871, p. 29, the issue of railroad aid bonds before levying tax to pay them does not render them invalid.—Thornburgh v. City of Tyler (Tex. Civ. App.) 1054.

Power to issue railroad aid bonds may be granted the city by its charter without expressing the grant in the title.—Thornburgh v. City of Tyler (Tex. Civ. App.) 1054.

Power given the city by charter to issue railroad aid bonds does not exempt it from complying with the general law relating thereto.—Thornburgh v. City of Tyler (Tex. Civ. App.) 1054.

Failure of board of aldermen to attach the city seal does not render city bonds invalid.—Thornburgh v. City of Tyler (Tex. Civ. App.) 1054.

A city cannot issue railroad aid bonds unless the power has been expressly conferred on it.—Thornburgh v. City of Tyler (Tex. Civ. App.) 1054.

Evidence *held* insufficient to show that railroad aid bonds were issued before a tax was levied to pay them.—Thornburgh v. City of Tyler (Tex. Civ. App.) 1054.

Const. art. 11, § 7, providing for the issue of bonds for public improvements, and a tax to be levied to pay the interest, *held* to mean that the rate of tax to be levied need only be so definitely fixed that it became merely a ministerial act to determine the rate.—Mitchell County v. City Nat. Bank (Tex. Sup.) 880.

Money derived by a city from sale of bonds is no part of its income, as respects power to contract debts in any way in excess thereof.—Webb City & C. Waterworks Co. v. City of Cartersville (Mo.) 625.

Rule for determining necessary current expenses of city, to see if it has income in excess thereof, so as to allow judgment against it for rental of hydrants, determined.—Webb City & C. Waterworks Co. v. City of Cartersville (Mo.) 625.

Const. art. 11, §§ 2, 7, and article 8, § 9, are not self-enacting, and give no authority to a municipal corporation to incur the debts provided for without an act of legislature.—Mitchell County v. City Nat. Bank (Tex. Sup.) 880.

Tax levied by municipal corporation under void charter *held* not validated by subsequent organization.—City of Dayton v. Dayton Coal & Iron Co. (Tenn. Ch. App.) 740.

City acting under void charter *held* incapable of levying taxes.—City of Dayton v. Dayton Coal & Iron Co. (Tenn. Ch. App.) 740.

A city ordinance, levying a tax of 1 per cent. per annum upon the cost value of the stocks of merchants in said city, is a property tax, and is invalid, because not uniform.—City of Brookfield v. Tooley (Mo.) 387.

## **MURDER.**

See "Homicide."

## **MUTUAL BENEFIT SOCIETIES.**

See "Insurance."

## **NAMES.**

See "Trade-Marks and Trade-Names."

## **NEGLIGENCE.**

See, also, "Carriers"; "Master and Servant"; "Municipal Corporations"; "Railroads"; "Street Railroads"; "Telegraphs and Telephones." Measure of damages, see "Damages."

In a definition of negligence, the words "a reasonable man" are inaccurate, as they are not equivalent to "a reasonably prudent man."—Missouri, K. & T. Ry. Co. of Texas v. Hannig (Tex. Sup.) 506.

The burden of proving contributory negligence rests upon the party charging it.—Galveston, H. & S. A. Ry. Co. v. Parrish (Tex. Civ. App.) 536.

A charge that by ordinary or reasonable care is meant such care as an ordinarily prudent person would exercise under similar circumstances is correct.—Houston City St. Ry. Co. v. Medlenka (Tex. Civ. App.) 1028.

Where the evidence in an action for personal injuries did not make plaintiff clearly guilty of contributory negligence, the question was for the jury.—Houston City St. Ry. Co. v. Medlenka (Tex. Civ. App.) 1028.

A charge as to the degree of care imposed upon a railroad in switching cars *held* not to impose a higher degree than ordinary care.—Houston & T. C. R. Co. v. Kimbell (Tex. Civ. App.) 1049.

A charge as to the liability of a railroad company for injuries through obstructions on the right of way examined, and *held* to state the correct principle of law.—Houston & T. C. R. Co. v. Kimbell (Tex. Civ. App.) 1049.

A charge as to the negligence of a railroad company and its lessee in permitting an obstruction to remain in the right of way *held* erroneous.—Houston & T. C. R. Co. v. Kimbell (Tex. Civ. App.) 1049.

The error in a charge as to the liability of a railroad *held* not cured by another special charge.—Houston & T. C. R. Co. v. Kimbell (Tex. Civ. App.) 1049.

Where one was injured by remaining in a car that was being switched after notice had been given that the car would be moved, it is proper to submit to the jury the question of his negligence in remaining in the car.—Houston & T. C. R. Co. v. Kimbell (Tex. Civ. App.) 1049.

While there is no degree of negligence known as "willful," when injury has been inflicted not resulting in death, it is immaterial that the petition alleges "willful and gross" negligence, the court having instructed the jury as to gross negligence alone.—Kentucky Cent. Ry. Co. v. Carr (Ky.) 193.

Where contributory negligence is an issue, the court should instruct so as to apply the law to the facts upon that question.—Planters' Oil Co. v. Mansell (Tex. Civ. App.) 913.

## **NEGOTIABLE INSTRUMENTS.**

See "Bills and Notes."

Railroad tickets, see "Carriers."

**NEWLY-DISCOVERED EVIDENCE.**

Ground for new trial in civil actions, see "New Trial."  
— in criminal prosecutions, see "Criminal Law."

**NEW TRIAL.**

In criminal prosecutions, see "Criminal Law."

An objection that an answer does not state a defense may be raised on motion for new trial.—*De Loach Mill Mfg. Co. v. Bonner* (Ark.) 504.

New trial granted when case has been dismissed for want of prosecution, where plaintiff had no knowledge of the dismissal, is without laches, and has a meritorious cause of action.—*Smith v. Patrick* (Tex. Civ. App.) 585.

New trial will not be granted on ground of newly-discovered evidence where the existence of such evidence was known before trial closed.—*City of San Antonio v. Kreusel* (Tex. Civ. App.) 615.

Newly-discovered impeaching evidence *held* not ground for new trial.—*Moore v. Temple Grocer Co.* (Tex. Civ. App.) 843.

Failure to consider evidence must be raised in a motion for new trial.—*Peoples v. Terry* (Tex. Civ. App.) 846.

That, when a charge was read, a bystander, who was near the jury, could not understand the contents, *held* no ground for new trial.—*Houston City St. Ry. Co. v. Medlenka* (Tex. Civ. App.) 1028.

A new trial will not be granted because of newly-discovered evidence, consisting of declarations, and being merely cumulative.—*Richardson v. Huff* (Ky.) 454.

A new trial will not be granted on the ground of newly-discovered evidence, where there is no affidavit of late discovery.—*Richardson v. Huff* (Ky.) 454.

An affidavit, on motion for new trial, because of disqualification of juror, is insufficient, when based on information and belief.—*Texas Farm & Land Co. v. Story* (Tex. Civ. App.) 933.

A motion filed September 14th, after judgment rendered September 10th, was not in time, under *Manaf. Dig. Ark. § 5153*, prescribing three days as the time for moving for new trial.—*Julinson v. Anderson* (Indian Ter.) 950.

**NOMINATION.**

For office, see "Elections."

**NOTES.**

Promissory notes, see "Bills and Notes."

**NOTICE.**

Of appeal in criminal prosecutions, see "Criminal Law."

Records of deeds, see "Deeds."

To agent, see "Principal and Agent."

To charge guarantors, see "Guaranty."

**NUISANCE.**

Elements of damage in an action for maintaining a nuisance determined.—*City of Paris v. Allred* (Tex. Civ. App.) 62.

Evidence *held* sufficient to show that damage occurred to plaintiff's land by a continuing nuisance.—*City of Paris v. Allred* (Tex. Civ. App.) 62.

Where a nuisance is of a permanent character, plaintiff can recover all the damages that have

occurred, or may occur, in a single action.—*City of Paris v. Allred* (Tex. Civ. App.) 62.

An indictment for maintaining a nuisance *held* not good, where it does not appear that the offense was committed within a year before the finding of the indictment.—*Commonwealth v. G. W. Taylor Co.* (Ky.) 399.

**OCCUPATION.**

Taxation, see "Licenses"; "Taxation."

**OFFICERS.**

Injunctions affecting, see "Injunction."

Mandamus to, see "Mandamus."

Particular classes of, see "Banks and Banking"; "Clerks of Courts"; "Corporations"; "Counties"; "Courts"; "Elections"; "Municipal Corporations"; "Receivers"; "Schools and School Districts"; "Sheriffs and Constables."

Quo warranto, see "Quo Warranto."

Deputy assessors are not entitled to judgment requiring the auditor and treasurer of the state to pay to them the amount of their salaries instead of to their principal, though their claims may otherwise be lost.—*Tiller v. Burke* (Ky.) 182.

**OPENING.**

Judgment, see "Judgment."

**OPINION EVIDENCE.**

See "Evidence."

**ORDERS.**

Appealability, see "Appeal and Error."  
For tax sale, see "Taxation."

**ORDINANCES.**

Municipal ordinances, see "Municipal Corporations."

Validity of ordinance authorizing arrest without warrant, see "Arrest."

**PARENT AND CHILD.**

See, also, "Guardian and Ward."

Action by parent for death of child, see "Death."

Where a son is emancipated by his parent, and continues to work for the latter, his wages constitute a valid claim against the parent.—*Duveneck v. Kutzer* (Tex. Civ. App.) 541.

A parent is entitled to the wages of his minor children, unless it appears that he fails to maintain and educate them.—*Parlin & Orendorf Co. v. Webster* (Tex. Civ. App.) 569.

**PAROL AGREEMENTS.**

See, "Frauds, Statute of."

**PAROL EVIDENCE.**

In civil actions, see "Evidence."

**PARTIES.**

Admissions as evidence, see "Evidence."

Competency as witnesses, see "Witnesses."

Death, ground for abatement, see "Abatement and Revival."

Persons affected by estoppel, see "Estoppel."

Rights and liabilities as to costs, see "Costs."

Right to allege error on appeal, see "Appeal and Error."

Right to appeal, see "Appeal and Error."  
To action to foreclose vendor's lien, see "Vendor and Purchaser."  
To appeal bonds, see "Appeal and Error."  
To foreclosure suit, see "Mechanics Liens."

In an action for an order to sell land held in trust, a beneficiary who had conveyed his interest need not be made a party.—*Shields v. Hinkle* (Ky.) 485.

Where property in the hands of a trustee for creditors was attached, *held*, that the preferred creditors might intervene, although their interests would be fully protected by the trustee.—*Boltz v. Engelke* (Tex. Civ. App.) 47.

Misjoinder of defendants must be pleaded. Abatement of suit on judge's own motion *held* error.—*Sparks v. McHugh* (Tex. Cr. App.) 1045.

## PARTITION.

Review of judgment, see "Review."

Under Shannon's Code, § 5035, it is not an abuse of discretion to refuse to tax the fund with the attorney's fees of adult defendants, whose interests are not assailed.—*Pate v. Maples* (Tenn. Ch. App.) 740.

A purchaser at a sale under judgment of partition will not be disturbed of his possession by any review of the decree.—*Lindell Real-Estate Co. v. Lindell* (Mo.) 368.

The court has jurisdiction to determine questions of title in a partition suit.—*Lindell Real-Estate Co. v. Lindell* (Mo.) 368.

In a suit in the circuit court for division of lands alleged to belong to plaintiff and another made a defendant, other defendants, alleged to be in possession, will be permitted to file answers and set up ownership.—*Logan v. Catron* (Ky.) 218.

## PARTNERSHIP.

A certain claim *held* not to be a partnership matter.—*Santleben v. Froboese* (Tex. Civ. App.) 571.

An administratrix of a surviving partner *held* not chargeable for sum paid out of an amount realized from an old partnership transaction, to the agent who conducted it, upon his representations that it was due him.—*Scudder v. Ames* (Mo.) 659.

Any sum realized from a partnership account, on which further advances have been made by the surviving partner, must be first applied to that portion of the account due the estate, in the absence of any special arrangements.—*Scudder v. Ames* (Mo.) 659.

A surviving partner *held* not entitled to credit for a commission paid to an agent for getting a claim of the estate through the court, when the claim had already been allowed.—*Scudder v. Ames* (Mo.) 659.

A surviving partner *held* not chargeable for his failure to further prosecute, at a considerable expense, a partnership claim, which his attorney advised him there was little chance of winning, although others afterwards realized from the claim, unknown to him.—*Scudder v. Ames* (Mo.) 659.

Attorney's fees paid by an administratrix of a surviving partner in litigation growing out of her efforts to make a settlement of the firm estate, to which there are complicated and conflicting rights, are properly charged to the estate.—*Scudder v. Ames* (Mo.) 659.

Neither a surviving partner nor his administratrix are chargeable with the duty of accounting for partnership assets, which are outside the state, until the proceeds thereof actually come into their hands within the state.—*Scudder v. Ames* (Mo.) 659.

Surviving partner *held* not chargeable to the partnership estate for the good will of the partnership business.—*Scudder v. Ames* (Mo.) 659.

Surviving partner *held* not chargeable with amount paid as taxes against the estate, which were afterwards declared void.—*Scudder v. Ames* (Mo.) 659.

The allowance of a payment, by a surviving partner out of the estate, in compromise of a contest over title to land, will not be disturbed on the technical ground that it should have been paid out of the separate estates of the partners.—*Scudder v. Ames* (Mo.) 659.

Two partners had all property in common, and charged all private expenses to the partnership "expense." *Held*, the survivor could not draw out money to balance the amount drawn by the deceased member.—*Scudder v. Ames* (Mo.) 659.

Where no loss occurs to the estate through the failure of a surviving partner to settle the partnership accounts and keep them separate, he is *held* not chargeable with interest on the partnership assets up to the time of filing such settlement.—*Scudder v. Ames* (Mo.) 659.

Evidence examined, and *held*, that the firm was not bound by a statement as to the condition of the firm made by one of the partners.—*Horne v. Greer* (Tenn. Ch. App.) 774.

Evidence examined, and *held* to sustain the allegations in a bill for accounting that the entries of the firm books were incorrect.—*Horne v. Greer* (Tenn. Ch. App.) 774.

Where a general instruction was given as to what constitutes a partnership, parties who denied the partnership, and introduced evidence to support their issue, *held* entitled to an instruction submitting their issues to the jury.—*Oliver v. Moore* (Tex. Civ. App.) 812.

## PATENTS.

For public lands, see "Public Lands."

## PAYMENT.

See, also, "Compositions with Creditors."  
Claims against estate of decedent, see "Executors and Administrators."  
On note, see "Bills and Notes."

Customary promptness in payment of bills is incompetent to show payment.—*Fletcher v. Dulaney* (Indian Ter.) 855.

Proof of payment by partial payments may be sufficient, without proof of exact date and amount of each payment.—*Fletcher v. Dulaney* (Indian Ter.) 855.

Money paid a municipality through a mistaken belief that an ordinance under which it was paid was valid may be recovered back.—*Bruner v. Town of Stanton* (Ky.) 411.

Evidence *held* not to show any other indebtedness than the note sued on, and to entitle defendant to have an admitted payment credited on the note.—*Ross v. Rees* (Ky.) 215.

Evidence *held* sufficient to sustain plea of payment.—*Chaney v. Ramey* (Ky.) 235.

## PENALTIES.

For keeping disorderly house, see "Disorderly House."

## PERFORMANCE.

See "Specific Performance."

## PERJURY.

Evidence on conviction for perjury construed, and *held* not circumstantial evidence, within Code



Cr. Proc. 1879, art. 746, forbidding conviction for perjury on circumstantial evidence alone.—*Franklin v. State* (Tex. Cr. App.) 85.

Instructions on trial of indictment for perjury *held* proper.—*Franklin v. State* (Tex. Cr. App.) 85.

Evidence *held* insufficient to sustain conviction.—*Carter v. State* (Tex. Cr. App.) 906.

An indictment which does not charge that the testimony of defendant was material is insufficient.—*McMurtry v. State* (Tex. Cr. App.) 1010.

Indictment for perjury *held* insufficient because of indefiniteness.—*McMurtry v. State* (Tex. Cr. App.) 1010.

An indictment for perjury *held* bad for indefiniteness.—*Higgins v. State* (Tex. Cr. App.) 1012.

Instruction as to the proof required *held* improperly refused.—*Higgins v. State* (Tex. Cr. App.) 1012.

## PERSONAL INJURIES.

See "Carriers"; "Master and Servant"; "Municipal Corporations"; "Negligence"; "Railroads"; "Street Railroads."

Measure of damages, see "Damages."

## PETITION.

See "Pleading."

## PLEA.

In civil actions, see "Pleading."

## PLEADING.

Counterclaim, see "Set-Off and Counterclaim."

Indictment, information or complaint, see "Indictment and Information."

In equity, see "Equity."

In particular actions or proceedings, see "Creditors' Suit"; "Death"; "Ejectment"; "Forcible Entry and Detainer."

Pleas in criminal prosecutions, see "Criminal Law."

Statute of frauds, see "Frauds, Statute of."

To support judgment, see "Judgment."

Plaintiff *held* to have the right to so plead as to anticipate every possible phase of the testimony.—*Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548.

Petition examined, and *held* to show right of foreign corporation to sue in Texas, although it did not allege that it had obtained a permit.—*Brin v. Wachusett Shirt Co.* (Tex. Civ. App.) 295.

Motion to require plaintiff to elect *held* properly denied where petition states but one cause of action, though in different forms in different paragraphs.—*Newton's Ex'r v. Cecil* (Ky.) 734.

Motion to compel plaintiff to elect on which count of his petition he would rely *held* properly denied.—*Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548.

It was error to refuse reasonable time to file reply to answer and counterclaim.—*Harrison's Ex'r v. Taylor* (Ky.) 723.

The court did not abuse its discretion in permitting a reply to be filed after the swearing of the jury and the stating of the case.—*Hall v. Cornett* (Ky.) 706.

Where the affirmative averments of an answer are controverted by a reply, and the answer is subsequently withdrawn, and then refiled, such averments of the answer are not left without a denial.—*City of Henderson v. McClain* (Ky.) 700.

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Indefiniteness and uncertainty cannot be assailed by demurrer.—*Fletcher v. Dulaney* (Indian Ter.) 955.

The fact that distinct offenses are not set out in separate paragraphs is not a cause of demurrer, but of motion to paragraph.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 458.

## Plea or answer, and cross complaint.

An objection that petition, in action for breach of contract to accept certain sawlogs, contains no allegation that they were scaled as required, must be set up by plea.—*Sabine Tram Co. v. Jones* (Tex. Civ. App.) 905.

It is error to refuse to permit defendant to file an answer tendered in due time, in proper manner, though it may contain libelous and scandalous matter.—*Turner v. New Farmers' Bank's Trustee* (Ky.) 721.

Where a pleading shows that the cause of action is barred by limitations, it is error to sustain a demurrer to an answer thereto setting up limitations as a defense.—*Spradling v. McNees* (Ky.) 765.

It is proper to strike from the answer averments which are but a denial in another form of allegations of the petition already denied.—*Burke v. Shannon* (Ky.) 223.

Cross bill seeking to substitute a third party plaintiff *held* erroneous.—*Garrett v. Robinson* (Tex. Civ. App.) 288.

Defendant cannot by cross bill bring in a substituted plaintiff.—*Garrett v. Robinson* (Tex. Civ. App.) 288.

## Amended and supplemental pleadings.

An amendment of a pleading, when equivalent to bringing a new action, cannot be allowed by the county court.—*Lasater v. Fant* (Tex. Civ. App.) 321.

A statement of the court *held* to operate as an amendment.—*Moffett-West Drug Co. v. Byrd* (Indian Ter.) 864.

In action on bill of exchange, *held* error, after trial and disagreement of jury and continuance for new trial, to strike out amended answer, setting up a sufficient defense.—*Walden v. Citizens' Sav. Bank* (Ky.) 488.

A suit for partnership accounting was *held* to be abandoned by the filing of amended petitions.—*Santleben v. Froboese* (Tex. Civ. App.) 571.

## Issues, proof, and variance.

The fact that the title deeds of the defendant in trespass to try title do not accurately describe the land does not make out a variance in the description of the land sued for and the land recovered.—*P. J. Willis & Bro. v. Smith* (Tex. Civ. App.) 325.

In action to recover on municipal bonds, a variance between those described and those offered in evidence is harmless, where defendant was not misled.—*Thornburgh v. City of Tyler* (Tex. Civ. App.) 1054.

In an action to recover on a contract for services, evidence as to reasonable value thereof is inadmissible.—*Lohner v. Wilcox* (Tex. Civ. App.) 27.

Evidence to diminish apparent damages resulting from a wrongful expulsion from a train was *held* admissible under a general denial.—*Mexican Cent. Ry. Co. v. Goodman* (Tex. Civ. App.) 580.

Where plaintiff alleges several independent acts of negligence, proof of any one act *held* sufficient.—*Davis v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 44.

## Defects, waiver, and aid by verdict.

Error in allowing the filing of an amended complaint, if any, *held* waived.—*Sarber v. McConnell* (Ark.) 395.

The defect in a petition in failing to allege notice of the acceptance of a guaranty is cured, demurrer being waived, and the issue as to notice being made in subsequent pleadings.—*Ford v. Harris* (Ky.) 199.

Consent to continuance after plea of privilege is filed is not a waiver of the plea.—*Jennings v. Shiner* (Tex. Civ. App.) 276.

Where the only issue presented by the answer was as to whether there was a contract between the parties, a defect in the petition, in failing to show a performance by plaintiff or breach by defendant, was not cured by either the answer or verdict.—*Combs v. Pridemore* (Ky.) 681.

## PLEDGES.

Of warehouse receipts, see "Warehousemen."

A pledge of collateral by C. & Bro. to W. & M. "for the payment of our notes this day executed, or any other unsecured liability or liabilities of ours" to W. & M., secures the payment of all liabilities of C. & Bro. to W. & M., whether secured or unsecured.—*Wilson v. Carothers* (Ky.) 684.

Where the pledgor of a note at the request of the pledgee signed his name to a renewal of the pledged note, upon the representation of the pledgee that it was merely for convenience, he is not liable thereon, the principal indebtedness having been discharged.—*Kentucky Nat. Bank v. Bramlett* (Ky.) 714.

A pledgee may enforce payment of a debt by sale of collaterals, though such debt is barred by limitations.—*Fombler v. Palestine Ice Co.* (Tex. Civ. App.) 896.

While a creditor who has surrendered collateral upon the payment of the secured debt by check is entitled, if the check is dishonored, to reclaim the collateral, yet when the check is paid the payment relates back to the delivery of the check, and the collateral is to be regarded as surrendered as of that date.—*Block v. Oliver* (Ky.) 238.

## POLICY.

Of insurance, see "Insurance."

## POSSESSION.

See "Adverse Possession."

## POWERS.

Language of a deed to land examined, and held to show intent not to convey by virtue of a power to do so, and that no title was conveyed.—*Hill v. Conrad* (Tex. Sup.) 789.

The act of the donee of a power of attorney is valid where the intention to act under the power is shown by the instrument or attendant circumstances.—*Hill v. Conrad* (Tex. Sup.) 789.

Where an instrument or the attendant circumstances show that it was not the intention to execute the instrument pursuant to a power to do so, the instrument cannot be made valid by reference to the power.—*Hill v. Conrad* (Tex. Sup.) 789.

Where it is uncertain whether an act done was by virtue of a power conferred, the act will not be construed to be an execution of the power.—*Hill v. Conrad* (Tex. Sup.) 789.

A deed by an attorney in fact of an executor, ratified by the executor, held valid.—*Terrell v. McCown* (Tex. Sup.) 2.

A discretionary power of sale to two executors held to survive on the death of one of them.—*Terrell v. McCown* (Tex. Sup.) 2.

A power of attorney given by an executor, having discretionary power to sell land, held valid.—*Terrell v. McCown* (Tex. Sup.) 2.

Discretionary power of executor under a will to sell land cannot be delegated.—*Terrell v. McCown* (Tex. Sup.) 2.

Evidence held to show execution by executor of his power to sell testator's land.—*Terrell v. McCown* (Tex. Sup.) 2.

## PREFERENCES.

In assignment for benefit of creditors, see "Assignments for Benefit of Creditors."

## PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error."

— in criminal prosecutions, see "Criminal Law."

## PREMIUMS.

For insurance, see "Insurance."

## PRESCRIPTION.

Acquisition of rights, see "Adverse Possession."

## PRESUMPTIONS.

On appeal, see "Appeal and Error"; "Criminal Law."

## PRINCIPAL AND AGENT.

See, also, "Brokers."

Insurance agents, see "Insurance."

The manager of a corporation, who obtains the signatures of the directors to a guaranty at the request of a creditor, to secure its debt, is not thereby made the agent of the creditor.—*Marx v. Luling Co-op. Ass'n* (Tex. Civ. App.) 596.

An act by an agent not strictly within his authority held ratified by his principal.—*In re Souldard's Estate* (Mo.) 617.

Evidence of agency held sufficient.—*Bowman v. Texas Brewing Co.* (Tex. Civ. App.) 808.

Facts held sufficient to permit an instruction as to the ratification by a principal of the acts of one holding himself out as an agent.—*Mutual Ben. Life Ins. Co. v. Collin County Nat. Bank* (Tex. Civ. App.) 831.

Pleadings held not sufficient to permit an instruction as to the estoppel of one to deny the authority of another holding himself out as an agent.—*Mutual Ben. Life Ins. Co. v. Collin County Nat. Bank* (Tex. Civ. App.) 831.

Notice to an agent whose relation to the subject-matter is not such as to make it his duty to notify the principal is not notice to the latter.—*Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877.

## PRINCIPAL AND SURETY.

See, also, "Bonds."

Liability of sureties on bail bonds, see "Bail." — on bonds in legal proceedings, see "Replevin."

— on notes, see "Bills and Notes."

Under Gen. St. c. 22, § 20, one whose name was subscribed as surety in his presence, and by his express direction, but without written authority, is not liable thereon.—*Bramel v. Ryron* (Ky.) 695.

Where two judgments are obtained, one against the main defendant and another against

his sureties, the judgment should provide that the proceeds of property which might be returned to the officer should be applied first to the judgment against the sureties.—*McLeod Artesian Well Co. v. Craig* (Tex. Civ. App.) 934.

Where the obligee on an official bond had notice, before it was filed with and approved by him, of a stipulation between the principal and his surety that said surety should not be bound unless additional signatures were secured, *held*, surety not liable where the stipulation is not fulfilled.—*McFarlane v. Howell* (Tex. Civ. App.) 315.

Where a guardian was discharged, but afterwards reappointed, *held*, the surety on his original bond was liable only for the property which should have been in his principal's hands at the time of his discharge.—*Haden v. Swepston* (Ark.) 393.

Where a guardian is discharged, but there is no order making a disposition of the funds, the surety on his bond will not be liable for interest on the amount in the guardian's hands which accrued after the discharge.—*Haden v. Swepston* (Ark.) 393.

An extension of a note for an indefinite period *held* not valid so as to discharge a surety thereon.—*Webb v. Pathe* (Tex. Civ. App.) 19.

Where A., T., J., and H. signed a note under circumstances indicating that all were principals, an agreement between J. and H. that H. was to sign as surety only is not binding on A. and T., and, they having paid the note, H. must contribute.—*Greene v. Anderson* (Ky.) 195.

One of several obligors who has discharged the joint obligation by the execution of his note is entitled to contribution from his co-obligors as if he had paid money.—*Greene v. Anderson* (Ky.) 195.

Several solvent obligors in a note are required, as between themselves, to contribute to the payment of the portion of an insolvent obligor only in proportion to the amounts received by them, respectively, from the original loan.—*Greene v. Anderson* (Ky.) 195.

If the surety in a note was induced by the creditor to release a mortgage which he held as indemnity by the assurance that the note would enter into a composition made by the principal, and be discharged in accordance therewith, the surety is not liable on a note executed by him for the balance, after deducting the amount paid under the composition agreement.—*Schuff v. Germania Safety-Vault & Trust Co.* (Ky.) 229.

The accommodation maker of a note, the nature of whose liability is known to the indorsee, is released by an extension of the time of payment without his consent.—*Schuff v. Germania Safety-Vault & Trust Co.* (Ky.) 229.

## PRIORITIES.

Of mechanics' liens, see "Mechanics' Liens."  
Of mortgages, see "Chattel Mortgages"; "Mortgages."

## PRISONS.

See, also, "Convicts."

Liability of town marshal, on failing to provide medical attendance for prisoner in lockup injured by fellow prisoner, determined.—*Moxley v. Roberts* (Ky.) 482.

## PRIVILEGE.

Of married women, see "Husband and Wife."  
Taxation, see "Taxation."

## PRIVITY.

Admission by privies, see "Evidence."

## PROBABLE CAUSE.

For prosecution, see "Malicious Prosecution."

## PROCESS.

In attachment, see "Attachment."  
Service on infant, see "Infants."

Service of a copy of the petition and the summons on a nonresident, pursuant to Civ. Code, § 56, avoids the necessity of appointing an attorney to defend or execute a bond before judgment, as provided in cases of constructive service.—*Young's Trustee v. Bullen* (Ky.) 687.

A summons valid in other respects may be amended by striking out any unnecessary clause as to the time of the commencement of the action.—*Lowenstein v. Gaines* (Ark.) 762.

## PROPERTY.

See, also, "Adjoining Landowners."  
Dedication to public use, see "Dedication."  
Protection of rights of property by injunction, see "Injunction."

In the absence of allegation and proof to the contrary, property belonging to a married couple will be presumed to be community property.—*Perkins v. Adams* (Tex. Civ. App.) 529.

## PROSECUTING ATTORNEYS.

See "District and Prosecuting Attorneys."

## PUBLIC DEBT.

See "Municipal Corporations."

## PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations."

## PUBLIC LANDS.

Though a survey was not filed within the time required by law, it was valid, and therefore a subsequent survey and patent to another were void, though issued before the former survey was carried into grant.—*Gibson v. Board* (Ky.) 684.

Under a transfer with warranty of so much of a national road certificate as was located on a certain tract, *held*, that transferee took a like amount of other land thereafter patented under a relocation of the certificate.—*Miller v. Gist* (Tex. Sup.) 263.

An application and affidavit, made for the purpose of acquiring title to public lands, which were sworn to before the land was put on sale, but otherwise regular, *held* insufficient.—*Cordill v. Moore* (Tex. Civ. App.) 298.

An application to purchase public lands, accompanied by an affidavit of settlement thereon for a home, are conditions precedent to acquiring title.—*Cordill v. Moore* (Tex. Civ. App.) 298.

An application to purchase public lands is properly made after the lands are classified and placed on the market, but before notification thereof has been filed.—*Cordill v. Moore* (Tex. Civ. App.) 298.

Evidence in an action to establish title to public land as a settler *held* to entitle plaintiff to judgment.—*Borchers v. Mead* (Tex. Civ. App.) 300.

The question of whether or not one is an actual settler on land is a question of fact, not of law.—*Borchers v. Mead* (Tex. Civ. App.) 300.

In an action to recover school lands upon a certificate, a petition is not subject to exceptions

where it contains the allegations required in a complaint in trespass to try title.—*Simon v. Stearns* (Tex. Civ. App.) 50.

One who settles on a section of school land is entitled to purchase all or any portion of it.—*Simon v. Stearns* (Tex. Civ. App.) 50.

Where the husband applied to purchase school lands, the fact that the wife died did not entitle the children to a further time in which to make payment, under the statute which makes such provision for the heirs when the purchaser dies.—*Simon v. Stearns* (Tex. Civ. App.) 50.

Evidence held to show a special, and not a general, entry.—*Childers v. Ryan* (Tenn. Ch. App.) 126.

Where a certain lease is shown to have been canceled, and there is evidence that it should not have been, the said evidence will not affect the fact that it was canceled.—*Borchers v. Mead* (Tex. Civ. App.) 300.

## PUBLIC POLICY.

Contracts in violation of, see "Contracts."

## PUBLIC SCHOOLS.

See "Schools and School Districts."

## PUBLIC USE.

Taking property for public use, see "Eminent Domain."

## PUNITIVE DAMAGES.

See "Damages."

## QUALIFICATION.

Of jurors, see "Jury."

## QUESTIONS FOR JURY.

In civil actions, see "Trial."

## QUO WARRANTO.

Quo warranto is not the proper remedy to restrain a legal officer from exercising his office beyond the territorial limits of his jurisdiction.—*State v. Rigsby* (Tex. Civ. App.) 271.

## RAILROADS.

See, also, "Carriers"; "Street Railroads."

Bonds in aid of, see "Municipal Corporations."  
Regulation of interstate commerce, see "Commerce."

A judgment against a railroad company for damages to abutting property resulting from the construction of the road, being for the taking of private property for public use, is a lien upon the entire road, in the nature of a vendor's lien.—*Ball v. Maysville & B. S. R. Co.* (Ky.) 731.

Since a railroad cannot be severed, but must be sold as an entirety, such a lien must, to be effective, exist upon the entire road.—*Ball v. Maysville & B. S. R. Co.* (Ky.) 731.

The fact that plaintiff failed to obtain personal judgment against the lessee, at the same time he obtained judgment against the lessor, does not deprive him of the right to have a receiver appointed, or take away his lien.—*Ball v. Maysville & B. S. R. Co.* (Ky.) 731.

The fact that the equipment of a railroad may be insufficient to enable a receiver to operate it, does not deprive a judgment creditor of the

right to have a receiver appointed.—*Ball v. Maysville & B. S. R. Co.* (Ky.) 731.

The rights of a lessee of the road are subordinate to such a lien.—*Ball v. Maysville & B. S. R. Co.* (Ky.) 731.

In an action by a judgment creditor for the appointment of a receiver of a railroad, a lessee of the road, whose rights are subordinate to plaintiff's lien, may be enjoined from using the road.—*Ball v. Maysville & B. S. R. Co.* (Ky.) 731.

Owner of fee in a railroad right of way must show an erection of water tank unnecessary to recover damages because of such erection.—*Louisville & N. R. Co. v. French* (Tenn. Sup.) 771.

The burden of proof is on a railroad company, seeking to enjoin the owner of land from taking stone therefrom near its right of way, to show that its roadbed would be endangered thereby.—*Maysville & B. S. R. Co. v. Beyersdorfer* (Ky.) 254.

The "Fencing District Act" held not to apply to railroads.—*Little Rock & F. S. Ry. Co. v. Huggins* (Ark.) 145.

Indictment under Ky. St. § 807, for disturbing a switch, need not allege that the railroad company was a corporation authorized to do business in the state.—*Rooney v. Commonwealth* (Ky.) 689.

Admission of rules of railroad on indictment for disturbing a switch light held harmless error.—*Rooney v. Commonwealth* (Ky.) 689.

### Operation.

It was error, in instructing the jury as to the permanent damages recoverable on account of the continued operation of the road, not to qualify the word "operation" by the words "skillful and prudent."—*Chesapeake & O. Ry. Co. v. Gross* (Ky.) 203.

It was error to admit evidence as to how much it would cost to fill up the lot in order to properly drain it, and as to how much it would cost to raise the house, as such evidence assumed that these changes were necessary to drain the lot, whereas it was shown that the lot could be drained at small expense by a proper system of ditching.—*Chesapeake & O. Ry. Co. v. Gross* (Ky.) 203.

Where a railroad company constructed a third track in an alley in which it had two tracks, the measure of compensation to the owner of abutting property is the actual diminution in the market value of his premises resulting from the construction and prudent and skillful operation of the additional track, and his right of recovery extends only to actual damages, and does not include damages resulting from the noise and jarring caused by trains.—*Chesapeake & O. Ry. Co. v. Gross* (Ky.) 203.

The plaintiff may recover compensation not only for the direct injury to his property up to the commencement of the action, but also for permanent and enduring injuries resulting from the continued operation of trains over the additional track.—*Chesapeake & O. Ry. Co. v. Gross* (Ky.) 203.

Terminal points at which cattle guards are required to be constructed, under Ky. St. § 1793, held to be points where the parallel fencing for any reason stops.—*McKee v. Cincinnati, N. O. & T. P. Ry. Co.'s Receiver* (Ky.) 241.

A railroad company may at any time remove cattle guards at a point at which it is under no legal obligation to maintain them.—*McKee v. Cincinnati, N. O. & T. P. Ry. Co.'s Receiver* (Ky.) 241.

A verdict for plaintiff against defendant railroad company for defendant's failure to construct a crossing at the place stipulated in plaintiff's deed of the right of way through his farm will

not be disturbed, being sustained by the evidence, and there being no error in the instructions.—*Louisville & N. R. Co. v. Hundley* (Ky.) 216.

Where a railroad company voluntarily constructs a bridge over ditches along its right of way, it is liable to a party for whose use it was built, for injuries by failure to keep it in repair.—*Texas & P. Ry. Co. v. Hall* (Tex. Civ. App.) 25.

Indictment against a railroad company for failure to give the statutory signals *held* to sufficiently allege that the crossing was a public highway.—*Chesapeake & O. Ry. Co. v. Commonwealth* (Ky.) 445.

Ky. St. § 784, does not require a railroad company to open its ticket office and waiting rooms 30 minutes before the arrival of night trains at a station, where no night office has ever been maintained, if passengers boarding trains there at night are charged only ticket rates on the trains.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 458.

Evidence *held* to show such failure to take precaution at railroad crossing as to render defendant liable to person injured.—*Missouri, K. & T. Ry. Co. v. O'Connell* (Tex. Civ. App.) 66.

#### — Injury to persons on or near track.

Where plaintiff injured on defendant's tracks was guilty of contributory negligence, he cannot recover where defendant's servants failed to discover his danger in time to prevent the injury.—*Smith v. Houston & T. C. R. Co.* (Tex. Civ. App.) 34.

Imprudence in driving too near a railroad track will not bar recovery, where a horse was frightened by steam intentionally thrown upon it.—*Texas & N. O. R. Co. v. Syfan* (Tex. Civ. App.) 551.

Evidence that there were no obstructions between an approaching engine and plaintiff was admissible to show that the engineer and fireman saw him before steam was emitted from the engine.—*Texas & N. O. R. Co. v. Syfan* (Tex. Civ. App.) 551.

Evidence *held* to show that the engineer or fireman unnecessarily threw steam upon plaintiff's horse, thereby frightening it.—*Texas & N. O. R. Co. v. Syfan* (Tex. Civ. App.) 551.

When a locomotive, in backing into a siding, moves a line of cars which has been standing there several weeks, the company *held* not liable for injury to a child playing under the cars.—*Texas-Mexican Ry. Co. v. Baldez* (Tex. Civ. App.) 564.

On an issue as to whether a locomotive was ringing its bell, evidence examined, and *held*, that there was not enough conflict to require the submission of the question to the jury.—*Texas-Mexican Ry. Co. v. Baldez* (Tex. Civ. App.) 564.

A railroad company is liable for frightening horses by needlessly blowing the whistle.—*Weil v. St. Louis S. W. Ry. Co.* (Ark.) 967.

Whether a locomotive whistle was needlessly blown is a question for the jury.—*Weil v. St. Louis S. W. Ry. Co.* (Ark.) 967.

Act April 8, 1891, does not preclude the defense of contributory negligence in an action against a railroad company for personal injuries.—*Little Rock & Ft. S. Ry. Co. v. Smith* (Ark.) 969.

An instruction as to effect of contributory negligence *held* erroneous.—*Little Rock & Ft. S. Ry. Co. v. Smith* (Ark.) 969.

#### — Injury to animals on track.

Negligence of a company in injuring a cow on the track *held* shown by circumstantial evidence.—*San Antonio & A. P. Ry. Co. v. Yeager* (Tex. Civ. App.) 25.

A railroad company which has fenced its track *held* liable for stock killed only by want of ordinary care.—*San Antonio & A. P. Ry. Co. v. Robinson* (Tex. Civ. App.) 76.

Evidence *held* insufficient to show that cattle on the track were killed by defendant's negligence.—*San Antonio & A. P. Ry. Co. v. Robinson* (Tex. Civ. App.) 76.

A railroad company constructing a private crossing at a fence through an inclosure *held* not bound to see that the gates are closed.—*San Antonio & A. P. Ry. Co. v. Robinson* (Tex. Civ. App.) 76.

A railroad company, under the statute, is not required to construct cattle guards at a private crossing in an inclosure through which its right of way is fenced.—*San Antonio & A. P. Ry. Co. v. Robinson* (Tex. Civ. App.) 76.

Evidence *held* sufficient to warrant submission to the jury of the question of negligence of a railroad company in killing a cow.—*Missouri, K. & T. Ry. Co. v. Farrington* (Indian Ter.) 946.

Evidence *held* for the jury in an action for stock killed.—*Missouri, K. & T. Ry. Co. v. Ward* (Indian Ter.) 954.

Where animals unlawfully running at large are killed, the railroad company is not liable, except for gross negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Russell* (Tex. Civ. App.) 570.

#### — Fires.

An instruction to find for plaintiff if by negligent management sparks escaped from defendant's engine, destroying plaintiff's property, *held* proper.—*Louisville & N. R. Co. v. Dalton* (Ky.) 431.

In an action for damages from fire within the city limits by sparks from an engine, an ordinance regulating speed of trains is inadmissible.—*Louisville & N. R. Co. v. Dalton* (Ky.) 431.

Although the evidence fails to connect the defendant with one of the two fires charged in the complaint, when the verdict finds damages corresponding to the value of the property burned at the other fire there is no error.—*Gulf, C. & S. F. Ry. Co. v. Baugh* (Tex. Civ. App.) 557.

*Held* a question for the jury whether the engines on defendant's road were equipped with spark arresters.—*Gulf, C. & S. F. Ry. Co. v. Baugh* (Tex. Civ. App.) 557.

## RAPE.

Indictment must allege that prosecuting witness is not the wife of defendant.—*Payne v. State* (Tex. Cr. App.) 515.

Information and belief of accused that his victim was above the age of consent is no defense.—*Edens v. State* (Tex. Cr. App.) 89.

An indictment for rape *held* not duplicitous.—*Oxshier v. State* (Tex. Cr. App.) 335.

Evidence *held* to show the crime committed by force, and not by fraud.—*Payne v. State* (Tex. Cr. App.) 515.

Evidence *held* irrelevant.—*Oxshier v. State* (Tex. Cr. App.) 335.

Where the act is proved by eyewitnesses, an instruction as to necessity of corroboration is unnecessary.—*McIntyre v. State* (Tex. Cr. App.) 104.

Where the judge charges on the theory that defendant is under 17 years of age, an instruction as to the burden of proving defendant to be over that age *held* properly refused.—*McIntyre v. State* (Tex. Cr. App.) 104.

The defendant may show specific acts of a lewd or lascivious character on the part of the prose-

cutrix shortly before the alleged offense.—*Brown v. Commonwealth (Ky.)* 214.

It is error to instruct the jury to convict if the act was committed against the will or consent of the prosecutrix "or" by force or putting her in fear.—*Brown v. Commonwealth (Ky.)* 214.

## RATIFICATION.

Of act of agent, see "Principal and Agent."

## REAL-ESTATE AGENTS.

See "Brokers."

## RECEIVERS.

Of corporations in general, see "Corporations."  
Of railroad companies, see "Railroads."

Under Rev. St. 1895, art. 1465, a receiver may be appointed to take charge of property involved in a suit for divorce and partition.—*Stone v. Stone (Tex. Civ. App.)* 567.

In action against receiver of railroad on failure to perform a contract by which the company acquires its right of way for damages properly provides for sale of the right of way on nonpayment of the judgment.—*Levy v. Tatum (Tex. Civ. App.)* 941.

Receiver of a railroad *held* liable for damages for discontinuing depot in violation of contract with the railroad, though it was discontinued by order of the court.—*Levy v. Tatum (Tex. Civ. App.)* 941.

A foreign receiver may sue if resident creditors are not adversely affected thereby.—*Johnston v. Rogers (Ky.)* 234.

In a suit by a foreign receiver to sell land in satisfaction of a mortgage to a foreign corporation, a judgment for attorney's fees, as provided in the mortgage, is unauthorized.—*Johnston v. Rogers (Ky.)* 234.

## RECOGNIZANCES.

See "Ball."

## RECONVENTION.

See "Set-Off and Counterclaim."

## RECORDS.

As evidence, see "Evidence."

Of particular instruments, see "Assignments for Benefit of Creditors"; "Deeds"; "Mortgages."  
On appeal in civil actions, see "Appeal and Error."

— in criminal prosecutions, see "Criminal Law."

## REDEMPTION.

From mortgage, see "Mortgages."

## REFORMATION OF INSTRUMENTS.

A contract will not be reformed for mistake, where the terms are clear, and the parties experienced business men, and plaintiff denies mistake.—*Vaughn v. Digman (Ky.)* 251.

A note for price of goods given on false representations as to their cost reformed to cover the original intent of the parties.—*Graham v. Guinn (Tenn. Ch. App.)* 749.

Evidence *held* to justify a reformation of mortgage to cover land actually intended to be described therein.—*Lilley v. Equitable Securities Co. (Tex. Civ. App.)* 1082.

Action to reform mortgage *held* not barred by laches.—*Byrne v. Ft. Smith Nat. Bank (Indian Ter.)* 957.

A mortgage will be reformed because of mistake only between the original parties or those claiming under them.—*Byrne v. Ft. Smith Nat. Bank (Indian Ter.)* 957.

## RELEASE.

See, also, "Compositions with Creditors."

Of vendor's lien, see "Vendor and Purchaser."

It was error to charge that an alleged agreement to release defendant must be entered into before the institution of the suit.—*Hall v. Corbett (Ky.)* 703.

## REMAINDERS.

Right of remainder-men to recover real estate does not accrue until death of life tenant.—*Govan v. Bynum (Tex. Civ. App.)* 319.

## REMOVAL OF CAUSES.

A railroad corporation organized under federal laws against whom suit is brought in a state court to recover more than \$2,000 *held* entitled to a removal.—*Texas & P. Ry. Co. v. Watson (Tex. Civ. App.)* 1060.

## RENEWAL.

Of lease, see "Landlord and Tenant."

## RENT.

See "Landlord and Tenant."

## REPEAL.

Of statute, see "Statutes."

## REPLEVIN.

Measure of liability on replevin bond *held* the value of the property at the date of the approval of the bond, with interest.—*McLeod Artesian Well Co. v. Craig (Tex. Civ. App.)* 934.

The fact that the bond recites three persons as principals, and is executed by one only, does not invalidate it, if the person who executed it was the plaintiff in replevin.—*McLeod Artesian Well Co. v. Craig (Tex. Civ. App.)* 934.

The rights of plaintiff in foreclosure proceedings, on a bond given by defendant, who replevied the mortgaged property, does not depend on pleadings.—*McLeod Artesian Well Co. v. Craig (Tex. Civ. App.)* 934.

An action on replevin bond providing for its due prosecution can be maintained where plaintiff dismissed the action on her own motion.—*McAlester v. Suchy (Indian Ter.)* 952.

Where defendant by a counterclaim asked judgment for a certain amount, a verdict for defendant *held* sufficient to support a judgment for such amount.—*Baldwin v. Dewitt (Ky.)* 246.

## REQUESTS.

For instructions to jury in civil actions, see "Trial."

— in criminal prosecutions, see "Criminal Law."

## RESCISSION.

Of contract for sale of land, see "Vendor and Purchaser."

**RESERVATIONS.**

In deeds, see "Deeds."

**RESIDENCE.**

For purpose of conferring jurisdiction, see "Divorce."

**RES JUDICATA.**

See "Judgment."

**RESTRAINT OF TRADE.**

See "Contracts."

**RETROSPECTIVE LAWS.**

See "Constitutional Law"; "Statutes."

**RETURN.**

Of election, see "Elections."

On execution, see "Execution."

**REVENUE.**

See "Taxation."

**REVIEW.**

See, also, "Appeal and Error"; "Certiorari"; "Criminal Law."

Allegations in a petition for review of a judgment in partition *held* sufficient to entitle plaintiff to such review.—Lindell Real-Estate Co. v. Lindell (Mo.) 368.

A review of a judgment in partition does not disturb the rights of any co-tenants, except such as are charged with holding adversely to the petitioner for such review.—Lindell Real-Estate Co. v. Lindell (Mo.) 368.

**RISKS OF EMPLOYMENT.**

See "Master and Servant."

**ROBBERY.**

Indictment *held* to sufficiently charge the taking by assault and violence.—Wiley v. State (Tex. Cr. App.) 986.

**SALES.**

See, also, "Vendor and Purchaser."

Judicial sales, see "Judicial Sales."

Of intoxicating liquors, see "Intoxicating Liquors."

Of land for nonpayment of taxes, see "Taxation."

Of property of decedent under order of court, see "Executors and Administrators."

On execution, see "Execution."

Tax sales, see "Taxation."

Where logs are marked with the buyer's brand at the time of the sale, the title passes, nothing remaining to be done by the seller except to deliver the logs.—Hagins v. Combs (Ky.) 222.

Certain evidence *held* to be irrelevant upon an issue as to whether the title to property for which plaintiff sued had passed at the time the property was burned.—Burke v. Shannon (Ky.) 223.

Title to the property passes, and its loss by fire is the loss of the buyer, where it is left with the seller until the performance of subsequent acts by the buyer, such as weighing or measuring.—Burke v. Shannon (Ky.) 223.

A conditional vendor *held* not bound under Act 1889, c. 81, to sell the property conveyed after regaining possession.—Milburn Manuf'g Co. v. Wayland (Tenn. Ch. App.) 129.

The mere acceptance of goods after the time fixed for delivery is not a waiver of damages for the delay.—Belcher v. Sellards (Ky.) 676.

Evidence *held* to show that the parties had agreed on the terms of a sale.—Moffett-West Drug Co. v. Byrd (Indian Ter.) 864.

Evidence examined, and *held* not to show intent between brothers-in-law to defraud seller.—Collins v. Rosenham (Ky.) 726.

**Remedies of seller.**

In an action for goods shipped to defendant to be used in constructing his house, evidence that the contractor took the goods from the depot is admissible.—Watson v. Winston (Tex. Civ. App.) 852.

An unsigned order sheet containing a description of goods to be used in the construction of defendant's house, which was made out by plaintiff at the time of a verbal transaction regarding the delivery of the goods, *held* part of the *res gestæ*.—Watson v. Winston (Tex. Civ. App.) 852.

An unexecuted bill of lading *held* not admissible in an action for the price of the goods described therein.—Watson v. Winston (Tex. Civ. App.) 852.

On an issue whether defendant or his contractor purchased goods used in defendant's house, evidence that defendant was using the goods daily *held* inadmissible.—Watson v. Winston (Tex. Civ. App.) 852.

On an issue whether defendant or his contractor purchased the goods, evidence that plaintiffs had never given the contractor credit was inadmissible.—Watson v. Winston (Tex. Civ. App.) 852.

In an action to recover the price of logs sold which were never accepted, the petition was defective, in failing to allege the time in which the contract was to be performed, or that the logs alleged to have been delivered were a part of the logs covered by the contract.—Combs v. Fridemore (Ky.) 681.

In action for price of trees sold, evidence *held* to sustain verdict for plaintiff.—Bullock v. Bird (Ky.) 284.

In an action on an oral promise, an unsigned order containing a stipulation amounting to a contract *held* not admissible against defendant.—Watson v. Winston (Tex. Civ. App.) 852.

To avoid a sale on the ground that the buyer did not intend to pay for the goods, the intention must have been one not to pay in any event; an intention merely not to pay according to contract being insufficient.—Strickland v. Willis (Tex. Civ. App.) 602.

Instructions *held* reversible error as misleading the jury on the questions whether the sale was induced by false representations of the buyer, whether it was in reliance on excessive ratings obtained by the buyer, and whether the goods were purchased with an intent not to pay for them.—Strickland v. Willis (Tex. Civ. App.) 602.

A purchaser who knows of his insolvency, or might know of it by the exercise of reasonable care, is not bound to disclose it to the seller.—Strickland v. Willis (Tex. Civ. App.) 602.

A buyer *held* not chargeable with fraud as to commercial ratings which were excessive, where the ratings were truthful at the time he made the statements to the commercial agency.—Strickland v. Willis (Tex. Civ. App.) 602.

Evidence in an action on a contract for the sale of goods *held* to entitle plaintiff to recover.—Lindsey v. Singletary (Tex. Civ. App.) 278.

**Remedies of buyer.**

An allegation of special damages for loss of time occasioned by defendant's failure to comply with the agreement to sell and deliver justified proof of the expense of hiring a certain person in preparing for receiving the goods.—*Moffett-West Drug Co. v. Byrd* (Indian Ter.) 864.

Expense of hiring a person in preparation for receiving *held* not too remote to be recovered as damages for breach of the contract to sell and deliver.—*Moffett-West Drug Co. v. Byrd* (Indian Ter.) 864.

For the seller's failure to deliver the goods according to the terms of the bargain, the measure of damages is the difference between the contract price and the market value of the article at the time when, and place where, it should have been delivered.—*Belcher v. Sellards* (Ky.) 878.

A person who buys goods under a warranty and with opportunity to examine them is estopped from claiming relief for a defect in the goods, only when it could have been discovered by a proper examination.—*Ricker Nat. Bank v. Brown* (Tex. Civ. App.) 909.

Damages for breach of warranty *held* properly refused as too remote.—*De Loach Mill Mfg. Co. v. Bonner* (Ark.) 504.

**SATISFACTION.**

See "Compositions with Creditors"; "Payment"; "Release."

**SCHOOL LANDS.**

See "Public Lands."

**SCHOOLS AND SCHOOL DISTRICTS.**

A contract made by two of three directors of a school district at a meeting not called by written notice, *held* invalid.—*Burns v. Thompson* (Ark.) 496.

A superintendent is not estopped to question the accuracy of a census list of school children by the fact that one distribution of the school fund has been made, based upon such list.—*Louisville School Board v. Superintendent of Public Instruction* (Ky.) 718.

Const. § 186, does not require an actual census each year as a condition precedent to the right of a county or school district to receive its share of the school fund according to the number of school children therein.—*Louisville School Board v. Superintendent of Public Instruction* (Ky.) 718.

Facts *held* sufficient to justify the court in cutting down the census list of school children in a city of the first class.—*Louisville School Board v. Superintendent of Public Instruction* (Ky.) 718.

Ky. St. § 2974, does not provide for an unjust or inaccurate method of ascertaining the proximate number of children in cities of the first class in years in which a regular census is not taken.—*Louisville School Board v. Superintendent of Public Instruction* (Ky.) 718.

The fact that the census list of school children in a certain city is shown to be much larger than the combined lists of cities whose aggregate population is supposed to equal that of said city, *held* not sufficient to overturn the work of the officials making the lists in question.—*Louisville School Board v. Superintendent of Public Instruction* (Ky.) 718.

Under Ky. St. § 2974, it is sufficient, in cities of the first class, in years when an actual census is not taken, to certify the number of children as shown by the preceding report, together with such an increase as has been ascertained

by the statutory method.—*Louisville School Board v. Superintendent of Public Instruction* (Ky.) 718.

Under Ky. St. § 2974, the census taken by order of the school board in cities of the first class should be used by the superintendent in apportioning the school funds.—*Louisville School Board v. Superintendent of Public Instruction* (Ky.) 718.

Commissioners' court, having sold certain school lands, *held* authorized, under Const. art. 7, § 6, and Rev. St. art. 4271, to release notes given for the price, taking in lieu thereof notes of a purchaser from the original vendee, secured by trust deed on land.—*Waggoner v. Wise County* (Tex. Civ. App.) 886.

As the charter of cities of the fourth class does not prescribe the secret ballot in the election of members of the board of education, the voting should be *viva voce*, and those who are qualified to vote under the general school law may vote.—*Moss v. Riley* (Ky.) 421.

Ky. St. § 4438, does not make the book entry of a school-district treasurer's appointment the exclusive evidence of such appointment, and hence parol evidence is admissible for that purpose.—*Sweeney v. Cook* (Ky.) 434.

Where a city, prior to act of 1879, had decided to assume control of schools, the mayor after such act has no power to call an election to determine whether such schools shall be under control of a board of trustees or of the city council.—*State v. Callaghan* (Tex. Sup.) 12.

**SECRET TRUSTS.**

See "Trusts."

**SELECTION.**

Of homestead, see "Homestead."

**SEPARATE ESTATE.**

Of married women, see "Husband and Wife."

**SEQUESTRATION.**

A refusal to quash a defective sequestration bond is immaterial, where defendant has replevied the property sequestered, and plaintiff has recovered judgment.—*McLeod Artesian Well Co. v. Craig* (Tex. Civ. App.) 934.

The sequestration bond, conditioned that plaintiff will pay to defendants all such charges and damages as may be adjudged against "them," is defective.—*McLeod Artesian Well Co. v. Craig* (Tex. Civ. App.) 934.

**SERVICE.**

Of process, see "Process."

**SET-OFF AND COUNTERCLAIM.**

In an action by a former committee for an idiot against his successor for necessities furnished, the latter cannot set off a judgment against the former for an individual debt.—*Brashears v. Frazier* (Ky.) 427.

In an action to recover unliquidated damages, a note given by plaintiff to defendant cannot be set off.—*Santleben v. Froboese* (Tex. Civ. App.) 571.

In a plea in reconvention on a sequestration bond, the affidavit on which the writ issued need not be set out.—*Wilkinson v. Stanley* (Tex. Civ. App.) 606.

Where special damages were alleged in a plea of reconvention, which would furnish ground for recovery, a general demurrer was properly



overruled.—*Wilkinson v. Stanley* (Tex. Civ. App.) 606.

## SETTLEMENT.

See "Compositions with Creditors"; "Payment"; "Release."

By executor or administrator, see "Executors and Administrators."

On public lands, see "Public Lands."

## SHERIFFS AND CONSTABLES.

Sheriff's deed, see "Execution."

Answer alleging that a sheriff's return had been made by fraud *held* not a sufficient impeachment of the return.—*Lock v. Slusher* (Ky.) 471.

A sheriff cannot be sued on his bond by a county creditor until the 1st day of January following the March in which the taxes out of which the debt is to be paid are due.—*Combs v. Crawford* (Ky.) 477.

## SIGNATURES.

On bills of exceptions, see "Exceptions, Bill of."

## SLANDER.

See "Libel and Slander."

## SLEEPING CARS.

See "Carriers."

## SPECIAL LAWS.

See "Statutes."

## SPECIFIC PERFORMANCE.

A deed of a portion of plaintiff's interest in land to her attorney was properly excluded in an action to enforce a parol gift of the land.—*La Master v. Dickson* (Tex. Civ. App.) 911.

A grantee of land, pending an action to enforce a parol gift thereof, is entitled to the rents due his grantor.—*La Master v. Dickson* (Tex. Civ. App.) 911.

Certain improvements, made after a parol gift of land, *held* permanent and valuable.—*La Master v. Dickson* (Tex. Civ. App.) 911.

That the vendor falsely and fraudulently represented the amount for which the property was assessed, and the character of the property, constitutes a good defense to an action for specific performance.—*Warfield v. Erdman* (Ky.) 708.

## SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

## STALE DEMAND.

See "Equity."

## STATEMENT.

Of case or facts for purpose of review, see "Appeal and Error"; "Criminal Law."

## STATUTE OF FRAUDS.

See "Frauds, Statute of."

## STATUTE OF LIMITATIONS.

See "Limitation of Actions."

## STATUTES.

Provisions relating to particular subjects, see "Building and Loan Associations"; "Commerce"; "Counties"; "Courts"; "Depositions"; "Exceptions, Bill of"; "Execution"; "Garnishment"; "Homestead"; "Mechanics' Liens"; "Principal and Surety"; "Railroads"; "Schools and School Districts"; "Taxation."

Validity of particular statutes, see "Constitutional Law."

It is not necessary, under Const. art. 3, § 36, to retain the numbering of the sections amended in the amending statute.—*Dickenson v. State* (Tex. Cr. App.) 520.

Legislation directed to cities of the first class is not special legislation, even though there be but one city of that class in the state.—*Louisville School Board v. Superintendent of Public Instruction* (Ky.) 718.

1 Rev. Laws 1826, p. 333, in reference to dower, cannot operate beyond the boundaries of the state, so as to affect estates elsewhere.—*Bartlett v. Ball* (Mo.) 783.

Act 25th Leg. p. 118, changing time of holding court in certain counties, was constitutionally enacted.—*McNeal v. State* (Tex. Cr. App.) 792.

Act 1897, relating to correction of formal defects in special verdicts, applies to actions pending as well as to future actions.—*Phoenix Ins. Co. v. Shearman* (Tex. Civ. App.) 1063.

The legislature, using words contained in a prior statute on the same subject which have received a judicial construction, is presumed to use them in the same sense.—*Cooper v. Yoakum* (Tex. Sup.) 871.

Limitations in *Mansfield's Digest* run in favor of nonresidents as well as residents of the territory.—*Schwab Clothing Co. v. Cromer* (Indian Ter.) 951.

Amendment of 1875 to Sand. & H. Dig. § 4908, was not passed in violation of Const. 1874, art. 5, § 23 providing that no law shall be amended, nor the provisions thereof extended, by reference to its title only.—*Nations v. State* (Ark.) 396.

An amendment to one section *held* to extend to other sections by implication, so as to include a new offense.—*Nations v. State* (Ark.) 396.

Ky. St. §§ 1761-1764, relative to compensation of county officers, *held* not unconstitutional as a local act.—*Winston v. Stone* (Ky.) 397.

Gen. St. c. 27, art. 2, § 7, *held* repealed by the statute relating to county levy.—*Combs v. Crawford* (Ky.) 477.

Act applying to all railroads not paying an ad valorem tax *held* not special legislation.—*Knoxville & O. R. Co. v. Harris* (Tenn. Sup.) 115.

The legislative journals are not admissible to show that a statute was not properly passed, the enrolled bill being conclusive.—*Owensboro & N. Ry. Co. v. Barclay's Adm'r* (Ky.) 177.

Amendments to statutes prescribing methods of procedure do not fall within the constitutional inhibition of retroactive laws.—*Phoenix Ins. Co. v. Shearman* (Tex. Civ. App.) 930.

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An act imposing a privilege tax *held* not unconstitutional, as diminishing corporate powers of railroad companies.—Knoxville & O. R. Co. v. Harris (Tenn. Sup.) 115.

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**Tax sales and deeds.**

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Failure to give notice was harmless where the owner of land sold under execution was present

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The wife need not be made a party in foreclosing a tax lien on a homestead.—Bean v. City of Brownwood (Tex. Civ. App.) 1036.

In an action to foreclose a tax lien upon a homestead, the wife is presumed to have only a homestead right.—Bean v. City of Brownwood (Tex. Civ. App.) 1036.

Issuing of two orders of sale on only one judgment *held* proper.—Bean v. City of Brownwood (Tex. Civ. App.) 1036.

Misappropriation of the price by the officer is no ground for setting aside a sale for taxes.—Bean v. City of Brownwood (Tex. Civ. App.) 1036.

Refusal to find that an owner of land sold for taxes would have designated a fractional portion for sale if he had been served with notice *held* proper.—Bean v. City of Brownwood (Tex. Civ. App.) 1036.

Rev. St. 1895, art. 517, providing for a sale under execution for taxes of a portion on the east side of land, need not always be followed.—Bean v. City of Brownwood (Tex. Civ. App.) 1036.

The pasting of paper over printed words of an order of sale was immaterial.—Bean v. City of Brownwood (Tex. Civ. App.) 1036.

A tax sale of land for an amount greater than the tax collector is authorized by law to charge as fees is void.—Eustis v. City of Henrietta (Tex. Sup.) 259.

Sayles' Civ. St. art. 447, requiring payment of taxes precedent to making defense against a void tax sale, *held* unconstitutional.—Eustis v. City of Henrietta (Tex. Sup.) 259.

Where the amount of taxes for which a homestead is alleged to have been bought is greater than the amount allowed by the constitution, the sale is void.—Hayes v. Taylor (Tex. Civ. App.) 314.

A tax sale of land in which there is a life estate passes only such estate.—Bleidorn v. Oakdale Iron, Coal & Transportation Co. (Tenn. Ch. App.) 360.

Description of land in order for sale *held* insufficient.—Little Rock & F. S. Ry. Co v. Huggins (Ark.) 145.

A description in a notice of sale for taxes *held* sufficient.—Chestnut v. Harris (Ark.) 977.

A deed of city realty, under a sale by the city tax collector, *held* not prima facie evidence that the tax had been levied according to law.—Earle v. City of Henrietta (Tex. Sup.) 15.

Tax deed *held* conclusive upon the purchaser claiming thereunder as to the facts relating to the sale therein stated.—Eustis v. City of Henrietta (Tex. Sup.) 259.

A tax deed that contains no recitals showing that the statutory requirements have been complied with is void on its face.—Loring v. Groomer (Mo.) 647.

**TAXATION OF COSTS.**

See "Costs."

**TELEGRAPHS AND TELEPHONES.**

Regulation of interstate commerce, see "Commerce."

A telegraph company *held* to have used due diligence in delivering a message.—Western Union Tel. Co. v. Burgess (Tex. Civ. App.) 1033.

In action against telegraph company for delay in delivery of message, evidence *held* insuffi-

cient to sustain verdict for plaintiff.—*Robinson v. Western Union Tel. Co.* (Tex. Civ. App.) 1053.

Instructions examined, and held properly given, under the pleadings, in an action for damages for failure to deliver a telegram.—*Graddy v. Western Union Tel. Co.* (Ky.) 468.

## TENANTS.

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## TESTAMENTARY POWERS.

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## THEFT.

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## TICKETS.

For carriage of passengers, see "Carriers."

## TIME.

For filing answer, see "Pleading."

— bills of exceptions, see "Exceptions, Bill of."  
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## TITLE.

By adverse possession, see "Adverse Possession."  
Determination of, in partition suit, see "Partition."

Estoppel to assert, see "Estoppel."

To land, see "Vendor and Purchaser."

To public land, see "Public Lands."

## TORTS.

See, also, "Carriers"; "Libel and Slander"; "Malicious Prosecution"; "Municipal Corporations"; "Negligence"; "Railroads"; "Street Railroads"; "Trespass"; "Trove and Conversion."

Civil damages from sale of liquors, see "Intoxicating Liquors."

Measure of damages, see "Damages."

Wrongful attachment, see "Attachment."

Where a personal injury was suffered in one state, and the action for damages was brought in another, held, that the liability for damages is governed by the lex loci.—*Louisville & N. R. Co. v. Whitlow's Adm'r* (Ky.) 711.

## TRADE.

Contracts in restraint of, see "Contracts."

## TRADE-MARKS AND TRADE-NAMES.

The members of a union of cigar makers are entitled to protection in the use of a label to designate the exclusive product of their labor, though they are employed for wages.—*Hetterman v. Powers* (Ky.) 180.

## TRANSCRIPTS.

Of record for purpose of review, see "Appeal and Error"; "Criminal Law"; "Justices of the Peace."

## TRESPASS.

To the person, see "Assault and Battery."

While title papers may be used to show boundary and extent of possession, there must be an actual entry and possession thereunder

before they can be so used.—*Chenault v. Quisenberry* (Ky.) 717.

Title to the land is a defense to an action for trespass in unlawfully dispossessing one of land.—*Vinson v. Flynn* (Ark.) 146.

## TRESPASS TO TRY TITLE.

### Right of action and defenses.

Under Rev. St. 1895, art. 5259, an action cannot be maintained on a right lower than that acquired by survey of, as well as location on, the land.—*Fall v. Nation* (Tex. Civ. App.) 46.

Plaintiff may recover though having only an equitable title at commencement of action, the legal title being thereafter conveyed to her.—*O'Connor v. Vineyard* (Tex. Civ. App.) 55.

Rights of the various parties determined, where certain defendants, as against plaintiffs, had acquired title by limitations.—*Miller v. Gist* (Tex. Sup.) 263.

One having equitable title by an instrument entitled to record held not barred by limitations from setting it up as a defense.—*Tompkins v. Brooks* (Tex. Civ. App.) 70.

The principle of laches does not apply to the setting up as a defense an instrument giving defendant equitable title.—*Tompkins v. Brooks* (Tex. Civ. App.) 70.

Defendant must set up in the same action a title acquired after suit brought.—*McCray v. Freeman* (Tex. Civ. App.) 37.

The objection that a claim is stale cannot be urged by a plaintiff against defendants claiming under a transfer of a headright certificate, who are in possession of the land and have been ever since the land was located.—*Staley v. Hankla* (Tex. Civ. App.) 20.

### Proceedings.

In an action by heirs of an alleged patentee, where the only issue was as to his identity, a deed purporting to have been executed and recorded after the death of such alleged patentee by one of the same name was admissible to show that some one of the patentee's name was claiming the land.—*Schott v. Pellerim* (Tex. Civ. App.) 944.

Recital in the instrument under which plaintiff claimed and the field notes of the survey introduced in evidence held to sufficiently show the acreage claimed by plaintiff.—*Miller v. Gist* (Tex. Sup.) 263.

Where a party would rely on a title accruing by virtue of limitations, he must plead it.—*Miller v. Gist* (Tex. Sup.) 263.

In trespass to try title, evidence of particular instances where plaintiff has sold the same parcel of land to different persons is not relevant, when the parcels so sold were not connected with the land in controversy.—*Pope v. Riggs* (Tex. Civ. App.) 306.

In trespass to try title, evidence of plaintiff's dealings with the land, which defendant may have known of from the records, is admissible.—*Pope v. Riggs* (Tex. Civ. App.) 306.

What the grantees under whom defendants claim understood as to what land was conveyed by an indefinite deed is admissible in trespass to try title.—*Pope v. Riggs* (Tex. Civ. App.) 306.

An instruction authorizing recovery of all the land is properly refused, where there can be no recovery, in any event, of a part of it.—*Terrell v. McCown* (Tex. Sup.) 2.

Admissibility of evidence to show title in defendant, under sale by executor under power in will, determined.—*Terrell v. McCown* (Tex. Sup.) 2.

Certain evidence held admissible to show payment of purchase money.—*Terrell v. McCown* (Tex. Sup.) 2.

Judgments in suits by executors against various persons for purchase money of land sold held admissible to show executor's acquiescence in the sale.—*Terrell v. McCown* (Tex. Sup.) 2.

#### Damages and improvements.

Evidence held insufficient to sustain defendant's plea of improvements in good faith.—*Gilley v. Williams* (Tex. Civ. App.) 1094.

Where improvements were not made in good faith, plaintiff should be allowed rental value of land as improved.—*Gilley v. Williams* (Tex. Civ. App.) 1094.

Defendant can plead false representations by plaintiff, and ask judgment for damages therefor, and for cancellation of deed given plaintiff in exchange for the land sued for.—*Herring v. Mason* (Tex. Civ. App.) 797.

Where plaintiff sues on vendor's lien, and judgment is rendered for defendant for more than the lien on a claim for damages, a judgment quieting title in defendant is proper.—*Herring v. Mason* (Tex. Civ. App.) 797.

Defendant can recover damages for false representations of plaintiff as to water supply on the land in suit deeded to him by plaintiff.—*Herring v. Mason* (Tex. Civ. App.) 797.

It is error to make payment of one-half the value of improvements a condition precedent to plaintiff's right to partition.—*Spicer v. Henderson* (Tex. Civ. App.) 27.

Where the rental value is due to improvements made by defendant, he should not be required, on decree for partition, to account for the same.—*Spicer v. Henderson* (Tex. Civ. App.) 27.

## TRIAL.

See, also, "Continuance"; "New Trial."

Criminal prosecution, see "Criminal Law."

Place of trial, see "Venue."

Trespass to try title to real property, see "Trespass to Try Title."

Certain improper remarks made by counsel held not sufficient to warrant a reversal.—*Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548.

On a jury trial, a court is not required to make findings of fact and law.—*Peoples v. Terry* (Tex. Civ. App.) 846.

Documents attached to the deposition may be detached and taken by the jury.—*Davis v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 44.

It is not error to admit testimony, a part of which is inadmissible, when the objection is made to the whole.—*Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877.

An objection to the admission of evidence as not being permissible under the laws of evidence held sufficient.—*Texas Brewing Co. v. Dickey* (Tex. Civ. App.) 577.

Where incompetency to do a certain thing is set up as a defense, and negligence is involved, held, evidence need not be confined to the one thing in question.—*Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548.

Where it is necessary for a defendant to plead and prove a contract as void under the statute of frauds, in order to make his defense, it is not error to allow plaintiff to prove the contract.—*Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548.

Under Mansf. Dig. Ark. § 5141, when neither party has requested a special verdict, and the jury disagree on a general verdict, the court may submit questions to the jury calling for a special verdict alone.—*Williams v. Love* (Indian Ter.) 856.

If the jury's findings of fact are sufficiently numerous and explicit, and leave nothing for

the court to do but to determine questions of law, they constitute a special verdict.—*Williams v. Love* (Indian Ter.) 856.

In an action for damages, a special finding of the jury held not to conclude the issues raised under the pleading.—*Stinnett v. City of Sherman* (Tex. Civ. App.) 847.

Where defendant pleaded that the land in question was hers upon payment of a certain sum, which she tendered, and in another count claimed the land absolutely, and the verdict was general in her favor, plaintiff was not entitled to the sum tendered.—*Peoples v. Terry* (Tex. Civ. App.) 846.

#### Taking case or question from jury.

The court should direct a verdict for plaintiff in an action on a note where defendant has the burden of proof, and there is no evidence in his favor.—*Yocum v. Cary* (Indian Ter.) 756.

It is error to direct a verdict for plaintiff where the evidence strongly supports the defendant's pleading.—*American Harrow Co. v. Tweddie* (Ky.) 400.

Where, in an action on a note, the first signer shows that he was a surety, and received no benefit, with knowledge of the payee, a charge directing verdict for plaintiff is error.—*Young v. New Farmers' Bank* (Ky.) 473.

It is not error to direct verdict, where there is no evidence to support plaintiff's claim.—*Morris v. Travelers' Ins. Co.* (Tex. Civ. App.) 898.

Where defendants plead possession of distinct portions as tenants of a co-defendant, held error to direct a finding for defendants, where there is evidence to show a common possession.—*Martin v. Trail* (Mo.) 655.

Where there is any evidence to support a cause of action, the issue of fact must be submitted to the jury.—*Bowman v. Texas Brewing Co.* (Tex. Civ. App.) 808.

Where the evidence fully establishes plaintiff's cause of action, it is not error to overrule defendant's demurrer to the evidence.—*International & G. N. Ry. Co. v. Davis* (Tex. Civ. App.) 540.

A demurrer to evidence waives all objections to the admissibility of such evidence.—*International & G. N. Ry. Co. v. Davis* (Tex. Civ. App.) 540.

A judgment on the pleadings should not be rendered where such action requires the assumption of a controverted fact.—*Jacobs v. Omaha Life Ass'n* (Mo.) 375.

Evidence in action for commissioners for the sale of real estate examined, and held error to take the case from the jury.—*West v. Prewitt* (Ky.) 467.

#### Instructions.

A charge on negligence should not declare that certain facts are entitled to special weight.—*Texas & N. O. R. Co. v. Syfan* (Tex. Civ. App.) 551.

It is not error not to submit a question to the jury not raised by the pleadings.—*Gordon v. Burris* (Mo.) 642.

Instruction without evidence to sustain it is properly overruled.—*Smith v. Covenant Mut. Ben. Ass'n* (Tex. Civ. App.) 819.

It is proper to submit to the jury whether a stipulation in a lease has been waived when the waiver is pleaded, and the plea is supported by evidence.—*Houston & T. C. R. Co. v. Kimbell* (Tex. Civ. App.) 1049.

It is error in a charge to assume a fact denied by one of the parties, where such denial has support in evidence.—*Houston & T. C. R. Co. v. Kimbell* (Tex. Civ. App.) 1049.

An instruction to allow plaintiff compensation for medical expenses is erroneous where there

was no evidence that such expenses had been incurred.—*Houston & T. C. R. Co. v. Kimbell* (Tex. Civ. App.) 1049.

Instructions examined, and *held* not prejudicial error.—*Texas Brewing Co. v. Walters* (Tex. Civ. App.) 548.

Instructions to jury in action for personal injury *held* not prejudicial.—*City of San Antonio v. Kreusel* (Tex. Civ. App.) 615.

A charge as to whether a car was properly constructed *held* erroneous, where there was no evidence tending to show the contrary.—*Houston & T. C. R. Co. v. Kimbell* (Tex. Civ. App.) 1049.

An instruction authorizing the jury to consider such evidence as they deemed proper *held* erroneous.—*Calisher v. Mathias* (Tex. Civ. App.) 265.

An instruction in an action on a contract to furnish certain materials *held* proper.—*Lindsey v. Singletary* (Tex. Civ. App.) 273.

Instructions in trespass to try title examined, and *held* improper, as on the weight of evidence, and argumentative.—*Cordill v. Moore* (Tex. Civ. App.) 298.

An instruction calling attention to a special and material fact *held* erroneous.—*Jones v. Jones* (Ky.) 412.

Failure to instruct on a matter not referred to in the pleadings or testimony *held* not error.—*Abraham v. Buck* (Ky.) 425.

An instruction on the theory as to measure of damages adopted by both parties *held* not error, though the theory was a mistaken one.—*Levy v. Tatum* (Tex. Civ. App.) 941.

An instruction that a certain fact must be shown "to the satisfaction of the jury by a preponderance of the evidence" *held* error.—*Mock v. Hatcher* (Tex. Civ. App.) 30.

An assumption of a fact in the charge clearly proved *held* not error.—*City of Paris v. Allred* (Tex. Civ. App.) 62.

Instructions in action for personal injuries *held* not inconsistent.—*Texas & P. Ry. Co. v. Moore* (Tex. Civ. App.) 67.

It is not error to refuse an instruction, though a correct proposition of the law, if it does not apply to the facts of the case.—*Krish v. Ford* (Ky.) 237.

A charge that was correct as far as it went, *held* not error, in the absence of a request for further instructions.—*Texas & P. Ry. Co. v. Eberhart* (Tex. Sup.) 510.

A refusal to charge that there could be no recovery on a cause of action improperly alleged in an amended petition, was proper, where it was charged that plaintiff could recover only on the cause as alleged in the original petition.—*Texas & N. O. R. Co. v. Syfan* (Tex. Civ. App.) 551.

The court charged that a certain fact must be found before a verdict could be rendered for plaintiff. *Held* not necessary to charge that the burden was on plaintiff to prove such fact.—*Texas & N. O. R. Co. v. Syfan* (Tex. Civ. App.) 551.

One must request special instructions where those given are not sufficiently amplified.—*Bruner v. Bruner* (Tex. Civ. App.) 796.

A party wishing a special instruction that the jury should not consider part of a written order properly admitted in evidence should so request the court.—*Watson v. Winston* (Tex. Civ. App.) 852.

Instructions *held* properly refused, as assuming a fact not shown by the evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Hauer* (Tex. Civ. App.) 1078.

Instruction asked by defendant examined, and *held* properly refused.—*Borchers v. Mead* (Tex. Civ. App.) 800.

Refusal to give a special charge, which takes one of the disputed questions away from the jury, is not error.—*Pope v. Riggs* (Tex. Civ. App.) 306.

Failure to charge on a certain point is not error where no request was made therefor.—*Robinson v. Western Union Tel. Co.* (Tex. Civ. App.) 1053.

It is proper to refuse a special instruction, the substance of which has already been given.—*Terrell v. McGown* (Tex. Sup.) 2; *Houston & T. C. R. Co. v. Gaither* (Tex. Civ. App.) 266; *Gunn v. Wynne* (Tex. Civ. App.) 290; *Armstrong v. Ames & Frost* (Tex. Civ. App.) 302; *Mexican Cent. Ry. Co. v. Goodman* (Tex. Civ. App.) 580; *Galveston, H. & S. A. Ry. Co. v. Gormley* (Tex. Sup.) 877; *Fletcher v. Dulaney* (Indian Ter.) 955; *City of Marshall v. McAllister* (Tex. Civ. App.) 1043.

## TROVER AND CONVERSION.

Petition in action against bank for conversion of deposit *held* sufficient on general demurrer.—*Coleman v. First Nat. Bank* (Tex. Civ. App.) 938.

That petition against bank for conversion of funds deposited by plaintiff, a married woman, fails to allege that plaintiff's husband did not draw out such funds, is no ground for a special demurrer.—*Coleman v. First Nat. Bank* (Tex. Civ. App.) 938.

## TRUSTS.

A settlement in writing construed, and *held* to constitute legal title in the beneficiary, subject to certain declared trusts.—*In re Soulard's Estate* (Mo.) 617.

Evidence *held* sufficient to show a delivery, and vest title to beneficiaries.—*In re Soulard's Estate* (Mo.) 617.

Instrument *held* sufficient to establish a trust, though the words "trust" and "trustee" were not used, where the intent to create a trust clearly appears.—*In re Soulard's Estate* (Mo.) 617.

That donor retains right to income of property conveyed by trust *held* not to make it invalid.—*In re Soulard's Estate* (Mo.) 617.

A trustee, having in good faith paid out for the support of the beneficiary the amount of certain collections before they were actually made, cannot be compelled to pay them on a debt of the beneficiary.—*Young's Trustee v. Bullen* (Ky.) 687.

A trustee who has made an unsuccessful defense to an action to subject income of the trust estate to the payment of a debt of a cestui que trust is not entitled to an allowance of attorney's fee on a trust estate until the debt has been paid.—*Young's Trustee v. Bullen* (Ky.) 687.

The trustee is a necessary party to an action to subject the income of a trust estate in payment of debts.—*Young's Trustee v. Bullen* (Ky.) 687.

A secret trust will not be enforced, as against creditors of the person sought to be charged with the trust, where the debts were created while the title was in the debtor, and without notice of the equity.—*Williams v. Williams* (Ky.) 198.

It is not necessary that a trustee to whom the purchaser's bond is payable should execute a bond before entering the order of the court for the sale of the land.—*Shields v. Hinkle* (Ky.) 485.

A constructive trust *held* not created by a promise by a devisee of land sold for taxes to purchase the land, and convey it to the executor of the deviser.—*Thorp v. Gordon* (Tex. Civ. App.) 823.

## TURNPIKES AND TOLL ROADS.

A creditor of a turnpike company cannot maintain an action on the construction bond given the county by the company for a debt due him from the company.—*Spradling v. McNees* (Ky.) 765.

## UNDUE INFLUENCE.

Procuring making of will, see "Wills."

## UNITED STATES.

Contract construed, and right of parties to proceeds of sale of cotton confiscated by the federal government determined.—*Briggs v. Walker* (Ky.) 479.

## UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

## USURY.

A trust deed will not be held void for usury, as against the lender, on account of commissions retained by the agent without the lender's knowledge.—*Sherwood v. Swift* (Ark.) 507.

Under Rev. St. U. S. § 5198, a surety sued on the list of several renewals of a note held not entitled to credit by usurious interest paid by principal at the time, where right of principal to recover is barred by judgment.—*Faulkner v. Marion Nat. Bank* (Ky.) 249.

Deducting interest on a note in advance held not usurious, where the note bore interest only from maturity.—*Webb v. Pahde* (Tex. Civ. App.) 19.

## VACATION.

(Of attachment, see "Attachment."  
Of judgment, see "Judgment.")

## VARIANCE.

Between pleading and proof in civil action, see "Pleading."  
— in criminal prosecutions, see "Indictment and Information."

## VENDOR AND PURCHASER.

See, also, "Sales."

Purchasers at sale on execution, see "Execution."  
— of property fraudulently conveyed, see "Fraudulent Conveyances."

The fact that a deed absolute on its face was intended to operate only as a mortgage is not binding upon a good-faith purchaser for value without notice.—*Lynn v. Simis* (Tex. Civ. App.) 554.

The possession by a lessee of a part of a tract owned by the lessor is notice of the latter's title to the entire tract.—*Mattfeld v. Huntington* (Tex. Civ. App.) 53.

A purchaser held chargeable with notice of equities shown by recitals in a chain of title.—*O'Connor v. Vineyard* (Tex. Civ. App.) 55.

Defective record of trust deed examined, and held not material as to a subsequent attaching creditor.—*Hart v. Patterson* (Tex. Civ. App.) 545.

A vendor who sells with a written agreement allowing him to repurchase within a certain time on certain conditions must make a tender of the price when the privilege accrues.—*Neiman v. Schuster* (Tex. Civ. App.) 1075.

Where a vendee possessed all the information as to title possessed by the vendors, and ex-

pressed himself satisfied, and his means of knowledge was equal to theirs, he cannot have relief for failure of title.—*Hawkins v. Wells* (Tex. Civ. App.) 816.

Where a deed containing a special warranty expresses the contract between the parties, the vendee cannot complain unless some misrepresentation was made, upon which he rightfully relied.—*Hawkins v. Wells* (Tex. Civ. App.) 816.

Held that, under the evidence, the vendee was not entitled to recover for failure of title.—*Hawkins v. Wells* (Tex. Civ. App.) 816.

Where a vendor, with no intent to deceive, merely expresses an opinion that the title is good, the vendee has no right to rely thereon.—*Hawkins v. Wells* (Tex. Civ. App.) 816.

In an action by the vendee to recover damages for breach of contract for the sale of land and certain personal property, a judgment for defendant on a counterclaim will not be disturbed, there being no substantial error in regard to the admission or rejection of evidence or as to the giving or refusing of instructions.—*Louis v. Tebbis* (Ky.) 219.

Where a parol sale of land was rescinded, and the vendee had taken timber to the value of the price paid for the land, he was not entitled to a return of the price paid.—*Webb v. Futy* (Ky.) 411.

Where vendee is sued on a purchase-money note, and the contract is executed, if vendor is insolvent vendee can set up a breach of warranty of title.—*Elder v. First Nat. Bank* (Tex. Civ. App.) 19.

A vendor cannot recover as for a failure to perform verbal agreements made as part of the consideration, without showing a failure to perform and that he has been injured thereby.—*Neiman v. Schuster* (Tex. Civ. App.) 1075.

Where one conveyed land absolutely on the verbal agreement for a reconveyance of a part thereof, held, that he could not rescind on the grantee's failure to reconvey.—*Bearrow v. Wright* (Tex. Civ. App.) 902.

### Vendor's Lien.

Failure of title is no defense to bill to enforce a vendor's lien.—*Williams v. Sax* (Tenn. Ch. App.) 868.

Wife not a necessary party to suit to foreclose vendor's lien against land in which she has homestead interest.—*Brightman v. Fry* (Tex. Civ. App.) 60.

One who assigns one of three notes secured by a vendor's lien, and purchases the property foreclosed under the two remaining notes, held to take such property subject to the lien of the third note.—*Benson v. Panther* (Tex. Civ. App.) 804.

Evidence held insufficient to show payment, in action to enforce vendor's lien.—*Bishop v. Jewell* (Ky.) 457.

Evidence held insufficient to show release of vendor's lien.—*Noel v. Hays* (Ky.) 432.

A lien for the purchase price of land will not follow the vendee, so as to become a charge upon lands which he receives in trade for the land originally purchased.—*Stephens v. Spradlin* (Ky.) 447.

Where vendor's lien notes, made in consideration of bond for deed, have been negotiated, vendor cannot extinguish lien by retaking possession of the land, though purchaser has abandoned contract without recording bond.—*Rose v. Taylor* (Tex. Civ. App.) 285.

Where land incumbered with an unrecorded vendor's lien is sold to an innocent purchaser, the lien attaches to the proceeds, though invested in an unperfected pre-emption right.—*Rose v. Taylor* (Tex. Civ. App.) 285.



Agreement between parties in action to enforce vendor's lien *held* to justify personal judgment against defendant.—*Ward v. Wilson* (Tex. Civ. App.) 833.

A vendor's lien *held* not to apply to those parcels of land covered by the deed which were fully paid for.—*Dorsey's Adm'r v. Swann* (Ky.) 692.

## VENUE.

In criminal prosecutions, see "Criminal Law."  
In garnishment proceedings, see "Garnishment."

A court which acquires jurisdiction of non-resident defendants by reason of a note having been executed in the county in which suit is brought, does not thereby acquire jurisdiction, over their plea of privilege, to determine another cause of action joined with the action on the note.—*First Nat. Bank v. East* (Tex. Civ. App.) 558.

An action against a corporation for maliciously prosecuting a suit may be brought in the county where the suit was instituted.—*Winn v. Carter Dry-Goods Co.* (Ky.) 436.

Under the act of April 9, 1880, regulating change of venue, an order refusing a change of venue cannot be reviewed, even upon appeal from a final judgment in the case.—*Owensboro & N. Ry. Co. v. Barclay's Adm'r* (Ky.) 177.

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## WAREHOUSEMEN.

A warehouse receipt is valid in the hands of a bona fide purchaser.—*Collins v. Rosenham* (Ky.) 726.

That the maker of a warehouse receipt was not the owner of the warehouse in which the whisky was stored is no defense to the maker in a suit for the whisky by a bona fide holder of the receipt.—*Collins v. Rosenham* (Ky.) 726.

The sureties in a bond executed by a tobacco warehouse company cannot avoid liability to a consignee of tobacco on the ground that the tobacco exchange requiring the execution of  
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the bond was illegal, as being a combination in restraint of trade.—*Globe Tobacco Warehouse Co. v. Leach* (Ky.) 423.

The suspension of the principal in the bond from membership in the tobacco exchange does not release the sureties from liability to a consignee of tobacco, unless such consignee, or at least the public, had notice of such suspension.—*Globe Tobacco Warehouse Co. v. Leach* (Ky.) 423.

Though the act of March 6, 1869, prohibits, under penalty, a warehouseman from issuing duplicate receipts, such receipts are valid as between the parties, and when the original receipts are taken up the title to the property vests in the holder of the junior receipts.—*Block v. Oliver* (Ky.) 238.

Where warehouse receipts were pledged to secure a note for \$2,000, and all other indebtedness owing to the bank by the payor, and the payor, upon discharging the \$2,000, took up only a part of the receipts, the bank continued to hold the remaining receipts to secure other indebtedness, and they did not inure to the benefit of the holder of junior receipts.—*Block v. Oliver* (Ky.) 238.

When a debt for which warehouse receipts had been pledged was discharged by check, and the warehouse receipts taken up, they ceased to be outstanding receipts, though the check had not then been paid, and the title to the property represented by the receipts thereupon vested in the holder of junior receipts.—*Block v. Oliver* (Ky.) 238.

## WARRANT.

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An information *held* insufficient to charge the offense of carrying a pistol into a social gathering, but to sufficiently charge the carrying of a pistol on and about the person.—*Lomax v. State* (Tex. Cr. App.) 92.

What constitutes offense determined.—*Snider v. State* (Tex. Cr. App.) 84.

An instruction that the defendant, in going to and returning from the place where he intended to sell the pistol, should have taken the most direct route, *held* not prejudicially erroneous.—*Zollicoffer v. State* (Tex. Cr. App.) 992.

Testimony that the offense was committed in January, 1897, is insufficient to show that it was committed some time prior to January 28, 1897, when the indictment was presented.—*Zollicoffer v. State* (Tex. Cr. App.) 992.

## WIDOWS.

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## WILLS.

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Contestants must produce substantial evidence to authorize the submission to the jury of the question as to whether a will was made through undue influence.—*Gordon v. Burris* (Mo.) 642.

Defendant's declarations, made before the execution of a will, that testatrix should never leave her property to plaintiff, are admissible to show undue influence.—*Gordon v. Burris* (Mo.) 642.

*Held*, that certain evidence as to the exercise of undue influence when a will was made should have been submitted to the jury.—*Gordon v. Burris* (Mo.) 642.

The burden is upon contestants to show that a will is invalid by undue influence.—*Gordon v. Burris* (Mo.) 642.

The exercise of undue influence cannot be proved by what testatrix said after executing her will.—*Gordon v. Burris* (Mo.) 642.

The fact that testatrix cried when speaking of her will and a disinherited granddaughter is admissible to show undue influence.—*Gordon v. Burris* (Mo.) 642.

Unexecuted will *held* valid as to the personality devised therein.—*Orgain v. Irvine* (Tenn. Sup.) 768.

Parol evidence is admissible to correct a mistake in the legatee's name.—*Gordon v. Burris* (Mo.) 642.

On death of a legatee under age, whose bequest had vested, *held*, the legacy was payable to her administrator.—*McReynolds v. Graham* (Tenn. Ch. App.) 138.

At common law a devisee was not bound by the covenant of his ancestor unless named therein.—*Bartlett v. Ball* (Mo.) 788.

As it appears from the will that testator's son was then living, and does not appear that he has since died, he is presumed to be the father of children born to P. since testator's death.—*Lynn v. Hall* (Ky.) 402.

A devise of land remaining unrevoked by any method provided by statute, a gift of other lands could not operate to adeem, since the land devised is left for the will to operate on.—*Fisher v. Kiethley* (Mo.) 650.

The doctrine of ademption does not apply to a payment in satisfaction of a legal obligation, or to property sold by testator to the devisee for value.—*Fisher v. Kiethley* (Mo.) 650.

#### Construction.

Under a devise to N. for life, with a provision that at her death the property "shall go and descend in equal shares to her children, and to the descendants of such of her children as may be dead," the title vests in the children in being at the death of the testator, opening up to let in after-born children; only the possession and enjoyment being postponed until the life tenant's death.—*Middleton's Heirs v. Middleton's Devisees* (Ky.) 677.

Devise of land to testator's wife for life, "for her support and maintenance, and to be disposed of at her pleasure," with a declaration that "the property is entirely hers, and at her disposal," vests in her the fee.—*Dills v. Adams* (Ky.) 680.

A devise to M. for life, and at her death to "descend to her heirs, or to such of them as shall be then living, and the descendants of them that may leave issue," and, if all her children die without issue, to "descend to the heirs of my sister," creates in the children a contingent remainder, which they may sell.—*Weatherford v. Boulware* (Ky.) 729.

Will construed, and *held*, that under a devise the beneficiaries took per capita.—*Ridley v. McPherson* (Tenn. Sup.) 772.

Under a will devising land to P., the wife of testator's son, "and her children," children born to P. by testator's son after testator's death take per capita with those born before his death.—*Lynn v. Hall* (Ky.) 402.

Will construed, and *held*, that certain devisees took a vested interest in remainder.—*Gough v. Clifton Land Co.* (Ky.) 406.

Will construed, and devisees thereunder determined.—*Sloan v. Thornton* (Ky.) 415.

Will construed, and *held*, that a devise therein did not show a payment of a debt to the devisee.—*Wade v. Dean* (Ky.) 441.

Will construed, and *held*, that the bequest vested, and that the time for payment only was postponed.—*McReynolds v. Graham* (Tenn. Ch. App.) 138.

Under a devise by a testator to his three nieces, "and, in case either of them die without issue of their bodies, the portion of the one dying to be equally divided between her survivors," each of the nieces takes the fee in her share, subject to be defeated in the event of her death without issue at any time.—*Collins v. Thompson* (Ky.) 227.

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Plaintiff may testify for himself against a nonresident defendant who has been served as provided by Civ. Code, § 56.—*Young's Trustee v. Bullen* (Ky.) 687.

A party, when a witness, may explain testimony in ex parte deposition taken by adverse party, though it was unambiguous.—*Goodbar Shoe Co. v. Sims* (Tex. Civ. App.) 1065.

Certain evidence by a widow in relation to transactions with her deceased husband *held* to be admissible.—*Davis v. Weathered* (Tex. Civ. App.) 21.

Plaintiff *held* incompetent as a witness against an administrator to show advance of money to testator's widow to apply on a mortgage on decedent's land.—*Robinson v. Redd's Adm'r* (Ky.) 435.

Evidence of statements by plaintiff as to alleged conversations between him and decedent *held* inadmissible in an action against decedent's administrator.—*Jones v. Jones* (Ky.) 412.

Where administrator reads a portion of deposition of opposite party, he thereby waives incompetency of such party to testify.—*In re Souldard's Estate* (Mo.) 617.

Answer of witness *held* responsive to question asked.—*Terrell v. McCown* (Tex. Sup.) 2.

Where the state was permitted to prove that the witness had become responsible for defendant's attorney's fee, the witness should have been allowed to state on cross-examination why he became so responsible.—*Oxshaer v. State* (Tex. Cr. App.) 335.

The question, "Did your message . . . involve any threats?" etc., is improper, as being leading.—*Perkins v. Adams* (Tex. Civ. App.) 529.

Evidence that an accusation of crime was pending against a witness is not competent to impeach him where it was not drawn out on cross-examination.—*Texas Brewing Co. v. Dickey* (Tex. Civ. App.) 577.

A witness testifying to criminal facts cannot be impeached by her declaration that she believed defendant not guilty.—*Taylor v. State* (Tex. Cr. App.) 1019.

A witness' declaration that deceased was the aggressor is not admissible to impeach her, where she did not testify that she was present at the fight.—*Taylor v. State* (Tex. Cr. App.) 1019.

A party may contradict a witness produced by him who contradicts his own testimony given

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Evidence of prior conviction *held* admissible to affect credibility of defendant.—Ray v. State (Tex. Cr. App.) 77.

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